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THE  
SOUTHWESTERN REPORTER,

VOLUME 96,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME AND APPELLATE COURTS OF ARKANSAS,  
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WITH TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS  
HAVE BEEN DENIED.

ALSO,

TABLE OF WRITS OF ERROR DENIED BY THE SUPREME COURT OF TEXAS IN CASES  
IN THE COURT OF CIVIL APPEALS.

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WERE DENIED BY THE

## SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE  
COURT OF CIVIL APPEALS

PRIOR TO NOVEMBER 21, 1906.

[Cases in which writs of error have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

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**MANOVITCH v. STATE.**

(Court of Criminal Appeals of Texas. June 26, 1906.)

**1. INDICTMENT—ALLEGATIONS OF VENUE.**

Where the third count of an indictment, referring to the first count, alleged that defendant "did on the day and date and in the county and state aforesaid," etc., the omission of the word "there" from the expression "then and there," in the charging part of the indictment did not render it defective.

**2. SAME—REFERENCE TO PRIOR COUNTS.**

While each count of an indictment must in the charging part thereof distinctly charge an offense, this rule has no reference to the formal allegations which may be supplied by reference to the beginning of the indictment.

**3. SAME—FORMAL COMMENCEMENT OF COUNTS.**

It is not necessary that each count of an indictment shall commence "in the name and by the authority of the state" or conclude "against the peace and dignity of the state."

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 97, 124, 269-270½.]

**4. SAME—DISMISSAL OF COUNT.**

Where the first count of an indictment, referred to in the other counts, is afterwards dismissed, it may still be looked to, to supply the date and venue of the offense.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 269, 270½.]

**5. CRIMINAL LAW — ELECTION BETWEEN COUNTS—HARMLESS ERROR.**

The refusal to require the state to elect which count of an indictment it will proceed upon cannot be complained of, where the court makes the election himself by submitting only one count to the jury.

**6. EMBEZZLEMENT—OWNERSHIP OF MONEY.**

Where a guest in a hotel deposited money with the clerk, who embezzled it, an indictment for the embezzlement properly alleged the ownership of the money in the proprietor of the hotel, and a charge to this effect was proper, and not upon the weight of the evidence.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 44-46.]

**7. SAME—EVIDENCE.**

Where an indictment for embezzlement did not specify any particular money as having been embezzled, it was not error to admit testimony as to the taking by defendant at the same time of a sum of money other than that upon the taking of which the indictment was founded, nor to refuse to give instructions limiting the effect of the testimony as to the taking of this further sum.

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**8. CRIMINAL LAW—TRIAL—LEADING QUESTIONS.**

In a prosecution for embezzlement of money, which defendant received in his capacity as night clerk of a hotel, the proprietor of the hotel was asked several somewhat leading questions, for instance: "Defendant was in your employment?" "You say he was night clerk?" "Did he have charge of anything, for instance, the office?" etc. These questions, however, merely called for the repetition of testimony previously given. *Held* that, though they were slightly leading, their form was not cause for reversal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3137, 3138.]

**9. EMBEZZLEMENT—EVIDENCE—ADMISSIBILITY.**

In a prosecution for embezzlement of money which defendant received in his capacity of night clerk in a hotel, evidence by the guest who deposited the money to the effect that he was a guest, was acquainted with defendant, and knew he was clerk, and that he deposited the money with defendant because he was clerk and thought it would be safe in his hands, was admissible.

**10. CRIMINAL LAW—INSTRUCTIONS.**

Where only one count of an indictment was submitted to the jury, requested instructions that if the jury should believe defendant guilty of a violation of the law, but be unable to ascertain on which charge of the indictment he was guilty, they should find him not guilty, was properly refused.

**11. EMBEZZLEMENT—EVIDENCE.**

In a prosecution for embezzlement, in which there was evidence for the state that after the offense defendant had been seen at a nearby town with a large roll of bills, evidence that just before the time defendant was seen with the bills a person answering defendant's general description appeared at a bank and exchanged silver money of the kind embezzled for bills was admissible.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 64.]

Appeal from District Court, Jefferson County; L. B. Hightower, Judge.

John Manovitch was convicted of embezzlement, and appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment contains three counts. The court submitted only the third, and therefore we deem it unnecessary to notice any questions arising in regard to the other two counts, except as it bears on the third count. The third count charged appellant with embezzlement, in that

he sustained the fiduciary and trust relation of clerk and employé of P. D. Gowling, charging him with embezzlement of \$200 which came into his care and possession by reason of his clerkship and employment. Motion in arrest of judgment was made, because the indictment fails to show that the court had jurisdiction over the offense, and especially the third count fails to show that the embezzlement was committed in Jefferson county, and fails to show where the offense, if any, was committed. In regard to the third count, it is especially urged that it cannot be aided by anything alleged in the preceding counts, because the third count is a separate and distinct count, under the law, from the others, as though each were a separate bill of indictment, and because the first count in the indictment charges him with having converted the money belonging to Marable, as does the second count, and the head of the bill of indictment does not contain the word "did," nor does it charge any offense, although it refers to Jefferson county and state of Texas; that it says he was a clerk, etc., but does not say that he did anything.

The first count charges: "The grand jurors for the county of Jefferson, state aforesaid, duly organized as such at the February term, A. D. 1906, of the district court of said county, upon their oath in said court present that John Manovitch, on or about the 24th day of August, one thousand nine hundred and four (1904), and anterior to the presentment of this indictment, in the county of Jefferson and state of Texas, was then and there in possession of personal property," etc. The third count is as follows: "And the grand jurors aforesaid on their oaths aforesaid do further present in said court that said John Manovitch on the day and date and in the county and state aforesaid was a clerk and employé of P. D. Gowling, and as such clerk or employé did then and unlawfully and fraudulently embezzle and fraudulently misapply and convert to his own use, without the consent of the said P. D. Gowling," etc. It is evident, from a reading of this, that this count does charge that appellant did unlawfully and fraudulently misapply and convert to his own use. In charging the embezzlement, following the expression "did then and," the word "there" is omitted. It is contended that this makes this count fatally defective. To this we cannot agree. "Then and there" has reference to the previous time and place alleged. The previous portion quoted from the third count states this sufficiently, in that it says "that John Manovitch on the day and date and in the county and state aforesaid was clerk," etc. This sufficiently fixes the time and place and venue in the third count, so far as charging those matters are concerned; and the omission of the word "there" will not render that part of the indictment invalid. In fact, the expression at that particular point, "then and

there," could have been omitted, and yet the indictment have remained complete. If it had simply stated "did unlawfully and fraudulently embezzle," etc., it would have been sufficient, without the insertion of the expression "then and there" under the peculiar averments of this count. It is well settled that each count itself in the charging part must distinctly charge an offense. But this does not refer to the formal allegations. These can be supplied by reference to the beginning of the indictment. See White's Ann. Code Cr. Proc. § 404, subs. 1, 2, and 3 for collation of authorities. The first count, if it contains a proper beginning, may always be looked to, to supply, if necessary, such allegation as to the commencement of any subsequent count. *Dancey v. State*, 35 Tex. Cr. R. 615, 34 S. W. 113, 938. Nor is it required that each count shall commence, "In the name and by the authority of the state of Texas," nor that each count shall conclude "against the peace and dignity of the state." *West v. State*, 27 Tex. App. 472, 533, 11 S. W. 482; *Stebbins v. State*, 31 Tex. Cr. R. 294, 20 S. W. 552, and *Dancey v. State*, supra. Where the count begins, setting out the formal part, it is sufficient, without stating in subsequent counts in what court it was presented. Where the date and venue of the offense are sufficiently alleged in the first count, it is unnecessary to repeat them in the other count, and where the first count is dismissed it may still be looked to, if necessary, to supply the date and venue of the offense. *Morgan v. State*, 31 Tex. Cr. R. 1, 18 S. W. 647; *Hutto v. State*, 7 Tex. App. 44; *Boles v. State*, 13 Tex. App. 650. So we do not believe there is any merit in appellant's motion in arrest of judgment.

It is urged that the court should have required the state to elect upon which count it would proceed for conviction, and erred in overruling appellant's motion for that purpose. Be this as it may, the court made the election himself, in submitting the issues to the jury, in confining their consideration to the third count. This is a sufficient election. The question has been several times decided. It is unnecessary to refer to the authorities.

Exception was reversed to that portion of the court's charge in which the jury were instructed that the indictment correctly alleged the money to be the property of Gowling, the exception being that it submitted the sufficiency and legality of the indictment to the jury, and took from them the right to determine the ownership; and, second, it was upon the weight of evidence; and, third, it should have instructed that, if they believe from the evidence that Marable gave his consent to take the money, he was the real owner, or if, from all the surrounding circumstances at the time, defendant believed or could have reasonably concluded that Marable left the money with him for any other purpose than as a trust fund, the

defendant would not be guilty. We do not believe there is any merit in any of these contentions. The evidence shows that Gowing was the proprietor of the hotel. Appellant was his night clerk; that as such night clerk he received \$261.25 from Marable, who was a guest at the hotel, put it in a place of safety in the hotel, and locked it up; and that this occurred between 12 and 1 o'clock at night. Sometime between that hour and daylight appellant took the money and fled. Under this state of case, we are of opinion that the court correctly informed the jury that the indictment properly alleged the ownership in Gowing, the proprietor of the hotel, and that it was not a charge upon the weight of the evidence. It was a conclusion of law upon which the court could instruct the jury.

Exception was also reserved to the admission of testimony relative to \$10, which was taken from the cash drawer at the same time the \$261.25 was taken. It seems that this \$10 belonged properly to the hotel. This made \$271.25 that appellant should have taken. Exception was also reserved to the failure of the court to restrict the jury in their consideration of this \$10 as explanatory of the purpose for which it was introduced. We do not think there was any error in any of these contentions. The court instructed the jury that, if appellant took more than \$50 in money, it would be a sufficient predicate for their finding him guilty of a felony. The money was taken at the same time, by the same act, and so far as this prosecution was concerned, was the property of Gowing. There was no error in admitting the testimony, nor was there any error in the court's failure to limit the evidence in regard to the \$10 so introduced. If he was guilty of embezzling \$200 mentioned in the indictment, he was equally guilty by the same act of embezzling this \$10 and \$61.25, which was deposited at the same time with the \$200. In other words, the indictment does not specify what particular money appellant embezzled, but simply in general terms charged him with embezzling \$200. If he was found guilty of having embezzled the money in excess of \$50, it was not necessary to charge the jury that the testimony in regard to the other money was admitted for any particular purpose. It was embezzlement as to all of it.

Exception was reserved to the admission of testimony to the effect that appellant was night clerk, and that his duty as such was to wait on people, collect money that came in, and take charge of valuables left at the hotel. It was objected that the questions were leading, and the answers stated conclusions. We do not agree with this contention. The questions and answers were as follows: "Q. Defendant was in your employment? A. Yes, sir. Q. You say he was night clerk? A. Yes, sir. Q. You know what his duties were as night clerk? Did he have charge of anything

—for instance, the office? A. Yes, sir. Q. What relation did he bear to the office of the hotel? A. He was clerk there in the office. Q. What were his duties? A. To wait on the people and collect money that came in, and take charge of any valuables left there." This bill is signed with the statement by the court, that these questions, taken in connection with what had theretofore been propounded, and answered by the witness, were not considered by the court as leading, but merely tended to a repetition of what had already been sworn. We do not think this bill shows any merit. The questions may have been slightly leading, but not of sufficient importance to notice.

The next bill of exceptions is reserved to some questions and answers because they were leading, argumentative, assumed matters and brought about repetitions. It is sufficient to say in regard to this bill that the witness was permitted to testify that, as soon as he discovered the absence of his clerk, he instituted search for him, and he did not see him any more until in court after his arrest, and that Marable was a guest at his hotel, and, further, that he was permitted to testify that he did not give appellant his consent to convert and misapply the money, and the further fact that he missed \$10 belonging to the hotel that was in the same cash drawer with the money Marable had deposited, and that appellant left without giving him notice of the fact that he was going, and did not tell him good-by. He also objected to the testimony of Acker to the effect that he was a clerk in the hotel, and that as said clerk his duty was to receive money and valuables left by guests. He also objected to the testimony of Marable to the effect that he was a guest at the Gowing hotel, and that he was acquainted with appellant, who was clerk at the hotel, and the further fact that appellant was acting in that capacity at the time. Marable was also permitted to testify that he deposited the money, and, further, that it was his understanding that he would get his money back, and that he simply shoved the money across the table or bar to appellant, who put it in the drawer, and locked it up, and that the witness then went downstairs, and that he handed it to appellant to be kept for him (witness) until called for.

Another exception was reserved to the continuation of this witness' testimony to the effect that he asked appellant to put away his money and take care of it until the next morning, and that the reason he gave it to him was because he was clerk of the hotel, and that he considered the money would be safe in his hands until the next morning. All of this testimony was admissible, and we find no error in the action of the court in regard thereto.

Appellant asked the court to instruct the jury, if from the evidence they should believe, beyond a reasonable doubt, that defendant is guilty of a violation of law, but was

unable to ascertain of which offense charged in the indictment he is guilty of, or if they should entertain a reasonable doubt as to which of said offenses charged he is guilty, you will find him not guilty. This was refused. There were three counts as before stated, and the court only submitted one. To this end the court is authorized by the law.

A witness was introduced by the state, by whom it was shown: That he saw a young man on the 24th of August, 1904, at the bank in which witness was interested at Nederland, whom he described as a young man near defendant's age. "I did not pay particular attention to him. The transaction was not a very ordinary one. \$200 or \$300 in silver was exchanged for bills. I do not remember the exact amount." He had the money in a sack, but the exact kind of sack witness did not remember and cannot describe it; did not pay any attention to it. His best recollection is that it was in a cloth sack. However, he is not positive as to that point. His best recollection in regard to the matter was that the money was in silver dollars, and that the amount was between \$200 and \$300. He could not say what character of bills he gave him in exchange for this silver; that it was just the ordinary run of bills that happened to be in the drawer at the time. He was further permitted to state that the young man who was in the bank was apparently about the age of defendant. This bill is signed with the qualification that the witness was not permitted to give any of the above evidence until the state had first placed another witness on the stand, by whom defendant was absolutely identified as being the man whom he saw at Nederland on the day in question, and that the defendant was seen by the said first witness just shortly after the time that witness at the bank had with defendant the transaction inquired about, and that at the time when seen by said first witness defendant had a large roll of bills, and was exhibiting them in the saloon at Nederland. As this matter is presented by this bill and explanation, we are of opinion there was no error in the admission of the testimony. The money deposited with appellant as clerk of the hotel was silver dollars, and, as before stated, there was \$261.25 of the silver deposited, and in addition there was \$10 taken out that belonged to the hotel. Nederland is a little station on the railroad about equal distance between Port Arthur and Beaumont, about 10 miles from each. We think this testimony was clearly admissible. It may not have been very cogent, but still the circumstances were admissible to identify appellant so far as they would tend in that direction. As this record is presented to us we do not find any error of sufficient importance to require a reversal.

The judgment is therefore affirmed.

BROOKS, J., absent.

## ARNWINE v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1906.)

### 1. HOMICIDE—THREATS—REPUTATION OF DECEASED.

Pen. Code 1895, art. 713, authorizing defendant to introduce evidence of threats in justification of the killing, whereupon the state may prove deceased's reputation, does not authorize proof of such reputation prior to attack thereon by accused unless such threats have been communicated.

### 2. SAME—DYING DECLARATIONS—EVIDENCE.

Deceased, as a part of his dying declaration, stated that at the time he was shot he was facing accused, when a physician asked him if he was not mistaken, stating that that could not be true, because he was shot in the rear part of the leg, and not in front, whereupon deceased stated he did not know whether his back was turned to accused or not when accused shot him. *Held*, that it was error for the court to eliminate deceased's colloquy with the doctor and permit the balance of the declaration to go to the jury.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 451-456.]

### 3. SAME—INSTRUCTIONS—THREATS—SELF-DEFENSE.

An instruction that if accused was not jerked or pulled from his horse by deceased's brother, and the latter made no demonstration as if to use a gun, but defendant raised the difficulty and shot him because of previous ill feeling, or because he was afraid of attack, the killing would not be reduced below murder, no matter how excited, angry, or alarmed defendant was at the time of the killing, because threats, even to take life, and no amount of fear, afford justification for the killing of the person threatening by the person threatened, unless at the time an intention is manifested to execute the threat, was erroneous, as improperly charging the law of threats as bearing on the issue of self-defense.

### 4. SAME—SELF-DEFENSE—PREVIOUS DIFFICULTY.

Where deceased's brother pulled defendant from his horse and seized a target rifle to shoot defendant, whereupon deceased joined the attack on defendant, or made demonstrations as defendant viewed the situation, defendant's right of self-defense against both was complete without regard to any previous difficulty which had occurred between them.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 164, 165.]

### 5. SAME—MANSLAUGHTER.

Where deceased's brother pulled defendant from his horse in an angry manner and started to get a target rifle with which to shoot defendant, whereupon deceased joined in the attack, and this enraged defendant's mind beyond cool reflection and caused him to kill both deceased and his brother, such facts were sufficient to raise the issue of manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 59-61.]

### 6. SAME—ADEQUATE CAUSE.

Where defendant and deceased's brother had not been on speaking terms for several years, and on meeting defendant in the public road deceased's brother pulled defendant from his horse as defendant was undertaking to pass him, whereupon an altercation ensued in which both deceased and his brother were killed, the acts of deceased's brother constituted adequate cause.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 67.]

Appeal from District Court, Cherokee County; Jas. I. Perkins, Judge.

Lee Arnwine was convicted of murder, and he appeals. Reversed and remanded.

See 90 S. W. 41.

Willson & Watkins and Johnson & Edwards, for appellant. Howard Martin, Asst. Atty. Gen., and J. E. Donley, for the State.

**DAVIDSON, P. J.** This is the second appeal. The conviction was for murder in the second degree.

Some five or six years prior to the occurrence narrated in this record, appellant and one of the deceased brothers, Lester Lattimore, had a fight at a party. From that time on there was ill feeling between them until the killing. Deceased (Clyde Lattimore) and appellant were on friendly terms. These were all young men; Lester Lattimore being 23 and Clyde and appellant each about 21 years of age at the time of the killing. From the time of the fight at the party, some years prior to this tragedy, appellant avoided Lester on all occasions in order to keep out of trouble with him, generally getting some one or more of his friends to accompany him when there was prospect of meeting Lester. On the day of the killing appellant had been to the town of Jacksonville, passing by the residence of Sam Lattimore, father of the two deceased boys, going and returning. As he was passing the elder Lattimore's on his return from town, the two deceased brothers were harnessing their team, which they hitched to a buggy directly, and followed on down the road, overtaking appellant some distance before they reached the gate leading into the "lower farm" of the elder Lattimore. The tragedy occurred at this gate. The buggy containing the boys who were killed on reaching the gate made a semicircle in order to enter it, which threw the rear end of their buggy across the road, reaching within a few feet of a sweet-gum tree, from which projected some limbs. Clyde Lattimore (for the killing of whom this conviction was had) got out of the buggy to open the gate. At this juncture appellant passed around the buggy, and, to use his expression, had to "duck his head" in order to pass under the projecting limbs from the sweet-gum tree; and in passing around the buggy his leg scraped or touched the hind wheel, whereupon Lester Lattimore caught him by the coat and pulled him off his horse. The coat was buttoned, and in pulling him off the button tore out and upward the cloth from the coat, leaving the button hanging by the strip. When appellant reached the ground, Lester drove the buggy inside the field, and appellant asked him "what in the hell he meant," and repeated this question. Finally Lester Lattimore called him a "God damn son of a bitch," and reached for his target rifle, which was in the bottom of the buggy. When he did this,

appellant began shooting, and fired three shots at Lester, which caused his horse to jump, and by this means threw Lester down in the foot of the buggy. Clyde came toward appellant, putting his hand toward his pocket, and used an expression which appellant did not understand further than the use of the words "God damn"; the remainder not being understood. He then fired two or three shots at Clyde, who turned away. Lester, who had gotten out of the buggy in the meantime, reached for the target gun which was in the buggy, and appellant fired six more shots at him, one of which proved fatal. This is practically the defendant's side of the case.

The state's theory is made largely by the dying declaration of Clyde, to the effect that, when appellant rode up to the rear of the buggy, he began cursing Lester Lattimore, and drew his pistol and began shooting him, and that Clyde approached him for the purpose of getting the gun from appellant to prevent the killing of his brother, and appellant shot him. This is practically the state's case, omitting a great many of the details and prior facts and incidental matters.

Over appellant's objection the state was permitted to introduce evidence of the good character or reputation of the deceased Lester Lattimore in regard to his being a peaceable and quiet man. The basis for this exception was that he had not attacked the reputation, nor had he proved communicated threats, of deceased. At this point it should be stated there was evidence of a threat introduced by appellant as having been made by Lester Lattimore a month or so before the tragedy, but this threat was never communicated, and appellant knew nothing of it until after the homicide. We believe this exception is well taken. Under article 713, Pen. Code 1895, a defendant may introduce evidence of threats, but these shall not afford justification unless deceased at the time did some act manifesting an intention to execute his threat, and, wherever threats are proved, the reputation of the deceased may be put in evidence. But this rule would apply only where the threats have been communicated, and not where uncommunicated. Our decisions have gone to the extent of holding that, under the provisions of this article, after proof of the communicated threat, the state may introduce evidence of the good character of the deceased, even when defendant has not sought to do so. *Russell v. State*, 11 Tex. App. 288; *Rhea v. State*, 37 Tex. Cr. R. 138, 38 S. W. 1012; *Sims v. State*, 38 Tex. Cr. R. 642, 44 S. W. 522. But this has never been extended, as far as we are aware, to instances of uncommunicated threats. So we believe that this exception was well taken.

Exception was reserved to the introduction of the dying declaration of Clyde Lattimore. Without going into a detailed statement of this matter, we are of opinion that a sufficient predicate was laid to admit the dying

declaration of Clyde. While the declarant was making his statement, questions were asked him. Perhaps he had finished two-thirds of the dying statement when they began plying him with questions. He stated that at the time he was shot he was facing appellant. At this juncture Dr. Longmier asked him if he was not mistaken about it, and stated that could not have been true; that he was shot in the rear part of the leg, and not the front. Whereupon declarant stated he did not know whether his back was turned to appellant or not when appellant shot him. The court eliminated this statement, and instructed the jury not to consider it. At least it was not permitted to go to the jury. Exception was reserved, with this elimination, to the introduction of the dying declaration, and *Drake v. State*, 25 Tex. App. 293, 7 S. W. 868, is relied upon as authority. Upon another trial this statement of deceased, if the dying declaration is introduced, should also go to the jury. This statement was upon a crucial point in the case. The theory of the state was that Clyde was not engaging in the difficulty, and that the shooting was not justified. Appellant's theory was that he was advancing upon him, making a demonstration towards his pocket as if to get a weapon, and upon this statement he relied largely to show the unreliability of the declaration. This declaration bore directly upon the position of the parties at the time the fatal shot was fired that killed Clyde; and it bore strongly upon the weight the jury might or might not attach to the dying statement of deceased. He had stated that he was facing appellant at the time of the shooting, and when the doctor called his attention to the fact that this could not be true—that he was shot in the back, instead of the front, of the leg—he then admitted that he did not know what position he was occupying at the time he received the shot. As before stated, the dying declaration of Clyde was perhaps as strong, if not the strongest, evidence introduced by the state tending to show the homicide was unjustifiable. Upon another trial, therefore, the excluded statement should be permitted to go to the jury if the dying declaration is introduced in evidence. In *Drake's Case*, supra, it was held that because a declarant had stated that his former statement was incorrect in some particulars it was not admissible. Here was a statement by declarant which the court eliminated. There would have been no error in the elimination of this testimony if the statement was irrelevant or immaterial. Wherever that is the case the court should eliminate and not permit it to go to the jury. The rule is well stated in regard to that character of testimony in *Krebs v. State*, 3 Tex. App. 348, as follows: "The dying declarations of a party are only admissible in evidence on the trial of a homicide, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration."

Wherever the dying declaration comes within this rule, it is admissible. Otherwise it is irrelevant and should be excluded. The statement of Clyde that was excluded was directly in regard to the tragedy and his connection with knowledge of the transaction. Therefore the court had no authority to reject this. In *Felder's Case*, 23 Tex. App. 477, 58 S. W. 145, 59 Am. Rep. 777, it was held that conflicting statements of a declarant could be introduced as impeaching the dying declaration as admitted, to be weighed by the jury. The dying declaration should have been rejected after the court eliminated the statement that deceased did not know how the shooting occurred. The dying declaration admitted as emasculated was not the dying declaration of the deceased.

Appellant reserved exceptions to several portions of the charge, some of which we think are well taken. For instance, the court charged the jury: "If, however, defendant was not jerked or pulled off his horse by Lester Lattimore, and Lester made no demonstration as if to use a gun, such as above mentioned, and defendant raised the difficulty and shot him because or on account of previous ill will, or merely because he was afraid Lester would some time attack or harm him, then, in such case, the killing would not be reduced below murder, no matter how much excited, angry, or alarmed defendant may have been at the time of the killing; for the law is that threats, even to take life, and no amount of fear caused by such threats, afford any justification for the killing of the person threatening by the person threatened, unless the party who has made such threat at the time of the killing, by some act then done, manifests an intention to execute the threat so made." This is the only reference to threats made in the charge. In view of our statute in regard to threats and its bearing upon the issue of self-defense, this charge as given not only does not present the law, but is negative in character, and restrictive of the right of self-defense under such an emergency. If communicated threats were facts in the case and relied upon as a part of the self-defensive theory, then the court should have given a proper charge in regard to it, and so charged it as to present appellant's defense as to this matter in an affirmative way, and authorized the jury to acquit if his life had been threatened by Lester, and Lester did some act or manifested an intention to execute the threat. If communicated threats were not in the case, appellant was ignorant of that fact, and it could not have operated upon his mind as an inducement to do the killing, and his defense under these circumstances was entirely independent of threats. The jury would have to look to other facts adduced to solve this theory favorably to the accused. As we understand this record, it does not show communicated threats. As before stated, there is evidence that deceased, Lester Lattimore, had made a threat to the



effect that if appellant ever spoke to him again he would kill him. But this was entirely uncommunicated to accused until after the killing. The quoted charge does not present the law of threats, but it uses uncommunicated threats as the means of eliminating or minimizing appellant's right of self-defense, and perhaps curtailing the law of manslaughter, as might be shown by a further analysis of the charge. The court further charged the jury: "If you believe that Lester Lattimore jerked or pulled defendant off his horse, and cursed and abused him and made a demonstration as if to seize, reach for, or present a target gun, and you further believe that before the occasion of the alleged killing Lester Lattimore and defendant had had a difficulty, and that ill feeling arose between them from such difficulty and continued up to the alleged homicide, and that since such previous difficulty said Lester Lattimore, by words or acts or by both words and acts, had manifested ill will towards defendant and an intention to do him bodily harm, you are instructed that in passing upon the issue of self-defense you may consider these last-mentioned circumstances in connection with all the reasonableness, or otherwise, of defendant's apprehension of danger, if he had such apprehension at the time of the alleged killing. And if you do not believe the killing of Clyde Lattimore, if he was killed in self-defense, you may nevertheless consider all said circumstances in passing upon the question of whether adequate cause, as an element of manslaughter, existed or not." The latter excerpt from the charge seems to be meaningless. Perhaps there are some words or expressions omitted. This charge seems to be upon the weight of the evidence, and is entirely too restrictive and argumentative. If Lester Lattimore jerked defendant from his horse and cursed and abused him, and made a demonstration as if to seize, reach for, or present a target gun, appellant's right of self-defense was thereby matured, and he had a right legally to shoot. It was not necessary to go further, and require and make a prerequisite to his right of self-defense that the previous difficulty had occurred between them in the years gone by; and therefore there was ill will existing from that time forward between the parties. Nor was the combination of these facts necessary to raise the question of manslaughter. If deceased's brother pulled appellant from his horse in the manner indicated by the testimony of appellant, and this enraged appellant's mind beyond cool reflection, then the question of manslaughter was suggested. Our statute says, where pain is inflicted, or blood drawn from the accused by deceased, that this is adequate cause. In this instance, there were two boys who had ill will towards each other for years, and were not on speaking terms, and one jerked the other from his horse, riding along the public road, as he was undertaking to pass him. This, in view of the facts,

would be adequate cause, and it should have been submitted to the jury as such adequate cause, and this without a combination of other facts as necessary to make or constitute it adequate cause. That the other causes or facts may have added to it may be conceded. But these should not be restricted by requiring other causes to be added to cause manslaughter.

There are other exceptions to some of the remaining clauses of the charge presenting the issues of manslaughter and self-defense, because on the weight of evidence, argumentative, restrictive, and negative. The same may be said of these charges and the exceptions as those already discussed. We desire to say, in a general way, without entering into a discussion of all these, that the law applicable to manslaughter and self-defense should be given in an affirmative manner and present the issues favorable to appellant, not in a restrictive argumentative manner as was done in this case, but directly, affirmatively and pertinently. It may be well enough to state that, upon another trial the jury should be instructed the law applicable to appellant's side of the case from the standpoint of more than one assailant in a direct and pertinent manner, for, if Lester Lattimore, as appellant stated, pulled him from his horse and seized his target gun for the purpose of shooting him, and Clyde, knowing this, joined or entered into the attack on him or made demonstrations as defendant viewed it, then he was entitled as much to self-defense against both as he was against Lester Lattimore. The law was strongly charged for the state.

For the reasons indicated, the judgment is reversed and the cause remanded.

BROOKS, J., absent.

#### STEPHENS v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1908.)

##### 1. INTOXICATING LIQUORS—ILLEGAL SALE—PROSECUTION.

In a prosecution for violating the local option law, the question as to which one of two elections adopting the law was valid was immaterial to defendant.

##### 2. CRIMINAL LAW—INSTRUCTIONS—HARMLESS ERROR.

Where, in a prosecution for violating the local option law, it was clear from the evidence that the sale was made, the failure to properly define the term "sale" in the charge was not reversible error.

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

Charley Stephens was convicted of violating the local option law, and appeals. Affirmed.

Odell, Phillips & Johnson and W. B. Featherston, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his

punishment assessed at a fine of \$30 and 30 days' confinement in the county jail.

Appellant complains that the state was permitted to introduce the proceedings of two local option elections; one held in the year 1901, and the other in 1904. The grounds of objection are that the indictment did not properly allege which particular election would be relied on, and because two years had not elapsed between said elections. Neither of these grounds of objection is well taken. We have heretofore held that the election of 1901 was never put into operation by proper publication. *Griffin v. State*, 87 S. W. 155, 13 Tex. Cr. Rep. 97. An interregnum of more than two years between the elections elapsed, as shown by this record. Therefore the court did not err in admitting the records connected with said two elections. So far as appellant was concerned, it would be immaterial which was a valid election. Unquestionably the last election was a valid election and was properly put into operation.

Appellant also complains that the court did not properly define the term "sale." There was no particular necessity for the court to define the term "sale" in the charge, as there is no question from the evidence that the sale was made.

There being no error in the record, the judgment is affirmed.

BROOKS, J., absent.

#### PRATT v. STATE.

(Court of Criminal Appeals of Texas. June 25, 1908.)

##### 1. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

A conversation between defendant and another, which, according to the bill of exceptions, occurred immediately after the killing, should have been admitted.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 816, 817.]

##### 2. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE—THREATS.

An instruction that, in order to justify the defendant in taking the life of the deceased, it must appear that at the time of the homicide the deceased did some act which was reasonably calculated, in view of all the circumstances, to produce in the mind of the defendant the belief that the deceased was then about to execute the threats so made, was erroneous, as the law of threats connected with the act of demonstration manifesting an intent to carry into execution the threat is a statutory ground for self-defense, and should be given in an affirmative manner to the extent that defendant may have the benefit of the law as applied to the facts covering this peculiar phase of the case, when the facts make that condition.

##### 3. SAME—SELF-DEFENSE—PREVIOUS INTENT.

A party may coolly make up his mind to kill another, and yet if, upon meeting the party whom he has determined to kill, that party makes an assault upon him which justifies him in killing in self-defense, the fact that accused had formerly made up his mind to do the

killing would not eliminate his right of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 138, 149.]

##### 4. CRIMINAL LAW—INSTRUCTIONS—IMPEACHING TESTIMONY.

Whenever it is necessary to charge in regard to the effect of impeaching testimony, the jury should be told that the evidence must be used for the purpose of affecting the credibility of the witnesses whose evidence is sought to be impeached.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1889, 1892.]

##### 5. HOMICIDE—BURDEN OF PROOF—SELF-DEFENSE.

Where there was no eyewitness to the transaction, and the state relied largely on defendant's confessions that he did the killing, his further statements in connection therewith that he did it in self-defense having been admitted, the burden was on the state to prove the falsity thereof.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 275, 278.]

##### 6. SAME—EVIDENCE—PHYSICAL AND MENTAL CONDITION OF DEFENDANT.

On a prosecution for murder, evidence that in the last few years defendant's physical condition had materially and seriously degenerated, and that his mind had been greatly impaired, so much so that at times he would do things when under excitement or anger that he would not recall after his mind became cool, should have been admitted.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 380.]

##### 7. SAME—INTENT TO EXECUTE THREATS.

The state having proved that defendant had threatened to kill deceased, defendant should have been allowed to testify that he had no such intent when he made the threats.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 287.]

Appeal from Hopkins County Court; R. L. Porter, Judge.

W. B. Pratt was convicted of murder in the second degree, and appeals. Reversed and remanded.

Paterson & Sharp, Wood & Melson, S. H. Russell, and Templeton, Crosby & Dinamore, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder in the second degree; five years being fixed as the punishment. The trial was had in Hopkins county on change of venue from Delta county. There are a great number of errors assigned, many of which we deem unnecessary to review.

Appellant proposed to prove by Mrs. Sue Pratt that, immediately after the shooting, he came to the house of witness, a short distance from the scene of the tragedy, and a short conversation occurred between them in regard to the homicide. Her testimony was excluded upon objection urged by the state that she was not the first party whom appellant met and told his story of the shooting, and that his statement was self-serving and was not *res gestæ*. These were grounds of objection urged by the state. The bill of

exceptions puts the conversation as occurring "immediately" after the killing. Upon another trial, the testimony of this witness should be permitted to go to the jury, if the question arises then as now. The testimony of several witnesses was introduced in regard to the statements of appellant concerning the homicide, some of which were *res gestæ*, and some were introduced presumably because thought to be incriminating. Some of these conversations occurred very shortly after the homicide, and some reached as far away nearly as 24 hours. We see no reason why the evidence of some of these witnesses should be excluded and others admitted. Her testimony is to some extent very much as that of the witness Medlin, whose testimony was permitted to go to the jury.

An exception was reserved to the court's charge on threats; and another charge requested by appellant was refused. The first portion of the charge in regard to this phase of the testimony was in the abstract, and did not apply the law to the facts. Then the court continues as follows: "In order to justify the defendant in taking the life of the deceased it must appear that, at the time of the homicide, the deceased did some act which was reasonably calculated, in view of all the circumstances to produce in the mind of the defendant the belief that the deceased was then about to execute the threats so made." It is contended (1) that the charge is in the abstract and does not apply the law to the facts; and (2) that it fails to charge the jury, if the defendant did some act at the time of the homicide which, taken in connection with all the facts and circumstances and environments of the of the case, was reasonably calculated, judging from the standpoint of the defendant, to produce in his mind the belief that deceased was about to execute his threats, the jury should then acquit. The charge is negative, and does not give the statute as we understand it should be given. The law of threats connected with the act of demonstration manifests an intent to carry into execution the threat is a statutory ground for self-defense, and should be given in an affirmative manner to the extent that defendant may have the benefit of the law as applied to the facts covering this peculiar phase of the case when the facts make that condition. If appellant believed at the time that his life was in danger, that the deceased was approaching him for the purpose of executing his threat, that he had the physical ability to do so, and that he had ordered him several times peremptorily to desist and not approach him, and deceased was still approaching him in an infuriated condition, and if these matters reasonably appeared to defendant to put his life in danger, or his body open to serious bodily injury, he had the legal right to shoot without legal blame.

A special charge was requested calling the court's attention to the deficiency in the general charge, and it should have been given or a similar charge, applying the law to the facts in an affirmative manner. While we would hardly feel called upon to reverse for giving one and refusing the other charge, yet upon another trial the special charge should be given.

The court gave the following charge: "You are further instructed that if one whose mind is cool and calm, although smarting under indignity previously inflicted upon him deliberately plans to take the life of another, and in pursuance of such determination meets such person and kills him, he would be guilty of murder, no matter if at such meeting his life became in danger. Therefore, if the jury find from the evidence that the deceased, C. M. Lyde, threatened to kill the defendant, W. B. Pratt, or do him serious bodily injury, or in any other way mistreated him; and if you further find that because of such conduct the defendant deliberately determined to kill Lyde, and that when he formed such determination his mind was cool and calm, and in a condition to understand and comprehend the nature of the act and its probable consequences; and if you further find that in pursuance of such determination, if any, the defendant, W. B. Pratt, on learning that Lyde was approaching the storehouse, armed himself; and if you further find that when Lyde arrived where defendant was, the defendant shot and killed Lyde, in pursuance of a determination previously formed in his mind, if any, then he would be guilty of murder." Exception was reserved to this charge upon the theory that it cut appellant off from all hope of the right of self-defense. This charge should not have been given in the manner it was given. It does not debar the accused of the right of self-defense, that he may have coolly and calmly made up his mind to kill another, if the other at the time of the meeting attacked him, and did some act manifesting an intention to take the life of the slayer or to do him serious bodily injury. A party may coolly make up his mind to kill another, and yet if, upon meeting the party whom he has determined to kill, that party makes an assault upon him which justifies him in killing in self-defense, the fact that the accused had formerly made up his mind to do the killing would not eliminate his the right of self-defense, that he may have the extent of authorizing the jury to find appellant guilty of murder simply because he had made up his mind to kill deceased, and the further fact that he did kill him. If there was no issue of self-defense or of manslaughter in the case, perhaps this might not have been harmful. Of course, if a party makes up his mind coolly and deliberately to kill another, and does kill, when the other party is not doing anything, it would be

murder. It is not correct, however, to give such a charge to the jury where the facts raise the issue of self-defense, unless the charge as given is limited by the law of self-defense. In other words, this charge is wrong because, as given, it authorized a conviction of appellant independent and outside of his theory of self-defense, and ignores the testimony bearing upon that issue.

In this connection a charge along the same line was given in regard to the law of manslaughter. It was erroneous to give this charge, and upon another trial it should not be given.

The testimony of the witnesses Blackwell and Tymes was admitted for the purpose of contradicting the witness Medlin. The testimony of Archie Shumate was admitted for the purpose of contradicting J. W. Medlin and Mrs. John Pratt. The testimony of Carter Anderson was also admitted in rebuttal for the purpose of contradicting the witness Bolin. The court, in his charge to the jury, limited the testimony of this witness to impeachment. Without going into the accuracy of these charges in properly presenting that issue to the jury, upon another trial we would say, wherever it is necessary to charge in regard to the effect of impeaching testimony, the jury should be told that the evidence must be used for the purpose of affecting the credibility of the witnesses whose evidence is sought to be impeached. The serious objection to this charge, for instance in regard to the witness Shumate, is that it eliminates that portion of his testimony from consideration of the jury which bore directly upon the merits of the case. He was one of the important witnesses in the case. While he also gave some evidence of an impeaching character against Medlin and Mrs. Pratt, yet much of his testimony bore directly upon the main issues of the case. The court's charge eliminated his testimony for all purposes except the contradiction of these witnesses. This was error.

The admissions and confessions of appellant that he killed deceased were admitted, and in connection, and as a part of this statement, his further statements were admitted that he did it in self-defense. It is contended that, this being true, the burden is on the state to prove the falsity of the defendant's statement that he killed deceased in self-defense. The state, to a very considerable extent, relied upon the admissions or confessions of appellant. There was no eyewitness to the transaction. It occurred very early in the morning. Appellant was in his own place of business. There had been previous difficulties and threats pro and con. Defendant was a very weak, feeble old man, his mental faculties seem to have been largely incapacitated, and his physical condition very much impaired. Deceased was a very large, athletic, robust man, 20 years or more younger

than appellant. He was approaching appellant's store or place of business when appellant halted him and told him not to come upon him. This he repeated three or four times, and deceased continued to approach until within a few feet. Witnesses differ as to the distance, perhaps as far as 20 or 25 feet, when appellant fired. The gun was loaded with what the witnesses term "No. 7½ shot," which is next to the smallest shot used in cartridges for shotguns. Appellant stated further that deceased's appearances to him were that he was very much infuriated, or, as he said, he had the appearance of a mad bull coming at him, and realizing his previous threats and his own utter helplessness in a personal conflict with deceased, and deceased refusing to stop when ordered to do so, and anticipating that his life was in danger, or his body of serious injury, he shot. Now, under these confessions, it is contended that the court should have charged the jury that it was incumbent on the state to disprove the statements of appellant which suggested the issue of self-defense; and in support of this we are cited to Jones v. State, 29 Tex. App. 20, 13 S. W. 990, 25 Am. St. Rep. 715. We believe that, under the authority of that case, and those cited therein, this charge should have been given. As was said in that case: "We do not wish to be understood as holding that in all cases where the admissions or confessions of a defendant are admitted in evidence against him, that it is necessary to give such or a similar instruction to the jury. What we decide is that in this case, in which the criminating evidence consists almost entirely of defendant's admission that he killed deceased, instruction should have been given, in view of the fact that the exculpatory portion of defendant's statements about the homicide were not shown by the state's evidence to be untrue. However, we are of opinion that in all cases where admissions and confessions of a defendant are admitted in evidence against him, and such admissions or confessions contain exculpatory or mitigating statements, it would be proper and just to the defendant to instruct the jury as was requested in this case. Pharr v. State, 7 Tex. App. 472; 1 Greenleaf on Ev. (9th Ed.) §§ 218, 219, 442, 443; 1 Bishop, Cr. Proc. §§ 1235, 1236." We believe, under the peculiar facts of this case, that a charge of this sort would have been proper. The parties had been friends up to Saturday evening; this killing occurred early on Monday morning. Some trouble arose between the parties, and they became considerably excited. The evidence shows that each party had threatened the other. There was a meeting between the parties on Sunday evening, one being on horseback and the other on foot; and the trouble was aggravated between them. Both showed temper. There was evidence that one or the other, either invited or challenged the other to

meet at the store Monday morning and settle the matter. The evidence is conflicting as to which one requested the meeting. On the morning of the homicide, appellant had gone to his store for the purpose of getting ice, and had opened the store sufficiently to let in the light, when deceased, observing this, approached rapidly from where he lived, some short distance away from the store. Appellant saw him coming, got his gun, and when deceased got within a short distance of the store, appellant warned him three or four times not to come, and fired one shot. Appellant's statement was admitted before the jury, and covered the transaction on Sunday evening, and the narration of the matters immediately antecedent to and dependent upon the homicide at the time of its occurrence. While he admitted the killing, and the state introduced this against him, defendant also stated the exonerating or justifying circumstances as a part and parcel of that statement. We believe, under the Jones Case, *supra*, and authorities cited, that the law laid down in the Jones Case should have been given; that is, we are of opinion that this case, under the facts, comes within the rule laid down in the Jones Case.

There was considerable testimony offered on the part of the defendant's family, and those who had known him for years, going to show that in the last few years his physical condition had materially and seriously degenerated, and that his mind had been greatly impaired, so much so that at times he was considered by his family and friends as being irresponsible; and he would do things when under excitement or anger that he would not recall after his mind became cool. This testimony, in our judgment, should have been permitted to go to the jury. It bore upon his mental status or what may have been his mental condition at the time of the killing, and from the time of the trouble originating on Saturday evening; for he seemed to be very much disturbed about the trouble he had with deceased from the time it originated and on beyond the tragedy.

Appellant took the stand in his own behalf. Prior to his becoming a witness the state had proved as original evidence, and perhaps on cross-examination of some of the witnesses, threats made by appellant against deceased on Saturday evening and perhaps on Sunday, which involved the life of the deceased. Appellant testified in his own behalf qualifiedly denying this, and stating, if he made them, he had no recollection of them, or words to that effect. He was then asked, if he had made those statements, whether he had made them seriously with the intention of executing them. His evidence would have been that they were not seriously made, and that he had no intention of killing deceased. On exception by the state this was ruled out by the court and not permitted to go to the jury. We believe this was error. Berry

v. State, 30 Tex. App. 423, 17 S. W. 1080; Lewallen v. State, 38 Tex. Cr. R. 414, 26 S. W. 832; Kinnard v. State, 35 Tex. Cr. R. 279, 33 S. W. 234, 60 Am. St. Rep. 47. Elliott, in his work on Evidence (volume 3, § 2146), says: "Where the character of the transaction depends upon the intent of the party, it is competent, when the party is a witness, to inquire of him what his intention was. The evidence of the party as to his intention in the transaction is not conclusive; but it is to be taken and considered with all of the other evidence in the case." It is further stated in the same section: "Intention is generally proved by circumstances because usually there is no other mode of proof. But when the only person who knows the fact is accessible as a witness, his answer must necessarily be more direct evidence than any other; and if there is any reason to suspect his candor the jury may make all allowances called for by his position and demeanor." Mr. Wharton says: "Ordinarily a witness cannot be examined as to another person's motives. It is otherwise with the witness' own motives as to which, when relevant, he is always open either to examination or cross-examination, hence a party, when examined as a witness, may be asked as to his own motives and intentions, when these intentions are material." Again it is said: "Under the common law and practice, until recent times, no question as to the defendant testifying as to the intentions could arise. Under recent statutes authorizing the accused to testify in his own behalf the question has several times arisen. As the intention is the essence of the crime and if there was no intention to commit the act there was no guilt, it necessarily follows that the testimony direct as to the intention is competent, and it is not incompetent because it comes from the mouth of the defendant." Berry's Case, *supra*. That threats were made by defendant was abundantly proved by the state. That he was very much excited and outraged by the conduct of the deceased was equally as abundantly proved. Under those circumstances, as we understand the law, appellant should have been permitted to state for the benefit of the jury, to be weighed by them, that he did not intend seriously to kill deceased when he made the threats. The jury or the court may not have believed him, but that would not render the testimony inadmissible. If he has the legal right to testify as to what his intentions were, it would not constitute a ground of exception that the court or jury might not credit his testimony in that respect. That would only affect its probative force and not its admissibility. We think there was error in rejecting this testimony.

The errors urged with reference to the impanelment of the jury, challenges of jurors, and the refusal of the continuance will not be revised, as they may not occur upon another

er trial, and would scarcely arise in the same manner.

For the reasons indicated, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

### CHANCEY v. STATE.

(Court of Criminal Appeals of Texas. May 16, 1906. On Rehearing, June 25, 1906.)

#### 1. ROBBERY—EVIDENCE—ADMISSIBILITY—MONEY IN POSSESSION OF DEFENDANT.

On a prosecution for robbery, a witness may testify as to how much money defendant had before the robbery, and to any fact or circumstance tending to show that the amount found on him after the robbery was what he ought to have had.

#### 2. CRIMINAL LAW—EVIDENCE—HEARSAY OPINION.

On a prosecution for robbery, a question to a witness as to what he told the officers as to how much money defendant ought to have was properly excluded, as calling for hearsay evidence and the opinion of the witness.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 973, 1035.]

#### 3. SAME—INCRIMINATING OTHERS.

On a prosecution for robbery, evidence that other parties than defendant were placed in such relation to prosecutor that they might have been the guilty parties was admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 789.]

#### 4. SAME.

Testimony of the sheriff that he received information that would have caused him to arrest one other than defendant was properly excluded.

#### 5. SAME—INSTRUCTIONS—WEIGHT OF EVIDENCE.

On a prosecution for robbery, an instruction that if defendant took one or more of the bills, which prosecutor testified had been taken from him, under circumstances that would constitute robbery, defendant should be found guilty, was not erroneous, as on the weight of the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1731-1771.]

On Rehearing.

#### 6. CRIMINAL LAW—TRIAL—REMARKS OF COURT—REFLECTION ON TESTIMONY OF ACCUSED.

Accused testified on his own behalf, and it appeared that he had been drinking heavily on the night of the crime. A witness for accused testified to drinking considerably that night, whereupon he was asked by counsel for accused if he was drunk, and in sustaining an objection to the question the court remarked: "If he did get drunk after he got in that condition, I don't think that his testimony would have amounted to much." Held, that the remark was reversible error, as reflecting upon the testimony of accused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1528, 1530.]

Appeal from District Court, Angelina County; James I. Perkins, Judge.

Falvey Chancey was convicted of robbery and he appeals. Affirmed. Rehearing granted, judgment set aside, and cause remanded.

O'Quinn & Robb and E. J. Mantooth, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for robbery. A bill of exceptions recites that while witness "McNeill was on the stand, on cross-examination by appellant, he made the following statement: 'After the robbery Mr. Watts or Mr. Nerren (the officers who had defendant in charge) searched defendant to see how much money he had, and I think found \$12 or \$15.' Defendant's counsel asked witness: 'What did you then tell said officers as to about how much money defendant ought to have?' The state objected, and the objection was sustained. This witness would have answered 'that defendant ought to have about the amount of money found on his person; witness having knowledge of the money defendant had only a few hours before.' The grounds of objection are not stated, nor does the bill state the purpose and object of defendant seeking to introduce this testimony. This renders the bill entirely defective. The court allows the bill, with the qualification that he informed appellant's counsel that witness would be permitted to testify as to his knowledge of how much money defendant had before the robbery, and to any fact or circumstance tending to show that the amount found on him after the robbery was the same that he ought to have, but that the answer to the question objected to would be both hearsay and an opinion merely of the witness, and that the facts upon which such opinion was based, and not the opinion of witness thereon, would be admissible." We are of opinion that there was no error in this ruling of the court. What the object and purpose of seeking this testimony was is not shown or stated. Nor is it made apparent by the bill.

While witness Watts was on the stand, being recalled by defendant, counsel for defendant asked the following question: "Did you make any investigation on the night of this robbery for the purpose of determining whether any other person or persons were seen with John Harris before the robbery on that night?" The state's objection was sustained by the court, in the following language: "That would call for nothing but hearsay. You may ask him if he knows of any person that was with John Harris that night." And to this statement of the court the witness replied (without being asked by defendant's counsel), "I did not see anybody with John Harris that night." Witness would have answered, if permitted to do so, "that he made investigation that night and the following morning to determine who was with John Harris, the injured party, and drinking with him in the various saloons before the robbery, and that he received information that would have caused him to arrest one Vance as one of the probable parties who robbed said Harris, and also that he was informed there were some two or more other parties, whose names are unknown,

that were in company with Harris and Vance, drinking with them and going around with them on that night." The object and purpose of this testimony is not stated. If, as a matter of fact, other parties were placed in such relation to Harris, the injured party, as they may have been the guilty parties, to the exclusion of appellant's participancy, it would have been admissible testimony. But this was not sought to be proved by this witness. Only a sum-up of his investigation was sought to be elicited, and his acts and conduct in ferreting out the guilty parties. If the purpose was to prove that other parties, and not appellant, did the robbing, it would have been perfectly legitimate and proper to have proved such fact; but that is not the character of evidence sought to be introduced. However, as before stated, the bill is fatally defective in not stating the reasons for seeking this testimony or its purpose.

Sims testified in behalf of the appellant, and after he had testified to drinking considerably and at various places, he was asked by appellant's counsel if he was drunk. The state objected. The objection was sustained. In doing so the court made the following remark: "If he did get drunk, after he got in that condition, I don't think that his evidence would amount to much." The ruling of the court, as well as the remark made by the judge was excepted to, and the bill reserved. The court qualifies the bill by stating that "the remark of the court was made while defendant's counsel was engaged in the apparent effort to discredit his own witness by seeking to either make him admit that he was drunk at the time inquired about, or, if he denied he was drunk, then to impeach him as to such fact. The court so understanding the matter, in a jocular spirit, and possibly from some impatience, addressed the remark complained of to defendant's counsel. I am unable to see how defendant could have been injured by the remark, for it was a comment, not upon evidence admitted, but upon that which was excluded, and, if any party could complain of it, it was the prosecution, whose main witness, John Harris, it was conceded, was drinking, and was proved by some witnesses to have been drunk, on the occasion of the alleged robbery." The object and purpose of introducing the fact that appellant was drunk is not stated. The remark of the court was improper, and should not have been indulged; but the testimony was not admitted, and the bill does not show what the answer of the witness would have been. If this bill had shown that the answer would have been that witness was drunk, it might have raised a very serious question. It would have tended very seriously to have impaired his testimony before the jury; and it would have been a comment adversely to the witness, and, therefore, adverse to appellant's cause in conveying to the mind of the jury the opin-

ion of the court in regard to the testimony of a drunken witness. It is not every remark of a court, criticising evidence, that will require a reversal. Usually the case will not be reversed on remarks of a court, where the testimony is rejected. In either event it must be shown in some way, or it must be made to appear, that the criticism of the testimony or failure of the testimony by the court, would probably have had an injurious effect. *Moore v. State*, 33 Tex. Cr. R. 306, 268 S. W. 403; *Wilson v. State*, 17 Tex. App. 536; *Moncallo v. State*, 12 Tex. App. 171; *Copeney v. State*, 10 Tex. App. 473. We do not believe this matter as presented in the bill requires a reversal of judgment.

Witness Watts was further asked by appellant's counsel the following question: "After you had made the investigation on that night, which you have explained to the jury, for the purpose of determining who was into that robbery business, I will ask you if you learned of any other person being here that night in town at that time?" The state objected on the ground that it would be the purest kind of hearsay, and he might have learned a whole lot of things that were untrue. The court sustained the objection, and defendant excepted. And this question was asked: "Did you, in your investigation of that matter as to who had probably committed this offense, make any search for any other person except the defendant, Chauncey, and McDonald." State objected, because immaterial. The court stated: "The rule is he may show the commission of the offense by some other person, and may do it by any legal evidence; but it must be some fact or circumstance that would be admissible against such person, if he was on trial." Appellant's counsel: "I am just going to ask him who." The Court: "You may ask him of any circumstance that would point to the guilt of any other person. He may have made any amount of investigation, and all that, and it would not be evidence as to the investigation he made; but any circumstance that would legally point to any one else as the perpetrator of the crime would be admissible. You may prove any circumstance pointing to the guilt of any other party, but as to what the sheriff did I will sustain." Defendant excepted to this ruling of the court. Appellant's counsel then asked: "State if you attempted to arrest or tried to arrest any other person that night as the party who might have been implicated in this robbery." State objected, and defendant excepted to court sustaining the objection. Question: "Did you attempt to arrest a man by the name of Vance?" The Court: "This is based on the ruling I have just made." To which action of the court defendant excepted. Question: "State if you made any investigation that night, after you learned of this robbery, for the purpose of arresting anybody that might have been connected with

it." The Court: "That is embraced strictly in the ruling I have just made. You can prove, such as if any other man was on trial, any circumstance that would tend to show his guilt." Witness: "I made investigation outside of this defendant and McDonald that night to try and determine who committed that crime up there that night. I examined the ground up there where the offense is said to have occurred." Question: "Did you make any investigation that night for the purpose of determining whether any other person was seen with John Harris before the robbery?" The Court: "That would call for nothing but hearsay. You may risk him if he knows whether any person was with John Harris that night." Defendant excepted to the ruling of the court. Answer: "I didn't see anybody else with John Harris that night." Question: "Did you try to arrest anybody that next morning that you had understood was with John Harris that night?" The Court: "That matter has been ruled upon." Defendant excepts to the ruling of the court. Answer: "There was a man by the name of Vance in town that night. He was in town the next morning. I couldn't say of my own knowledge where he went. I watched for him during the next day, but have not seen anything of him." Question: "Did you ever get a pistol that belonged to Vance?" The state objected, because immaterial. Objection sustained, and defendant excepted. Answer: "There were three other persons with Vance in Lufkin that night. They were Dock Sims, Will Tyner, and a man by the name of Simpson. I don't know where Vance came from. I found those three persons with Vance that morning here in town. I never saw anything of Vance after the Cotton Belt train went north. I had seen Vance before that time. I have been knowing him 10 or 12 years. I saw Vance that morning before the Cotton Belt train left town. I didn't find out that he had left town until that night. I saw Vance at least a half dozen times between the time of the robbery and the time the Cotton Belt train left." Question: "After Vance left, did you make any attempt to arrest him?" State objects, because immaterial. Objection sustained and defendant excepted. Question: "After you had made an investigation of this matter, and discovered that Vance had gone, state if you made any attempt to arrest him." State objects, as immaterial matter altogether. The Court said: "It is an immaterial matter." Defendant excepted. On cross-examination: "This man Vance looks like he is about 35 years old, and I suppose would weigh about 170 pounds. He did not look like Falvey Chancey. Vance was never indicted for this offense that I ever heard of. I am sheriff of this county and handle capias for persons who have been indicted. This defendant was in front of Scoggins' saloon that morning when I first found him." To which ac-

tion of the court in excluding all and each of the answers of the witness as shown in the several exceptions herein, defendant excepts. Defendant then stated to the court, and it was true, that defendant would have proved by the witness, in answer to said questions by him propounded, that he (witness) would have proved that he (Watts) made investigation that night and next morning to determine who was with John Harris that night (the injured party), and drinking with him in the various saloons before the robbery, and that he (Watts) received information that would have caused him (Watts) to arrest one Vance as one of the probable parties who robbed the said Harris, and also that he was informed there were some two or more other parties whose names were not ascertainable and unknown to said Watts, except the said Vance, were in company with said John Harris, drinking with them and going around with them that night."

Any testimony that would prove or tend to prove that other parties than appellant robbed Harris would be legitimate. If it tended to exculpate Harris, it would be favorable to him. If it tended to incriminate, of course, it would be unfavorable, as tending to show either a conspiracy or that the parties were acting in concert as principals. But the witnesses relied upon to prove these facts must state the facts, not their conclusions from the facts. If these witnesses knew any of the parties whose names were sought to be proved were in fact with Harris at the time he was robbed, or were connected with the robbery, it would be a legitimate fact; but it is not permissible to prove the conclusions of a witness, based upon his investigation of a criminal transaction. Under the peculiar state of case, it will be noted that this witness stated that, as far as shown by this bill, some of these were drinking about the saloons where Harris and others were drinking. This was testified by Sheriff Watts. As to his conclusion as to whether Vance was supposed or not supposed to be connected with the robbery, that was properly excluded in the manner as presented here. Perhaps, if Vance had been sufficiently connected to have shown him to have been in the robbery, or to have been in such position at the time of the robbery to have participated in it, then it might have been legitimate to show his flight as a circumstance against him and in favor of appellant, provided appellant was not one of the guilty parties. As we understand this bill, it was shown that Vance was in the town that night, and was drinking with Sims and others, perhaps appellant and the assaulted party, around the saloon, and it was further shown by this witness that Vance left on the train the following day. We are of opinion that, as this bill presents the matter, there is nothing in the record requiring a reversal of the judgment; for the witness



was permitted to testify as far as it was legitimate.

We have examined the charge, and do not believe that it is the subject of any criticism, nor that it was upon the weight of the evidence, where it informed the jury that, if they should find any of the bills of currency mentioned by witness Harris was taken from him by appellant, to find him guilty of robbery. This was not on the weight of the evidence. Witness testified to the taking of quite an amount of money in the form of currency bills; and it was not error for the court to instruct the jury that, if they should find appellant took any one or more of these bills under circumstances which would constitute robbery they should convict him. The court was not assuming as a fact that the bills were taken, or taken by appellant, and left this as a matter of fact to be determined by the jury.

Finding no reversible error in the record, the judgment is affirmed.

#### On Rehearing.

This judgment was affirmed at the present term, and is now before us on rehearing. It is contended that we were in error in holding that the remarks of the trial court in excluding testimony were not of sufficient importance to require a reversal. In the original opinion it was said that "the remark of the court was improper and should not have been indulged; but the testimony was not admitted, and the bill does not show what the answer of the witness would have been. If this bill had shown that the answer would have been that witness was drunk, it might have raised a very serious question. It would have tended very seriously to have impaired his testimony before the jury, and it would have been a comment adversely to the witness, and therefore adverse to appellant's cause in conveying to the mind of the jury the opinion of the court in regard to the testimony of a drunken witness." As stated in the original opinion, the court qualified the bill by stating: "The remark of the court was made while defendant's counsel was engaged in an apparent effort to discredit his own witness by seeking to either make him admit that he was drunk at the time inquired about, or, if he denied he was drunk, then to impeach him as to such fact. The court, so understanding the matter in a jocular spirit, and possibly from some impatience, addressed the remark complained of to defendant's counsel. I am unable to see how defendant could have been injured by the remark, for it was a comment, not upon evidence admitted, but upon that which was excluded; and, if any party could complain of it, it was the prosecution, whose main witness, John Harris, it was conceded, was drinking, and was proved by some witnesses to have been drunk on the occasion of the

alleged robbery." This exception was met in the former opinion upon the theory that it was upon rejected, and not admitted, testimony. It was then stated and reiterated that the remark of the court should not have been indulged. Upon a more careful investigation of the matter we are of opinion that the remark was more far-reaching than at first thought. The judge himself explained the remarks as reflecting upon the prosecuting witness, Harris, and, if complaint could be alleged, it should come from the prosecution, and not the defense. It was in evidence that appellant took the stand in his own behalf, and it was further in evidence that defendant was drinking heavily, and some of the testimony goes to show that he was drunk on the night of the alleged robbery, as was Sims, whose name was mentioned as a witness in the bill of exception. If the trial court was right in stating that it would have reflected upon prosecuting witness, Harris, and his remark was sweeping enough to reach other witnesses besides Sims, then defendant himself was included within that category. The remark of the court was calculated to impress the jury with the fact that the court did not believe the evidence of those witnesses who testified in the case, including defendant, who were under the influence of liquor, amounted to anything, and thereby discredited their testimony in the minds of the jury. We are therefore of opinion that we were in error in not reversing the judgment for this reason on a former day of the term. We are further of opinion that it was such error as requires a reversal.

The rehearing is granted, and the judgment of affirmance is set aside, and the cause remanded.

BROOKS, J., absent.

#### ARMSTRONG v. STATE.

(Court of Criminal Appeals of Texas. May 9, 1906. Rehearing Denied June 25, 1906.)

##### 1. HOMICIDE—EVIDENCE—DEADLY WEAPON—CAUSE OF DEATH.

In a prosecution for homicide, evidence held sufficient to show that the deceased was killed by means of a knife, and that the knife was a deadly weapon.

##### 2. HOMICIDE—THREATS—INSTRUCTIONS—ISSUES.

Where defendant and deceased were friendly up to the time of the difficulty, and the only threats shown were made during the difficulty, it was not error for the court to omit to charge the law relating to threats.

##### 3. HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.

Where the only previous assault made by deceased was by throwing a beer glass at defendant, by which he claimed deceased broke one of defendant's fingers and cut his neck, and the court charged directly, with reference to the blow inflicted by the glass in submitting the issue of manslaughter, that if such blow

caused either pain or bloodshed it would constitute adequate cause, and charged in the application of the law to the facts directly in regard to the blow from the glass, defendant was not entitled to object that the charge on manslaughter was too restrictive, in that it confined the jury to the consideration of the provocation to the acts of deceased at the time of the difficulty, and excluded any previous assault.

#### 4. SAME—COOLING TIME.

Where, in a prosecution for homicide the difficulty consisted of continuous acts from its inception to its close without any appreciable intervening time, it was not error for the court to omit to submit the issue of cooling time.

Appeal from District Court, Harris County; J. K. P. Gillaspie, Judge.

Charlie Armstrong was convicted of murder, and he appeals. Affirmed.

E. T. Branch, W. C. Oliver, Dist. Atty., and J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for murder in the second degree.

It is contended in motion for new trial that the state failed to prove appellant died from the effects of the knife wound. This is not borne out by the record. One of the witnesses testified that Will Horrey is dead. The cause of his death was that Charlie Armstrong stabbed him with a knife. Another witness testified that appellant stabbed deceased in the breast with a knife. Speaking of the defendant, she said, "Charlie killed him." The evidence is clear and unequivocal that during the difficulty appellant did stab deceased, and that he died, and an inquest was held over his body by the justice of the peace. And the wounds were described: One being in the breast and the justice testified he thought the knife entered the heart; and the other was in the arm. This was sufficient evidence to prove the fact that appellant killed him. *Goodman v. State*, 91 S. W. 795, 15 Tex. Ct. Rep. 254. No witness undertook to describe the knife. The point is made on the insufficiency of the evidence to show its deadly character, but the point is not made that the charge should have been given in reference to the question; that is, if the weapon was not a deadly one, it would not be ordinarily presumed death was intended, etc. The question here is, is the evidence sufficient to show it was a deadly weapon. We think it is sufficient as well as to show that he killed deceased by means of the knife.

Nor was there any error in the court's failure to charge the law of threats. If any threats were in fact made by deceased, it was made during the difficulty, as shown by the testimony. There were no antecedent threats. The parties were friendly up to the time of the difficulty. It is not necessary under this character of case that a charge be given on the subject of threats. *Hancock v. State*, 83 S. W. 696, 11 Tex. Ct. Rep. 607; *Thomson v. State*, 93 S. W. 111, 15 Tex. Ct. Rep. 436.

It is contended that the charge on manslaughter is too restrictive, in that it confined the jury to the consideration of the provocation to the acts of deceased at the time of the difficulty, and that it excluded from their consideration any previous assault. If there was any previous assault by deceased, it was by means of throwing a beer glass at appellant, in which he claimed that deceased by this means broke one of his fingers and produced a cut on his neck. The court charged directly in regard to the blow inflicted by the glass in submitting the issue of manslaughter; and informed the jury that, if said blow caused either pain or bloodshed, it would be adequate cause. He also charged, in the application of the law to the facts, directly in regard to the blow from the glass.

The charge is also criticised because it did not submit the issue of cooling time. We do not believe this question was in the case. The acts were so near together that the difficulty was a continuous one from its inception to its close. As we view the facts, there was no interregnum of sufficient importance to raise the question of cooling time. The court charged the jury, as we understand the charge, that they should look at it from defendant's standpoint, and, if his mind was excited so as to render it incapable of cool reflection at the time of the difficulty, they would convict him of manslaughter. And he further informed the jury that, in judging defendant and as things appeared to him, the jury should do so from his standpoint, and as they reasonably appeared to him, and they were instructed to take into consideration all the facts and circumstances in evidence and the conduct of deceased towards him. Taking the charge as a whole, we do not believe there was any reversible error.

The evidence for state justified the verdict of the jury in finding appellant guilty of murder in the second degree.

The judgment is affirmed.

#### KEGANS v. STATE.

(Court of Criminal Appeals of Texas. June 25, 1906.)

#### CRIMINAL LAW—MISCONDUCT OF JURY.

Where, after the jury had retired and before an agreement had been reached, the reputation and character of accused was discussed, and the fact that he had been previously convicted as well as the pendency of other cases against him adverted to, to such an extent that one of the jurors was sufficiently affected to agree to a verdict and a higher punishment than he would otherwise have given, the jury was guilty of such misconduct as vitiated the verdict.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2055.]

Appeal from Criminal District Court, Harris County; J. K. P. Gillaspie, Judge.

Ben Kegans was convicted of horse theft, and he appeals. Reversed and remanded.

K. C. Barkley, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of a horse, and his punishment fixed at five years' confinement in the penitentiary.

The misconduct of the jury was raised in motion for a new trial, and is here urged as ground for reversal. The evidence shows that after the jury retired to consider of their verdict, the reputation and character of appellant was discussed, and the fact that he had been previously convicted, as well as the pendency of other cases against him in Ft. Bend county. This occurred before the jury had agreed upon their verdict, and it is shown that one of the jurors was at least affected sufficiently to agree to a verdict, and a higher punishment than otherwise he would have given. It is made to appear that he would not have given a higher verdict than two years, if these matters had not been stated and discussed, and that he did then agree to the verdict and to the assessment of five years as the punishment. It is unnecessary to go further into the details of this misconduct. Under the following authorities we believe this case should be reversed. *Mitchell v. State*, 36 Tex. Cr. R. 278, 33 S. W. 367, 36 S. W. 456; *Tate v. State*, 38 Tex. Cr. R. 261, 42 S. W. 595; *Holmes v. State*, 38 Tex. Cr. R. 370, 42 S. W. 996; *Hargrove v. State*, 33 Tex. Cr. R. 431, 26 S. W. 993; *Washburn v. State*, 31 Tex. Cr. R. 352, 20 S. W. 715. The statute provides that new trials in felony cases shall be granted where the jury, after having retired to deliberate upon the case, has received other testimony. We are of opinion that this was such misconduct as entitles appellant to a reversal.

The judgment is reversed, and the cause remanded.

BROOKS, J., absent.

#### McMAHAN v. STATE.

(Court of Criminal Appeals of Texas. June 25, 1906.)

#### 1. WITNESSES—ADVERSE WITNESS—CROSS-EXAMINATION.

Where, in a prosecution for theft from the person, prosecutor endeavored to shield defendant, and testified that he did not swear before the grand jury that he told defendant to take care of any money, it was not error for the court to permit the state to call the witness' attention to the fact that he had previously told R. that the money had been taken from his pocket without his consent.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1094-1097.]

#### 2. CRIMINAL LAW—VERDICT—AMENDMENT.

Where a verdict was returned finding defendant guilty as charged in the indictment and assessing his "punishment at two years in the penitentiary," the insertion of the word "confinement" at the direction of the court did not vitiate the verdict.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2107, 2111.]

96 S. W.—2

#### 3. LARCENY—TAKING FROM THE PERSON—INSTRUCTIONS.

Where, in a prosecution for larceny from the person, the evidence on the issue of prosecutor's want of consent to the taking was weak, it was error to charge that, though the money was taken from prosecutor's person and possession without his knowledge, and prior to the taking it was understood between defendant and prosecutor that, if the latter should become so drunk that he could not take care of himself, defendant should take care of prosecutor's money, and in compliance with such understanding defendant took the money without any intent to steal it, defendant should be acquitted, unless defendant took the money without prosecutor's consent and with intent at the time of the taking to steal it, was erroneous as too restrictive.

#### 4. SAME.

The court should have charged that if, prior to the taking of the money, prosecutor told defendant to take care of him in case he got too drunk to take care of himself, and defendant believed prosecutor intended him to take his money from him, or in case they had a reasonable doubt as to whether that was true, in either case they should acquit.

#### 5. SAME—ELEMENTS OF OFFENSE.

Where accused took money from prosecutor's person while prosecutor was intoxicated, as accused believed prosecutor had previously directed, and did not form an intent to appropriate any part of the money to his own use until later, he was not guilty of theft.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 3-10.]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

James McMahan was convicted of theft from the person, and he appeals. Reversed and remanded.

Buck, Cummings & Doyle, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft from the person, and his punishment assessed at two years' confinement in the penitentiary, and prosecutes this appeal.

During the trial the state put the witness John E. Martel on the stand. It seems that, after examining the witness some time, he stated that he did not swear before the grand jury that he told this fellow (defendant) to take care of any money. State's attorney then asked said witness: "When did you conceive the idea of swearing that in this case? That was after you had gone to see Mr. McMahan. Didn't you tell Mr. Roy, down in the justice's courtroom, this money was taken out of your pocket without your consent? Didn't you tell him that?" To which question and answer thereto, defendant then and there objected on the ground that it was effort on the part of the state to impeach its own witness. To which the court remarked: "If it is a matter of surprise to the county attorney." Defendant's counsel stated that was not claimed. Thereupon the county attorney replied: "We will put Mr. Roy on the stand to prove this man told him the money was taken without his consent." To which question, answer, and statement defendant's counsel then and there

renewed his objection upon the ground that it was an effort of the state to impeach their own witness; that the remark of the court was uncalled for, and the statement of the county attorney was an effort to get before the jury evidence of hearsay declarations. This was overruled. Said witness was permitted to state as follows: "I reckon you know if anybody takes money out of your pocket when you are asleep. I don't know whether Mr. Roy asked me the question as to whether the money was taken out of my pocket without my consent or not. I told Mr. Roy I didn't know when the money was taken. I did not know who got the money, and would not have known if they had not told me. I did not tell anybody to put their hand in my pocket and get out the money." The court explains this by stating that it appeared to the court that this witness was an unwilling witness for the state, and was anxious to shield defendant if possible. It appears that the witness was permitted to state that Roy asked him, on a former occasion, the question as to whether the money was taken out of his pocket without his consent or not. "I told Mr. Roy I did not know when the money was taken. I do not know who got the money, and would not have known if they had not told me. I did not tell anybody to put their hand in my pocket and get out the money." Under the circumstances, as explained by the court, we are inclined to believe that it was competent for counsel for the state to call the witness' attention to facts stated by him in order to refresh his memory. It seems from his answer here that the same was without prejudice to appellant.

We do not believe there was any error in the action of the court with reference to the verdict of the jury and the correction thereof. The jury returned the verdict as follows: "We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at two years in the penitentiary"—and signed by the foreman. The word "confinement" was afterwards inserted, and the verdict, so reformed, was signed. This was simply a formal change or reformation. The verdict was sufficient without this. We do not believe that the court was required to instruct the jury to return a verdict of not guilty on appellant's motion.

Appellant insists that the court erred in the following portion of the charge: "Even though you should believe from the evidence that the money alleged in the indictment was taken from the person and possession of Johnie Martel, and without his knowledge, but further believe from the evidence that, prior to such taking, it had been understood and agreed by and between the defendant and said Martel that, should said Martel become so drunk that he could not take care of himself, then the defendant should take from him, the said Martel, such money as he (Martel) might have on his person, and that

in compliance with said understanding, defendant took said money from the person and possession of said Martel for the purpose of keeping the same for said Martel, and without any intention to steal the same at the time he took it, if he did take it, then you will acquit the defendant; and you will acquit the defendant if you do not believe from the evidence beyond a reasonable doubt that the defendant took said money without the consent of said Martel, or if you do not believe from the evidence beyond a reasonable doubt that in taking said money, if he did take it, he intended at the time of taking to steal it." It is claimed that this charge shifts the burden of proof to the defendant, and requires defendant to make proof of such facts as would authorize an acquittal on this line. Appellant further contends that said charge was not in accordance with the evidence, and the court should have charged the jury, if they believed from the evidence, previous to the taking of said money by defendant, prosecutor, Martel, told defendant to take care of him in case he got too drunk to take care of himself, and that defendant, from said statement so made to him by prosecuting witness, believed he intended for him to take his money from him, or in case they had a reasonable doubt as to whether this were true, in either event they should acquit defendant. In view of the fact that the evidence on the question of consent or not on the part of the prosecutor as to the taking is weak, we believe that the charge of the court was too restrictive, and was not exactly applicable to the evidence; and the charge suggested by appellant should have been given, as it met his phase of the case. It may be that prosecutor was a reluctant witness and desired to shield appellant, still this did not relieve the state from proving beyond a reasonable doubt that prosecutor did not consent to the taking. Here is some of the testimony on that subject. Prosecutor was drunk or drinking, and had gone to sleep in the saloon. While in that condition, appellant, who was a waiter and handling beer around the theater, went up to prosecutor, put his hand in his pocket, pulled out what was taken by the witnesses to be a \$5 bill, and remarked at the time, "This is easy money." It appears that prosecutor and appellant had previously known each other, and were good friends; that prosecutor told appellant, before he got drunk that night, to look after him and see that he did not lose anything; that he meant for him to look after him just like one friend would look after another; that nothing was said about any money, but that he meant for him to take his money or other valuables if he got so drunk as not to be able to take care of himself. In reply to the state's questions, prosecutor stated that nothing was said about appellant putting his hand in his pocket and taking his money; that he never told anybody to put his hand in his

pocket and take out \$5; that he did not give appellant his consent for him to put his hand in his pocket and take out \$5. It was also shown in this connection that appellant that night delivered a \$5 bill to a saloon man by the name of Whitney McNish, and got \$1.50 in change, and told McNish to keep the balance of it for some one, but witness did not remember the name. Appellant says that he told him to keep it for the prosecutor, Martel. This is about the state of case on the question of consent. As stated, it is evident, from a review of this record, that the witness Martel desired, as far as he could, to shield appellant in giving in his testimony. We believe, under the peculiar facts of this case, the court should not have given the charge on the subject of consent as indicated in that copied above. There was really in the evidence no understanding or agreement by and between defendant and Martel that, if he became too drunk to take care of himself, the defendant should take from said Martel such money as he might have on his person at the time, and yet the charge of the court put the question to the jury in that form. If appellant had authority from Martel to take his property, it was by an implied consent; that is, he was requested generally to take care of him, and, as stated by Martel himself, this included to look after his valuables if he got too drunk to take care of them himself. He gave him no direct instructions or request as to taking the money out of his pocket. The charge requested, which the court refused to give, was in direct response to the evidence, and put this question of implied consent directly before the jury, and we think it should have been given. We do not believe that the subsequent portion of the charge of the court to the effect, if they believed from the evidence beyond a reasonable doubt that the defendant took said money without the consent of the said Martel, they should acquit him, cured the defect.

We also believe that the second requested instruction asked by appellant should have been given. It had relation to testimony adduced before the jury. Appellant claimed that he had consent to the taking; at least prosecutor's implied consent. He may have taken the money at the time in good faith, and subsequently formed the design to appropriate a part of it. There is evidence showing that, while he deposited \$3.50 for prosecutor, he appropriated \$1.50 of it to his own use. If he formed the intent to appropriate this money at this time, this would not constitute theft. It may be that the court regarded the testimony as weak on this line, and we are inclined to agree with the court; still the testimony was in the case, and the jury should have been permitted to pass on that fact.

For the errors pointed out, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

## CHENOWITH v. STATE

(Court of Criminal Appeals of Texas. June 25, 1906.)

### 1. INTOXICATING LIQUORS—WRONGFUL SALE—GIFTS.

Where accused was charged with violating the local option law, he could not be convicted if the proof showed a gift of liquor, instead of a sale.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 155.]

### 2. SAME—LOCAL OPTION LAW—ORDER—PUBLICATION—CONDITION PRECEDENT.

Under Sayles' Rev. Civ. St. art. 3391, providing that, before a local option law can go into operation, the order shall be published for four successive weeks in a newspaper to be designated by the county judge, such publication is a condition precedent to the operation of the law.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 44.]

### 3. SAME—SUFFICIENCY OF PUBLICATION.

After the county judge had designated a newspaper for the publication of an order putting local option in force, and after the publication of the order for three weeks an injunction was served on the editor of the paper and the county judge, and the fourth publication was never made in that paper. After service of the writ, the editor of another paper, without direction of the county judge, on his own volition, secured a copy of the order, and inserted it in his paper for two or three weeks when he was enjoined, after which the county judge entered an order putting the law in force, basing the same on three publications in the first paper and one in the second. *Held*, that such publication was insufficient to put the law in force, within Sayles' Rev. Civ. St. art. 3391, requiring publication for four successive weeks in a newspaper designated by the county judge.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 44.]

### 4. SAME—RATIFICATION.

Where a county judge, on being approached by the editor of a newspaper, expressly refused to authorize him to publish an order putting the local option law in force in the county, the judge's subsequent act in certifying the adoption of local option in the county based in part on the voluntary publication of such order by the editor did not constitute a ratification of such publication.

Appeal from Bell County Court; W. R. Butler, Judge.

H. C. Chenowith was convicted of violating the local option law, and he appeals. Reversed.

J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Having been convicted of violating the local option law, appellant prosecutes his appeal.

Several questions are suggested for revision, one of which we deem to be of controlling interest. Before passing to the discussion of that question we hold that the court should have charged the jury, in accordance with appellant's request, to the effect that unless there was a sale a conviction could not occur, or rather, if the beer was given to the alleged purchaser, it would not be a violation of the law.

The question of serious moment, however,

arises from the fact that the issue was made that the law was not put into operation as the provisions of the statute required. The question was raised on bills of exception in regard to the admission of testimony, special charges requested, and on demurrer to the sufficiency of the evidence. The facts bearing upon this question are, in substance: That after the county judge had designated the Temple Tribune as the paper in which the publication for the four weeks was to be made, and after the publication of the order for three weeks an injunction was served on the editor of that paper and the county judge, and the fourth publication was never made in that paper. Before the injunction was served on the Temple Tribune, the editor of the Belton Journal-Reporter had an interview with the county judge, in which the county judge stated to him, if the injunction should be served upon the other paper, that the publication could then be had in the Belton Journal-Reporter. After the service of the writ on the Temple Tribune, the editor of the Belton Journal-Reporter approached the county judge (Felts) and reminded him of the previous conversation, and requested that the county judge should designate his paper to publish the result. The county judge promptly declined, in the following language: "Mr. Crouch, I have been served with the writ of injunction, and therefore cannot discuss the matter with you further." Crouch, editor of the Journal-Reporter, then of his own volition secured a copy of the order and inserted it in the Belton Journal-Reporter for two or three weeks, when he was enjoined by an order of the judge of the Eleventh judicial district. However, he seems to have disregarded the injunction and continued the publication. The certificate of the judge to the publication of the order is in the following language: "I, G. M. Felts, county judge of Bell county, Texas, do hereby certify that, acting under the instruction of the commissioners' court, I selected and designated the Temple Tribune, a weekly newspaper published in Temple, Tex., as a paper in which to make publications of the above and foregoing order, and that the publication of the result of said local option election was published in said paper on August 24, September 4, and September 11, 1903, and that after the third publication thereof same was enjoined by the district judge of the Seventeenth judicial district of the state of Texas, after which I permitted same to be published the fourth, fifth, sixth, and seventh times in the Belton Journal-Reporter, a weekly newspaper published in Belton, Tex., on the 18th and 25th of September, and on the 2d and 9th of October, 1903, and that the fourth publication having been made in the Belton Journal-Reporter on September 18, 1903, prohibition became effective in Bell county on September 26, 1903, at 12 o'clock p. m. G. M. Felts, County Judge Bell County. Attest:

C. K. White, Co. Clk., by W. J. Lee, Deputy."

The bill of exceptions setting out the above order of the county judge makes it appear that, instead of using the language "I caused the same to be published the fourth, fifth, sixth, and seventh times," it reads, "I permitted the same to be published the fourth, fifth, sixth, and seventh times." There is some difference between "causing" a thing to be done and "permitting" it to be done. Following the practice in this court, we will take the bill of exceptions as controlling the statement of facts, where there is a discrepancy or variance. But we might say that, so far as the merits are concerned, there is practically no difference under the view we take of the main question involved. It will be noticed that this order of the county judge certifies that it was published in the paper, and the proof further is that it was published only three times in the Temple Tribune, and that it was published then four times in the Belton Journal-Reporter. The county judge in the order selects the first publication in the Belton Journal-Reporter, and adds it to the three publications in the Temple Tribune, and on the 26th of September makes his certificate and puts the law into operation on the 26th at 12 o'clock. The three subsequent publications in the Belton Journal-Reporter, therefore, would pass out; the judge's certificate having been made prior to such publication. This is the state of the record. The publication was not had four weeks in any single newspaper prior to the making of the certificate by the judge. While there were four publications, three of which were in one newspaper and one in the other, we are of opinion this would not be sufficient. The contention is seriously urged in several different ways in this record that this publication was not in accordance with the law, and that by reason of the publication and certificate, either or both, the law was never legally published. It will hardly be the subject of discussion, at least seriously so, that the three publications in the Temple Tribune put the law into operation, because the law required four such publications. It will hardly be the subject of further discussion that the judge under this certificate did not rely upon the four publications in the Belton Journal-Reporter, nor did he make any certificate of that sort putting the law into operation by virtue of such four publications. His certificate is that the four publications were made in the Belton Journal-Reporter, but he only economizes the first publication, and added that to the three publications had in the Temple Tribune. We believe the contention of appellant is correct that the law was not put into operation as required by the statute. The provisions of the statute require that the county judge shall designate the newspaper, and that four successive weeks' publication shall be had. He designated the Tribune, but a sufficient num-

ber of publications were not made. He did not, under the facts adduced, select the Belton Journal-Reporter. He mentioned the matter to Crouch (the editor) conditionally. When the circumstances occurred, Crouch approached him for authority, and he declined to give it. Crouch of his own volition obtained a copy of the order and published it in his paper. These facts are not sufficient to show that the Belton Journal-Reporter was designated by the county judge. In fact, he declined emphatically to have anything to do with the matter.

It will be seen, by reading the terms of article 3391, Sayles' Rev. Civ. St., that before the law can go into operation the publication must be had in accordance with the terms of that statute for four successive weeks in a newspaper to be designated by the county judge. Unless this has been done, the statute has not been complied with, and the law has not been put into operation. It has been the universal holding of this court in regard to the local option law that all the statutory provisions precedent to putting the law into operation must be complied with, and unless this has been done the law will not be operative. *Ex parte Conley*, 75 S. W. 301, 8 Tex. Ct. Rep. 197. So it has been held that the action of the commissioners' court ordering the election, and the election, with all of its incidents, must conform strictly to the requirements of the statute, or the election will be void. *Ex parte Conley*, supra; *Boone v. State*, 10 Tex. App. 418, 38 Am. Rep. 641; *Prather v. State*, 12 Tex. App. 401; *Akin v. State*, 14 Tex. App. 142; *Donaldson v. State*, 15 Tex. App. 25; *Stallworth v. State*, 18 Tex. App. 878; *Ex parte Kramer*, 19 Tex. App. 123; *Smith v. State*, 19 Tex. App. 444; *Ex parte Sublett*, 23 Tex. App. 309, 4 S. W. 894; *Ex parte Kennedy*, 23 Tex. App. 77, 3 S. W. 114; *Ex parte Burge*, 32 Tex. Cr. R. 459, 24 S. W. 289. In *Kramer's Case*, supra, it was said: "If the election was not conducted in accordance with the requirements of the law, it is void, and not merely voidable, and all proceedings had under and by virtue of such void election are absolutely void, and may be questioned, not only directly, but collaterally." *Ex parte Schwartz*, 2 Tex. App. 74; *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Kilgore*, 3 Tex. App. 247. In *Donaldson's Case*, supra, this court said: "The local option law being for a particular locality only, it is a quasi local or special law, and depends for its validity upon its adoption in conformity with the law permitting its adoption. So, in regard to posting notices, it has been held with unvarying certainty as a prerequisite to the validity of the election that the necessary statutory notices be posted for the time required by the statute; that the omission of one or more of the five notices would render the election invalid. *Ex parte Conley*, supra; *Smith v. State*, 19 Tex. App. 444; *Swenson v. McLaren* (Tex. Civ. App.) 21 S. W. 300; *Frickie v. State* (Tex. Cr.

App.) 45 S. W. 810; *Bowman v. State* (Tex. Cr. App.) 40 S. W. 798; *Bowman v. State* (Tex. Cr. App.) 41 S. W. 635; *James v. State*, 21 Tex. App. 353, 17 S. W. 422. So it has been held, further, that the election will be invalid where it was not held within the time specified by the statute; that is, in not less than 15 nor more than 30 days after the order was entered for such election. *Curry v. State*, 28 Tex. App. 475, 13 S. W. 752; *King v. State*, 33 Tex. Cr. R. 547, 28 S. W. 201. *Conley's Case*, supra. These are sufficient authorities, it occurs to us, to demonstrate that it is a prerequisite to the validity of the local option election that the prerequisite terms of the statute should be complied with in order to put it into operation. It has been also held by an unbroken line of authority that, if there be an issue on the trial whether the prerequisite steps have been taken, the jury shall be appropriately charged in regard to the matter, and thus leave to their decision whether the law had been put into operation, and if they should find that it had not been, the jury should be instructed to acquit. *Gaines v. State*, 37 Tex. Cr. R. 73, 38 S. W. 774; *Chapman v. State*, 37 Tex. Cr. R. 167, 39 S. W. 113; *Bowman v. State*, 38 Tex. Cr. R. 14, 40 S. W. 796, 41 S. W. 635; *Shields v. State*, 38 Tex. Cr. R. 252, 42 S. W. 398; *Frickie v. State*, 39 Tex. Cr. R. 254, 45 S. W. 810; *Bob Jones v. State* (Tex. Cr. App.) 43 S. W. 981; *Grammer v. State*, 61 S. W. 402, 2 Tex. Ct. Rep. 85. Many other decisions of this court could be added to the list of cases already cited. It may be mentioned in this connection that since the case of *Irish v. State* (Tex. Cr. App.) 29 S. W. 778, where there is no issue as to the validity of the election, the court may instruct the jury the law is in force; but, where the evidence suggests an issue, then it must be submitted to the jury for their decision as a question of fact.

By the terms of article 3391 the law has imposed the duty upon the county judge to designate the newspaper and have the order declaring the result published in said newspaper for four consecutive weeks. It is a duty that the law imposes upon him, and with which the commissioners' court seems to have no concern. *Drechsel v. State*, 35 Tex. Cr. R. 577, 34 S. W. 932. Then the conclusion seems to be irresistible that, as a prerequisite to the certificate of the judge, the publication must occur for the four successive weeks, or, in the absence of paper, the posting of proper notices for that length of time. If this conclusion is correct, of which we have no doubt, then this publication for the four successive weeks is a prerequisite antecedent condition to the law going into effect. That the county judge did not designate the Belton Journal-Reporter is made evident, as we understand this record, by two uncontroverted facts: First, his certificate; and, second, the testimony of the editor of the Belton Journal-Reporter, which

testimony has heretofore been mentioned. If it be contended that the first publication in the Belton Journal-Reporter on September 18th could be added to the three publications in the Temple Tribune, then in order for that to have occurred the county judge must have designated the Belton paper. This he did not do, and the editor so testified. After the publication in the Journal-Reporter, the act of the county judge indorsing that publication, or adopting it or ratifying it, would not be legal. An officer charged with a duty must perform that duty under the terms of the law that imposed the duty. He cannot do it otherwise and make it legal, nor can he adopt the act of another who does and make it legal. A public officer is not authorized to ratify the act of others. The duty is imposed upon him and in accordance with the terms of the statute.

There is a marked distinction at this point between the ratification of the act of an agent, where the matter occurs between private parties, and where it is between a public officer and other parties. This principle has been overwhelmingly recognized, and it is hardly necessary to cite authorities. But we refer to all the authorities already cited in this opinion in support of this proposition, for they all demonstrate the fact that in order to put the law into operation the terms of the law itself must be complied with. We find no decision from this court to the contrary. The principle is the same here in regard to publication as it is in regard to giving notice for the election, declaring the result, etc. It would hardly be contended that the election would be valid where private individuals posted the notices, when it is made the duty of the clerk to post or cause to be posted such notices, and the adoption by the clerk of such posting after the election would not make it his act. This question has also been before our Supreme Court in *Walker v. Rogan*, 93 Tex. Sup. 248, 54 S. W. 1018. That decision was in regard to a contract between the Land Commissioner and Walker, and the question there was one of ratification. The court said: "But the state could only become a party to a contract, such as it contemplated by the statutes under consideration, by a compliance with their terms. The acts of the officers mentioned in the statute are not the acts of the state, unless they are such as the statute authorizes. They are invested with no discretion in contracting or refusing to contract. The state's offer to sell is expressed in the terms of the statute, and it becomes bound only when the purchaser accepts and complies with them. If the applicant is not entitled under the law to purchase, no contract arises from his doing the things specified in the statute. For this reason the principles by which the rights of parties to a contract between individuals, where one of them is a minor, cannot be applied in determining whether a contract arose in this transaction between the state

and the minor." The provisions of the statute under review by our Supreme Court did not extend to or include minors, and it was held, therefore, that the doing of the act mentioned in the statute created no contract, and a mandamus to carry out the contract was refused. That decision cites the following authorities in support of it, and which clearly sustain the conclusion reached: *The Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. Ed. 169; *Delafeld v. Illinois*, 2 Hill (N. Y.) 175. Practically to the same effect is the recent case of *Mound Oil Co. v. Terrell* (decided at present term of our Supreme Court) 92 S. W. 451. One of the leading cases upon this question is found in *State v. Bank of State of Missouri*, 45 Mo. 528. To the same effect is *Mayor v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Delafeld v. State of Illinois*, 26 Wend. (N. Y.) 192; *Wilhelm v. Cedar County*, 50 Iowa, 254; 19 Amer. & Eng. Ency. of Law (1st Ed.) p. 474, notes 1, 2, 3, 4, for collation of authorities. It is said that nothing short of an express act of the Legislature can validate an act done in contravention of statutory law. *State v. Bank of Mo.*, 45 Mo. 528; *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431, 35 Am. Dec. 654; *Brown v. Mayor of New York*, 63 N. Y. 239; *In re Van Antwerp*, 56 N. Y. 261. To the same effect is *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 835. And it has been held that an act which is entirely void, not for want of formality or regularity, or for mistake as to time, etc., but for want of power under the law, cannot be ratified even by the Legislature. A great many cases are cited in support of this proposition, and are found collated in note 4, on page 474, vol. 19 Amer. & Eng. Ency. of Law (1st Ed.). Some of these cases have already been cited. We desire to add to these, *McCracken v. San Francisco*, 16 Cal. 616; *Pimental v. City of San Francisco*, 21 Cal. 351; *McMillen v. Boyles*, 6 Iowa, 304; *McManning v. Farrar*, 46 Mo. 376; *Silliman v. Cummins*, 13 Ohio, 116; *Horton v. Town of Thompson*, 71 N. Y. 513; *Grogan v. City of San Francisco*, 18 Cal. 590. This being a local option law, the Legislature itself could not make the act of publication in the Belton Journal-Reporter a legal publication. There is no way under this law to make this a valid publication, except by having it done in accordance with the terms of the statute prescribing the method and manner of the publication.

It is also a sound proposition, as we understand, that the act of ratification must be the act of the sovereign power, or its authorized agents, acting in the manner prescribed by law. *Wilson v. School District No. 4*, 32 N. H. 118; *Argenti v. City of San Francisco*, 16 Cal. 255; *School District v. Aetna Ins. Co.*, 62 Me. 330; *Chamberlain v. Inhabitants of Dover*, 13 Me. 466, 29 Am. Dec. 517; *McCracken v. San Francisco*, 16 Cal. 591. The unofficial conduct of individuals has no controlling effect. Authorities already cited, and



for collation of other authorities see 19 Amer. & Eng. Ency. of Law (1st Ed.) vol. 19, p. 476, and notes. It has been held that a municipal corporation cannot ratify an ultra vires contract by subsequent action. *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *Uncas Nat. Bank v. City of Superior*, 115 Wis. 340, 91 N. W. 1004; *City of Unionville v. Marfin* (Mo. App.) 68 S. W. 605; *Pearsoll v. Chapin*, 44 Pa. 9. We therefore hold that the act of the county judge undertaking or seeking to adopt or ratify the act of the editor of the *Belton Journal-Reporter* was ultra vires, beyond his authority, and void. The testimony is uncontradicted in regard to this question and apparently admitted to be true. If, on another trial, this should be found to be the real status, we hold that the law has not been put into operation for want of a proper publication.

The judgment is reversed, and the cause remanded.

BROOKS, J., absent.

#### BLAIR v. STATE.

(Court of Criminal Appeals of Texas. June 25, 1906.)

##### POISONS—PRESCRIPTION—INDICTMENT.

Acts 29th Leg. p. 45, § 2, prohibits the prescribing of morphine, with the proviso that the section shall not prevent any physician from prescribing, in good faith, for the use of any habitual user of narcotic drugs, such substance as he may deem necessary for the treatment of such habit. Accused, a physician, was charged with unlawfully and knowingly furnishing morphine for the use of S., he well knowing her to be a habitual user of morphine, and that he did not prescribe the same in good faith for the use of such habitual user, etc. *Held*, that the indictment was fatally defective for failure to charge that he did not deem it necessary for the treatment of the habit to which it was alleged S. was addicted.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Dr. C. C. Blair was convicted of prescribing morphine, etc., and he appeals. Reversed and dismissed.

Orrick & Terrell and Baskin, Dodge & Baskin, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment was framed under the act of the Twenty-ninth Legislature, p. 45, § 2, which prohibits certain parties from prescribing morphine and other narcotic drugs, under the provisions of said section, with the following proviso: "Provided, however, that the provisions of this section shall not be construed to prevent any lawfully authorized practitioner of medicine from prescribing in good faith for the use of any habitual user of narcotic drugs, such substance as he may deem necessary for the treatment of such habit." Motion in arrest of judgment was made because the indictment

is insufficient in that it fails to properly negative the exceptions in this statute.

The charging part of the indictment is as follows: "Did then and there unlawfully and knowingly furnish to and subscribe, for the use of Ada Smith, morphine, the said Ada Smith being then and there a habitual user of morphine, and the said Dr. C. C. Blair then and there well knew the said Ada Smith to be such a habitual user of said drug, and did not then and there prescribe the same in good faith for the use of said habitual user, contrary to the form of the statute," etc. The point of attack is on the allegation negating the exception. A comparison of this negative averment with the terms of the proviso above quoted, in our judgment, demonstrates the correctness of the criticism of the indictment. In order to bring appellant within the terms of this law, the indictment must allege such facts as make him amenable, and if he comes within the terms of the proviso, he has not violated this statute. Those who are brought within the proviso are not within the terms of the inhibition because excepted from the punishable provisions of the act. In order to bring a party within the provisions of this act it should have alleged not only that he did not prescribe it in good faith for the use of Ada Smith, but that he did not deem it necessary for the treatment of such habit. The good or bad faith is not the criterion. It is the good faith on the part of the physician prescribing the medicine or such substance as he may deem necessary for the treatment of such habit. If the prescription for the morphine was deemed necessary for the treatment of the habit of Ada Smith, then appellant is not within the purview of the statute, and is exempted by the terms of the law. The mere fact that he may or may not have given it in good faith is not sufficient. The good faith is measured by what the party prescribing deems necessary for the treatment of the habit. If the morphine was necessary for the treatment of the habit, the giving of it was not violative of the statute.

We are of opinion that this indictment is not sufficient, and the motion in arrest should have been sustained. Therefore the judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., absent.

#### PINSON v. STATE.

(Court of Criminal Appeals of Texas. June 25, 1906.)

##### 1. HOMICIDE—SELF-DEFENSE—EVIDENCE—INSTRUCTIONS.

Where, on a trial for homicide, accused relied on self-defense, and the evidence showed that immediately before the killing accused and decedent had a difficulty, and accused testified that decedent raised his gun to a shooting position and that accused whirled his gun around and shot decedent, killing him to save his own

life, an instruction on self-defense which correctly stated the law with respect to real danger was not erroneous on the ground that it did not sufficiently charge as to reasonable appearances of danger viewed from the standpoint of accused, since under the evidence the danger was a real one.

**2. CRIMINAL LAW—ERRONEOUS INSTRUCTIONS—HARMLESS ERROR.**

Where, on a trial for homicide, there was no evidence reducing the homicide to manslaughter, accused could not complain of an instruction submitting the issue of manslaughter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 8160; vol. 26, Cent. Dig. Homicide, § 717.]

**3. HOMICIDE—MURDER IN THE SECOND DEGREE—EVIDENCE—SUFFICIENCY.**

Evidence on a trial for homicide examined, and held to support a finding of murder in the second degree.

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Clayton Pinson was convicted of murder in the second degree, and he appeals. Affirmed.

Campbell & McMears and A. M. Barton, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was allotted a term of five years in the penitentiary for murder in the second degree.

There is a bill of exceptions in the record in regard to some remarks of the county attorney made in his argument to the jury. Upon objection being raised, he immediately withdrew the remarks, and asked the jury not to consider them; and the court reprimanded the attorney, stating they were improper even if he withdrew them, and that such conduct was wrong, and told the jury not to consider anything said by the county attorney as to other cases and other verdicts, but to try this case on its own facts.

The main attack is on the charge of the court on self-defense and manslaughter, in that the charge on manslaughter is too general, and that on self-defense is not sufficient, because it deals in generalities, etc. We do not agree with these contentions. Sufficient of the evidence to bring in review these matters may be thus stated. Deceased (Minzes) had complained to Stacy (uncle of appellant) about some hogs getting in his (Minzes') crop, deceased being a renter of Stacy's. Appellant was ordered by his uncle, Stacy, to build a pen and put the hogs in it. He had succeeded in doing so, with the exception of one, and just preceding the difficulty had been down to the field, and caught that hog. In going into the field controlled by Minzes he had to break the lock on one of the gates, and some inference is to be drawn from the testimony, that this enraged or angered Minzes. Shortly before the meeting between appellant and deceased, deceased had borrowed a gun at the nearby residence of Grigsby, and had started down the road, when he met appellant, both being on horseback. Immediately present was a

negro in a wagon, whom appellant had with him down at the field. They were on their return from the field, when the meeting occurred with Minzes. The facts in regard to this meeting, from the defendant's standpoint are pretty much the same as detailed by the negro and appellant in their testimony; and for the purpose of illustrating the condition and environments, we will take the testimony of appellant himself. He says, in going to the farm and returning, he had to go by Grigsby's house; and through a lane at that point. Minzes was farming on the halves on the Stacy place. Stacy had some hogs about a mile below the house at the lower end of the plantation. While appellant was down there that morning, Minzes came, and requested him to tell his uncle to put up his hogs. Appellant told his uncle, who ordered him to haul rails out of the field, build a pen at the house, and put up the hogs. He informed his uncle that Minzes had the gate locked. His uncle told him to take an axe, and if they refused to unlock the gate, cut the chain. Appellant went by and told the "women-folks," and the refused to open the gate; and he told them that he had orders to cut the chain. He did cut the chain, but to avoid a difficulty or trouble with the Minzes he went to the lower gate, a half mile from the Minzes' residence. He hauled the rails, built the pen, caught all the hogs except one. On the evening of the difficulty he went down there again, about 4 o'clock, and not having any dog, he drove the hog out in the open, and ran him down on horseback. Returning he met Minzes. They stopped and engaged in conversation. He said to appellant, "'Clayton, haven't I always treated you as a gentleman.' I said, 'Yes, you have always treated me as a gentleman.' I said, 'Haven't I always treated you as one.' He said, 'Until to-day.' He said, 'Don't you come on my place any more.' I said, 'Mr. Minzes, I am working here by the month, hired to my uncle here for wages, and we have a crop in that field, and if he says for me to go down there I will have to go.' He said, 'Don't you come down there; if you do, I will kill you.' I said, 'I will have to go I guess, if he gives me orders to go.' He ripped out an oath, and said, 'You damn son of a bitch! I will kill you anyhow!' And he raised his gun to about that position (indicating) holding it in about a shooting position. I saw he was going to shoot, and I had my gun lying across my lap, and whirled it around and shot. I did not get it up. I do not think I had time to get it up to my shoulder. I shot Minzes in self-defense to save my own life.'" Without going further into the defensive theory of it, this is stating it as strongly as the testimony will admit; fully as strong as the negro's testimony. Several members of the Grigsby family witnessed the meeting and the incidental matters connected with the killing, as it was within 80

yards of their residence, where Minzes had just previously borrowed the gun.

The charge on self-defense is criticised because it is not sufficiently full in regard to reasonable appearances viewed from the defendant's standpoint, and is rather restrictive. We do not believe there is any merit in this. The court charged the jury that every person is permitted by law to defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself. He then further charges: "If you believe defendant shot and killed said Minzes, but that said Minzes was at the time trying to shoot him (defendant) and that defendant shot and killed Minzes, believing at the time he did so, as viewed from the defendant's standpoint that he was in danger of losing his life or of serious bodily injury at the hands of said Minzes," they should acquit. He further charged the jury: "A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. And further if from the evidence you believe defendant killed the said Minzes, but further believe at the time of so doing the deceased had made an attack on him with a gun, or had made a demonstration with a gun as if to shoot defendant, which, from the manner and character of it, and the relative strength of the parties, and the words, if any, of deceased accompanying the assault or demonstration, if any, and the defendant's knowledge of the character and disposition of deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that acting under such reasonable expectations or fear, the defendant killed the deceased, then you should acquit him. And if the deceased was armed at the time he was killed, and was making such an attack, if any, on defendant, and if the weapon used by him and the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant." We believe these charges sufficiently, and fairly presented self-defense. If defendant's theory is correct, as made by his testimony, and that of the negro witness sustains him, then apparent danger was not in the case. It was a case of real danger. The court might have limited the charge on self-defense to real danger. But the court went further, and gave appellant the benefit even of the appearances of danger.

The court out of an abundance of caution

gave a charge on manslaughter, which is not raised by the defendant's evidence. If his testimony is to be credited he had a clear case of self-defense, and the jury could have acquitted him. However, witnesses for the state put a somewhat different light upon the transaction. Deceased borrowed the shotgun from them, and started down the lane, and 77 measured yards from the Grigsby residence met appellant and the negro. They did not hear what was said between the parties, but could see them. Their testimony excludes the idea that Minzes had raised the gun, or made any demonstration with it, so far as they could see. There was some conversation between them, which these witnesses did not hear. But those of the Grigsby family, who were watching the parties at the time exclude the idea of a demonstration by deceased with a gun. While it was safer to give the charge on manslaughter in this connection, there may be a question whether the issue was in the case. But of this appellant cannot complain. The charge authorized the jury to find appellant guilty of manslaughter if from all the facts and circumstances introduced in evidence, they should find that appellant's mind was rendered incapable of cool reflection. The jury gave him murder in the second degree.

It is contended that the evidence is not sufficient. The testimony for the state justified the jury in finding the appellant guilty. If appellant shot Minzes to death, and there was no demonstration on Minzes' part to use a shot gun, but there was a heated and angry conversation between them, and he determined to kill for this reason, then appellant was at least guilty of murder in the second degree, unless there were facts growing out of the matter which would render his mind incapable of cool reflection; and this the jury did not find; or unless the jury should believe defendant's theory of it, and it was self-defense, and this they did not do. There was evidence in our judgment sufficient to justify the jury in finding him guilty of murder in the second degree.

Finding no reversible error in the record, the judgment is affirmed.

BROOKS, J., absent.

#### RIGGS v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### 1. INTOXICATING LIQUORS—PROSECUTIONS—INFORMATION.

Where there had been two local option elections in a county, an information for a violation of the local option law was not insufficient because it did not allege which election was relied on.

#### 2. CRIMINAL LAW—PLEA OF FORMER JEOPARDY—REQUISITES.

Former jeopardy in the same tribunal may be relied on without presenting any formal plea. [Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 666.]

### 3. INTOXICATING LIQUORS — PROSECUTIONS — EVIDENCE.

On a prosecution for a violation of the local option law, C., a witness for defendant, was asked on cross-examination if, shortly after the date of the transaction, he went to prosecutor and told him that N., defendant's partner, wanted to see him at defendant's place of business with reference to signing a receipt for the liquor, to which witness replied that he did not remember, and prosecutor, over the objection of defendant, testified in rebuttal of defendant's evidence that C. told him that N. wanted to see him, and that on calling at defendant's place of business N. desired prosecutor to sign a receipt for the liquor, and over the objection of defendant prosecutor also testified that after the conversation with N. he met defendant, who asked him if he had "fixed up that matter." *Held*, that the testimony objected to was admissible, since, if the purpose of the receipt was to show that it was a receipt for liquor which prosecutor had sent for by defendant, it was pertinent on behalf of defendant, but, if by such process defendant was endeavoring to fabricate testimony, it was material evidence against him.

### 4. CRIMINAL LAW — APPEAL — HARMLESS ERROR — ADMISSION OF EVIDENCE.

On a prosecution for a violation of the local option law, testimony of a witness that at a time other than that of the alleged offense defendant had drinks called "Ino" and "Frosty" in the back part of his restaurant, without showing that they were intoxicating, was not prejudicial.

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

John Riggs was convicted of violating the local option law, and he appeals. Affirmed.

A. S. Bledsoe and Odell, Phillips & Johnson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50 and 30 days' confinement in the county jail; hence this appeal.

Appellant excepted to the information on the ground that it did not allege which election was relied on; it being stated that there had been two local option elections in Johnson county. The information is in the usual form, and, under it, it was competent for the state to offer whichever election it saw fit. Of course, if it offered an election which was not legal, that would be the misfortune of the state. In this instance it appears that there was no question about the legality of the proceedings attending the election offered in evidence.

Appellant reserved a bill of exceptions to what he terms was the overruling of his plea of former jeopardy. Of course, it was competent (being in the same tribunal) for him to rely on a plea of former jeopardy, without presenting any formal plea. If he had offered proof of his former jeopardy, and the same had been rejected by the court, then we would have a different question before us. This was not done.

Several bills of exception were offered with reference to a transaction between Luns-

ford (prosecutor) and Newberry. The first bill relates to the testimony of Will Coley, who was introduced on behalf of the defendant. On cross-examination of this witness he was asked to state if it was not a fact that shortly after the 28th of October he went to the witness Jack Lunsford and told him that Newberry wanted to see him at Riggs' place of business with reference to signing a receipt for the whisky in question. This was objected to on the ground that it was a transaction occurring between Newberry, Riggs, Coley, and Lunsford, in which appellant did not participate; that he could not be affected thereby. Witness stated that he did not remember whether he had any such conversation or not. When Jack Lunsford was on the stand in rebuttal of defendant's evidence, he was asked the following question: "Whether or not shortly after October 28th, that being the date of this transaction, you saw and had a conversation with Will Coley; and if so, what did Coley say?" This was objected to, on the ground that it was not in rebuttal, not admissible for the purpose of impeachment, and was upon an immaterial issue, etc., and for the further reason that the statement was made in the absence of defendant and could not be binding upon him. The court stated that he admitted it, not for the purpose of showing the guilt or innocence of the defendant, but for the purpose of showing the interest or lack of interest of witness Will Coley, if it does show any such interest. The witness stated that shortly after October 28, 1904, he met Will Coley on the sidewalk, "and he told me that Albert Newberry wanted to see me. I went down to Riggs' joint, where Newberry was, and we had a drink, and Coley introduced me to Newberry. Newberry wanted me to sign a receipt for this whisky; that is, the two quarts of whisky. The receipt was dated October 21, 1904." The nature or character of this receipt is not shown, or how it could injuriously affect appellant on the trial of this case.

However, the next bill of exceptions shows that this same character of testimony with reference to the receipt was adduced; that is, witness Lunsford was asked if, after he had a conversation with Newberry about signing the receipt for the whisky in question, he met defendant, Riggs, and had a conversation with him. This was objected to as immaterial and inadmissible; that any conversation or transaction occurring between Lunsford and defendant so long afterwards would not be admissible on this issue. The objection was overruled and the witness Lunsford stated that he saw John Riggs after he had the conversation with Newberry (who, by the way, was his partner), and Riggs asked him if Newberry and witness had fixed that matter up. The bill shows his answer was, "I told him." We notice that the brief of appellant on this point says

that he told him, "No," which we presume is correct. This bill of exceptions brings this matter directly to the knowledge of appellant, and shows that appellant knew of an attempt to get prosecutor, Lunsford, to execute some sort of a receipt concerning the whisky. Of course, Riggs, having knowledge of such transaction, would be affected thereby, and render all of this testimony admissible. If the purpose of the receipt was to show that it was a receipt for whisky which Lunsford had sent for by Riggs, it would be very pertinent testimony on behalf of appellant. However, if Riggs by this process was endeavoring to fabricate testimony, it would be material evidence against him; and the fact that the court told the jury, which is complained of in another bill of exceptions, that he would admit the testimony as indicating the interest of the witness Coley, would be favorable to appellant.

By bill of exceptions No. 3, it is not made apparent at what particular time the state proposed to prove what Riggs and Newberry had in the back end of their restaurant. It seems Coley was working for them at the same time. Objection was urged to this evidence, that it was at some other time than when the transaction occurred. However, the bill does not show as to this. The answer of the witness to the effect that they had a kind of drink called "Ino" and "Frosty" in the back end of the building, without showing this was an intoxicant, would not affect appellant, even if it was on another occasion or at another place than when the alleged offense occurred.

We have carefully examined the record, and in our opinion there are no reversible errors. The judgment is affirmed.

BROOKS, J., absent.

### WOOLLEY v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### 1. SEDUCTION — CRIMINAL PROSECUTION — INSTRUCTIONS.

In a prosecution for seduction, where there was evidence of the birth of a child to prosecutrix, an instruction not to convict unless the testimony of prosecutrix was corroborated by other evidence tending to connect defendant with the commission of the offense, was deficient in failing to require corroboration of her testimony as to promise of marriage and as to the fact of intercourse.

#### 2. CRIMINAL LAW — NEW TRIAL — GROUNDS — MISCONDUCT OF JURY.

Comments by jurors in a prosecution for seduction on the failure of the defendant to take the stand as a witness in his own behalf are ground for new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2251.]

Appeal from District Court, Houston County; B. H. Gardner, Judge.

Al Woolley was convicted of seduction, and appeals. Reversed and remanded.

Moore & Adams, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a case of seduction. We deem it unnecessary to discuss the alleged error of the court refusing the continuance under the view that we have taken of other questions.

The evidence of prosecutrix discloses the fact that in March, 1902, she became engaged to appellant, and that in the following December it was broken off, as stated by the witness, "on account of Boll Weevil." This was about Christmas. About the 28th of December she engaged herself to Gat Lucas, as she stated, "the first time he went with me." This engagement did not last long, perhaps a month. In January, 1903, she engaged herself to Jim Williams. She was anxious to marry him and he obtained the license for that purpose; but her family objected, as there was some rumor current in the neighborhood that he was then a married man. She then renewed the engagement with appellant, who, she says, seduced her in August or September, and had intercourse with her three times between then and Christmas, and that he agreed to marry her by Christmas of that year. He notified her about that time that he would not marry her. Shortly thereafter she engaged herself to Ed Mackey. She says, as a reason for breaking off the engagement with Mackey, that she was then pregnant and did not want to impose upon him. She says appellant gave her money to take a trip to see her brother in Baylor county, and it is a fact that she made the trip. She is not corroborated as to the fact that appellant gave her the money for the trip. She says the first act of intercourse occurred between appellant and herself at night, en route to her home from a social gathering; that they were on horseback, and he invited her to get down and have intercourse with him, and finally she acceded; that this was the first time she ever had intercourse with any man; that this intercourse was had while they were standing; that she was 5 feet and 2 inches in height, and appellant was 6 feet or over. She gives no further statement as to how they managed to have intercourse with the disparity of height. Perhaps this is a sufficient statement of the case.

The court charged the jury that, if they should believe the testimony of Victoria Padgett to be true, and that it showed or tended to show that defendant was guilty of the offense charged, still they could not convict unless they should further find there was other testimony outside of that of Victoria Padgett, the seduced female, tending to connect defendant with the commission of the offense. Exception was reserved on several grounds—that there were two phases of the testimony that should be corroborated: First, as to the marital contract;

and, second, as to the act of intercourse. We believe this exception is well taken. There is slight evidence of corroboration in regard to the marital contract, through the mouth of the mother of prosecutrix; but as we understand this record we fail to find any testimony corroborating prosecutrix in regard to appellant's act of intercourse, unless it be the fact that he was engaged to her and was frequently in her company. It is necessary, in a case of this character, that the prosecutrix, who is an accomplice, be corroborated both as to the marital contract and the intercourse with the alleged seducer. The fact that she had a child is not of itself a corroboration of the fact that appellant was the father of the child. This could have occurred as well from intercourse with any other man as with accused. It is a pungent fact, however, that she had intercourse with some man; in fact it would be absolutely conclusive of that fact. We believe that the court's charge was deficient in this respect. *Spenrath v. State* (Tex. Cr. App.) 48 S. W. 192; *McCullar v. State*, 36 Tex. Cr. R. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

There is another question which requires a reversal, to wit, the misconduct of the jury after their retirement in discussing the fact that appellant did not take the stand and testify. The affidavits of jurors attached to the motion for new trial are to the effect that the prosecutrix had testified to circumstances reflecting on the guilt of defendant, and that it was his province to take the stand and contradict the same, if it was not true, and that he failed to do so. It was further stated, if the defendant was not guilty as charged, he ought to have taken the stand as a witness and denied it, if untrue; and, further, that more than once some of the jurors commented on the failure of the defendant to testify as a witness in his own behalf. *Thorpe v. State*, 40 Tex. Cr. R. 346, 50 S. W. 383; *Tate v. State*, 38 Tex. Cr. R. 261, 42 S. W. 595; *Wilson v. State*, 39 Tex. Cr. R. 365, 46 S. W. 251; *Buessing v. State*, 43 Tex. Cr. R. 85, 63 S. W. 318; *Beard v. State*, 65 S. W. 905, 3 Tex. Ct. Rep. 583; *Adams v. State*, 64 S. W. 1055, 3 Tex. Ct. Rep. 314; *Rogers v. State*, (Tex. Cr. App.) 55 S. W. 818.

There is another ground of the motion which we notice casually, to wit, the newly discovered testimony. Gat Lucas filed an affidavit to the effect that he engaged himself to prosecutrix the first time he went with her, and shortly afterwards he had intercourse with her; that she would not permit him to have intercourse except standing up; that he besought her to lay down, and she refused. There is also the affidavit of another witness to the effect that he saw Gat Lucas and prosecutrix in the act of sexual intercourse. This act, under the statements made by these witnesses, occurred prior to the time of the alleged seduction

by appellant. From the testimony and affidavits attached it is made to appear that, as soon as these troubles arose with reference to the girl, the parties who had been at different times engaged to her scattered and left the country. Appellant went to Arkansas; Gat Lucas went to Meridian, Miss.; another witness went to a distant county in this state; and Jim Williams disappeared, and, so far as the record shows, without leaving any evidence as to what became of him. These engagements all occurred within the space of two years. There is an intimation along the line of the testimony that she engaged herself to each of the different parties upon the first occasion she was with him. In fact, the records makes rather striking the facility with which she engaged herself to these different parties, and her decided aversion and opposition to performing the act of sexual intercourse any otherwise than in a standing position.

Appellant also assigns error as to some remarks the court made to appellant's counsel during the trial, especially that part of it in which the court criticises the intonation of voice of counsel during his cross-examination of the prosecutrix. This will hardly occur upon another trial. The other alleged errors will hardly occur upon another trial, and are therefore not discussed.

For the errors discussed, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

#### DEISHER v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### 1. INTOXICATING LIQUORS—LOCAL OPTION—EFFECT OF ADOPTION—STATE LAWS.

The state law with reference to giving intoxicants to a minor is effective in local option territory.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 171-175.]

#### 2. SAME—PROSECUTIONS—EVIDENCE.

On a prosecution for selling intoxicants to a minor, it appearing that the minor approached defendant to get whisky from him, and that defendant referred him to another, and that subsequently the whisky was placed where defendant stated it would be placed, it was proper to permit the minor to testify that shortly after he got the whisky, he saw the one to whom he was referred and gave him a dollar.

#### 3. CRIMINAL LAW—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where an indictment charged the giving of intoxicants to a minor and also a sale to him, but conviction was had under the count charging a giving, any error in permitting the minor to testify to show a sale was harmless.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3137, 3143.]

Appeal from Erath County Court; M. J. Thompson, Judge.

John Delsher was convicted of giving intoxicating liquor to a minor, and he appeals. Affirmed.

Nugent & Carter, for appellant. J. M. Yantis, Asst. Atty. Gen., for the State.

**HENDERSON, J.** Appellant was convicted of giving intoxicating liquors to a minor in a local option district, and his punishment fixed at a fine of \$50.

The conviction was under the second count of the indictment. It has been held that the state law with reference to giving intoxicants to a minor in a local option territory is effective in said territory. *Stephens v. State*, 85 S. W. 797, 12 Tex. Ct. Rep. 443. The only question that requires consideration is presented in bill of exceptions to the introduction of testimony from the witness Albert Miller, in effect, as follows: About five minutes after I got the whiskey I saw Coon Delsher, brother of defendant, and gave him a dollar. John Delsher was not present at the time. If appellant had been convicted for violating the local option law, there might have been some question as to the admissibility of this testimony. Still, as we understand the record, it would have been admissible against appellant. He referred prosecutor to Coon Delsher. They seemed to have been present together at the time prosecutor approached appellant to get whisky from him, and appellant seems to have referred prosecutor to Coon Delsher, his brother, and subsequently, according to the testimony of prosecutor, the whisky was placed where appellant said it would be, and subsequent to this he met Coon Delsher and gave him the dollar. However, under the conviction in this record, the admission of said testimony, whether right or wrong, did not affect appellant. He was convicted under the second count of the indictment for giving whisky to the minor, and the jury evidently did not believe in the dollar transaction; that is, they evidently believed the story of Coon Delsher in that respect, denying that prosecutor gave him a dollar. So the admission of said testimony had no effect as to appellant's conviction.

Appellant says that the evidence is not sufficient to sustain the conviction. To this contention we cannot agree. There was sufficient testimony coming from prosecutor to authorize the conviction. While this was contradicted on the part of appellant by other witnesses, the jury appear to have believed prosecutor's evidence.

There being no error in the record, the judgment is affirmed.

**BROOKS, J.**, absent.

### JONES v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### 1. DISORDERLY CONDUCT—INDICTMENT—SUFFICIENCY.

Under Pen. Code 1895, art. 334, providing that, if any person shall rudely display any

pistol or other deadly weapon in or near a private house, he shall be fined, an indictment alleging that accused displayed a gun near a private house, without alleging that the gun was a deadly weapon, was not sufficient to support a conviction.

#### 2. SAME—INSTRUCTIONS.

In a prosecution for disturbing the peace, the court should have instructed that the jury must believe, before they could convict accused, that he not only cursed and swore near a private residence, but that he did so in a manner calculated to disturb the inhabitants thereof.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Disorderly Conduct, §§ 7, 19.]

#### 3. NAMES—MIDDLE NAMES—INITIALS—INDICTMENT—VARIANCE.

An indictment alleging that a private house was owned by "Sam M." and proof that it was owned by "S. O. M." did not constitute a variance.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Names, § 2.]

Appeal from Rockwall County Court; J. H. Chisholm, Judge.

K. T. Jones was convicted of disturbing the peace, and appeals. Reversed, and cause remanded.

H. M. Wade and T. B. Ridgell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

**HENDERSON, J.** Appellant was convicted of disturbing the peace, and his punishment assessed at a fine of \$5.

Inasmuch as the case turns upon questions involved in the indictment, we quote therefrom, as follows: That K. T. Jones, "about the 4th day of June, 1905, in the county of Rockwall, did then and there unlawfully go into and near the private house of Sam McReynolds, there situated, and did then and there unlawfully and willfully use loud and vociferous language, and swear and curse, and rudely display a gun, in a manner calculated to disturb the inhabitants of said private house, against the peace and dignity of the state." Appellant made a motion to quash the indictment on the ground that the gun was not alleged to be a deadly weapon. We believe this motion should have been sustained. At least, the court should have refused to authorize a conviction on testimony with reference to the gun. Article 334, Pen. Code 1895, provides: "If any person shall go into or near any public place, or into or near any private house, and shall use loud and vociferous or obscene, vulgar or indecent language, or swear or curse, or yell or shriek, or expose his person, or rudely display any pistol or other deadly weapon, in a manner calculated to disturb the inhabitants of such public place or private house, he shall be fined," etc. It would appear that to rudely display a pistol or other deadly weapon is made an offense; that is, a pistol must be alleged to be a deadly weapon, and any weapon which is rudely displayed in a manner calculated to disturb the inhabitants of a private house, must be a deadly weapon. There is no allegation in the indictment that

said gun was a deadly weapon; consequently a conviction predicated upon this part of the indictment could not be sustained. We understand the court in submitting the case to the jury, authorized them to convict appellant for rudely displaying a gun. There is no allegation that the gun was a deadly weapon, and there is no proof that it was—the evidence, in fact, showed the contrary.

We also believe that the court should have instructed the jury, as requested by appellant, to the effect that the jury must believe, before they could convict appellant, that he not only cursed and swore near the alleged private residence, but he did so in a manner calculated to disturb the inhabitants thereof. The charge of the court did not contain this feature, and authorized the jury to convict regardless of whether the cursing and swearing was in a manner calculated to disturb the inhabitants of said house.

We do not believe there is anything in the contention of appellant with reference to the name of the alleged owner of the house. The indictment alleged the private residence was that of Sam McReynolds. The evidence showed that it was the private residence of S. C. McReynolds. There was no variance between the names Sam McReynolds and S. C. McReynolds. The middle initial can be rejected as surplusage, and "S." in the proof would stand for "Sam." This is not like the case of *Wolf v. State*, 85 S. W. 8, 12 Tex. Ct. Rep. 1027, referred to by appellant. In that case the allegation in that indictment was the sale was made to Mike Bowles, and the proof was that the liquor was sold to two parties, one named L. W. Bowles and the other Frank Bowles. Neither was known or called Mike, nor did the first initial in their name stand for Mike.

For the errors heretofore pointed out, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

#### WOODROE v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

##### 1. CRIMINAL LAW—FORMER ACQUITTAL—IDENTITY OF OFFENSE CHARGED.

A prosecution for unlawfully carrying a pistol is not barred by a former acquittal of a charge of assault with intent to murder, alleged to have been committed on the same occasion on which it was claimed that the pistol was unlawfully carried.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 386-403.]

##### 2. JURY—EXAMINATION OF JURORS.

In a prosecution for unlawfully carrying a pistol, there was no error in refusing to allow the jurors to be examined as to whether they knew anything about the facts of a former case in which defendant was acquitted of a charge of assault with intent to murder; it not ap-

pearing what defendant proposed to prove by the questions.

##### 3. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

Where, in a criminal prosecution, several jurors answered in the negative questions as to whether they would give the same credence to colored as to white witnesses, the subsequent sustaining of an objection to the question was not error, in the absence of any showing that any of the jurors who answered the question in the negative sat on the jury.

##### 4. SAME—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in the admission of evidence as to a conceded fact held harmless.

##### 5. WEAPONS—CARRYING PISTOL—SELF-DEFENSE.

Where, in a prosecution for unlawfully carrying a pistol, it appeared that defendant shot a certain person at her home and then pursued him with the pistol for 200 to 500 yards, defendant was not excusable on the ground that the pistol was used and carried in self-defense.

Appeal from Rockwell County Court; J. H. H. Chisholm, Judge.

Mary Woodroe was convicted of unlawfully carrying a pistol, and appeals. Affirmed.

H. M. Wade, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of unlawfully carrying a pistol, and her punishment assessed at a fine of \$25; hence this appeal.

Appellant claims that the court committed error in striking out her plea of former acquittal. Such plea of former acquittal set up the fact that appellant had previously been acquitted of an assault with intent to murder, and that was the very occasion when she had the pistol for which she is now being tried. That was no bar to this prosecution.

By the first bill of exceptions she questioned the action of the court in impaneling the jury, and in refusing to permit her to question the jury whether they knew anything about the facts of the case wherein defendant was tried and acquitted of an assault with intent to murder Will Cane. Appellant does not say that she proposed to prove that either of the jurors was a member of the former jury, or what particular fact she proposed to prove. We do not believe there is anything in this matter.

On the trial appellant proposed to ask the jury the following question: "Would you give the same credence to colored witnesses that you would to white witnesses when they testify with the same degree of intelligence and with the same degree of apparent credibility, and who have the same opportunity to know the facts?" Several jurors answered they would not. To which counsel for the state objected for the following reasons: Because it is upon the credibility of the witnesses, and not the subject of inquiry here—and the court sustained said objections. Appellant does not show that any of the jurors who answered the question in the negative sat



upon the jury, or what became of them. There was no error in this.

When the witness Al Bray was on the stand, the state asked him if, when appellant was seen with the pistol, she was not about 100 yards from the entrance to the place where the negro lived, and in the public road, and "did not run a wounded negro with a big gun in her hand?" To which he answered, "Yes." This was objected to, because it was leading and prejudicial to appellant's rights before the jury. We understand this same evidence to have been proved by a number of witnesses; that it was a conceded fact, testified to by appellant herself. Consequently there was no error in this.

Appellant excepted to a number of charges given by the court, and asked several charges which were refused. The proposition announced by appellant is to the effect that at the time she carried the pistol she was acting in self-defense, and ought not to be convicted. A party may act in self-defense in a difficulty, and at the same time violate the law against carrying a pistol. It may be that appellant lawfully had the pistol and acted in her self-defense at the house, and she may have been properly acquitted for that offense. But the testimony here shows without controversy that after she shot prosecutor in the assault with intent to murder Cane, who was at her home, she pursued him some 80 yards from her house to the public road, and thence at least 200 yards along the public road, and off her premises, and she only desisted from the pursuit when she met Brady and his wife in the road, and they interfered and she stopped. It occurs to us that it would be a travesty upon self-defense to authorize such a pursuit with pistol as is here shown. She had already shot Will Cane at her house. He dropped his pistol, according to her account, and fled from her premises. She pursued him until he got off her premises, and then still pursued him some 200 yards—she says 500 yards; and according to the testimony there was no occasion for this pursuit at all. It could not have been in self-defense. The court did not err as to this matter in the conduct of the trial, in instructing the jury as he did, and in refusing the requested instructions of appellant on this subject.

We do not believe there was any error in the action of the court permitting the testimony in regard to the watch. According to the evidence the taking of this watch by Addison Daniel was in conjunction with appellant, and at the time she shot Will Cane, and this was a part of the res gestae of the shooting of Will Cane, which evidence was introduced by appellant.

We do not believe there is any reversible error in the record, and the judgment is affirmed.

BROOKS, J., absent.

## OWENS v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

### 1. WITNESSES—CROSS-EXAMINATION.

In a prosecution for violating the local option law, the prosecuting witness was asked on cross-examination if he did not steal the whisky and refused to answer "Yes" or "No." Thereupon the court stated to the witness that he had a right to make any explanation he wanted to. Objection was made to this, and witness was again asked the same question, which he answered in the negative, still insisting that he wanted to explain, but in fact making no explanation. *Held*, that no error was committed.

### 2. SAME.

In a prosecution for violating the local option law, the prosecuting witness was asked if he heard anything about the whisky, and what he heard. Defendant excepted to the latter portion of the question. The exception was sustained, and witness merely answered that he heard that defendant had whisky. *Held*, that this was not erroneous.

### 3. SAME.

Where, in a prosecution for violating the local option law, a witness had testified that he took the whisky procured from defendant to a ball game, it was proper to allow the state, on cross-examination, to ask him what he did with the whisky and where he hid it.

### 4. SAME.

In a prosecution for a violation of the local option law, a witness was asked who told him to see prosecuting witness to find out what he was going to testify, and answered that no one sent him, but he just happened to go that way. *Held*, that this was not erroneous.

### 5. SAME—SHOWING BIAS OF WITNESS.

In a prosecution for violating the local option law, it was competent for the state to prove on cross-examination of a witness that he asked the prosecuting witness what he swore in the grand jury room, as showing the animus or interest of witness in favor of accused.

### 6. CRIMINAL LAW—TRIAL—IMPROPER ARGUMENT—CURING OF ERROR.

In a prosecution for violation of the local option law, prosecuting attorney, in argument, stated that if defendant was turned loose they might just as well tear down the courthouses and jails and burn the law books, as it would license any man to go out and violate the penal laws of the state. Other statements were to the effect that, if the jury acquitted defendant, they would arm him with a bottle of whisky in one hand and a verdict of "not guilty" in the other, and license him to go out and sell whisky to the negroes, and that, if the jury allowed such guilty men as defendant to be turned loose, they might just as well do away with the local option law. In response to argument by defendant's counsel that the sale relied on by the state was the only sale they could find with which defendant was charged, the prosecuting attorney stated that he had not been allowed to inquire into any other sale of whisky made by defendant, and that the defendant's counsel knew that to be a fact. After the statements quoted, the prosecuting attorney was reprimanded, and the jury instructed to disregard the argument. *Held*, that this action of the court cured any error resulting from the use of the improper argument.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1693.]

### 7. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE—SUFFICIENCY.

In a prosecution for violating the local option law, evidence *held* sufficient to support a conviction.

Appeal from Panola County Court; J. G. Woolworth, Judge.

Bill Owens was convicted of violating the local option law, and appeals. Affirmed.

A. G. Brooke, S. W. Johnson, B. W. Baker, and Johnson & Edwards, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50, and 30 days' confinement in the county jail; hence this appeal.

On the trial, when prosecuting, Will Allerson was on the stand. On cross-examination appellant asked him if he did not steal the jug of whisky from the horn of Bill Owens' saddle; and Allerson refused to answer "Yes" or "No." The court of its own motion stated to prosecuting witness, in the presence and hearing of the jury, that he had a right to make any explanation he wanted to. This was objected to on the ground that it was not the province of the court to interfere and was highly prejudicial to the defendant. The court approves this by stating that, while Will Allerson was being cross-examined, counsel asked him if he did not steal the whisky from the horn of Bill Owens' saddle; and witness was admonished to say "Yes" or "No," and said "No," and wanted to explain the matter, and the county attorney insisted that he had a right to make an explanation. The witness did not make said explanation. The question was again asked, and witness again wanted to explain to the court—said he had a right to explain. He made no explanation, and the same was not answered. In this there was no error.

While this same witness was on the stand, the following question was propounded to him by the county attorney: "Did you hear anything about the whisky, and what did you hear?" To which he answered, "Yes, sir; I heard he had whisky." Defendant excepted to this. The court explains this by stating that there was no exception to the question, "Did you hear anything about the whisky?" Exception was made by defendant's counsel to the other part of the question, "What did you hear?" which was sustained by the court, and the witness was not permitted to answer. No error is shown in this.

The next bill shows that this same witness answered, "Did you hear where defendant was?" He answered, "Yes, sir." He was then, according to the court's explanation, asked, "What did you hear?" This was excepted to and sustained by the court. There was no error in this.

When the witness Mack Bowers, who testified on behalf of appellant, was on the stand, he was permitted to answer the following question, propounded to him by the state on

cross-examination: "What did you do with the whisky, and where did you hide it?" To which he answered, "I hid it in a tree top." Defendant excepted to this. The court explains this by stating that the witness, over the objection of the county attorney, stated that he (witness) carried the whisky with him to the ball game, and the state was then permitted to show on cross-examination what he did with the whisky. It occurs to us that this was legitimate cross-examination.

In bills Nos. 10 and 11 it is shown that the witness replied in the negative to questions, and there was consequently no injury to appellant.

In bill No. 12 witness Gabriel Jennings was asked: "Who told you to go over there and see Will Allerson, and find out what he was going to swear in this case?" Witness answered: "No one sent me. I just happened to come that way." This constitutes no error.

We believe it was competent to prove on the cross-examination of the witness Sam Johnson that he asked Will Allerson what he swore in the grand jury room, and he answered, "Yes, sir," as this showed the animus or interest of the witness in favor of appellant. It is not shown that any testimony was given on this subject further than was stated.

Appellant reserved a number of bills of exception to the remarks of the county attorney in his argument before the jury. The first bill shows that the county attorney in his closing argument used this language: "That, if the defendant in this case was turned loose by the jury, they had just as well tear down the courthouses and jails and burn all the law books, as it would license any man to go out and violate the penal laws of the state of Texas." This was excepted to on the ground that the language was inflammatory, and prejudicial to the rights of the defendant. The court explains this by stating that at the time the county attorney made the remark the court asked the county attorney to refrain from making such statements, and instructed the jury to disregard the statement made by the county attorney. And again he used the following language: "If the jury acquitted defendant in this cause, they would arm him with a bottle of whisky in one hand and a verdict of 'not guilty' in the other, and license him and any other white boy in Panola county to go out and sell whisky to the negroes." This was excepted to. The court instructed the jury not to consider said language. The county attorney then remarked: "When you get close in after them, they begin to 'squeal and squirm.'" This language was excepted to by appellant. The court approved this bill with the explanation: "When the county attorney made the statement therein alleged, the court reprimanded the county attorney

for making same, and instructed the jury then and there to disregard the same."

This portion of the argument was also objected to: "If the jury allowed such guilty men as the defendant to be turned loose, they might just as well do away with the local option law in Panola county." And further, "He wasn't allowed to inquire into any other sale of whisky made by the defendant on that day, and that defendant's counsel knew that to be a fact." This language was excepted to. The court approved this with the explanation that when the county attorney made the statement he reprimanded him and instructed the jury to disregard the same. Defendant's counsel, Mr. Brooke, in his argument had made the statement that this was the only sale they could find with which defendant was charged. Some of the statements indulged in by the county attorney were not authorized by anything in the record, but it seems that in the use of such expressions he was promptly reprimanded by the court and the jury instructed to disregard the same. Under the circumstances we believe that this action of the court cured any error that could have been committed in the use of the language imputed to the county attorney. We do not understand that any written charge was asked by appellant on the subject, and the court under the circumstances did all that he was required to do in reprimanding counsel and instructing the jury to disregard the argument.

Appellant insists that this case should be reversed because the evidence is not sufficient to sustain the conviction; that the state's witness, Will Allerson (on whom the prosecution relies), is contradicted by other witnesses, and in some respects contradicts himself, and that he is shown not to have had a good reputation for truth. As to this, his credibility was a question purely for the jury. They seem to have believed him notwithstanding the attack made on him by appellant, and his testimony shows a sale of liquor by appellant to him on the occasion inquired about. It would make no difference whether this was Mack Bowers' whisky or appellant's whisky. If appellant sold prosecutor the whisky he would be guilty, if it was Mack Bowers' whisky and not his own. He and Mack Bowers were the only two white boys at the ball game—appear to have been companions there. According to Mack Bowers' testimony, he (Bowers) had a jug of whisky there, and it was removed from witness' saddle to appellant's saddle some time during the evening. The jug of whisky seemed to have been used together. Evidently they had more whisky than they required for their own use. It must have been brought there for the purpose, as made manifest by the testimony of Allerson, when he states that he bought a half pint of whisky from appellant out of this jug. As stated, the credibility of the state's witness was a matter for the jury. They believed his evidence. We do not feel

authorized to overturn the verdict of the jury.

The judgment is affirmed.

BROOKS, J., absent.

#### QUINN v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### 1. WEAPONS—CARRYING PISTOL—DEFENSES—INSTRUCTIONS.

In a prosecution for unlawfully carrying a pistol, in which defendant claimed that he had traded for the pistol and on the way home with it stopped at the house of prosecuting witness to obtain from him an explanation of an insult which it was alleged witness had previously offered to the wife of defendant, a requested instruction that defendant had a right to stop at prosecutor's house and ask an explanation, and, if attacked, to defend himself with the pistol, should have been given.

#### 2. SAME.

Where, in a prosecution for unlawfully carrying a pistol, defendant claimed that he traded for the pistol, and in carrying it home stopped at the house of prosecuting witness to demand from him an explanation of an insult which defendant claimed prosecutor had previously offered to defendant's wife, the fact that defendant's wife had never been insulted did not destroy the defense, if, as a matter of fact, she told defendant that she had and he believed it.

Appeal from Kaufman County Court; H. M. Cosnahan, Judge.

J. H. Quinn was convicted of unlawfully carrying a pistol, and appeals. Reversed.

J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of unlawfully carrying a pistol on and about his person. It is not controverted that he carried the pistol. His defense was that he had exchanged a gun for said pistol, and had procured the pistol from the party with whom he swapped, and was then carrying it home; and on the way stopped at the house of prosecutor, which was directly on the road, and accosted him with regard to an insult which he claimed was committed by the prosecutor toward his wife a day or two previous, and which he had heard the night before.

The court instructed the jury: "If defendant had a right to exchange his rifle for a pistol and carry the pistol home, and if on the occasion in question he was carrying the same home by the house of Nicholson, and stopped and called Nicholson out for the purpose of obtaining an explanation from him of insulting conduct which he alleged Nicholson had been guilty of towards his (defendant's) wife, and had no intention of attacking or intimidating said Nicholson, you will find the defendant not guilty. But if you believe from the evidence beyond a reasonable doubt that defendant stopped at the house of Nicholson intending to attack or intimidate him, you will find him guilty, even though you may believe Nicholson had insulted his

wife or not. Or if you believe from the evidence beyond a reasonable doubt that Nicholson never insulted the wife of defendant, you will convict defendant and assess his punishment at a fine," etc. That portion of said charge is objected to which instructed the jury that if appellant stopped at Nicholson's, intending to attack or intimidate him on account of the insult towards his wife, to find him guilty, and in not giving the charge requested by appellant, to the effect that appellant had a right to stop by Nicholson's to ask an explanation, and to defend himself with a pistol, if attacked. We think that this charge should have been given, as that was the defense claimed by appellant.

Moreover, we believe that the court was in error in instructing the jury to find appellant guilty, if they believed from the evidence beyond a reasonable doubt that Nicholson never insulted the wife of defendant. We do not believe appellant's guilt depended on this fact. Notwithstanding his wife may not have been insulted by Nicholson, if she told appellant so and he reasonably believed it, he had a right to accost prosecutor and demand an explanation.

For the errors discussed, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

#### ANDERSON v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

##### 1. CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—FILING TIME—DOCKET ENTRIES.

An order entered on the docket allowing 20 days after the adjournment of the term in which to file a statement of facts is sufficient, without its being carried forward into the minutes of the court.

##### 2. SAME—FAILURE TO FILE—DILIGENCE.

The term at which accused was convicted adjourned on November 27th and on November 25th, an order was entered granting accused 20 days after term within which to file a statement of facts. A statement, containing only 8 pages, was filed January 4th, and the only diligence shown was that appellant's attorney prepared and presented the statement of facts to the district attorney, who approved the same, when the attorney intended to go to another town, where the judge resided, to obtain his allowance thereof on December 14th, when he ascertained that the judge had gone some 40 or 50 miles away on a hunting excursion "in the woods," and was unable to ascertain his whereabouts until after the expiration of the 20 days, and that he obtained the allowance of the statement immediately after the judge's return on January 1st. *Held* that, in the absence of a showing when the statement was approved by the district attorney or when the judge left on his excursion, the showing of diligence was insufficient.

##### 3. SAME—REVIEW—QUESTIONS PRESENTED.

Without a statement of fact, the denial of accused's application for a continuance and objections to the court's charge cannot be reviewed.

Appeal from District Court, Bandera County; R. H. Burney, Judge.

Pat Anderson was convicted of hog theft, and he appeals. On motion to strike the statement of facts. Granted. Judgment affirmed.

Jno. R. Storms, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft of hogs.

The Assistant Attorney General moves to strike out the statement of facts because not filed within time. This is met by affidavit as to diligence, and certificate of the clerk that the proper order was entered upon the docket allowing 20 days after the adjournment of the term in which to file said statement of facts. The entry upon the docket is sufficient, under the present law, without being carried forward into the minutes of the court. In regard to the diligence used we find that the court adjourned on November 27th. The order allowing the 20 days was entered on November 25th. The statement of facts found in the record contains 8 pages, and was filed on January 4th, after the adjournment on November 27th. The affidavits show that the attorney for appellant prepared a statement of facts, presented it to the district attorney for his approval, and that it was approved by him, but does not state the date when the agreement was reached and the approval had. It is further shown in the affidavit that the attorney for appellant intended to go to Kerrville, the residence of the district judge, on December 14th, the seventeenth day after the term adjourned; that he 'phoned to Kerrville to ascertain his whereabouts, and received information that the district judge had gone on a hunting excursion, and perhaps was 40 or 50 miles away from the town of Kerrville "in the woods"; that he was unable by this communication to ascertain the whereabouts of the judge, further than as stated, and that he did not locate the whereabouts of the judge before the expiration of the 20 days; that as soon as the district judge returned, some time about January 1st, he immediately went to the town of Kerrville and presented a statement of facts; and that it was approved and on January 4th filed in the proper court. This is the substance of the diligence. We are of opinion that this is not sufficient. It is not shown or attempted to be shown at what time the district judge left Kerrville on his hunting excursion; nor is it shown at what time the agreement was reached between the district attorney and appellant's counsel as to the statement of facts. If the statement of facts had been agreed upon shortly after the adjournment of the court, it was not diligence to seek the district judge or endeavor to locate him on December 14th—over 16 days of the time had then elapsed. If the agreed statement of facts had been approved the day after the term adjourned, there was ample time to have found the

district judge and had the statement of facts approved, and this whether he had gone on his hunting excursion or not. This affidavit is too general, and does not show that sufficient diligence was used. Therefore, we are of opinion that the motion to strike out the statement of facts is well taken.

It is unnecessary, in the absence of the statement of facts, to discuss the questions presented for revision. Without the statement of facts we cannot review intelligently the application for continuance; and viewed from the standpoint of the motion for new trial the testimony may have been of such a character as to have shown that the court was right in refusing it. The same may be said with reference to the criticism of the court's charge.

As presented by this record, we find no reversible error, and the judgment is affirmed.

BROOKS, J., absent.

#### JORDAN v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.

In a prosecution for burglary, evidence that, about a month after the alleged crime, witness went to the scene of another burglary, tracked the supposed perpetrator thereof with bloodhounds to a certain place, and there arrested defendant, was not admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 822-835.]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Robert Jordan was convicted of burglary, and appeals. Reversed and remanded.

J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary, and prosecutes this appeal.

The case against appellant was for the burglary of a house. The evidence against him, aside from his confession, was of a circumstantial character; that is, that he was found in possession of a watch some time after the alleged burglary, being the principal testimony against him. While the witness Amos Eldridge was testifying in behalf of the state, he was permitted to testify that on January 6th, some month or so after the alleged burglary, he arrested Robert Jordan, on information received over the phone from a man by the name of Morris that some one had broken into the house of Jim Wrinkles; that he went into the neighborhood of where the crime was said to have been committed, and with his bloodhounds trailed along the public road to a schoolhouse, where he arrested appellant. Another bill of exceptions in this connection shows that he arrested appellant for breaking into the house of Jim Wrinkles and stealing a pistol. This was

objected to because irrelevant, immaterial, and prejudicial to the rights of the defendant, as he was being tried for the offense of burglary committed at Elvin Jones' three or four months before the arrest for the burglary of Jim Wrinkles' house. We do not believe this testimony was admissible. It has often been held by this court that testimony as to other offenses is not admissible unless the same would tend to show the intent of the party alleged to have committed the offense, or a part of the *res gestæ*, etc. Here the details of this last-mentioned offense—the burglary of Wrinkles' house, together with the pursuit of appellant with bloodhounds and running him down and making his arrest—were introduced. The details of this latter offense could have no possible bearing on appellant's criminality in the former offense, but would greatly serve to excite the prejudice of the jury against appellant. We do not believe the testimony, as shown in either appellant's first or second bill of exceptions, was admissible against him. The testimony in the second bill was not only of another offense, but it was hearsay as to that offense.

For the admission of this character of testimony, the judgment is reversed and the cause remanded.

BROOKS, J., absent.

#### WALKER v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### CRIMINAL LAW—IDENTIFICATION OF GUILTY PERSON—SUFFICIENCY OF EVIDENCE.

Testimony of one robbed in the dark that, judging from the man's size and voice, he was of the opinion that defendant was the guilty party, is insufficient to sustain a conviction; he having known defendant only a few hours before the robbery, his testimony being that there was nothing unusual about defendant's size, shape, or voice, and that his identification of him was based on suspicion, because, as he said, if there had been any danger of robbery in the place, defendant would have told him.

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Richard Walker appeals from a conviction. Reversed and remanded.

J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of robbery, the punishment being fixed at five years in the penitentiary.

It is perhaps unnecessary to notice any other question suggested, except the sufficiency of the evidence. The alleged injured party, Pratt, testified that he, in company with the defendant and others, drank and gambled until 7 or 8 o'clock in the evening, when he and defendant went to a house in Denison, where there were two women; that appellant and one of the women left the house, and witness stayed at

the house with the other woman. About five minutes after defendant left the woman remaining with witness put out the light, and they began undressing for the purpose of going to bed. About that time some one came in the house and demanded of witness his money, threatening him with death if he refused. Witness says that he was greatly frightened, and gave the party \$3.50. It was at night and dark. The identity of the assaulting party is the main question. In regard to this matter, witness testified: Judging from the man's size and voice, it was the opinion of witness defendant took the money. They were strangers up to a few hours before this transaction occurred. He says it was so dark in the room during the time the assaulting party was in there that he (witness) was unable to distinguish further than that he was the man, judging from his size and voice. It was his opinion that defendant was the man who got his money. He said there was nothing unusual as to defendant's size or shape, about as any other man, and nothing peculiar about his voice by which he could distinguish it from the voice of any one else. He says it was just an ordinary voice, and that he was swearing to this on suspicion; and the reason he assigns for this suspicion is that, if there had been any danger, defendant would have told him (witness) of that danger. This is the substance of the testimony. We do not believe that the identification under the testimony here is sufficiently made out to authorize a conviction. Ency. of Ev. vol. 4, p. 924, and authorities there cited. It does not exclude with that certainty required by law every reasonable hypothesis except the guilt of the accused.

The judgment is reversed, and the cause remanded.

BROOKS, J., absent.

#### HAZLETT v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### 1. CRIMINAL LAW—EVIDENCE—SELF-SERVING ACTS.

In a prosecution for theft of a steer which was killed by defendant, where the defendant claimed that the steer killed belonged to his father-in-law, who had given his consent to the killing, and the state proved that when the head of the animal was pointed out to the sheriff the ears had been cut off, testimony of the defendant's father-in-law that he had found the ears in the defendant's lot, where the animal was killed, in defendant's absence, and that they had his mark on them, was not objectionable as a self-serving act of the defendant.

#### 2. LARCENY—INSTRUCTIONS.

In a prosecution for theft of a steer, where it was shown that the animal belonging to the prosecutor and one which belonged to the defendant's father-in-law were very much alike, and defendant claimed that he had taken the one belonging to his father-in-law with his con-

sent, a charge should have been given on the law applicable to mistake.

#### 3. CRIMINAL LAW—TRIAL—INSTRUCTIONS—ASSUMPTIONS OF FACT.

In a prosecution for theft of a steer, where it was shown that the animal owned by prosecutor and the one owned by defendant's father-in-law were very much alike, and defendant claimed that he had taken the one owned by his father-in-law with his consent, a charge that if the defendant took the animal in such a manner as to constitute theft, and that the consent of his father-in-law was used as a pretext, and that he took it with the fraudulent intent to deprive the owner of its value, and appropriate it to his own use, the consent of the father-in-law did not justify the defendant, was erroneous as an assumption of fact by the court.

Appeal from District Court, Llano County; Clarence Martin, Judge.

Lon Hazlett was convicted of theft, and appeals. Reversed and remanded.

Flack & Dalrymple, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for the theft of a steer, alleged to belong to Ike Phillips.

A brief summary of the facts will show that Phillips placed about 14 head of two-year-old steers in the pasture of S. B. Moss, the father-in-law of appellant. Appellant lived in the Moss pasture. The testimony is not clear as to when Phillips should have gotten his steers out of the pasture, or whether he got them all. His claim is that he got all of them but one, a red, unbranded steer. He made two sales of these steers—one to Hudson and Stribling, and the other to Gray. His contention being that these sales included all of the steers placed in Moss' pasture, except a red, unbranded one. The evidence leaves it uncertain as to whether Phillips' steer was marked. Phillips states that he saw this steer about the last of June, 1905, when he sent it back by some hands to Moss' pasture from the stock pens in Llano. He made his sale to Gray the last of July, or the 1st of August, 1905; and that he looked for the steer several times after he made the sale to Gray but never found it. The state's contention further is that this steer remained in the Moss pasture until the 9th of October, 1905, when it was killed by defendant. Appellant's side of the case is that he killed a red, unbranded steer, that it was not Phillips', but belonged to his father-in-law, S. B. Moss. The testimony makes it practically certain that Moss owned such a steer, as shown by the evidence of S. B. Moss, Jeff Moss, Holmes, and Carl Moss, and defendant, as well as by Ira Hazlett. The steer owned by Moss had been running in Moss' pasture since a calf, and appellant proved by himself and Moss that he had the right and authority from Moss to kill the steer. It was also proved by appellant that he and Iva Hazlett marked the steer he killed in the mark of his father-in-law, Moss, some time prior to its being killed. Appellant kill-

ed the animal in the evening, and was assisted by his brother-in-law, Jeff Moss. The sheriff came out later on, after Jeff Moss had gone away, with one quarter of the beef, and found the other three quarters of it at appellant's house, and the hide stretched upon the fence. There was a conversation between appellant and the sheriff at the time, in which appellant stated to the officer that he had a right to kill the animal, which was testified by the sheriff as well as by appellant, appellant going more into the particulars of the statement than did the sheriff, the substance of which was that he informed the sheriff that the animal belonged to Moss, and Moss had authorized him to kill it. Exception was reserved to the charge of the court, because this explanation was not submitted to the jury. Upon another trial this should be done.

The head of the animal was pointed out, to the sheriff, and upon inspection, the ears had been cut off, which the state used as a pregnant circumstance of guilt. Appellant made the statement at the time to the sheriff and his posse that the children had been cutting at the ears with dull knives, or something to that effect, and for that reason he had cut the ears from the head and given them to the children. They looked about the lot where the animal was killed, and failed to find the ears. The next morning, in the absence of defendant, who had gone away to work, his father-in-law, Moss, came to appellant's place, and, in the lot where the animal was killed, found a couple of ears suiting the description of the ears, color, etc., of the animal killed, which he secured and took away with him. Moss was introduced as a witness, and it was proposed to prove the fact that he had found these ears in appellant's lot, where the animal was killed, and that they had his mark on them, which was the mark appellant and Ives Hazlett testified they had placed on Moss' animal. The court rejected this on exception by the state, on the ground that it was a self-serving act of appellant. We do not appreciate the force of this. Appellant was not there when the ears were found, and it is manifest from the record that no other animal had been killed at this place, except the one in question. And if any ears were found there at all, they were evidently the ears from the animal appellant killed. This testimony was clearly admissible, and was material. It was error to reject this testimony.

It is shown that the animal belonging to Moss, or that described by the witness as belonging to Moss, and that belonging to Phillips, were very much alike. Appellant reserved another exception to the charge, because the law applicable to mistake was not given. We are of opinion, under the facts of this case, a charge should have been given upon this subject.

There is another criticism of the charge that we believe is correct. The court char-

ged the jury, in substance, that if they should find beyond a reasonable doubt that defendant took the animal in such manner as to constitute theft, as that term is defined, and they should further find from the evidence beyond a reasonable doubt that the consent, if any, of the said Steve Moss was used by defendant as a pretext, "and you further find that notwithstanding such consent (if any) that defendant killed said animal (if he killed it) with the fraudulent intent to deprive the owner of the value of the same, and appropriate it to his own use and benefit, and in such manner as to constitute theft, as that term has been defined to you in this charge, then you are instructed that such consent of the said Steve Moss (if any) would not justify the defendant in killing said animal, if you find he killed it." We believe this charge is erroneous. It is an assumption of the fact on the part of the court, or rather indicates to the jury the belief of the court, that appellant may have obtained the permission of Moss to kill his animal as a fraudulent pretext for killing the animal of Phillips. We think this was a charge on the weight of the evidence and an assumption of a fact that was not testified to by any witness. All of the witnesses for the defendant testifying in regard to the matter makes it evident that Moss had such an animal, and that he authorized defendant to kill it. It is further an undisputed fact that Jeff Moss, son of S. B. Moss, assisted in killing it. Appellant's testimony is that the animal killed was in the mark of S. B. Moss. The testimony in regard to the Phillips animal leaves it exceedingly doubtful if it was marked at all. Of course, if appellant killed the animal of Phillips' knowing it was Phillips', he would be guilty of theft, and Moss' consent or authority for appellant to kill his animal would be no defense to the killing of the animal of Phillips. But the court assumes, in the face of this testimony, it occurs to us, that appellant used the consent and authority of S. B. Moss to cover up the theft of Phillips' animal. We do not believe the court should have assumed this fact and charged the jury as it did.

For the errors indicated, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

## HENDERSON v. STATE.

(Court of Criminal Appeals of Texas. June 28, 1908.)

### 1. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR—INDICTMENT—COUNTS—ELECTION.

Where accused was indicted on two counts, one for cutting prosecutor's fence and one for cutting a part of prosecutor's fence, accused was not prejudiced by the court's refusal to compel the state to elect on which count it would rely for a conviction.

## 2. SAME—EVIDENCE—ACTS OF CODEFENDANT.

Accused and his codefendant were charged with fence cutting, and, after evidence connecting them with the offense, evidence was offered that the codefendant, who was not on trial after his arrest, asked leave of the officer to step aside; that he was accompanied by one of the officers, who saw him throw away something which looked like a pistol or wire nippers; and that the officer went to the place and recovered the nippers the day succeeding the night on which the offense was committed. *Held*, that such evidence was admissible against accused.

## 3. SAME — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

Where a jury were charged on the subject of circumstantial evidence, it was immaterial that they were not instructed that the case was one in which the state relied on the circumstantial evidence for a conviction.

## 4. SAME.

An instruction that, in order to warrant a conviction on circumstantial evidence, each fact necessary for the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, and that all the facts necessary to the conclusion of guilt must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and "no other person committed the offense charged," was not erroneous for failure to directly charge that the testimony must exclude every reasonable hypothesis consistent with defendant's innocence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1883-1888.]

Appeal from District Court, Coke County; J. W. Timmins, Judge.

Alex Henderson was convicted of fence cutting, and he appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

**HENDERSON, J.** Appellant was convicted of fence cutting, and his punishment assessed at confinement in the penitentiary for one year; hence this appeal.

There are two counts in the indictment; one for cutting prosecutor's fence and one for cutting a part of prosecutor's fence. Appellant made a motion to require of the state to elect, which was overruled by the court. In some character of cases the court might require an election before trial, or after the introduction of the evidence and before going to the jury; but it does not occur to us that there is any possible injury that could accrue to appellant from the refusal of the court to require an election as between these two counts. It was the same offense, and the cutting of a part or the whole of the fence could be submitted to the jury at the same time.

Appellant complains of the action of the court admitting against him certain evidence. Appellant and his codefendant, Pearl Henderson, were charged with the same offense. There was evidence connecting them with the commission of said offense. After their arrest, Pearl Henderson asked leave of the officers to step aside to answer a call of

nature. One of the officers went with him, and while out to one side saw him throw something down, which he took to be a pistol or wire nippers. He went to the place and recovered a pair of wire nippers. This was the next day after the commission of the offense; the offense having been committed on the night before. The objection to this testimony was based on the fact that Pearl Henderson was not on trial and the testimony was not admissible against this defendant. This objection would not exclude the testimony, if it was otherwise admissible. When there is testimony tending to show that the parties were engaged together in the commission of an offense, or in a conspiracy to commit an offense, the general rule is that what one not on trial said or did after the perpetration of the offense or consummation of the conspiracy cannot be adduced in evidence against the other. However, this is subject to the exception that it can be shown that a co-conspirator was found in possession of the fruits of the crime or the weapon or instrument with which the crime was committed. *Rodriguez v. State*, 32 Tex. Cr. R. 259, 22 S. W. 978; *Angly v. State*, 35 Tex. Cr. R. 427, 34 S. W. 116; *Munson v. State*, 34 Tex. Cr. R. 498, 31 S. W. 387; *Norsworthy v. State* (Tex. Cr. App.) 77 S. W. 803. Under these authorities we believe this testimony was admissible against appellant.

It is also urged that the charge on circumstantial evidence is defective in that the jury were not informed that the case was one of circumstantial evidence. This was omitted from the charge. However, we take it that, the jury having been charged on circumstantial evidence, they understood it was such a case.

Appellant also objects to said charge because it did not directly instruct the jury that the testimony must exclude every reasonable hypothesis consistent with the innocence of appellant. This is very similar to the charge in *Jones v. State*, 34 Tex. Cr. R. 490, 30 S. W. 1059, 31 S. W. 664. The charge is as follows: "You are further instructed that, in order to warrant a conviction on circumstantial evidence, each fact necessary for the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts, that is, the necessary facts to the conclusion, must be consistent with each other and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged." In addition to the charge in the *Jones Case*, supra, we find this sentence at the conclusion of the charge: "That the accused and no other person committed the offense charged." Does this additional sentence relieve the charge of error? In



Smith v. State, 35 Tex. Cr. R. 621, 33 S. W. 339, 34 S. W. 960, in the opinion on motion for rehearing, this question appears to have been considered, and it was there said: "It will be found that the charges on this subject which have met the approval of the courts not only tell the jury to investigate the facts affirmatively, and to find beyond a reasonable doubt that, taken together, they are of a conclusive nature, and lead on the whole to a satisfactory conclusion, and produce in effect a reasonable and moral certainty of the guilt of the accused, but that they also are to test this question in a negative way; that is, to try it as to whether or not there is any reasonable hypothesis from the facts in the case consistent with the innocence of the accused, and, if there is, to acquit him. This view, we take it, is in consonance with the opinion in the Webster Case, 5 Cush. (Mass.) 386, so often quoted, and which has been followed by this court. In that case the jury were told that they must not only find, to a moral certainty, that the accused committed the offense, but that no other person committed it; thus directly leading the minds of the jury to the question of exhausting every other reasonable hypothesis that might indicate that some other person than the accused committed the offense charged. The charge in this case followed the Webster Case, except in this last respect, but omitted to state to the jury in any form that they must try the case as to any other person who might have committed the offense, or that they must exhaust the case upon every reasonable hypothesis consistent with the defendant's innocence before they could convict him." Here, as shown above, the jury were distinctly told that they must find "the accused and no other person committed the offense charged"; that is, they must exhaust the case as to any other person. Under this authority we believe the charge of the court was sufficient.

We have carefully examined the record, and in our opinion the evidence is sufficient to support the verdict of the jury.

The judgment is affirmed.

BROOKS, J., absent.

#### ELEGE v. STATE.

(Court of Criminal Appeals of Texas. June 20, 1906.)

#### SEDUCTION—MARRIAGE BEFORE INSTITUTION OF CRIMINAL PROCEEDINGS—EFFECT—STATUTORY PROVISIONS.

Pen. Code, art. 969, as amended by Acts 28th Leg. p. 221, c. 136, providing that, if the parties marry at any time before defendant pleads to the indictment for seduction, then the prosecution shall be suspended, but not dismissed, and if the indictment has been returned the case shall be continued on the docket, and if the defendant after said marriage in good faith continues to live with the person so seduced for two years after said marriage then

said prosecution shall be dismissed, to be revived, however, in case defendant within two years without cause abandons said wife, etc., does not apply where the marriage occurs prior to the institution of the criminal prosecution, so as to warrant a prosecution where, within two years after a marriage entered into before such prosecution was commenced, defendant abandoned his wife.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 62.]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Will Ellege was convicted of seduction, and appeals. Reversed.

Preston Martin, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of seduction, the punishment being fixed at two years' confinement in the penitentiary.

By acts 28th Leg. p. 221, c. 136, article 967 of the Penal Code was amended so as to make the punishment for the crime of seduction not less than 2 nor more than 10 years in the penitentiary. Article 969 was amended so as to read as follows: "If the parties marry each other at any time before the defendant pleads to the indictment before a court of competent jurisdiction, then the prosecution, if begun, shall be suspended, but not dismissed, and if indictment has been returned, the case shall be continued on the docket of the court from term to term, and if the defendant after said marriage in good faith continues to live with the person so seduced for two years after said marriage, then said prosecution shall be dismissed; but if the defendant within two years after said marriage, without the fault of his said wife, such fault amounting to acts committed by her after said marriage as would entitle him to a divorce, shall abandon her or refuse to live with her, or shall be so cruel to her as to compel her to leave him, or shall be guilty of such outrages, or cruelties toward her as to render their living together insupportable, then the prosecution shall be revived, and said marriage shall be no bar to the same, and the female so seduced shall be a competent witness against the defendant; provided, however, that if after the prosecution is begun, and prior to the time he pleads to the indictment before a court of competent jurisdiction, the defendant in good faith offers to marry the female so seduced, and if she refuses to marry him, such refusal shall be a bar to further prosecution," etc. It seems that under the terms of this article, where a prosecution is begun, and indictment is pending, and to avoid the consequences of the charge, the accused marries the seduced woman, then the case shall be continued on the docket for the space of two years, in order to hold the accused to perform his marital relations in good faith. And it would seem further, that if he should abandon the marital relation or treat his wife in such unbecoming manner as to force

her to leave him, the prosecution may be revived. If we understand the reading of this article it applies only where prosecutions have begun at the time of the marriage; and further, that it is only where the indictment has been returned in the case that it shall be continued on the docket as the means of holding the accused in good faith to carry out his marital contract. If this is a proper construction, then the provisions of this article do not apply where the marital stage is assumed between the parties prior to the institution of criminal proceedings. We think it clear that the terms of this statute only apply where the marital relation is assumed in order to avoid punishment prescribed by law, and this marital relation has been assumed after the institution of the criminal proceeding. It would follow therefore, if the marital relation was assumed by the parties, not with reference to pending prosecutions, but before such was begun, then the terms of this law and the law of seduction do not apply. A party who has seduced a woman, and marries her in accordance with his promise before the institution of a criminal proceeding would thereby not be held responsible under the law of seduction, and an indictment should not be returned against him.

Under the facts of this case it is uncontroverted, and is even proved by the state beyond any question that the marital relation was assumed on March 8, 1905; that the parties became engaged about March 20, 1904; that intercourse between the parties began in August or September, 1904, some months before the marital relation was assumed. The indictment was returned on April 24, 1906, more than a year subsequent to the marriage. Under this statement of the evidence and the construction we have here placed upon the law, the indictment should not have been returned, and the prosecution was without authority of law. It may be apropos to state further that about two weeks subsequent to the marriage, the wife of appellant notified him one night that earlier in her life she had been criminally intimate with one of her cousins. Shortly afterwards he left, with the view of going to Ft. Worth and engaging in business, with the promise of sending for his wife. This he failed to do. In April, 1905, his wife was carried before the grand jury, and there testified that she had not had intercourse with her husband prior to the marriage and that she was not then pregnant. Defendant had married her on the 8th of March, 1905, with the statement from her that she was pregnant, and that he married her because of the previous engagement between them. In April, 1906, the father of appellant's wife went before the grand jury and secured an indictment, which was returned on April 24th. The appellant's wife was not before the grand jury, and therefore did not testify before

that body. We think it is very doubtful whether this case could be sustained on the evidence. For instance, the wife testified that prior to her marriage she would not let appellant have intercourse with her, except when he was provided with the means of preventing pregnancy, and that she watched this matter closely and saw that the necessary preparations were made with what she calls "rubber goods" to prevent conception. But it is not necessary to go into a detailed statement of the evidence under the view we take of the law. Therefore we hold that the statute on seduction does not apply in this case as made by the facts; that where the marriage occurs prior to the institution of the criminal prosecution article 969 has no application.

The judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., absent.

### HIRSCH v. STATE.

(Court of Criminal Appeals of Texas. March 23, 1906. On Rehearing, June 25, 1906.)

#### 1. INTOXICATING LIQUORS—SALE—CONSIGNMENT C. O. D.—PLACE OF SALE.

Where a person in one county, which was local option territory, there gave an order for liquor to the agent of a dealer, whose place of business was in another county, and the liquor was shipped C. O. D., the sale was in the latter county.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 162.]

#### 2. CRIMINAL LAW—APPEAL—REVIEW—PRESENTATION OF QUESTION BELOW—EXCEPTIONS—EVIDENCE.

A bill of exceptions is insufficient to raise a question as to the admission of evidence, where it contains no statement of any ground or grounds of exception.

#### 3. SAME—CRIMINAL PROSECUTION—INSTRUCTIONS.

On a prosecution for a violation of the local option law the state's evidence showed that B. gave defendant's agent at G., in H. county, an order for liquor, and that it was shipped from defendant's place of business in another county C. O. D.; but there was evidence that defendant was in G. subsequent to the transaction and gave orders to the express agent there that whenever 30 days elapsed and a consignee had not called for a shipment it should be shipped back to defendant at his expense, and defendant testified that he held the company liable for shipments when the goods were taken out. The court instructed that, if the liquor was to remain the property of defendant until delivery and payment, defendant was guilty, but refused to instruct that if the order was a bona fide one, subject to the approval of the seller, defendant was not guilty. *Held*, that the instruction covered the defense and should have been given.

Appeal from Hunt County Court; F. M. Newton, Judge.

M. Hirsch was convicted of violating the local option law, and he appeals. Reversed.

Mock & Doss, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction is for violating the local option law; the punishment assessed being a fine of \$80 and 50 days' confinement in the county jail.

The state's case was an ordinary C. O. D. sale. The order was taken by Anderson, representing the Hirsch Liquor Company, of Dallas. If the case had concluded from the state's testimony there would have been no case, because it was brought strictly within the direct line of C. O. D. decisions. Therefore the sale was in Dallas, and not in Hunt county. However, appellant introduced evidence tending to show a reservation of title in his company, and thus made an issue on the question of point of sale.

The state was permitted to prove, over appellant's objection, that while appellant was in Greenville he visited the office of the American Express Company and gave instructions that all goods shipped to Greenville by the Hirsch Liquor Company and remaining there not called for at that time, amounting to 75 or 100 cases, be returned to the Hirsch Liquor Company at Dallas. This testimony should have been excluded. The state's case was that it had been shipped C. O. D. on an order or contract, which would have made the sale at the point of shipment in Dallas. This testimony evidently had the effect, and intended to do so, that the Hirsch Liquor Company was shipping into Greenville intoxicants by the wholesale without previous orders. This character of testimony evidently had a very deleterious effect upon the case, as evidenced by the high punishment given.

A revision of the other questions we deem unnecessary in the light of the record. Upon another trial those questions will not arise, and, if they do, they will be presented in a different manner.

The judgment is reversed, and the cause remanded.

#### On Rehearing.

At our recent Dallas term the judgment herein was reversed, and the cause remanded. The opinion treated alone a bill of exceptions to the introduction of evidence. The Assistant Attorney General has filed a motion for rehearing, calling our attention to the fact that the bill of exceptions is insufficient to raise the question, because of a want of a statement of any ground or grounds of exception. An inspection of the bill shows this to be correct. The other questions in the case were not discussed on the theory. Under the disposition made, it was unnecessary, as these questions would hardly arise upon another trial. However, the bill of exceptions being deficient, if that were the only question in the case, it would require an affirmance.

Other questions, however, being raised, it becomes necessary now to discuss those, under the view taken of the matter as presented in the motion for rehearing. There were two theories made by the testimony. The

state's evidence, as stated in the original opinion, covers an ordinary unequivocal C. O. D. transaction; the order having been given by Branch to the agent of Hirsch Liquor Company, and the whisky shipped under and by virtue of this order. Had the case stopped at this point, there would be no question that the sale would have been in Dallas county, at the point of shipment. *Treadaway v. State*, 42 Tex. Cr. R. 466, 62 S. W. 574; *Keller v. State*, 87 S. W. 669, 13 Tex. Ct. R. 264. There was evidence introduced to the effect that Hirsch was in Greenville subsequent to the transaction set out in the indictment, and gave orders to the agent of the American Express Company at that point that whenever 30 days elapsed, and the consignee had not called for the consignment, to ship the goods back to the Hirsch Liquor Company in Dallas at the expense of the Hirsch Liquor Company. Hirsch testified, further, that he had an understanding with the express company that, where goods were shipped from his house through this express company, he would look to that company for the value of the goods, and that the company was to be responsible to him for the goods shipped over its lines when the goods were taken out. The facts shown on the surface seem to be: If the goods were not delivered, they were to be returned to the Hirsch Liquor Company at Dallas, at the cost of the Hirsch Liquor Company. If they were delivered to the consignee, then the company was to be responsible to the Hirsch Liquor Company for the price of the delivered goods.

The court charged the jury, and this is the only charge given on the subject, as follows: "If, therefore, you believe from the evidence beyond a reasonable doubt that the Hirsch Liquor Company of Dallas, Tex., did on or about the 30th day of November, 1904, ship any intoxicating liquor to C. C. Branch at Greenville, in Hunt county, Tex., by the American Express Company, collect on delivery, and if you further believe from the evidence that Mr. Hirsch, the defendant, was then and there a member of the firm of the Hirsch Liquor Company, and if you further believe from the evidence that said express company acted as the agent of the Hirsch Liquor Company and delivered said intoxicating liquor to said Branch at Greenville, in Hunt county, Tex., and if you further believe from the evidence that the express company, as the agent of the Hirsch Liquor Company (if it was such), did deliver said intoxicating liquor to said Branch as aforesaid, and remitted the money therefore to said Liquor company, and if you further believe from the evidence that said liquor was to remain the property of the Hirsch Liquor Company until delivered at Greenville, Tex., and paid for by the prosecuting witness, then you will find the defendant guilty," etc. This was the state's side of the case. The following charge was asked by defendant: "If you believe from the evidence that C. C. Branch.

on or about the 30th day of November, 1904, in Hunt county, Tex., did receive from the hands of the American Express Company a package of intoxicating liquors, and if you further believe from the evidence that the said intoxicating liquors were shipped by the Hirsch Liquor Company, of Dallas, Tex., through said express company, upon a written order signed by said C. C. Branch, and that said Branch paid the price of the goods and also the express charges, and if you further believe that goods shipped were consigned to the American Express Company at Dallas, Tex., by the seller, and if you further believe that the said American Express Company is a common carrier, and if you further believe from the testimony that the said order was a bona fide order, and was subject to the approval of the seller, then in that event the defendant would not be guilty, and you should so find." This charge was refused, and exception reserved to its refusal. It should have been given. It was the defendant's side of the case.

While the motion of the Assistant Attorney General is well taken so far as the bill of exceptions is concerned, in that it is deficient, yet this requires a reversal of the judgment, and for this reason the rehearing is refused.

The judgment is therefore reversed, and the cause remanded.

BROOKS, J., absent.

#### WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. June 13, 1906.)

#### HOMICIDE—INTENT—INSTRUCTIONS.

Defendant, in a homicide case, is entitled to an instruction submitting as an issue the question of intent; the testimony not giving such a description of the wound or the knife with which it was inflicted as to prove the knife was a deadly weapon, defendant having testified that he hurt deceased to a greater extent than intended, and Pen. Code 1895, art. 717, providing that the instrument by which a homicide is committed is to be considered in judging the intent of the offender, and, if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 586.]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Ed Williams appeals from a conviction. Reversed and remanded.

McLean & Scott and Parker & Dunn, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment fixed at confinement in the penitentiary for a term of 50 years; hence this appeal.

Appellant insists that the corpus delicti was not proved. We do not agree to this contention. Taking the confession of appellant, together with all the other facts and circumstances of the case, we believe that the evidence is sufficient to show that appellant stabbed his wife with a knife, and that she died from the effect of the wound inflicted some five days later. However, it will be an easy matter for the state on another trial of this case to relieve it of any question as to the cause of death by placing on the stand some of the attendants or physicians who were with deceased during the five days she survived the effects of the wound.

However, the court committed an error in failing to charge the jury, under article 717, Pen. Code 1895, as to the intent of defendant in inflicting the wound. The testimony showed that the wound was inflicted with a knife, but the witnesses fail to give any such description of this knife as would show that it was a deadly weapon; nor is the character of the wound described in such manner as to afford proof that the weapon used was a deadly one. The depth of the wound is not shown. Said article provides that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." In this case there is pertinent testimony coming from appellant to the effect that he hurt deceased to a greater extent than he intended, suggesting at least as an issue whether or not in inflicting the wound he intended to kill deceased. If we had the size of the knife and the depth of the wound, even then it would by no means follow that appellant would not be entitled to a charge on his testimony indicating his want of intent to take life. But certainly, in the absence of testimony showing the deadly character of the weapon, he was entitled to have the question of intent presented as an issue to the jury for them to determine from the evidence. The fact that deceased died from the effects of the wound did not establish this intent, but under the circumstances left it as a question of fact for the jury to find. If he did not intend to kill her, he was not guilty of felonious homicide, but may have been guilty of some grade of assault. We are by no means deciding the question here that appellant did not have the intent to kill her when he inflicted the wound, but we are merely holding that this should have been submitted to the jury to be determined by them, and the submission by the court of an accidental homicide did not meet the issue. *Danforth v. State*, 44 Tex. Cr. R. 105, 69 S. W. 159; *Martinez v. State*, 35 Tex. Cr. R. 386, 33 S. W. 970; *Shaw v. State*, 34 Tex. Cr. R. 435, 31 S. W. 301.

For the failure of the court to submit the question of appellant's intent to the jury, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

### MITCHELL v. STATE.

(Court of Criminal Appeals of Texas. June 6, 1906.)

#### 1. HOMICIDE—MANSLAUGHTER—PROVOCATION—INSULTING CONDUCT.

Where one kills another on account of insulting conduct toward the slayer's wife, his mind being enraged beyond cool reflection, the offense is manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 73.]

#### 2. SAME—SELF-DEFENSE—APPREHENSION OF DANGER.

Pen. Code 1895, art. 713, provides that one accused of murder may show threats made, but that they shall not be regarded as justification unless decedent at the time of the homicide manifested an intention to execute the threats. *Held*, that where defendant, on being informed of threats against his life by decedent, armed himself and approached decedent to peaceably discuss the matter, but on reaching him it became reasonably necessary, viewed from defendant's standpoint, to kill in order to protect himself from death or serious bodily injury, he was justified in so doing.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 158-167.]

#### 3. SAME—INSTRUCTIONS—SELF-DEFENSE.

Pen. Code 1895, art. 713, provides that one accused of murder may show threats made, but that they shall not be regarded as justification unless decedent, at the time of the homicide, manifested an intention to execute the threats. In a prosecution for murder, the court instructed that if, prior to the homicide, defendant had been informed that decedent had threatened defendant's life, the threats would afford no justification unless at the time of the killing decedent had done, or was in the act of doing, some act manifesting an intention to carry out the threats, in which event defendant would have the right to act upon such appearance of danger, but that, if decedent had not done and was not doing some act manifesting such an intention, defendant was not justified. *Held*, that the instruction was erroneous, as in negative form and practically shifting the burden of proof, and defendant was entitled to an instruction that, if decedent had threatened to take defendant's life, etc., he had the right to kill.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 614-632.]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Jim. Mitchell was convicted of murder in the second degree, and he appeals. Reversed.

B. B. Beard, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for murder in the second degree, with five years in the penitentiary fixed as the punishment.

Appellant shot and killed his brother Ned. Prior to the difficulty, deceased had made treats against appellant's life and had sought to seduce and debauch appellant's

wife. On Saturday, prior to the killing, deceased had again threatened the life of appellant, and subsequently was seen with a pistol and knife. The night prior to the homicide, a would-be assassin had been about the premises of appellant, and stood about a tree indicated where the party stood. Appellant and his wife, after examining these tracks, came to the conclusion that they were those of deceased. That morning a witness communicated to appellant the recent threats of deceased, and his wife informed him for the first time of the attempts of deceased to prostitute her. He had concluded to go to work for the day, and had gotten his team. He immediately turned, put his team up, got his gun, and went to the graveyard where deceased and others were at work, for the purpose of talking with deceased about these matters, as he testified. On reaching the scene of the trouble, two witnesses (white men) testified for the state to facts which show an unlawful killing on the part of appellant. Appellant's testimony was to the effect that when he reached the graveyard he called his brother and told him to come to him, as he desired to talk with him. Appellant was armed with a shotgun. Deceased started in the direction of appellant, as appellant says, armed with a spade. Seeing this, he told deceased not to approach him. He continued to come, and, believing that he intended to kill him with a spade, appellant shot. His gun was a breach-loading shotgun, having one barrel loaded with No. 4, or, as he terms it, "squirrel," shot. What conversation occurred between appellant and deceased is narrated by the two white men practically as by appellant. The difference in their testimony arises as to the immediate condition and attitude of deceased towards appellant when the shot was fired. They state that deceased did not have a spade, but had been working with a hoe, which he had dropped when he started to his brother.

If appellant killed deceased on account of insulting conduct, either with or without threats, and his mind was enraged beyond cool reflection, this offense could be of no higher grade than manslaughter, so far as the record is concerned. It is unquestioned that this was the first meeting after the communication of the insulting conduct. It was the first meeting after the communication of the threats. Appellant had the right to approach his brother and discuss these matters with him in a peaceable manner, and to protect himself against an anticipated attack on the part of his brother he had the right to carry his gun. Shannon v. State, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17. If, after reaching him, it became necessary, or reasonably necessary, viewed from appellant's standpoint, to kill to protect himself from death or serious bodily injury at the hands of deceased, he would be justified. The jury should be told plainly

and affirmatively that such was the law. Not only so, but the law would authorize him to kill in self-defense, if there was an act on the part of deceased indicating to the mind of appellant that deceased was then about to execute the threat against his life. The jury should be affirmatively informed, if deceased had threatened the life of appellant, and this threat had been communicated to appellant, and at the time of the homicide deceased by some act then done manifested an intention to execute the threat, appellant had the right to shoot. This is statutory. Article 713, Pen. Code 1895.

In regard to threats, the court instructed the jury: If they "shall find from the evidence that prior to the homicide the defendant had been informed that deceased had threatened the life of defendant, such threats of themselves would afford no justification for the offense, unless it be shown that at the time of the killing the deceased had done or was in the act of doing some act, or was making some demonstration manifesting an intention then and there to execute or carry out such threats, or which was reasonably calculated, in view of all the evidence and circumstances of the case considered from defendant's standpoint, to produce, and did produce, in the mind of the defendant the belief that deceased was about to execute such threats; and in that event defendant would have the right to act upon such reasonable appearances of danger, notwithstanding such danger might not in fact have been real, and justifiable. But if you shall find that deceased on the occasion in question had not done nor was in the act of doing some act, or was not making some demonstration manifesting an intention then and there to execute or carry out such threat, if any you find had been communicated to defendant, or which was not reasonably calculated, in view of all the evidence and circumstances of the case considered from defendant's standpoint, to produce, and did not produce, in defendant's mind the belief that deceased was about to execute such threat, then defendant cannot be justified on that ground. These are the charges given by the court in regard to threats. These were not only given in a negative form, but were a limitation upon the right of self-defense, viewed in the light of threats; but it really, or at least practically, shifted the burden from the state to the defendant. If appellant is entitled to a charge on the subject of threats at all, he is entitled to an affirmative one, and in fairness, under our law, the jury should be told, if they believed deceased had threatened to take the life of accused, or had threatened to do him some serious bodily injury, and they further believed that at the time of the homicide he did some act which caused defendant to reasonably believe or apprehend that his life was in danger, or his person was in danger of serious bodily injury, under such circumstances he had the right to shoot and

kill, and would therefore be guilty of no offense. The charge quoted does not submit the law as it is written in the Code, nor is it in harmony with the law or the theory of the law of self-defense.

Because a charge was not given properly submitting the law of threats, in connection with the law of self-defense, this conviction is set aside, and the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

# JONES v. STATE.

(Court of Criminal Appeals of Texas. May 16, 1900.)

## BURGLARY—INDICTMENT—SUFFICIENCY.

An indictment under Acts 1899, p. 318, c. 178, making it a separate and distinct offense to burglarize a private residence at night, and defining a private residence as any building or room occupied and actually used at the time of the offense as a place of residence, must allege that the building or room was occupied and actually used at the time of the offense as a place of residence, and an allegation that the house was a private residence is insufficient.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 62.]

Appeal from Criminal District Court, Galveston County; J. K. P. Gillaspie, Judge.

Zack Jones was convicted of burglary, and he appeals. Reversed.

R. H. & Alice S. Tiernan and John Grothgar, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment fixed at five years' confinement in the penitentiary.

The indictment has two counts—one charging a daytime burglary, and the other a nighttime burglary. He was tried under the last count, which, in the charging part, alleges as follows: Zack Jones "with force and arms, then and there in the nighttime, a certain house there situate, then and there occupied and controlled by R. Bernadoni, the same then and there being a private residence, feloniously, fraudulently, and burglariously, by force, threats, and fraud, did break and enter, with the intent then and there to commit the crime of theft, and with the intent then and there the corporeal personal property of value, of and belonging to said R. Bernadoni, then and there being found in said house, feloniously and fraudulently to steal, take and carry away from and out of said house and out of the possession of said R. Bernadoni," etc. Appellant moved to quash said count on the ground that it was an attempt to charge a burglary of a private residence, and that the same should have charged that said house was occupied and actually used at the time of the offense by the said Bernadoni as a place of residence. This prosecution is under the amendment of the Twenty-Sixth Legislature. Chapter 178,

p. 818, Acts 1899. Article 839a provides: "The offense of burglary of a private residence is constituted by entering a private residence by force, threats or fraud at night, \* \* \* with intent to commit a felony or the crime of theft." Article 845c defines a private residence under said article, and says the same shall be construed to mean any building or room occupied and actually used at the time of the offense by any person or persons as a place of residence. Article 845a makes the punishment of a private residence imprisonment in the penitentiary for any term of years not less than five. In *Williams v. State*, 62 S. W. 1057, 2 Tex. Ct. Rep. 359; *Brown v. State*, 64 S. W. 1050, 3 Tex. Ct. Rep. 227, this amendment came before this court for construction. See, also, *Jones v. State*, 80 S. W. 530, 10 Tex. Ct. Rep. 399, a former appeal by this appellant. In said cases it was held that the amendment in question made the burglary of a private residence a distinct offense, enhancing the punishment therefor. In the last-named case it was held that, where the facts and circumstances showed a nighttime burglary of a private residence, the party could not be prosecuted and convicted of a daytime burglary.

However, the form of indictment under this amendment has not previously been before this court. The question here is, is the designation that said house "was a private residence." sufficient, or should the indictment, in order to be complete, allege that said building or room was occupied and actually used at the time of the offense by prosecutor as a place of residence? Mr. Bishop lays down the rule on this subject, as follows: "If to such place the statute adds a descriptive phrase, it should be covered by a proper allegation." Bishop, Cr. Proc. vol. 2, § 136; *Norris v. State*, 50 Ala. 126; *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Bell v. State*, 20 Wis. 599. It occurs to us, from the language used in said articles 839a and 845c, that it was intended to make the burglary of a private residence at night a distinct offense, and that this private residence should be some building or room occupied and actually used at the time of the offense by some person named as a place of residence. This subsequent article is descriptive of what a private residence under the amended statute is, and as we understand this must be proved. Under our statutes what has to be proved, should ordinarily be alleged in the indictment. On the trial of this case the facts constituting it a private residence under article 845c were proven, and the court instructed the jury in accordance with said proof. However, the indictment did not contain this description of said private residence, which we hold was a necessary averment.

Because of the insufficiency of the indictment the judgment is reversed, and the prosecution ordered dismissed.

## JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. May 23, 1906.)

### 1. CRIMINAL LAW — EVIDENCE — OTHER OFFENSES.

On a prosecution for burglary, it was error to admit evidence that defendant, when arrested and taken before a justice, and before he was warned, was discovered trying to get rid of a pin and watch, and to show that they were the fruit of former crimes.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 822-824.]

### 2. BURGLARY—INSTRUCTIONS—DEFENSES.

On a prosecution for burglary it appeared that a pair of pants were stolen, and that prosecutor, thinking that the pants worn by defendant were the pair stolen, asked defendant where he got them, to which he replied that he did not remember. Held, that though the court charged on explanation, and though there was evidence that a pocketbook also stolen was found at defendant's house, it was error not to charge on defendant's affirmative defense that he had purchased the pants.

### 3. SAME—POSSESSION OF PROPERTY.

On a prosecution for burglary, where it was shown that a purse stolen was found at defendant's house, an instruction that, if defendant was in possession of the purse and gave no explanation, it was a circumstance against him, was erroneous.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 80, 118.]

### 4. SAME—INDICTMENT—OCCUPANCY.

An indictment charging nighttime burglary should charge, not only that the house burglarized was a private residence of prosecutor, but that the same was occupied and actually used at the time of the offense by prosecutor as a place of residence.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 62.]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Monroe Johnson was convicted of burglary, and he appeals. Reversed.

Roy Butler, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the burglary of a private residence, at night, and his punishment fixed at confinement in the penitentiary for a term of seven years; hence this appeal.

The state's case depended on circumstantial evidence. Prosecutor, A. Baer, lived in Tyler. On the night of the alleged burglary he and his wife had gone to church, leaving their cook and children at home. Baer left a pair of pants hanging on a chair, either in the room where he and his wife slept, or in the adjoining room. They came back from church; and the wife testified that she saw the pants hanging on the chair after she returned. The next evening it was discovered that the pants were missing, and also a pocketbook in the pants pocket, containing \$48. Search was made for the pants and missing money, but they were not found. A week or so after the alleged burglary appellant (a negro carpenter living in Tyler)

went to the store of Baer for the purpose of getting him to go on the bond of his brother, who had been arrested for some offense. When he approached, prosecutor informed him that he had on his pants which had been stolen a short while before in the alleged burglary. In that connection he told him that he did not charge him with stealing the pants, but that he may have gotten them from some one, and asked him how he got them. Appellant stated he did not remember. Appellant was immediately arrested, carried to the justice of the peace, and while there he was discovered trying to get rid of a pin. This is not described, but it was presumably a breastpin of some character. The pin was taken from him, either out of his mouth or in his hand near his mouth. He was also discovered handing a watch to his brother. His brother left with the watch, which was subsequently recovered. There was also discovered in appellant's trunk at his home, a pocketbook which was identified by prosecutor as the pocketbook which had been stolen from him on the night of the alleged burglary.

Appellant was carried to the jail immediately after his arrest. The next day they sent to the jail for the pants he had on at the time of his arrest, and he furnished the jailer with a pair of pants somewhat of the same description as those claimed by prosecutor, which were carried to prosecutor, though he failed to identify them, stating they were not the pants appellant had on at the time he approached him in his store. The jailer testified that he discovered in the stove, evidence of the burning of clothing, and a part of what he took to be the waistband of a pair of pants that resembled in color the gray pants alleged to have been found by prosecutor on appellant. Appellant denied he had burned any pants in the jail; but testified that he only wore the pair of pants he had on in the store to the jail, and that these were the same pants he pulled off and sent the next day to the prosecutor; that the pants burned in the jail belonged to a prisoner who was lousy, and from whom they were taken by the prisoners and burned on that occasion. Appellant also proved as a part of his defense that he traded for the pants he had on in the store, and which were taken from him at the jail, with a yellow negro at his house about a week or so before he was arrested; that he gave for said pants a pair of overalls. This was testified to by other witnesses. This is a sufficient statement of the testimony to discuss the assignments of error.

Appellant insists that the court committed an error in admitting against him evidence of other offenses in no wise connected with the offense for which he was being tried, to wit, evidence concerning the burglary of the premises of Fain, which occurred about September 8th—the burglary for which appellant was

then being tried occurring in October. And he also objected to the introduction in evidence against him of testimony regarding the watch found on him. We do not understand that the testimony about the watch showed appellant had stolen it, or had procured it in any previous burglary, but the circumstances connected therewith were of a suspicious character. These matters are presented in several bills of exception, and we believe that the evidence in regard thereto should have been excluded. It was not competent, appellant not having been warned, to show what appellant did concerning said pin and watch in the justice court; and it was not competent to go further and show that these articles were the fruits of former crimes, inasmuch as they had no bearing on the case then being tried, either as a part of the *res gestæ*, or to show intent or system. *Long v. State*, 39 Tex. Cr. R. 537, 46 S. W. 821.

Appellant also complains of the failure of the court to give the jury an affirmative charge on his defense of purchase of said pants, which he contends was the main criminative fact used by the state against him. We note in this connection that the court charged on explanation given by defendant, if any, at the time of his arrest. However, an examination of the record discloses that appellant gave no explanation, but stated to the prosecutor that he did not remember how he got the pants. There are some cases which hold, where an explanation was given at the time, and that is the same as testified to by witnesses on the trial as appellant's defense, then a charge on explanation would be sufficient, as it presented the same matter. However, here, as stated, there was no explanation made. On the trial appellant proved by himself and other witnesses that he purchased or traded for the pants in question. This was a substantial matter offered by defendant, meeting the state's case on its main criminative fact; and we hold that the court should have presented this question in the charge to the jury so that they might have passed on the truthfulness thereof as a defense. It is no answer to this proposition that there were other criminative facts also against appellant. For instance that there was found at his house a pocketbook taken at the same time of the alleged burglary, and with the pants, which prosecutor identified as his property. As to this there was no actual possession proven, but as to the pants there was. Appellant should have been afforded a charge presenting his theory as to how he came into possession of said pants. *Alvia v. State* (Tex. Cr. App.) 60 S. W. 551; *Bond v. State*, 23 Tex. App. 180, 4 S. W. 580; *Smith v. State*, 24 Tex. App. 290, 6 S. W. 40.

The charge as to appellant's possession of the purse was also criticised. We think it is subject to the criticism. That is, it was.



suggested to the jury that, if they found appellant was in possession of the same and he gave no explanation, they were authorized to consider it as a circumstance against him.

Although the question is not raised as to the sufficiency of the indictment, under a recent holding of this court the indictment is not sufficient and a new one should be found. *Zack Jones v. State* (May 16, 1906) 96 S. W. 44. The indictment should charge, not only that the house burglarized was the private residence of the prosecutor, but that the same was occupied and actually used at the time of the offense by said prosecutor as a place of residence.

The judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., absent.

### WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. May 23, 1906. On Rehearing, June 28, 1906.)

**PERJURY—PROCEEDINGS IN WHICH OATH WAS ADMINISTERED—AUTHORITY OF OFFICER.**

Code Cr. Proc. 1895, arts. 34, 35, authorize county and district attorneys to take affidavits that an offense has been committed and to prepare pleadings, etc. Article 36 authorizes them, for the purpose mentioned in the two preceding articles, to administer oaths. Article 391 authorizes the issuance of process to bring witnesses before the court to examine into violations of the gaming laws, and authorizes county and district attorneys to cause such process to issue, and, when the same has been done, under article 941 the examining court may investigate the matter and interrogate witnesses under oath. *Held*, that where, after a raid upon a residence where gambling was supposed to be going on, one of the persons found in the house was sworn by the county attorney and interrogated, his answers to the questions were no basis for a prosecution for perjury, as the attorney had no authority to proceed with such an investigation as a court of inquiry.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, § 13½.]

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Kid Williams was convicted of perjury, and he appeals. Reversed. Motion for rehearing overruled.

McNeal & Ellis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction of perjury. The evidence shows that the imputed perjury was committed before the county attorney. The officers made a raid upon the residence of Frazier, under the idea that gambling was there being carried on. Among others, appellant was found in the house. About midnight he and others were carried to the courthouse. The county attorney was brought, and proceeded to swear appellant and asked him some questions. The indictment alleges that appellant stated, when asked by the county attorney, that he had not seen certain parties

play at a game of cards on which money was bet.

It may be seriously questioned if this indictment is sufficiently specific to charge the offense of gambling at a private residence. Without discussing that question, in our judgment the county attorney had no authority to administer the oath and proceed to the investigation as a court of inquiry, as shown by this record. Articles 34 and 35, Code Cr. Proc. 1895, authorize the county attorney to take the affidavit of a complaining witness charging an offense, which shall be returned to the proper court after being reduced to writing and sworn to by the complainant. Article 36, Code Cr. Proc. 1895, authorizes the county attorney for this purpose to administer oaths. So far as we have been able to ascertain from the statute, this is the extent of the authority of that officer to administer oaths. Article 941, Code Cr. Proc. 1895, authorizes the magistrate, whenever he has reason to believe or know that an offense has been committed, to summon witnesses or cause them to be summoned, place them under oath, and investigate the matter, and, if an offense has been committed, take necessary steps to have the parties prosecuted. But the limitation of the authority in Texas to hold courts of inquiry is relegated to the judicial department—magistrates and justices—except grand juries. While in gambling transactions the statute seems to authorize the county or district attorney to subpoena persons toward the enforcement of the gambling law, the statutory authority in regard to this matter stops at that point. It does not authorize him to swear witnesses, and the language is so indefinite it is a very serious question as to what is the extent of the power, if any in fact has been conferred by this particular statute upon such officer. Be this as it may, it seems that, under our procedure, a limitation is placed upon the authority of the county or district attorney to administer oaths, except as provided in articles 34, 35, 36, Code Cr. Proc. 1895. This being true, the statements of the appellant made before the county attorney here were not under such an oath as is authorized by law; that is, not in such judicial proceeding as mentioned in the statute. They were not in a tribunal authorized to administer oaths or to take his testimony.

Appellant made a motion to quash, as well as in arrest of judgment, which should have been sustained. There are some other questions in the case which would require a reversal; but, under the view we take of the legal status of the matter, there is no offense charged, and a discussion of the other matters is not indulged.

For the reasons indicated, the judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., absent.

### On Rehearing.

At a former day of this term the judgment herein was reversed, and the prosecution ordered dismissed. This opinion is in conflict with that in *Bailey v. State*, 41 Tex. Cr. R. 158, 53 S. W. 117, and being in contravention of that opinion the effect of this opinion is to overrule it. The Assistant Attorney General has filed a motion for rehearing, basing it upon the *Bailey Case*. We have reviewed the *Bailey Case* and the reasoning, in connection with what we have said in this case and the statutes bearing upon the question, and are of opinion that the *Bailey Case* went too far and placed a construction upon the statute not warranted. Articles 34 and 35, authorize the county and district attorneys to take affidavits that an offense has been committed in their respective districts or counties, and prepare proper pleadings, etc., and article 36 authorizes them, for the purposes mentioned in the two preceding articles, to administer oaths. This is as far as our statutes have gone authorizing those two officers to administer oaths in criminal cases, or in regard to criminal matters. Article 391 authorizes the issuance of process to bring witnesses before the court to examine into violations of the gaming laws, and authorizes the county and district attorneys to cause this process to issue. But, as said in the original opinion, this seems to end their authority. When this has been done, under article 941, Code Cr. Proc. 1895, the examining court may look into the matter and interrogate witnesses under oath, but it does not clothe the county and district attorney with such judicial power, nor undertake to do so. Therefore, we are of opinion that the *Bailey Case* is wrong, and should be overruled to this extent.

We believe that the original opinion is correct, and therefore the motion for rehearing is overruled.

BROOKS, J., absent.

### McKINNEY v. STATE.

(Court of Criminal Appeals of Texas. April 18, 1906. Rehearing Denied June 6, 1906.)

#### 1. HOMICIDE—EVIDENCE—RES GESTÆ—OTHER OFFENSE PART OF SAME TRANSACTION.

Where, on a prosecution for murder, it appeared that there had for some time been ill-feeling between defendant, on one side, and deceased and another, on the other, it was proper to admit, as *res gestæ*, evidence showing that on the night of the homicide, and prior to the altercation in which it occurred, defendant had quarreled with the other and shot at him; it appearing that the two altercations were, in effect, a continuous affair.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 343.]

#### 2. SAME—EVIDENCE—THREATS.

Where, on a prosecution for murder, it appeared that about two hours prior to the homicide defendant had had trouble with deceased and another, it was proper to admit evidence that just after such trouble defendant

was brought into a building by men who were holding his arms, and that he said, "If you had let me alone I would have killed all of them," as the threat evidently comprehended deceased.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 293-296.]

#### 3. SAME—PREPARATIONS.

Where, on a prosecution for murder, it appeared that defendant and another became engaged in an altercation with deceased, which led to the homicide, defendant and the other acting together, it was competent to show by a witness that prior to the shooting he sold a pistol to defendant's companion.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 301, 339.]

#### 4. SAME—INSTRUCTIONS—INTENT.

On a prosecution for murder the evidence showed that defendant and another, acting together, were firing in the direction of deceased, and kept up the firing until they exhausted their ammunition; that they returned to a store, got more ammunition, and came back and continued firing until they killed deceased. Defendant requested an instruction that, if defendant and his companion began shooting toward deceased, but that they were not intending to shoot deceased, or any other person, but were only shooting with the intention of alarming him, but in the course of the shooting defendant's companion intentionally and without justification killed deceased, of which intent defendant had no knowledge, defendant was not guilty as a principal. *Held*, that the instruction was properly refused as not warranted by the evidence.

#### 5. SAME—ENGAGING IN COMBAT.

Where, on a prosecution for murder, it appeared that there was an altercation between defendant and deceased, and that defendant went to a store and got his gun and, returning, began shooting at deceased, who was shot while retreating, it was proper to give a charge predicated on the proposition of defendant voluntarily engaging in a combat, knowing that it might or probably would result in death or serious bodily harm to his adversary.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 590, 591.]

Appeal from District Court, Haskell County; H. R. Jones, Judge.

Jake McKinney was convicted of murder in the first degree, and he appeals. Affirmed.

C. H. Steele, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

The homicide occurred in the town of Carney, Haskell county. Rob Walker (deceased), his brother Tom Walker, and McCullough kept a restaurant or lunch stand, and McKinney and Lester Power were publishing a newspaper; Power being the owner. The business part of the town was in one line of houses, extending along the street from north to south. Walker & McCullough's store was 100 or 150 feet north of the hotel and printing office. A number of stores and vacant lots intervened. The printing office was situated next to the hotel and Hinds' store, in front of which the parties who did the shooting stood on the night of the homicide. The

state's testimony tended to show: That on some account there was a grudge existing between appellant and Lester Power on one side and the Walkers and McCullough on the other. Some time in the early part of the night, prior to the shooting, the parties, or some of them, had an altercation, and some two or three hours later it was renewed in front of the hotel. Appellant and Lester Power, acting together, went to Hinds' store, got their guns, came out, and shot at the Walkers, who retreated north toward their store, not being armed at the time, and firing no shots. That they could not get in at their store, it being locked, and they came down in front of McFadden's drug store, the next door south. Tom Walker went into this store, and his brother remained on the outside. Tom attempted to get his brother to come in out of danger, as the parties were firing in that direction. His brother started to retreat around the corner of said store, when he was shot in the back, the ball striking his spinal column, which caused his death. The defendant's theory was that, after the difficulty in front of the hotel, they retired to Hinds' store, 12 or 20 steps off, to get their guns to protect themselves, and that as they came out of the store, as they had a right to do for their protection, the firing began. They claimed that after the parties fired at them, or they thought they were, they fired in self-defense. It was further claimed by appellant that the testimony showed that Lester Power fired the shot which killed Robert Walker, and that the circumstances showed he was firing at random, and, if Power intended to kill deceased, he (McKinney) did not participate in his intent. We think this a sufficient statement of the case to present the matters discussed in the assignments.

The state was permitted to prove by Tom Walker, and other witnesses, over appellant's objection, that on the night of the homicide, and prior thereto, and near Ed Hinds' store, in Carney, defendant and Rob Walker were talking, and in said conversation called the name of Frank McCullough, and McCullough, being nearby and hearing his name called, started toward defendant, and said, "What is that about McCullough?" Defendant then said to him, "You have been talking about ladles of this town, and have talked about the Walker boys, and you have got to leave this town." And McCullough said in reply thereto, "You are a liar." Then defendant went up to McCullough and slapped him in the face, and said "Hiike," and then McCullough ran in the direction of Walker & McCullough's restaurant, and defendant shot at him with a pistol twice as he ran off. This was objected to by appellant on the ground that the same was irrelevant, immaterial, and calculated to prejudice the rights of defendant in this case. The court overruled the objections, and explains that this evidence was admitted as a

part of the *res gestæ*, because it was shown that defendant had threatened to run Frank McCullough, Tom Walker, and Rob Walker (deceased) out of town, or he would kill them, and therefore tended to show the state of the defendant's feelings toward McCullough and Walker at the time of the killing. This matter was connected with the difficulty, as it happened on the same night of the homicide, and it seems to have been a continuous affair, more or less, from this time on until the shooting occurred in which the homicide was committed. The explanation of the court in that connection we think sufficiently shows a reason for its admission, even if it be conceded that the bill is otherwise sufficient, which we very much doubt. The objection urged is that it was immaterial, irrelevant, and prejudicial, which cannot be considered as pointing out any real objection to the admission of this testimony. The statements in connection with the evidence do not show that the court acted improperly in its admission.

By appellant's next bill of exceptions it seems that the state was permitted to prove that some time in August, prior to the difficulty, there was a difference of opinion, and some unpleasant feeling, between Lester Power and Tom Walker and Rob Walker about the privilege of selling drinks at a picnic. The bill does not show what the character of this difference was. If we recur to the evidence, it was of no particular significance, and what was introduced as to that transaction could not have possibly injured appellant. The court further explains that such evidence was admitted, because it was shown that defendant and Power were acting together, and as tending to show the state of Power's feeling towards deceased. The evidence did show that the parties were acting together at the time of the homicide, and in fact they appear to have been co-operating during the entire altercation occurring that night. If, as the court states, the parties were acting together in pursuance of a conspiracy, the evidence complained of, even if it had any significance, may have been introduceable as showing the animus actuating Lester Power, and that appellant participated with Power in his animus.

The third bill of exceptions shows that the state proved by Mrs. Hinds that she was in the dining room of the hotel at Carney on the night of the homicide, and about two hours prior thereto, and just after some trouble between defendant and Charley Tankersley, L. H. Womble and Dr. Lewis brought defendant in the dining room, one of them holding each of defendant's arms. "Defendant said, 'If you had let me alone I would have killed all of them.'" To the introduction of which evidence, defendant then and there objected, for the reason that the same was irrelevant, immaterial, and calculated to prejudice the rights of the defendant. The court explains this bill as follows: "This evidence was ad-

mitted after it had been shown that defendant had just had trouble with Charlie Tankersley and Rob Walker (deceased), for the purpose of showing the state of his feelings toward deceased, and this statement was made by defendant after a gun had been taken from him." We presume appellant intended to object to this evidence because the threat, if any, or the declaration, was not uttered against deceased. We take it that it comprehended deceased. Evidently, from the court's explanation, there is no escape from this. The bill itself does not present any fact to show the inadmissibility of this testimony, and the bill should always be so full as to disclose error on the part of the court.

There are some exceptions urged in the statement of facts that perhaps are not presented in the bill of exceptions. But an examination discloses that the testimony which was complained of was admissible. Appellant was present and participated in the difficulty. In his exception, defendant's threat was unquestionably uttered against deceased, as he mentioned the Walker boys. We think it was competent to show that the witness sold a pistol to Lester Power, prior to the shooting. He was evidently armed at the time. We think it would make very little difference where he got his arms—whether a gun or pistol. It would make but little difference whether the testimony showed Lester Power surrendered his gun to sheriff or whether the sheriff took the gun from him.

Appellant objected to the court's charge in the definition of principals. We think this charge is correct, and in accordance with our statute, and is applicable to this case.

Appellant complains because of the refusal of the court to give his special requested instruction, as follows: "Should you believe the defendant and Lester Power began shooting toward deceased and his brother, but that they were not intending to shoot deceased or his brother, or any other person, but were only shooting with the intention of alarming them, and that such shooting was so continued with only such intent on the part of defendant, but in the course of said shooting said Lester Power intentionally and without justification shot and killed deceased, and you do not believe beyond a reasonable doubt that defendant knew of such intent on the part of said Lester Power to shoot deceased at said time, then defendant would not be guilty as a principal in the commission of said offense, and you will acquit him." We do not believe this charge was called for by any testimony delivered in the case. All the testimony shows that the parties were acting together; that they were firing in the direction of deceased, and where he was ultimately killed; that they kept up the firing until they exhausted their ammunition; that they returned to the store, got more ammunition, and came back and continued firing

until they killed deceased. So we fail to see how a charge of this character was called for.

We make the same observations with reference to the exception of appellant to the court's charge because of its failure to announce the principles suggested in the above requested charge. We think the court's charge on self-defense was correct, if it be conceded that appellant was entitled to such a charge. We also believe that the court was authorized to give a charge predicated on the proposition of appellant voluntarily engaging in a combat, knowing that it might or probably would result in death or serious bodily harm to his adversary.

In our opinion, the court was not required to instruct the jury that defendant had the right, after retreating, to arm himself with ammunition and return to the scene of the difficulty and renew the shooting. It does not occur to us that the testimony discloses that this action on his part was rendered necessary in order to protect himself from danger or apparent danger. Indeed, it seems to us, after the retreat of said parties, when appellant and Lester Power returned from the store with their guns, there were no such acts or demonstrations on the part of the two Walker boys which caused appellant to believe that he was in any danger. Nor do we believe that there was any evidence which shows that deceased or his brother renewed or attempted to renew the difficulty, or fired any shots at any time during the difficulty.

There being no error in the record, the judgment is affirmed.

BROOKS, J., absent.

#### STONEMAN et al. v. BILBY.\*

(Court of Civil Appeals of Texas. May 26 1906.  
Rehearing Denied June 23, 1906.)

#### 1. TAXATION — DELINQUENT TAXES — FORECLOSURE — JURISDICTION.

Under Sayles' Rev. Civ. St. art. 5232o, providing that, where the owner of delinquent tax lands is a nonresident, he shall be cited by notice by publication on the filing of an affidavit averring that he is a nonresident, a citation by publication in a suit to foreclose for delinquent taxes is unauthorized, except on the filing of the proper affidavit.

#### 2. JUDGMENT — COLLATERAL ATTACK — EVIDENCE — ADMISSIBILITY.

The presumption that a sufficient affidavit was filed to authorize the issuance of a citation by publication is on collateral attack rebuttable, unless rebutting it involves a contradiction of the record.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 834.]

#### 3. SAME — PRESUMPTIONS.

A judgment of foreclosure for delinquent taxes did not recite the filing of an affidavit prerequisite for the publication of a citation or service on defendant in the action. The record affirmatively showed an insufficient affidavit. *Held*, that it would be inferred that the

\*Writ of error denied by Supreme Court Oct. 11, 1906.

service of the citation by publication was had on the defective affidavit, and the presumption that a sufficient affidavit had been filed was overcome.

Appeal from District Court, Scurry County; W. K. Homan, Special Judge.

Action by John S. Bilby against G. C. Stoneman and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. C. Hughes and C. P. Woodruff, for appellant.

SPEER, J. Appellee instituted this suit in trespass to try title to recover from appellant and another a section of land in Kent county. The defendants pleaded not guilty and the cause was submitted to the court, without the intervention of a jury, who rendered judgment in favor of the plaintiff in the action.

The following are the findings of fact made by the trial court, which we adopt:

"First. The land in controversy in this suit, being survey No. 2, abstract No. 505, of 640 acres in Kent county, Tex., was patented to W. P. Wilson August 15, 1883, by patent No. 140, in volume 6. Wilson conveyed said land to George S. Roll by deed dated January 31, 1884. Roll conveyed to O. J. Wren and F. Cookson by deed dated October 25, 1884. O. J. Wren conveyed to H. T. Cookson and F. P. Shultz an undivided one-fourth interest in the land, by deed dated April 16, 1887. F. Cookson conveyed by quitclaim deed to Dorr Clark and D. C. Plumb, by deed dated March 23, 1895. H. T. Cookson and F. P. Shultz conveyed by quitclaim deed, dated January 31, 1895, to Clark and Plumb. Dorr Clark and D. C. Plumb conveyed to Henry G. Weare by deed dated November 20, 1895, this conveyance reciting that the grantee was a resident of Spearfish, S. D. A trust deed on the land in controversy was executed by Clark and Plumb to D. T. Bomar June 26, 1895. Clark and Plumb conveyed to Charles L. Ware by deed dated March 1, 1899. Henry G. Weare and John P. Allison conveyed to Charles L. Ware by deed dated March 8, 1899. The Wilkins Land Mortgage Company conveyed the lands in controversy to John S. Bilby, plaintiff in this suit, by deed dated December 5, 1901. Charles L. Ware and the Evans-Snyder-Buel Company conveyed this and other lands to plaintiff, John S. Bilby, by deed dated October 31, 1900. Charles L. Ware executed a deed to plaintiff, John S. Bilby, October 2, 1903, for the land in controversy, reciting that this conveyance was made for the purpose of correcting any omission in the description of the land in his previous conveyance to Bilby of March 30, 1900. All the foregoing conveyances were duly acknowledged and placed of record in the deed records of Kent County, Texas.

"Second. Suit was instituted in the district court of Kent county on March 11, 1899, by the county attorney, on behalf of the state,

against 'unknown owner,' to foreclose the lien for taxes on the land in controversy delinquent for the years 1895, 1896, and 1897, aggregating \$43.57. The petition in said suit was verified by the affidavit of the county attorney that the averments contained therein are true to the best of his knowledge and belief, but contains no allegation that the owner was a nonresident of the state, or that the owner was unknown and could not be ascertained by inquiry. This petition was on a printed form, prepared under the act approved April 13, 1895, and contained the allegation that the delinquent tax record of Kent county, comprising a list of all lands which had been returned delinquent since January 1, 1885, had been prepared by the comptroller of public accounts; that the land in controversy is embraced therein, and returned delinquent for the taxes since January 1, 1895; that a duplicate of said tax record had been sent to the county clerk of Kent county, and by him recorded in a book styled and labeled the 'Delinquent Tax Record of Kent County,' which was immediately by the clerk certified to the commissioners' court of Kent county, published in a newspaper as required by law, and that said court had filed a list of all of said lands so advertised for taxes, including the land in controversy, and caused this suit to be filed. A notice in substantial compliance with the requirements of article 5232o, Sayles' Rev. Civ. St., addressed to 'unknown owner' and to all persons owning or having or claiming any interest in the land in controversy, was issued on the date of the institution of the suit, and duly published. On October 10, 1899, the state filed its first amended original petition in the tax suit, which was the same in all respects as the original petition, except that it alleged that the delinquent tax record had been prepared by the tax collector of Kent county, under the provisions of an amended act 'as enacted by the regular session of the Twenty-Fourth Legislature,' that said delinquent tax record had been certified by the county judge of Kent county, and delivered by the tax collector to the county clerk, who caused a duplicate thereof to be sent to the comptroller of public accounts. On the same date of the filing of this amended petition a judgment was rendered in favor of the state against 'unknown owner' for the sum of \$44.63, taxes due on the land in controversy, adjudging a lien in favor of the state for the amount of taxes, interest, and cost, and foreclosing the same, directing the issuance of an order of sale, and that the officer making the sale execute a deed to the purchaser thereat, subject to the right of the defendant to redeem the land within two years from the date of the sale by paying to the purchaser double the amount of money paid by him therefor, and that said order of sale should have the force and effect of a writ of pos-

session as between the parties to the suit or any one claiming under the defendant, and that the officer place the purchaser in possession of the land within 30 days after the day of sale. Order of sale was issued under this judgment on November 8, 1899, and the land sold to the defendant J. Renfro on December 5, 1899, for the sum of \$80, and the order of sale returned June 9, 1900. A deed was executed by N. N. Rodgers, sheriff of Kent county, the officer making the sale on December 5, 1899, to the defendant J. Renfro for the land in controversy, conveying all the estate, right, title, and interest which the said 'unknown owner' had on November 8, 1899, or at any time afterwards, in the land, subject, however, to defendant's right to redeem the land within two years after the date of sale by paying to the purchaser double the amount of money paid by him therefor, which deed was duly acknowledged and recorded in the deed records of Kent county.

"Third. J. Renfro conveyed to defendant G. C. Stoneman, by deed dated January 28, 1901, the land in controversy, which deed was duly acknowledged and recorded.

"Fourth. Defendants have held possession of the land claimed by them from the dates of their respective conveyances, and have made improvements thereon of the character and to the amount as claimed in their petition. No proof has been made in this case of the value of the land without such improvements, or its value with the improvements.

"Fifth. At the time of the institution of the tax suit against 'unknown owner' in the district court of Kent county, to wit, March 11, 1899, the records of deeds of Kent county showed the legal title of the land in controversy to be in Henry G. Weare, of Spearfish, S. D., and I find that the county attorney of Kent county could have ascertained the name and residence of the owner of said land at the time of the institution of the tax suit by reference to the deed records of Kent county.

"Sixth. In the judgment of foreclosure rendered in the tax suit on October 10, 1899, there was no recital of notice to or service upon the defendant in that suit, but said judgment recited that the defendant appeared by an attorney appointed by the court to represent the defendant, and I find that the record in said tax suit shows no affidavit by the county attorney that the defendant in that suit was a nonresident of the state, or that the owner of said land was unknown and could not be ascertained by inquiry.

"Seventh. The present suit was instituted on March 26, 1902."

It is sufficient for an affirmance of the judgment if we sustain any one of the three conclusions of law made by the trial judge, and this we do. The findings show that the judgment of foreclosure rendered in the tax suit contained no recital of notice to, or

service upon, the defendant in that suit, and that the petition, although sworn to by the county attorney representing the state, contained no allegation that the owner was a nonresident of the state, or that the owner was unknown and could not be ascertained by inquiry. Supplementing the findings of the trial court, we further find that the original petition in the foreclosure suit contained the allegation "that the defendant's place of residence is unknown to plaintiff." The question first arises, does the failure to file the affidavit for a service by publication, as required by article 5232a, Sayles' Rev. Civ. St., affect the jurisdiction of the court to proceed to judgment in the case? That article, so far as pertinent to the inquiry, reads: "Wherever the owner or owners of any lands or lots returned delinquent or reported sold to the state, or that may hereafter be reported sold or returned delinquent for the taxes due thereon for any year or number of years, are non-residents of the state, or the name of the owner or owners of said land or lots be unknown, then upon affidavit setting out that the owner or owners are non-residents or that the owner or owners are unknown to the attorney for the state and after inquiry cannot be ascertained, said parties shall be cited and made parties defendant by notice," etc. We think it is to be understood from this language that as a condition precedent to the court's power to inquire into the merits of the action the affidavit provided for must have been filed. In other words, a citation by publication is not authorized except upon the filing of such affidavit, and, of course, a judgment without citation may be shown to be invalid if properly attacked. The following authorities appear to treat such omission as a jurisdictional defect: *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; *Iams v. Root* (Tex. Civ. App.) 55 S. W. 412; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Coons v. Throckmorton*, 25 Ark. 60; *Allen v. Smith*, 25 Ark. 495; *People v. Pearson*, 76 Cal. 400, 18 Pac. 424; *Bardsley v. Hines*, 33 Iowa, 157; *Jefrey's Heirs v. Hand's Heirs*, 37 Ky. 89; *Murdock v. Hillyer*, 45 Mo. App. 287; *Gilmore v. Lampman* (Minn.) 90 N. W. 1113, 91 Am. St. Rep. 376; *Beckett v. Cuenin* (Colo.) 25 Pac. 167, 22 Am. St. Rep. 399.

This brings us to a consideration of the further question whether or not the failure to file a proper affidavit in the original tax foreclosure suit can be shown in this, since the attack is collateral. We are not unmindful of the rule laid down in the Texas cases above cited, to the effect that on collateral attack the presumption is that a sufficient affidavit was filed to authorize the issuance of the citation by publication. But we understand the rule to be that this is a rebuttable presumption unless rebutting it involves in some way the contradiction of the record. As before shown, the judgment does

not recite the filing of an affidavit or service upon the defendant in the action, but, on the contrary, the record does affirmatively show an insufficient affidavit (the sworn petition), and in such case the inference is that the service was had upon the defective affidavit, the only one in the record, and the presumption above referred to is therefore overcome. This we understand to be the application of the exact rule announced by us in the cases of *Earnest v. Glaser*, 74 S. W. 605, 7 Tex. Ct. Rep. 712, and *Babcock v. Wolfarth*, 80 S. W. 642, 10 Tex. Ct. Rep. 164, in each of which cases a writ of error was refused.

Holding as we do in these respects, we affirm the judgment of the district court irrespective of his other conclusions of law, which we find it unnecessary to decide, or even to discuss.

**Affirmed.**

MISSOURI, K. & T. RY. CO. v. GARRETT.\*  
(Court of Civil Appeals of Texas. June 23, 1906. Rehearing Denied June 23, 1906.)

**1. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.**

Where a paragraph of the charge defining the measure of damages recited that it was applicable only in the event the jury had previously found that defendant, through its failure to exercise ordinary care, delayed and roughly handled the cattle in question en route, resulting proximately in their injuries, it was not objectionable as on the weight of evidence.

**2. CARRIERS—TRANSPORTATION OF LIVE STOCK—INJURIES—ACTION—INSTRUCTIONS.**

In an action against a carrier for injuries to live stock, an instruction directed a verdict for defendant in the event the jury found the cattle were not delayed and roughly handled, and the succeeding paragraph charged that, if plaintiff failed to show by a preponderance of the evidence, his right to recover, the jury should find for the carrier. *Held*, that the previous paragraph was not objectionable as directing a verdict for defendant, if the jury found it was not guilty of the negligence charged.

**3. SAME—EVIDENCE.**

Where, in an action for injuries to cattle shipped, the cattle were shown to have had a market value at destination, evidence as to what plaintiff paid for the cattle was immaterial.

**4. SAME.**

Where, in an action for injuries to cattle shipped, whether they were injured on the line of another railroad company was not an issue, it was not error for the court to refuse to permit defendant to prove a paragraph of plaintiff's original petition alleging that the cattle were so injured.

**5. TRIAL—CUMULATIVE EVIDENCE—EVIDENCE OF WITNESS AT FORMER TRIAL.**

Where the evidence of a witness at a former trial was substantially the same as that given at a subsequent trial, it was not error for the court to refuse to permit the introduction of his former testimony.

Appeal from District Court, Midland County; Jas. L. Shepherd, Judge.

Action by H. N. Garrett against the Mis-

\*Writ of error denied by Supreme Court Oct. 11, 1906.

souri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

See 87 S. W. 172.

Whitaker & Gibbs, for appellant. Camp & Caldwell, for appellee.

**SPEER, J.** From the context of the charge we think it apparent that the jury could not have been misled into the error of allowing damages against appellant for injuries received by appellee's cattle prior to the time it received the shipment at Denison.

Paragraph 7, defining the measure of damages, is not on the weight of evidence, as insisted by appellant, since the paragraph itself is applicable only in the event the jury have previously found that appellant, through its failure to exercise ordinary care, delayed and roughly handled the cattle en route, resulting proximately in their injuries.

While paragraph 8 directed the jury to return a verdict for the defendant in the event they found that the cattle were not delayed and roughly handled, a verdict in appellant's favor was not made to depend upon such finding, but in the succeeding paragraph the jury were also told that, if the appellee failed to show by a preponderance of the evidence his right to recover, they would find for the company. Paragraph 8 certainly is not incorrect in directing a verdict for the defendant if the jury found from the evidence it was not guilty of the negligence charged.

There was no error in refusing to permit appellant to prove what appellee had paid for the live stock in question at Odessa, Tex. The cattle are shown to have had a market at their destination and under such circumstances the evidence tendered was altogether immaterial. *Railway v. Dishman*, 91 S. W. 828, 14 Tex. Ct. Rep. 650. Whether or not the cattle were injured while on the line of the Texas & Pacific Railway Company under the pleadings in the case was not an issue, and the court therefore committed no error in refusing to permit appellant to introduce in evidence the paragraph of appellee's original petition setting forth such injuries. The allegations were substantially the same in the pleading upon which this trial was had. Neither was there reversible error in the court refusing to permit appellant to introduce in evidence the testimony of the witness Elmer Voliva given upon a former trial of the case, since his testimony upon that trial was substantially the same as that given upon the last; the greatest difference being that he was not cross-examined as thoroughly as he was upon the former trial.

An examination of the record discloses that there is sufficient evidence to support the verdict and judgment for the amount of damages awarded. All assignments are therefore overruled, and the judgment is affirmed.

**ALLEN et al. v. ANDERSON & ANDERSON.**

(Court of Civil Appeals of Texas. April 21, 1906. On Rehearing, June 23, 1906.)

**1. VENDOR AND PURCHASER — BONA FIDE PURCHASER—FORM OF CONVEYANCE.**

A deed reciting that, in consideration of a specified sum paid by the grantee to the grantor, the grantor has sold, conveyed, and by the deed sells and conveys to the grantee property described, and binding the grantor to deed, "quitclaim, assign, sell and transfer" the premises to the grantee, is more than a quitclaim deed, and conveys the premises to the grantee, who is entitled to the protection of a bona fide purchaser, where he paid the purchase money without notice of the claim of a third person.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 467-473.]

**2. SAME—PURCHASER FROM BONA FIDE PURCHASER.**

A purchaser from a bona fide purchaser for value holding under a warranty deed is entitled to claim the same protection the bona fide purchaser would have been entitled to if he had not sold.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 580-582.]

**3. SAME — NOTICE OF DEFECTS IN TITLE — EFFECT.**

A purchaser was given 20 days in which to look up the title, and was authorized to reconvey the property to his grantor on finding that the title was defective. The purchaser found a defect in the title, but did not reconvey. *Held*, that the notice of the defect was not notice of another defect.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 477-494.]

**On Rehearing.**

**4. APPEAL—REVERSAL OF JUDGMENT.**

Where it does not conclusively appear that the case was fully developed in the trial court, the court on appeal, instead of rendering judgment, must remand the cause for another trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4597-4599.]

**5. EVIDENCE—HEARSAY.**

Proof that a grantor stated to another that he notified his grantee at the time of the making of the conveyance that a third person had an interest in the land conveyed is inadmissible as hearsay.

**6. TRIAL—ISSUES—INSTRUCTIONS.**

Where the issue was whether a purchaser was a bona fide purchaser, as against one claiming an interest in the land by reason of a contract made by a former owner, an instruction that the deed to the purchaser was not binding on a minor, who during minority had conveyed the premises to a remote grantor, unless she ratified the deed after attaining full age, was outside the issue and misleading.

**7. INFANTS—CONVEYANCES—RATIFICATION.**

An infant conveyed land which a third person claimed as a remote grantee. The infant, on attaining majority, conveyed the land for a valuable consideration to the third person. *Held*, that the conveyance to the third person did not ratify the former deed, but vested in the third person the infant's title.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Action by Anderson & Anderson against Sim Allen and others. There was a judgment for plaintiffs against defendants S. E.

Fowler and D. H. Thompson, and in favor of defendant Allen against plaintiffs, and defendants Fowler and Thompson appeal. Reversed and remanded.

Templeton & Harding, for appellants. Anderson & Anderson, for appellees.

**BOOKHOUT, J.** This was a suit brought in the district court of Ellis county, Tex., by Anderson & Anderson against Sim Allen, S. E. Fowler, and D. H. Thompson, for an undivided one-half interest in a certain lot in Waxahachie, and for rents. Judgment was rendered for appellees Anderson & Anderson for a half interest in the land, and for \$27 rents against S. E. Fowler and D. H. Thompson, and in favor of defendant Sim Allen against plaintiffs. On the 23d of April, 1900, George Connor and Katie Connor conveyed to C. A. Harris the lot in dispute. It is known as the Monroe Connor homestead, 84x80 feet on Main street in the town of Waxahachie. Harris borrowed money from Sim Allen and gave him a deed of trust on the lot. Harris having defaulted in the payment of the debt, the deed of trust was foreclosed, and Allen purchased the property. Subsequently Allen employed the law firm of Anderson & Anderson to recover possession of the lot, and, in payment of their services rendered and to be rendered, Allen and said firm entered into the following contract, to wit: "The State of Texas, Ellis County. This agreement between Sim Allen of the first part and Anderson & Anderson of Waxahachie, Texas, of the second part, witnesseth, that for and in consideration of legal services rendered and to be rendered in connection with the suit for the Monroe Connor place in Waxahachie, in suit of Sim Allen v. C. A. Harris by said Anderson & Anderson, said Allen does sell to said Anderson & Anderson one-half of the lot described in said suit and said Anderson & Anderson takes said half in lieu of their fee. Witness our hands this 17th June, 1901. Sim Allen. Anderson & Anderson, per E. P. A. Witness: L. Keplinger, Wm. Keplinger." This contract was never recorded. Judgment was rendered in favor of plaintiff on May 21, 1901, in the case of Sim Allen v. Harris, and a writ of possession was issued by virtue of which Allen was placed in possession of the property. On December 4, 1901, Sim Allen sold and conveyed the entire lot to S. E. Fowler for the consideration of \$125. S. E. Fowler on December 9, 1901, conveyed the lot by warranty deed to A. J. Proctor in consideration of \$300. March 14, 1902, A. J. Proctor conveyed the lot to D. H. Thompson for the consideration of \$300. This deed recites that, "in consideration of the sum of \$300 cash," paid by D. H. Thompson to the grantors, A. J. Proctor and wife, they "have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said D. H. Thompson, of the county of Ellis, state of Texas," the property in controversy, fully describing the same;



"to have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in any wise belonging unto the said D. H. Thompson, his heirs and assigns forever, and we do hereby bind ourselves, our heirs, executors and administrators to deed, quitclaim, assign, sell and transfer all and singular the said premises unto the said D. H. Thompson, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof." This suit was filed May 8, 1902.

The appellant Thompson contends that he purchased the land for value and without notice of the contract between Slim Allen and Anderson & Anderson, or any claim by them to the land, and hence is an innocent purchaser. The appellees deny this and say that the deed from Proctor to Thompson, under which Thompson claims title, is a quitclaim deed, and for this reason he is not entitled to be protected as an innocent purchaser. To this Thompson makes reply that the deed to him he is not a quitclaim, but a deed conveying the land itself; that, if this is not so, then his vendor, A. J. Proctor, purchased the land through a warranty deed and paid value for it without notice of the claim of appellees and was an innocent purchaser; and that he (Thompson) is entitled to the benefit of the bona fides of his vendor. Is the deed from Proctor to Thompson a quitclaim deed? If so, then Thompson is not entitled to protection as a good-faith purchaser under that deed; but this fact would furnish no reason why he would not be entitled to claim the benefit of the good faith of his vendor, if in fact Proctor was a good-faith purchaser. The conveyance to Thompson contains the words "deed, quitclaim, assign, sell, and transfer all and singular," etc. Does the use of the word "quitclaim" show that this is a quitclaim deed in the strict sense of that species of conveyance? In the case of *Garrett v. Christopher*, 74 Tex. 454, 12 S. W. 67, 15 Am. St. Rep. 850, it is said: "Whether the conveyance be a quitclaim or not is dependent upon the intent of the parties to it, as that intent appears from the language of the instrument itself. If the deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed, and will not sustain the defense of innocent purchaser. If it appears that it was the intention to convey the land itself, then it is not such quitclaim deed, although it may possess characteristics peculiar to such deeds. The use of the word 'quitclaim' does not restrict the conveyance, if other language employed in the instrument indicates the intention to convey the land itself." It held in that case that the instrument conveyed the land, and that one claiming under it who had paid the purchase money, without notice, actual or constructive, of any outstanding claim, was an innocent purchaser. The

conveyance passed upon in the case of *Richardson v. Levi*, 67 Tex. 359, 3 S. W. 444, and set out on page 362 of 67 Tex., page 445 of 3 S. W., used the words, "grant, bargain, sell, demise, release, and forever quitclaim." The instrument was held to be a conveyance of the lot in question, as distinguished from the interest of the grantor in the lot, and that one holding under such a deed and having paid the purchase money was an innocent purchaser and entitled to protection as such against a prior unregistered deed, of which he had no notice. See, also, *Harrison v. Boring*, 44 Tex. 255; *Taylor v. Harrison*, 47 Tex. 454, 20 Am. Rep. 304. We think it clear that the instrument under which Thompson claims is more than a quitclaim deed; that by it the parties intended to, and did, convey the lot. This being so, if when Thompson paid the purchase money he had no notice, actual or constructive, of appellees' claim, then he is an innocent purchaser and entitled to be protected as such. It is clear, as appellees' contract had not been recorded, that Thompson had no constructive notice of the same. He testified, and his testimony is undisputed on this point, that he had no actual notice of the contract between Allen and appellees, or that appellees were claiming the land. Again, the undisputed evidence shows that Proctor, the immediate vendor of Thompson, purchased and paid for the lot without any notice of appellees' claim to the same, and it is conceded that Proctor held a warranty deed, and was a purchaser for value and under the facts we hold he was an innocent purchaser. This being so, the appellant Thompson was entitled to claim the bona fides of his vendor and have the same protection Proctor would have had if he had not sold and the suit was against him.

It is insisted by appellees that Proctor, the vendor of Thompson, ought not to be held an innocent purchaser for the reason that when the lot was conveyed to him he was given 20 days to look up the title, and that before the 20 days had expired he had notice that the title was defective, and could have exercised his right to reconvey the property to Fowler, his vendor, and get back his money. The defect that Proctor had notice of was not the claim of appellees to the lot, but a defect resulting from the fact that Katie Connor, one of the vendors in the deed to Harris, was, at the time she signed the deed, a minor. Notice of this defect was not notice of appellees' claim to the lot, and they could derive no benefit by reason thereof. The fact that Proctor could, upon the discovery of such defect, have required Fowler to pay back the consideration received by him, upon reconveying the lot to him, cannot avail the appellees. The record shows that Thompson did on September 18, 1903, procure a deed from Katie Connor for the consideration of \$25. Under the facts as recited in this opinion, the trial court should have instructed a verdict for the defendants, appellants here. The case having been fully

developed, and it not appearing probable that there would be any change in the evidence if the cause were remanded, we will proceed to render such judgment as should have been rendered by the trial court.

The judgment is reversed, and judgment here rendered for D. H. Thompson for the lot, and in favor of all the appellants for their costs.

Reversed and rendered.

#### On Rehearing.

The appellees have filed a motion for rehearing, in which it is strenuously insisted that this court erred in rendering judgment here for appellants, for the reason this case was tried by a jury in the court below, and there was no serious contention made in that court that D. H. Thompson was entitled to recover as an innocent purchaser, and that we should not have rendered, but remanded, the case. We rendered judgment, believing that the case had been fully developed, and that there would be no change in the evidence upon another trial. We have come to the conclusion that it does not conclusively appear that the case was fully developed in the trial court, and that, instead of rendering judgment for appellants, we should have remanded the cause for another trial. Having concluded to grant the motion for rehearing and to remand the cause, it becomes necessary to consider some of the assignments not discussed in the original opinion.

The assignment of error complaining of the admission of evidence of the statement by E. P. Anderson, Sr., that Sim Allen told him he had notified Fowler of the interest of Anderson & Anderson, and of Kate Connor, when he sold the land to Fowler, is sustained. This evidence was hearsay, and, it having been objected to on that ground, the objection should have been sustained and the evidence excluded.

The several assignments of error complaining of the court's charge as to the effect of the title deeds in Thompson's chain of title are well taken. These assignments relate to paragraphs 2, 3, 4, 5, 6, and 8 of the charge, and in each of said paragraphs the jury are told, in substance, that the effect of the deed is to vest all the title of the vendor in the vendee to the land in controversy, "but was not blinding on Kate Connor, unless she ratified her former deed to C. A. Harris after she became 21 years of age." Kate Connor and George Connor had sold and conveyed the land to C. A. Harris. At the time Kate Connor was a minor. This qualification to each of said deeds was foreign to any issue in the case, and had a tendency to mislead the jury and was error.

On September 18, 1903, Kate Connor conveyed to the defendant D. H. Thompson, by general warranty deed, her interest in the property in dispute. The court charged the jury that the deed from Kate Connor to D.

H. Thompson, dated September 18, 1903, in evidence before them, had the legal effect to ratify her former deed to C. A. Harris, and related back and vested in Sim Allen the full legal title in said land at the time he recovered judgment against C. A. Harris. Kate Connor conveyed to Thompson her title to the property absolutely for a valuable consideration, and such conveyance did not relate back and ratify her former deed to Sim Allen and vest in Sim Allen the full legal title to the land at the time he recovered judgment against C. A. Harris.

The motion for rehearing is granted, and the judgment is reversed, and cause remanded.

#### INTERNATIONAL & G. N. R. CO. v. PLOEGER et al.

(Court of Civil Appeals of Texas. June 27, 1906.)

##### 1. RAILROADS—PERSONAL INJURIES—PERSONS WALKING ON TRACK—CONTRIBUTORY NEGLIGENCE.

Deceased was walking along a railroad track at a point where he could have seen an approaching train at a distance of over half a mile, and where he could with perfect safety and convenience have left the track and walked by the side of it. Deceased knew that it was nearly train time, and had good sight and hearing, but continued on the track until he was struck by a train coming from behind. *Held*, that he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1294.]

##### 2. SAME—DISCOVERED PERIL.

Where, in an action against a railroad company for the death of a person killed while walking on the track, it appeared that deceased was guilty of contributory negligence as a matter of law, it was necessary for plaintiff in order to recover, to prove that, after the operatives of the train discovered that deceased was in danger, they failed to use all the means at hand consistent with the safety of the train, to stop it.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1324, 1325.]

Appeal from District Court, Williamson County; V. L. Brooks, Judge.

Action by Laura E. Ploeger and others against the International & Great Northern Railroad Company. On remand from the Supreme Court with answers to certified questions. Reversed and remanded.

S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for appellant. O. E. Roberts, for appellee.

FISHER, C. J. The judgment heretofore rendered by this court reversing and remanding this cause will be set aside, and the judgment will again be reversed and remanded; which judgment shall become operative and effective from this date, to wit. June 27, 1906. It is not necessary that we should go over and repeat the nature and result of this suit and the issues involved, as they are suf-

Sciently stated in the original opinion. At a previous day of this term this court (93 S. W. 226) reversed and remanded, on account of the error of the trial court in refusing an instruction requested by appellant to the effect that if the jury believed that the deceased entered upon the track immediately in front of the rapidly moving train, to find for the defendant. There was a dissent from this conclusion, whereupon the difference was certified to the Supreme Court. That court in its opinion delivered May 23, 1906 (93 S. W. 722), held with the dissenting justice, on the ground that the doctrine announced in *Sanches v. Railway*, 88 Tex. 117, 30 S. W. 431, applied, which is to the effect that the engineer, when he sees one preparing to go upon the track in front of a moving train, so as to put himself in a place of danger, must sound the whistle or cause the bell to ring as a warning of the approach of the train. In the *Sanches Case* it was held that the injured party in going on the track was guilty of contributory negligence, but as the engineer testified that he saw him when he started toward the track, discovered peril would commence from that time, and a warning of the approach of the train should have been given. *Sanches* had his back towards the train, and did not hear or see its approach. And it is clear that if the facts had shown that he was aware of the near approach of the train, the court would never have held that the duty rested upon the engineer to give him notice or warning of a condition which he was well aware of. The *Sanches Case* announces a familiar principle, and we have no war to make with that doctrine; but its application to the facts of this case is so unauthorized and opposed to the deductions and conclusions to be drawn from the evidence in the record, that the ruling of the Supreme Court can only be explained upon the ground that the certificate of dissent did not state all the facts, or that the court's attention was not pointedly called to the distinguishing feature of this case from the *Sanches Case*, or through the rush of business the facts were not sufficiently inquired into in order to see that the *Sanches Case* did not apply.

No one will doubt the proposition that if *Sanches* saw or heard the near approach of the train that struck him when he started towards the track, the Supreme Court would not have held that any duty rested upon the engineer to give him warning by sounding the whistle or ringing the bell. The duty to give the warning is to let one who is about to place himself in a position of peril know of the approaching train, but if he is aware of this fact, no duty to ring the bell or sound the whistle would exist, unless it is to be expected that the noise so occasioned would produce the same effect upon a man as it would upon a cow near the track; that is, occasion a condition of fright, with the hopeful expectation that he would curl his meta-

phorical tail over his back and "light out" for home. Although it may be expected that there will be occasional exhibitions of judicial eccentricity, it is clear that the Supreme Court in this case intended no such absurdity as this. The question raised by the charge which this court held should have been submitted was in accord with the theory advanced by the evidence of the defendant that the deceased was not walking on the track when struck, but was on the public road or street, and approaching the track with a view of going over the same immediately in front of the rapidly approaching train. When he was first seen by the engineer he was within a few feet of the track, stooping over going towards it, and was within about 70 feet of the rapidly approaching train, and was immediately struck when he reached the track. This was in the day time, between 11 and 12 o'clock, and there was nothing whatever to obstruct the view of the train, and the evidence shows that there was no impairment of his ability to see or hear. The position of the deceased and the evidence relating to the physical condition and surroundings, and the nearness of the train when he started to go upon the track, shows beyond dispute that the deceased saw or heard the train, and must, in the nature of things, have discovered its near approach when first seen by the engineer, and when it became apparent that he was moving towards the track. To hold otherwise, would be to shut our eyes to the physical facts and to base ruling upon an assumption opposed to reason. And if it had occurred to us that the contention that the *Sanches Case* was applicable would be seriously considered, we would have fully set out the facts, and made a finding upon that question to the effect as just stated. The defendant had the right to have a charge submitted according to the theory raised by its evidence, and if the evidence shows that the deceased saw or heard the near approach of the train when he was seen by the engineer to start towards the track, a place of danger, that theory should not have been incumbered with an instruction to the effect that the engineer rested under the duty to sound the whistle or ring the bell. The deceased in this case, as was the party injured in the *Sanches Case*, and in the other cases to be noticed, was guilty of contributory negligence as a matter of law, which phase of the question will be discussed in another part of this opinion; and if this is true, of course, no duty upon the part of those operating the train would arise until the peril or danger of the deceased was discovered, or until it was discovered that he was about to put himself in a position of danger. And we repeat that, when this situation arose, the conclusion is irresistible that the deceased was aware of the near approach of the train; consequently, it was useless to give him warning of that fact. What we have said expresses the views of

the writer and Associate Justice EIDSON, not for the purpose of making this a ground of reversal, but merely as a criticism of an opinion that we believe to be clearly erroneous, which, nevertheless, we must follow and accept as the law of the particular question decided.

But we now approach a question upon which we are agreed that reversible error is shown. Since the original disposition of this case by this court, the Supreme Court has decided *Railway v. Matthews*, 93 S. W. 1068, 15 Tex. Ct. Rep. 958, and *Railway v. Edwards*, 93 S. W. 106, 15 Tex. Ct. Rep. 681, both of which cases are applicable to the facts of this case; and when applied clearly demonstrate that the deceased, when killed and immediately prior thereto, was guilty of contributory negligence. We can concede that the evidence is sufficient to show that at the time he was walking on the track he was a licensee and not a trespasser. In the *Matthews* Case it is held that if one is rightfully upon the track walking at a place where he has the right to walk by reason of a license, permission, or consent from the railway company, he must, nevertheless, exercise ordinary care for his own safety; and if at the place where he was struck there is a convenient way parallel with the track upon which he can walk, and he would be put to no inconvenience in availing himself of such way, when circumstances are such as to indicate that a train is approaching or is likely to approach, and he continues to remain on the track and is struck by the train, he would be guilty of contributory negligence. It might be conceded that along that portion of the track that the deceased was walking until the Sloan street crossing was reached there was no pathway parallel with the track upon which the deceased could walk; but the facts in the record, as indicated by the photographic views of the Sloan street crossing, irresistibly lead to the conclusion that when the deceased reached that crossing he would have stepped from the track and found a safe and convenient way on the street parallel with the track upon which he could walk. The crossing is shown to be not less than 60 feet wide; just how far between the two stock gaps the evidence does not definitely show. He was struck and killed when on the crossing, and the weight of the evidence tends to place him about the center of the crossing when he was struck. There is some other evidence which tends to show that he was a little distance north of the center of the crossing; and, according to the plaintiffs' theory, he was walking on the track with his back to the approaching engine when he was run down and killed.

From the length of time that he had been working at the brick yard, and passing along the track to and from that place to the town of Taylor, and other evidence in the record, shows that he must have been familiar with the movements and the schedule time of

trains running over that particular portion of the track. The train that struck him was a regular passenger, and, according to the evidence of the railway people, was on time. There is some evidence tending to show that it was a few minutes late, but however this may be, it cannot be denied but what the deceased must have known that the train was due, and that it was likely to come at any moment. He was struck in the daytime, between 11 and 12 o'clock; and the evidence shows that there was no impairment of his ability to see and hear. Admit, as contended by the plaintiffs, that no signal or warning was given of the approach of the train, and that the deceased was relying upon such warning in order that he might have an opportunity to leave the track with safety. If this is true, it would not relieve him from the imputation of negligence; for, as held in the *Edwards* Case, reliance upon the fact that the railway company will do its duty would not excuse one situated as was the deceased from the exercise of ordinary care for his own safety. If the plaintiffs' theory is correct, that he was a licensee, and was walking on the track with his back towards the approaching engine, still when he reached a place on the track where he could walk with safety, and without inconvenience have left it, knowing that the train would likely approach, and which fact he could have ascertained by the exercise of the slightest care, he was guilty of negligence in remaining in his dangerous situation. As bearing upon this question the evidence shows that there was nothing to obstruct the view of the approaching train, and it could have been seen for over half a mile. It was coming rapidly and on schedule time, according to the great weight of evidence; or at least, the conclusion should be indulged that it was to be expected at any moment. It was traveling, according to the testimony, from 15 to 30 miles an hour. What we have said is with reference to the situation of deceased when considered from the standpoint of the plaintiffs' evidence. We will now consider his conduct in the light of the evidence offered by the appellant. It was the contention of the appellant that the deceased was not on the track when first discovered by those operating the train; that is, the engineer and the fireman, but that he was on the street or road, and that when the train approached in about 70 feet of the crossing the deceased was discovered by the engineer a few feet from the track in a stooping position going toward the track from the street. When he went on the track with the train so near which he could and should, by the exercise of the slightest care, have discovered, he was guilty of contributory negligence. This is apparent from both the *Sanchez* and the *Edwards* Cases. Now, if he was guilty of contributory negligence, then the only issue left in the case is one of discovered peril; and, in order for the plaintiffs to recover, the burden rested upon

them to establish the fact that after the peril had been discovered, the engineer and those in control of the engine failed to employ all means at hand with safety to the train and the passengers and employes to stop it in order to prevent running him down. And if the deceased was guilty of negligence those in control of the train rested under no duty to discover his presence on the track or to discover his situation of peril. But the duty only arose, as before said, when the peril or dangerous situation was discovered, or when he was about to put himself in a dangerous situation. *Ft. Worth & Denver City Ry. Co. v. Shetter*, 94 Tex. 199, 59 S. W. 533; *Texas & Pacific Ry. Co. v. Breadow*, 90 Tex. 27, 36 S. W. 410; *M. & K. T. Ry. Co. v. Magee*, 92 Tex. 616, 50 S. W. 1013.

The fourth paragraph of the charge of the court instructed the jury that the servants of the defendant rested under the duty of maintaining a lookout to discover the presence of the deceased on the track. From what we have said, of course, it was error to give this instruction, and for this error the judgment will be reversed, and the cause remanded.

Reversed and remanded.

#### WETZ et al. v. SCHNEIDER et al.

(Court of Civil Appeals of Texas, March 7, 1906. On Rehearing, June 27, 1906.)

#### 1. WILLS — UNDUE INFLUENCE — EVIDENCE — ADMISSIBILITY — TESTATOR'S DECLARATIONS.

Declarations of a testator are not admissible as evidence of undue influence, or of the truth of the facts stated by him, but only as manifestations of his mental condition.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 415-420.]

#### 2. SAME.

In a will contest proceeding, evidence examined, and held not to tend to prove fraud or undue influence on the part of the proponents of the will.

On Rehearing.

#### 3. SAME.

Where, in proceedings for the contest of a will on the ground of undue influence, the undisputed evidence shows testatrix to have been possessed of a strong intellect, evidence is not admissible of declarations by her not tending to show that her mind was capable of being subjected to the control of others, so that she did not follow her own wishes in disposing of the property.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 436.]

James, C. J., dissenting in part.

Appeal from District Court, Guadalupe County; M. Kennon, Judge.

Will contest by Louisa Schneider and others against Jacob Wetz and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Ogden & Brooks, J. M. Woods, H. M. Wurzbach, and F. J. Maier, for appellants. Dibrell & Mosheim and Adolph Seidemann, for appellees.

NEILL, J. Aside from declarations of the testatrix and her conversations with others, the evidence in this case is substantially the same as it was upon the trial at which the judgment first appealed from was rendered. Upon that appeal the evidence was fully stated, carefully considered, thoroughly discussed, and the opinion reached, from an application of the law, as we understand it, to the facts, that the evidence was insufficient to show that the will sought to be probated was either the product of fraud or undue influence. *Wetz v. Schneider* (Tex. Civ. App.) 78 S. W. 394. See *Patterson v. Lamb* (Tex. Civ. App.) 52 S. W. 98; *McIntosh v. Moore* (Tex. Civ. App.) 53 S. W. 611; *Barry v. Graciette* (Tex. Civ., as those in the record before us. The law then enunciated, as applicable to the facts, is too well settled to be disturbed by this court. It is unnecessary for us to reiterate the evidence, or enter into a discussion of it, or to repeat the principles of law pertinent to it; for nothing can be added to what was said in our opinion on the prior appeal as to the law of the case as applicable to the facts then presented, which were substantially the same App.) 71 S. W. 309; *Franklin v. Boon* (Tex. Civ. App.) 88 S. W. 263; *Trost v. Dingler*, 118 Pa. 259, 12 Atl. 296, 4 Am. St. Rep. 593; *Englert v. Englert*, 198 Pa. 326, 47 Atl. 940, 82 Am. St. Rep. 808; *Masterson v. Berndt* (Pa.) 56 Atl. 866; *O'Brien's Appeal* (Me.) 60 Atl. 880; *Yorty v. Webster* (Ill.) 68 N. E. 1069; *Woodman v. Illinois Trust & Savings Bank* (Ill.) 71 N. E. 1099; *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84. It is sufficient to say our opinion remains unchanged.

Declarations of a testator are not admissible as evidence that he was unduly influenced in making the will, nor as evidence of the truth of the facts stated by him, but only as external manifestations of his mental condition. *Kennedy v. Upshaw*, 64 Tex. 411; *McIntosh v. Moore* (Tex. Civ. App.) 53 S. W. 612; *Campbell v. Barrera* (Tex. Civ. App.) 32 S. W. 725; *Schouler on Wills*, § 193, 11 Am. & Eng. Enc. Law (1st Ed.) 156. There was no issue as to the mental capacity of the testatrix to make the will, and, as her declarations which were introduced in evidence did not raise such issue, we fall to see how, under the law, they could affect any other issue in the case.

The testimony of the witness Lempke to the effect "that he heard Henry Stolte tell the testatrix that Louisa Schneider had sent the valentine, and that he heard Herminz Wetz tell her that she ought to have no more doubts about who sent the valentine, as her mother and Mrs. Nuhn knew that Louisa Schneider had sent the valentine," if true, does not, either of itself, or taken in connection with all the evidence in the case, tend to prove fraud or undue influence on the part of the proponents or any of them. But, considering the time and circumstances when and under which the witness testified such statements were made, as well as the testimony of all others

who he says were present on the occasion, it is shown to a moral certainty that such testimony is untrue.

Because the evidence is wholly insufficient to sustain the verdict, the judgment is reversed, and the cause remanded.

FLY, J., concurs. JAMES, C. J., dissents.

#### On Rehearing.

NEILL, J. Though this motion was filed some time ago, we have postponed passing upon it until now, in order that we might have time to give it full consideration. After viewing it in the light of the law enunciated by our courts, of those of other jurisdictions, and the most eminent text-writers upon the principal question involved, we must say that, if an opinion about which no doubt has or can be entertained may be strengthened, ours has been.

The contention of appellees that we erred in holding that "declarations of a testator are not admissible as evidence to prove that he was unduly influenced in making the will, nor as evidence of the facts stated by him," has no foundation in the law for its support, and as long as it is imbedded in principles of justice and reason never will have. The question here involved and the cases bearing upon it received an exhaustive examination in *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, and the rule there laid down is that where a will is disputed on the ground of fraud, duress, imposition, or other like causes, not drawing in question the testator's mental capacity at the time of its execution, neither prior nor subsequent declarations are competent evidence. In *re Calkins*, 112 Cal. 301, 44 Pac. 577, it is said that "in order to establish that a will has been executed under undue influence it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state and give a picture of the condition of his mind contemporaneous with the declarations themselves. Whenever the condition of the mind is a fact which is desirable to prove, it may be established by such evidence as is competent to that purpose. The mental condition of the individual is made manifest to others by his statements, declarations, conversations, as well as by his conduct, and, when the state of the testator's mind at the time of executing the will is the fact to be shown, his contemporaneous declarations or statements furnish the most satisfactory evidence of the fact." Upon the same subject it is said in *Re Ar-*

nold's Estate (Cal. Sup.) 82 Pac. 256: "Whenever the declarations of the testator constitute narratives of the exercise of undue influence or of the effect of such influence upon him, they are inadmissible for that purpose, whether made before or after the execution of the will. If made at the time of its execution, they may be admissible if they are so made as to constitute a part of the *res gestæ*; but if not, although made at the time, they are no more competent than if made subsequently. If they are such a character that they also reveal his condition of mind, they may be admissible for that purpose, though not of the *res gestæ*; but their effect must be carefully limited to questions of his condition of mind, and they must not be considered as narratives, of the exercise or the effect of undue influence"—citing *In re McDevitt*, 95 Cal. 26, 30 Pac. 101; *Estate of Donovan*, 140 Cal. 390, 73 Pac. 1081; *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008; *Estate of Gregory*, 133 Cal. 137, 65 Pac. 315; *Haines v. Hayden*, 95 Mich. 347, 54 N. W. 911, 35 Am. St. Rep. 566; *Coghill v. Kennedy*, 119 Ala. 664, 24 South. 459; *Tyler v. Gardiner*, 35 N. Y. 578.

None of the declarations or acts of the testatrix tend in the least to show that her mind was capable of being, and was in fact, so subject to the control of another person that she did not follow her own normal wishes and plans in the disposition of her property but yielded to the volition of another. On the contrary, the undisputed evidence shows that she was possessed of a strong and vigorous intellect, in full possession of her faculties when she executed the will in question, and fully capable of exercising her own desires. The testatrix under the law had the right to make the will, she made it in compliance with all the forms of the law, the evidence shows she was competent to make it, and in making it she exercised her own free will and volition, uninfluenced by the word, act, or gesture of anybody else. In the opinion of the majority of the court there is an utter lack of evidence to support the verdict. This was so patent to us when the former opinion was written, that we omitted to express an opinion upon another assignment of error, though they were considered and deemed not well taken.

The motion is overruled.

JAMES, C. J. (dissenting). Having noted my disagreement with the disposition of the case as made by the main opinion and the opinion for rehearing, I shall state, first, that my dissent extends to the ruling that the declarations of the testatrix were incompetent for any purpose connected with the issue of undue influence; and, second, to the ruling that the testimony in this record is insufficient to warrant finding that undue influence exerted by the proponents, or some of them, was instrumental in causing the testamentary discrimination against appellee. I concede the rule to be that the prior or sub-

sequent declarations of a testator are incompetent as primary or direct proof that he was unduly influenced in making this will, or of the facts stated by him. But I think, and it is also shown in the opinion upon rehearing, that such testimony is admissible to "illustrate the mental state of the testator and to give a picture of the condition of his mind" at the time of making the declarations. The opinion seems to hold that if the testator is shown to have been possessed of testamentary capacity, or of "strong and vigorous intellect," as in this case, such testimony can be of no effect. It appears to me that a person may be of strong and vigorous intellect, and at the same time be of such temperament or mental structure as renders him easily susceptible to particular passions or influences. This mental fact is one which the jury is entitled to inquire into and consider, in order for them to determine whether or not the person was one who was susceptible to the particular form of influence. As to such fact the expressions, conduct, and declarations of the testator are admitted. Underhill on Wills, § 161. For a clear discussion of the question see *Shaller v. Bumstead*, 99 Mass. 112. Such declarations, however, are not direct evidence of the exertion of undue influence; but in my judgment there was, outside of the declarations, sufficient evidence to warrant the finding that the will, in so far as it related to appellee, was the product of undue influence.

### SCHAFFER v. HEIDENHEIMER.\*

(Court of Civil Appeals of Texas. June 6, 1906.  
Rehearing Denied June 27, 1906.)

#### DEEDS—CONSTRUCTION—DESCRIPTION—FIELD NOTES.

A deed to plaintiff's ancestor described the land as all that certain tract or parcel of land lying in L. county, containing 2,906 acres, consisting of the lower three-fourths of a league of land originally granted by the Mexican government to W. by a certain concession, and conveyed to S. by certain deeds referred to for more particular description. Plaintiff's ancestor executed a deed through which defendant claimed, describing the land as all that tract or parcel of land found to contain 2,906 acres by a recent survey designated, lying and situated in L. county, being "off of" the South three-fourths of a league of land originally granted to W., followed by field notes, after which the deed recited that it was the same land conveyed to plaintiff's ancestor by such previous deed to which reference was made, etc. *Held*, that the latter deed did not indicate an intention on the part of the grantor to convey thereby the entire tract conveyed to him by the former deed, and hence the reference to such former deed therein was ineffective to control the field notes which did not include all of the land conveyed by such former deed.

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Suit by Abraham Heidenheimer against W. E. Schaffer and others. From a judgment for plaintiff, defendant Schaffer appeals. Affirmed.

Baldwin & Christian, for appellant. Jas. B. & Chas. J. Stubbs and J. F. Dabney, for appellee.

**FLY, J.** This suit was instituted by appellee against appellant and several others to recover 417 acres of land in Liberty county, off the south three-fourths of the William Whitlock league of land. The suit was dismissed as to all the defendants except appellant, who pleaded not guilty. A trial without a jury resulted in a judgment in favor of appellee.

Both parties claim through Samson Heidenheimer. Appellant claims through a deed made by Samson Heidenheimer to Victor B. Wilson in which the land is described as follows: "All that certain tract or parcel of land found to contain 2,906 acres by a recent survey made by J. G. Minter lying and being situated in the county of Liberty and state of Texas, being off of the south three-fourths of a league of land originally granted to William Whitlock." The above is followed by field notes, after which it is recited in the deed: "Being the same land which was conveyed to me by Seabrook W. Sydnor, administrator de bonis non of the estate of J. S. Sydnor, deceased, by deed dated December 12th, A. D. 1878, and recorded in Liberty county deed records in Book D, pages 326 to 328, to which deed and the record reference is here made, and the same is made a part hereof. Said deed was recorded in Liberty county, January 24th, A. D. 1879." It was agreed by the parties: "That the defendant William E. Schaffer is now the legal owner of whatever title was conveyed to Victor B. Wilson by the instrument last-mentioned; and, if said deed does not convey to said Victor B. Wilson the entire south three-fourths of said league, then the plaintiff, Abraham Heidenheimer, is the legal owner of whatever interest in the south three-fourths of said league which remained in Samson Heidenheimer, after the conveyance to Victor B. Wilson by Samson Heidenheimer above mentioned." It was also admitted that the field notes in the aforementioned deed did not include a certain portion off of the west end of the south three-fourths of the William Whitlock survey. The sole question presented is: Which should prevail, the description by field notes or the general description following them, which describes the land as that conveyed to the grantor by the administrator? If the description by field notes should prevail, the judgment is correct; but, if the general description with reference to the deed of the administrator should prevail, the judgment should have been rendered in favor of appellant.

Before entering into a discussion of the points at issue we will refer to the description of the land given in the deed of the administrator to Samson Heidenheimer, which may be of some moment in the solution of

\*Writ of error denied by Supreme Court Oct. 11, 1906

the question. It is as follows: "All that certain tract or parcel of land lying and being in Liberty county, state of Texas, containing 2,906 acres, consisting of the lower three-fourths of a league of land originally granted by the Mexican government to William Whitlock, now deceased, by concession of date the 11th day of May, 1831, and which said land was conveyed to John S. Sydnor by Mary Whitlock et al., by deed bearing date the 15th day of April, A. D. 1852, and also including the interest of said John S. Sydnor, deceased, conveyed to him by Robert Whitlock by deed of date the 3d day of September, A. D. 1853, to which two deeds above mentioned reference is here made for a more particular description of said property." It is the rule that every part of a deed must be given effect if possible and the largest estate arising from its terms will be given to the grantee. If there be ambiguity so as to render it susceptible to two constructions, that construction will be given it that is most favorable to the grantee. *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930. It is also the rule that the intent of the parties, as in the case of all contracts, when it can be arrived at from the deed, should prevail, unless contrary to law. *Dev. Deeds*, § 836. The entire deed must be read and such construction given as will, if possible, give effect to every portion of the deed. These rules will be kept in view in construing the deed which forms the basis of dispute in this case.

It appears from the deed of Sydnor to Samson Heldenheimer that although the amount of land was described as 2,906 acres, it was the intention of the grantor to convey three-fourths of the Whitlock league but when the grantee in that deed conveyed the land, it was surveyed presumably for his benefit and it is fully described by the field notes of that survey. We say that it was described by the field notes of that survey, although it is not specifically so stated in the deed. But the clear inference is that those are the field notes used in the deed to Victor B. Wilson. Those field notes describe 2,906 acres of land and the description is clear and explicit. That description is followed by the words "being the same land conveyed to me by Seabrook W. Sydnor," etc., and we do not think they create an ambiguity in the deed. It is not stated that it is all of the land conveyed by Sydnor but the "same land." It was the same land but not all of it. This construction is borne out by the description given before the field notes are set out where the land is described, not as the south three-fourths of a league of land but as "being off of the south three-fourths of a league of land originally granted to William Whitlock." If the whole had been intended the land would not have been described as "being off" the three-fourths of a league. We think it clear that the reference to the deed made by

Sydnor to Samson Heldenheimer was given merely to point out the title and not to supplement or control the description given by the field notes. There is ample authority to sustain this proposition.

In the case of *Brown v. Heard* (Me.) 27 Atl. 182, it is said: "It was contended that the clause in plaintiff's deed, at the end of the particular description of the premises by metes and bounds, 'meaning and intending to convey to the said Heard the same premises conveyed to me,' etc., should enlarge the specific description in it given by metes and bounds. Assuming that the language referred to a larger estate than is included by the metes and bounds given, which is by no means certain, the contention cannot prevail. It is merely a help to trace the title but cannot enlarge the grant." So in the case of *Smith v. Sweat* (Me.) 38 Atl. 554, the words, "meaning and intending to convey the same premises conveyed to me," etc., were used after a description by metes and bounds, and the court said: "There is no ambiguity in these descriptions. Fixed and definite boundaries are given, and these boundaries must prevail, unless we are to attach more importance to a mere reference to source of title, or an intention clause, than to specific descriptions; and this we have seen cannot be done. Words of reference or of explanation or intention never destroy a specific grant." This principle is spoken of by the Maine court as being too well settled to require the citation of authorities. In *Lovejoy v. Lovett*, 124 Mass. 270, after a description by metes and bounds was used the words, "being the same premises conveyed to me by Ezra Holden, by deed dated May 7, 1829," were inserted and it was held that those words should not overcome the inference to be drawn from the other parts of the deed. "Reference is made to the Holden deed, not for the purpose of fixing the metes and bounds, as if describing the lot conveyed, but to show the grantor's chain of title." Citing the Massachusetts case with approval, in *Cullers v. Platt*, 81 Tex. 858, 16 S. W. 1003, the court said: "Where a grantor conveys specifically by metes and bounds, so there can be no controversy about what land is included and really conveyed, a general description as of all of a certain tract conveyed to him by another person, or as in this case, all of a survey except a tract belonging to another person, cannot control, for there is a specific and particular description about which there can be no mistake and no necessity for invoking the aid of the general description. In the case of *Sanger v. Roberts*, 92 Tex. 312, 48 S. W. 1, the Supreme Court discussed the question and said: "We concur in the proposition announced by the Court of Civil Appeals, that when there is a repugnancy between a particular description of a tract of land in a deed and a general description, the former will, as a general rule,



control. In other words, where the premises are described by metes and bounds and that is followed by a reference to some other writing for a further description, the latter cannot ordinarily be looked to to enlarge the former."

There can be no doubt as to the correctness of the judgment of the lower court, and it is therefore affirmed.

# JEFFERSON & N. W. RY. CO. v. DREESON.\*

(Court of Civil Appeals of Texas, May 23, 1906. Rehearing Denied June 27, 1906.)

## 1. DAMAGES — MITIGATION — GRADING CONTRACT—OTHER EMPLOYMENT.

The doctrine that one is not entitled to recover under a breach of contract for personal services, when he obtained other equally remunerative employment during the period of the contract, does not apply to a contract for grading and clearing as so much per yard or acre.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 129.]

## 2. MASTER AND SERVANT — WRONGFUL DISCHARGE—OTHER EMPLOYMENT—BURDEN OF PROOF.

The fact that damages suffered by discharge in violation of a contract for personal services might have been reduced by obtaining other employment is a matter of defense to be shown by the employer.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 43, 54-56.]

## 3. CONTRACTS—GRADING CONTRACT—PLEADING—VARIANCE.

In an action for a refusal to permit plaintiff to carry out a contract for grading and clearing at a specified price, the petition alleged that there was no specified time as to when the work was to be completed. There was evidence claimed by defendant to show that it was a part of the contract that the work should be done as quickly as plaintiff could do it. *Held*, if true, not to constitute a variance.

## 4. SAME—ISSUES.

Where, in an action for a refusal to permit plaintiff to carry out a contract for grading and clearing at a specified price, defendant denied making the contract and did not plead that, if made, it was broken because plaintiff failed to perform within the time agreed, it could not take advantage of a breach by plaintiff in that regard.

## 5. SAME.

A declaration alleged the breach of a contract whereby plaintiff was to have graded and cleared one mile of railroad in one county and three miles in another at a specified price. The answer was a general denial and a special plea of payment as to the one mile and no contract and as to the balance, that plaintiff was so slow and unskillful as to the mile completed that he was not wanted for the other work, that the delay was injurious to defendant, and that plaintiff knew that time was material. *Held* to raise no issue as to whether the work was to be performed in a specified time.

Appeal from District Court, Marion County; P. A. Turner, Judge.

Action by J. J. B. Dreeson against the Jefferson & Northwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. T. Armistead, for appellant. R. R. Taylor, for appellee.

**EIDSON, J.** This is an action by the appellee against the appellant for damages on account of the alleged breach of a contract alleged to have been made by appellant with appellee, whereby appellee was to grade and clear the right of way for a railroad track for appellant for a distance of four miles, one mile of which extended from the defendant's track near Clark & Boyce Lumber Company's mill in Marion county on the track of the Missouri, Kansas & Texas Railway Company in Jefferson, and the other three miles being the extension of the railroad in Cass county, near Cave springs, and running northwesterly three miles, for which appellee was to receive 10 cents per yard for moving the dirt and \$25 per acre for clearing and grubbing the right of way. Appellant answered in the court below by general denial, and specially that it had paid the plaintiff in full for the grading and clearing of the one mile of track in Marion county. As to the three miles in Cass county, the defendant pleaded that it never made any contract with plaintiff therefor; and further, that the plaintiff spent four months in grading and clearing the one mile in Marion county and that it was done in such an unskillful manner, and with so much delay, that the defendant did not want him to do the similar work in Cass county, as it was necessary for it to be done promptly and much sooner than plaintiff could or would do same, and that, as plaintiff had taken four months instead of one to do the work in Marion county, its business was at a standstill in consequence thereof, and that time was material without delaying the completion thereof, all of which was known to the plaintiff. There was a trial before the court and jury, which resulted in a verdict and judgment for appellee in the sum of \$650.

Appellant's first assignment of error complains of paragraph 7 of the court's charge to the jury, which, in effect, instructed them that if defendant broke said contract, and refused to allow the plaintiff to grade the three miles of road in Cass county, and to grub the right of way, to find for the plaintiff whatever amount he would have made if he had been permitted to do said work. Appellant contends that the instruction was error because the plaintiff, in order to show himself entitled to recover, was required to prove that he was unable to procure other remunerative employment during the time he would have been engaged on the work in Cass county. We do not think this insistence of appellant is sound. The doctrine that a party is not entitled to recover under a breach of contract for personal services when he obtained other employment equally as remunerative during the period of the contract does not apply to a case of this kind. This was not a contract for personal services, but

\*Writ of error denied by Supreme Court Oct. 11, 1906.

to do certain stipulated work which may have been performed by the employees of appellee, and he was entitled to the profits that he would have realized in the event he had caused the work to be performed. Besides, even in cases of breach of contract for personal services, the plaintiff is not required to plead and prove that he had been unable to obtain employment after the breach of the contract in order to entitle him to recover. He makes out a *prima facie* case by establishing the wrongful breach of the contract, and if his damages can be reduced by showing that he obtained other remunerative employment during the period of the contract breached, it is a matter of defense to be shown by the opposite party. *Porter v. Burkett*, 65 Tex. 383; *Telegraph Co. v. Bross* (Tex. Civ. App.) 45 S. W. 178.

The court below did not err in refusing to give to the jury appellant's special charges Nos. 1 and 3, because there were no pleadings authorizing these charges. And there was no error in the refusal of the court below to give to the jury appellant's special charge No. 2, as the matter to which it relates was fully covered by the eighth paragraph of the general charge of the court.

We overrule appellant's fifth assignment of error. In our opinion there is no variance between the allegations of appellee's petition and the proof. The petition alleged that there was no specified time as to when the work was to be completed, and there is no testimony in the record showing that there was a specified time agreed upon as to when the work was to be completed. Appellee testified that Clark told him that he wanted him to do the work as quickly as he (witness) could, but it does not appear when he told him this. Clark testified that he was in a hurry for the completion of the work and that he told appellee that he wanted it done quickly and that he was well apprised of that fact; but Clark does not testify that it was a part of the contract that the work should be done as quickly as appellee could do it. Conceding that it was a part of the contract that the work should be done as quickly as appellee could do it, that would not show that it was to be done in any definite or specified time. And further, appellant, having denied that the contract for the three miles in Cass county was made at all, and not having pleaded that if it was made it was breached because appellee failed to perform it within the time agreed upon, is not in a position to take advantage of appellee's failure to comply with that feature of the contract. Under the pleadings of the parties, there was no issue as to whether or not the work was to be performed in a specified time; the only issue being as to whether the contract was made, and, if so, whether appellee was damaged by the breach thereof.

We discover no reversible error in the record, and the judgment of the court below is therefore affirmed.

# KEYSTONE MILLS CO. v. PEACH RIVER LUMBER CO.\*

(Court of Civil Appeals of Texas, May 30, 1906. Rehearing Denied June 27, 1906.)

## 1. BOUNDARIES — CALLS FOR MONUMENTS — DISAPPEARANCE OF MONUMENTS—CALLS FOR DISTANCES—PRESUMPTIONS.

Where bearing trees called for in a survey have disappeared, it will be presumed that the trees had been at the distances called for in the survey.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 146-148.]

## 2. SAME—PRIORITY OF SURVEYS—CONFLICT—BURDEN OF PROOF.

Where bearing trees, called for in a survey, had disappeared, one claiming under a junior survey, seeking to change the construction of the senior survey with respect to the call for distances to the trees, must affirmatively show that the trees were not at the place fixed by the distances called for.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 149-152.]

## 3. SAME—EVIDENCE—LOCATION OF LOST BEARING TREES CALLED FOR IN SURVEY—SUFFICIENCY.

Evidence on the issue of the location of a boundary between senior and junior surveys examined, and *held* not to locate lost bearing trees called for in the senior survey, and the distances called for therein control.

## 4. SAME—FIELD NOTES—ADMISSION IN EVIDENCE WITHOUT OBJECTION AND WITHOUT PROOF OF DEATH OF SURVEYOR.

Field notes of a surveyor, not shown to be dead, admitted in evidence without objection, must be given effect as evidence.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 172.]

## 5. SAME—PRIORITY OF SURVEYS—FIELD NOTES.

The field notes of a junior survey cannot be resorted to for the purpose of creating an ambiguity in the calls of a senior survey.

## 6. SAME—LOCATION OF LOST BEARING TREES—EVIDENCE.

Where the bearing trees called for in a senior survey had disappeared, a claimant under a junior survey was entitled to show the location of the trees.

## 7. EVIDENCE — DECLARATION OF DECEASED SURVEYOR—ADMISSIBILITY.

The declaration of a surveyor, since deceased, in a position to know the fact which the declaration concerns, is admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1131.]

## 8. SAME.

The declaration of a surveyor, since deceased, may be expressed in field notes of a junior survey.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1131.]

## 9. SAME—WEIGHT AND EFFECT.

A declaration of a surveyor, since deceased, must, to have effect as evidence of a boundary, possess the element of certainty, and a statement of a surveyor declaring that an object was found by him at one place, and also at another place, is without any value as testimony.

## 10. BOUNDARIES—FIELD NOTES.

The field notes of a surveyor stated that on a line running from a corner he found a corner with bearings, and that the point where he found the bearings was a specified distance south of another corner. Another surveyor, making a survey and map, showed by his measurements that such corner with bearings was not that distance from the corner referred

\*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

to in the field notes. *Held*, that the field notes were not evidence of the location of the corner with the bearings.

11. *SAME*.

Where the field notes of a surveyor concerning the location of bearing trees in another survey are inconsistent, they are no evidence of the location of the bearing trees, which had disappeared.

12. *SAME*—CERTIFICATE OF SURVEYOR—EVIDENCE—COMPETENCY.

A general statement by a district surveyor that a certain survey is free from any conflict, without giving any facts, is not competent evidence in determining the boundaries of another survey.

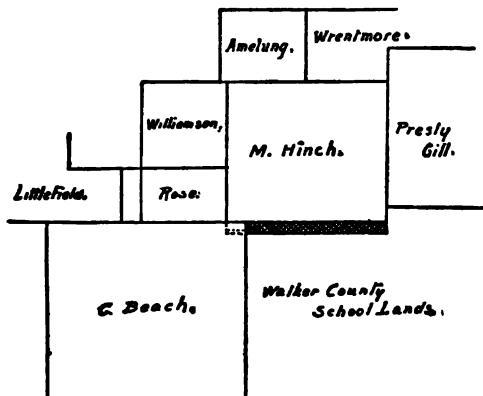
13. *SAME*—PRIORITY OF SURVEYS—CONTROLLING EFFECT OF SENIOR SURVEY.

Where the call for distances in a senior survey includes land in a junior survey, and there is nothing to limit the force of the call for distances in the senior survey, the call for distances therein controls.

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

Action by the Peach River Lumber Company against the Keystone Mills Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

The following is a copy of the sketch referred to in the opinion:



Nugent & Foster, for appellant. Maco & Minor Stewart and Llewellyn & Kayser, for appellee.

JAMES, C. J. Appellee sued the Keystone Mills Company for a tract of 844.66 acres of land and for damages for cutting timber therefrom. The issues depended upon the position of the south boundary line of the Michael Hinch league and labor, which is owned by appellant. Appellee owned the Walker county school survey of three leagues, adjoining the above survey on the south, and the strip in question is claimed to be a part of it. The cause was tried by the court, and the issue was determined in favor of plaintiff. The question for us to determine is whether or not there was evidence that was competent and sufficient to support the judgment rendered. If there was any testimony which could legally serve as a basis for the

judgment, our duty to affirm it would be plain.

The evidence is voluminous; but, in view of the question narrowed down as above stated, it will not be necessary for us to do more than to refer to testimony upon which the judgment is claimed to rest, and then determine whether or not such testimony could legally be resorted to to establish plaintiff's contention, and, if so, to determine whether or not such testimony was sufficient in law to support the judgment. The field notes of the Michael Hinch survey are: "Beginning at the southeast corner of said Wrentmore survey, and on the west boundary of Presly Gill's survey, a stake from which a black oak 24 in. dia. brs. N. 22° W., 4½ vrs. distant, mkd. H, also a black oak 15 in. dia. brs. S. 66° W., 22 vrs. distant, mkd. M H; thence S., on Gill's W. boundary, 2,000 vrs., which is marked, and the remainder an open line 5,099 vrs. to the corner, a stk., from which a pine 20 in. dia. brs. S. 54° W., 1 vrs. distant, and also a pine 24 in. dia. brs. N. 8° W., 14 vrs. distant, both marked H; thence W. 5,099 vrs., to corner, a stk., from which a black oak 12 in. dia. brs. N. 8° W., 2 vrs. distant, also a white oak 16 in. dia. brs. S. 45° E., 9 vrs. distant, both marked M H; thence N. 5,099 vrs., to corner on the south boundary of L. F. Amelongs one-third league survey, a stake, from which a black oak 30 in. dia. brs. N. 83° W., 16 vrs. distant, also a white oak 18 in. dia. brs. S. 30° W., 14 vrs. distant, both marked M H; thence E. 5,099 vrs., and adjoining Amelongs and Wrentmore, to the beginning." There was no issue as to the whereabouts of the north line of the Hinch. Its position was assumed by both parties as being at a certain place, and fixed by the south line of surveys on the north of it. It is observed from the testimony that the distance called for going south would carry the south line of the Hinch far enough to include the strip in question, and also that the south line would have to go that distance to have the quantity called for. The Walker county school land was surveyed in 1856. The Hinch is the older, having been surveyed in 1845. The Hinch calls for its east line to extend south 5,099 varas, "a stake, from which a pine 20 in. diameter bears S. 54° W., 1 vara distant, also a pine 24 in. diameter bears N. 8° W., 14 varas distant, both marked H." For its south line it calls: "Thence W. 5,099 varas, to corner and stake, from which a black oak 12 inches diameter bears N. 8° W., 2 varas distant, also a white oak 16 in. diameter bears S. 45° E., 9 varas distant, both marked M H." The trees called for have disappeared. The result of this fact is that, applying the field notes of Hinch survey to the ground, the trees not being in existence, the east and west lines would go the distance called for, 5,099 varas, and the south line would take in the strip of land in

question. In other words the presumption would be that the bearing trees had been at the distance they were called for. The Walker county school land being a junior survey, and appellee being plaintiff, to change the construction of the Hinch survey, as above stated, it devolved upon plaintiff to show affirmatively that said bearing trees were somewhere else. Has it discharged this burden? Is the question we have to deal with.

Plaintiff's case depends on the testimony of its witnesses Duke and Luttrell, and upon the field notes of two junior surveys, to wit, the Walker county school land survey, made in 1856, and the Joseph Rose survey, made in 1868, and also upon a certain certificate of nonconflict between the Beach and other surveys made by A. E. Knowles, a surveyor who in 1850 surveyed the H. B. Littlefield survey; said certificate accompanying a sketch and appearing to have been filed in the General Land Office, and reading as follows: "State of Texas, Montgomery Land District. Montgomery, March 15, 1851. I, A. E. Knowles, district surveyor in and for said land district, certifies that there is no conflict upon Clark Beach league survey and that the sketch is a true representation of the relative relation these four surveys bear one another. Given under my hand at the land district surveyor, Montgomery district. A. E. Knowles." This sketch showed the Hinch south line and the Beach north as identical. It appears that the Beach patent did not issue until April, 1851, and probably that Knowles made this certificate of nonconflict in connection with the issuance of the Beach patent. The above is substantially the evidence relied on as establishing the fact that the Hinch southwest corner was upon the north line of the Beach, which would place the south line of the Hinch where the court found it to be. We shall examine the merits of these elements of testimony, respectively.

Appellee's brief states Duke's testimony as follows: "Plaintiff's witness, Jerry Duke, testified that he had seen the marked line run from the northeast corner of the Beach due east, having observed same 20 years before the trial; that he had lived in the woods and in the neighborhood of this land since the year 1871; that he was familiar with the north line of the Walker county survey, and had been since 1871, having ridden over the land twice a day, and had seen the landmarks and hacks on the timber; that he had seen the oak at the northwest corner of the Walker county survey, at the northeast corner of the Clark Beach, identifying same on plaintiff's map; that the corner trees were blown down in 1875, but that the charred stumps of the trees still remained, and he had pointed same out to plaintiff's surveyor, Luttrell; that the line he saw on the north line of the Walker county survey in 1871 was the old marked line, and

that by general reputation the said oak was the northwest corner of the Walker county survey. Plaintiff's line and said marked line was the north line of the Walker school land. He further testified that of late years a line had been marked through the timber south of the old line that he spoke of having seen in 1871. He further testified that when he first knew the marked line he mentioned between the Hinch and the Walker county survey that there were hacks on the trees marking the lines, and that there was a marked tree at the northeast corner of the tract in controversy in this case; that this marked tree was in a line with the marked line he had first mentioned, and in a true line with the northeast corner of the Clark Beach; that this marked tree was blown down in the storm of 1875. Plaintiff's witness Jerry Duke testified that he had lived in and about the land in controversy for many years, having lived on Peach creek since 1871; that he has been familiar with the north line of the Walker county survey since 1871 and familiar with the hacks on the timber along that line; that he knew where the northwest corner of the Walker county survey was located as well as the northeast corner of the Clark Beach; that he has known that corner since 1871; that when he first knew it the tree was standing; that he has been to that corner and pointed out the tree to Luttrell; that he, together with Luttrell, ran a line from the old tree eastward and that said line run by Luttrell corresponded with the old marks in 1871-72; that when he first saw said line it was an old marked line; that he was on this land as early as 1871, he at that time living some three or four miles from same; that it was the general reputation in the community that the old tree was at the northwest corner of the Walker county survey and that the line he spoke of was the north line of the Walker county survey; that there was no old line running across Walker county survey south of the old line that he testified to as running east from the corner of the Clark Beach; that he had, of late years, observed a new line running east and west across the north part of the Walker county survey, which new line is south of the old line that he first testified about. Said witness was born in 1837 and rode through this timber once a week more or less since 1871. When he first knew the south line of the Hinch and the north line of the Walker county school land survey there was now and then a hack on the trees; that there were marked trees at the northeast corner of the tract in controversy. Those trees were in a line with the marked line first mentioned and in the same line with the Clark Beach corner; that these trees were blown down in the storm of 1875; that all the trees at the northeast corner were blown down except a gum and an oak. Plaintiff's witness Jerry Duke testified that he pointed out to Luttrell

a point at which had formerly stood two marked oaks which were blown down in the storm of 1875, same standing in the position in which plaintiff's witness, Luttrell places the southwest corner of the Hinch survey."

The witness Duke's acquaintance with the locality began as late as 1871. He knew the Beach northeast corner, about which there is no dispute; that the north line of the Walker county school land extended east from the corner; that when he first knew it it was a line marked with hacks, and there was a marked tree at the northeast corner of the strip in controversy, in a line with the marked line just mentioned and in a true line with the northeast corner of the Beach; that the marked tree at the northeast corner of the strip in controversy was blown down in 1875; that all the trees were blown down in 1875, except a gum and an oak. In reference to these trees the witness gave the following testimony: "Q. When you first knew this line was it a clearly marked line? A. Now and then there was a hack on the trees. Q. These trees were in a line with the marked line you speak of? A. Yes, sir. Q. How far back did you see these lines? A. There were a good many trees blown down. That was in 1875, and the oaks were all blown down. Q. These trees you found were gum and oak? A. Yes, sir; there was a gum at the northeast corner. Q. Northeast corner of what? A. Of the school land, at the northeast corner; that is where all the timber was blown down except this gum and oak, it stayed." At the southeast corner of the Hinch the trees called for by its surveyor were two pine trees marked H. This witness saw no pine trees there, only gum and oak, and he saw no trees marked H. It is very plain that the testimony of this witness did not identify the southeast corner of the Hinch survey at this place by anything he saw there as conforming with the description given for that corner by the surveyor who made the Hinch corners. His testimony is equally imperfect in identifying the bearing trees called for to witness the southwest corner of the Hinch. He says he saw these original trees standing on the north line of the Beach survey. He says they were also blown down in the storm of 1875; that their remains are still lying there; and that he pointed them out to Luttrell. But he testified that these trees were red oaks, while the surveyor designated them as a black oak and a white oak. The witness also testified they were marked by hacks, such as surveyors give, three hacks, the witness believed, and by hacks only. This falls short of what can be called an identification of the witness trees as described in the field notes. This witness testified to the general reputation of the line he was testifying to as being the north line of the Walker county school land. His testimony was not such as would authorize the Hinch lines to be stopped short of their distance at the points he describes. The tes-

timony of the surveyor, Luttrell, is no better in this respect than that of Duke. His work in connection with these surveys appears to have been done in preparation for this trial, and all he knew concerning the identity of the bearing trees spoken of, he obtained from Mr. Duke. The testimony of neither of these witnesses was sufficient to locate the Hinch bearing trees, consequently it affords no reason in law or in fact for stopping the Hinch east and west lines short of the distance they called for.

We now proceed to examine into the evidence as to the locality of said original witness trees as affected by the field notes of the Walker county school land and of the Rose. The former was surveyed in 1836, 11 years after the Hinch, and the latter in 1868, both by the same surveyor, Mr. Wade. Wade was not shown to be dead, but, as his field notes went in as evidence without objection, we apprehend they ought to be given any effect as evidence they may, in any event, have been entitled to. The significance of the field notes he made for the Walker county school land lies in the fact that he made the survey at a time when it could be presumed that the evidences of the work done in surveying the Hinch were still visible upon the ground; in the fact that the northeast corner of the Beach is now, and was then, well known and readily found, and he calls for that corner as the northwest corner of the Walker school land, and running thence east for the north line he calls to come to two pine trees marked H, which answer for the identical trees called for by the Hinch surveyor, thence he called to go north 927 varas to the southwest corner of the Pressly Gill survey. If this be competent evidence of the locality of the Hinch bearing trees at its southeast corner it would no doubt be sufficient to support the judgment in this case. Was it competent? The rule has frequently been stated that the field notes of a junior survey cannot be resorted to for the purpose of creating an ambiguity in the calls of a senior survey. This principle does not seem to us to apply in a matter of this kind. Here, the bearing trees having disappeared, it was open for any person having an interest in so doing, and of course to plaintiff in this case, to show by any evidence which tended to prove the fact, where those trees were originally. The declaration of a surveyor who is deceased, he being shown to have been in a position to know the fact which the declaration concerns, is admissible. *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500. Such a declaration we apprehend may be expressed in field notes even of a junior survey. This statement of the law would appear to conform to what is expressed in *Freeman v. Mahoney*, 57 Tex. 626. We think, however, that such a declaration, to have any weight or effect as evidence in any case, should possess the element of certainty. The statement of a surveyor, which

declares that an object was found by him at one place and also at another place, is without any value as testimony, being in itself ambiguous and equivocal. Such, we think, is the character of the declaration involved in the field notes of the Walker county school survey.

Not only does Mr. Wade's notes say that on a line running east from the Clark Beach northwest corner he found a corner with the Hinch bearings, but they say, at the same time, that the point where he found them was 927 varas south of the Pressly Gill southwest corner. Mr. Luttrell, who made the survey and map which plaintiff asserts is correct, shows by his measurements that such point in a line east of the Beach corner is, in fact, only 505 varas from the Pressly Gill southwest corner. Thus we have Mr. Wade's field notes telling us that he found the Hinch bearing trees at a point in a line due east from the Beach northeast corner (which, in fact, placed it 505 varas from the Gill corner), and also that this point was 927 varas from the Gill corner. This is an inconsistent and irreconcilable declaration. It is ambiguous itself and it would in our opinion be going too far to allow ambiguous calls in one survey to serve as evidence in clearing up an ambiguity in another survey. But we are satisfied to place our decision upon the principle that such declarations are not evidence at all when they are intrinsically uncertain in what they declare. The same observations apply with equal force to the field notes made by Wade in 1863 for the Rose survey. That survey calls to begin at the southeast corner of the Williamson, which corner is shown to be on the Hinch west line at the distance of 3,292 varas from the Hinch northwest corner; thence to run south on the west boundary of the Hinch 1,808 varas to the southwest corner of the Hinch and calling for the Hinch bearing trees with original marks, thence to run west with north line of C. Beach survey, etc. The true distance according to Mr. Luttrell from the southeast corner of Littlefield to the Beach north line is only about 700 varas. Thus, as far as the evidence goes, it is made to appear that the field notes of the Rose, while they call for the Hinch bearings to be in the north line of the Beach, also call for them to be a much further distance south. The declaration involved in these field notes concerning the locality of the Hinch bearing trees is inconsistent in itself, and of no force as evidence of that fact.

The certificate of Knowles was not competent evidence. It appears from the field notes of the Littlefield survey that Knowles was district surveyor of Montgomery land district, and that he made the original survey for the Littlefield tract in October, 1850. It is claimed by appellant that, as the Beach patent

did not issue until March 15, 1851, it is evident that the certificate was required for the purpose of ascertaining whether or not there was any conflict existing on the Beach, and, having made a survey for that purpose, Knowles found that there were no conflicts, which necessarily included finding that the Hinch south line did not extend over into the Beach. The certificate does not show what work Knowles did in order to have placed him in a position to know the corner of the Hinch, or that he made any survey of the Hinch at all. Certainly a general statement by a district surveyor that a certain survey is free from conflicts without any facts given is not competent evidence in determining the boundaries of another survey. In this instance we would have to presume that he made an actual survey of the Hinch according to its field notes, and we would have to indulge the further presumption that he found the Hinch southwest corner bearing trees where they did not conflict with the Beach. This is further than presumptions are allowed to be pursued.

There is in the record a copy from the map of Montgomery county in use in the General Land Office in 1901, certified to by the commissioner. This map does not indicate any conflict between the Hinch and the Beach and shows the south line of the former as a prolongation of the north line of the Beach. The Hinch, although made after the Beach, does not mention the Beach in its field notes. The north line of the Beach is not a call in the Hinch notes. As between the Hinch and the Walker county school land the former prevails, and must be fixed on the ground by means of its own field notes, where that is possible, and it is possible to do so even in the absence of the bearing trees, or identification of them, by giving effect to the call for distance to its southern corners for its south line, which also in this instance gives effect to the call for quantity. The land office map referred to does not aid in locating the Hinch bearing trees on the ground. The calls in the Hinch survey are not negated by a sketch of this kind. The proof was that the call for distance for the south line of the Hinch makes it include the land in controversy, as against the adjoining junior survey. There being in our judgment no evidence that could have had the effect of identifying the said bearing trees called for in the Hinch, there was nothing to limit the force and effect of the call for distance in fixing its south line. We are therefore led to the conclusion that plaintiff's proof was insufficient, and that judgment should have been rendered for defendant.

The judgment will be reversed, and here rendered that plaintiff take nothing.

Reversed and rendered.

**STATE v. ST. LOUIS SOUTHWESTERN  
RY. CO. OF TEXAS.**

(Court of Civil Appeals of Texas. June 27,  
1906.)

**1. TAXATION—MODE OF ASSESSMENT—RAIL-  
ROADS.**

Sayles' Ann. Civ. St. 1897, arts. 5073, 5082, provide for a listing and assessment in each county of railroad real estate, specifying the number of miles and value per mile, which valuation shall include right of way, depots, depot grounds, etc. Article 5120a provides that the assessor shall list for taxation property unrendered in past years "in the manner prescribed in the preceding article." Article 5119 referred to, provides for a listing of property, specifying the manner of describing it by giving the name of the owner, abstract number, etc., such also being the manner of assessing ordinary real property as prescribed by article 5118. *Held*, that an assessment under section 5120a of an unrendered portion of a railroad roadbed is sufficient which gives the length and assessed value of such unrendered roadbed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 660-666.]

**2. SAME.**

Under Sayles' Ann. Civ. St. 1897, art. 5082, providing that every railroad shall deliver to the county assessor a list specifying the length of the road in the county and valuation per mile including depots, depot grounds, etc., a railroad is assessed as an entirety, and not as so many distinct miles of road or distinct parts of the surveys over which it passes.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 661.]

**3. SAME—TAX SALES—INTEREST TO BE SOLD.**

Under Sayles' Ann. Civ. St. 1897, § 5082, providing for the assessment of a railroad within a county as an entirety, and not as so many distinct miles of road, the state, in an action for the recovery of taxes on an unrendered portion of the roadbed is entitled to a decree for the foreclosure of a lien on an undivided interest in the roadbed.

Appeal from District Court, Franklin County; S. P. Pounders, Special Judge.

Action by the state of Texas against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

The statement of the nature and result of the suit contained in appellant's brief, which is conceded by appellee to be correct, is as follows: "This suit was instituted by the county attorney of Franklin county upon a back assessment compiled under article 5120a, Batts' Civil Statutes, to recover delinquent taxes for the years 1888 to 1901, inclusive, upon about one-quarter of a mile of the roadbed of appellee, situated in Franklin county. The petition alleged, in substance: That since the year 1888, the appellee has had 11.29 miles of roadbed extending across Franklin county from east to west. That for the years 1888 to 1891, inclusive, .38 of a mile of said roadbed was not rendered for taxes in Franklin county and was not placed upon the unrendered roll, the rendition for said years being 10.91 miles, and that the taxes on said fractional part of a mile of said

roadbed were delinquent and unpaid. A similar allegation was made with respect to .74 of a mile of said roadbed for the years 1892 to 1898, inclusive, and to .25 of a mile for the years 1899 to 1901, inclusive. That on the 6th day of February, 1904, the tax assessor of Franklin county, after having first ascertained by the certificate of the comptroller of public accounts the fact that the records of his office do not show that said fractional part of a mile of roadbed in Franklin county has been rendered or assessed for the years aforesaid, proceeded to list and assess said property and place said assessment upon a back or additional roll which was duly certified by the commissioners' court for collection. That the state and county taxes due and delinquent, as shown by said roll, amounted to \$561.16, exclusive of interest and penalties. The suit was brought in the name of the state of Texas to recover said delinquent taxes upon said back assessment roll for the benefit of Franklin county, praying for judgment and foreclosure of said tax lien and for general relief, to which the defendant's general demurrer was sustained and, the plaintiff refusing to amend, the suit was dismissed."

C. W. Stringer, for appellant. Glass, Estes & King, for appellee.

EIDSON, J. (after stating the facts). Appellant assigns as error the action of the court below in sustaining appellee's general demurrer to appellant's petition and dismissing the suit. The record does not disclose the specific grounds upon which the action of the court below was based. We infer from the argument of counsel for appellee contained in their brief in support of the action of the court below, that such action was based upon the supposed ground that the assessor in making the list and assessment of the property for back taxes failed to comply with the statute relating to assessments of this character. If such action of the court was based upon that supposed ground in our opinion, it is untenable. Article 5073, Sayles' Ann. Civ. St. 1897, provides that all railroad companies shall list all of their real and personal property, giving the number of miles of roadbed and line in the county where such roadbed and line is situated, at the full and true value; and article 5082, *Id.*, provides that it shall be the duty of every railroad corporation in this state to deliver a sworn statement on or before the 1st day of June of each year to the assessor of each county into, or through, which any part of their road may run, a classified list of all real estate owned by or in possession of the said company in said county, specifying the whole length of the railroad and the value thereof per mile, which valuation shall include right of way, roadbed, superstructure, depots, and grounds upon which said depots are situated, and all shops and fixtures of

every kind used in operating said road. Article 5120a, Id., provides as follows: "If the assessor of taxes shall discover in his county any real property which has not been assessed or rendered for taxation for any year since 1870, he shall list and assess the same for each and every year for which it has not been assessed, in the manner prescribed in the preceding article, and such assessment shall be as valid and binding as though it had been rendered by the owner thereof; but no such real property shall be assessed by the assessor unless he has ascertained by the certificate of the comptroller of public accounts the fact that the records of his office do not show that the property has been rendered or assessed for the year in which he assesses it." And article 5119 referred to in the above-quoted article provides that if the assessor of taxes discovers any real property in his county subject to taxation which has not been listed to him, he shall list and assess such property; and specifies the manner of describing the same by giving the name of the owner, abstract number, number of certificate, etc. In the case of *Morgan v. Smith*, 70 Tex. 637, 8 S. W. 528, the Supreme Court held, in effect, that any requisite of article 5119 need not be complied with where good cause is shown for such noncompliance; and the same doctrine is practically held in the cases of *McCormick v. Edwards* (Tex. Sup.) 6 S. W. 32, and *Henderson v. White* (Tex. Sup.) 5 S. W. 374.

Article 5118, *Sayles' Ann. Civ. St. 1897*, provides the same manner and form of assessing real property by the owner as is provided in article 5119 to be complied with by the assessor in assessing unrendered real property. The statute providing for the listing and assessment of the roadbed or line of a railroad by the corporation owning same, does not require that the provisions of article 5118, relating to the manner of assessment of real property by the owner, be complied with, but simply requires that the number of miles of roadbed in the county, and the full and true value thereof be given. This being true, the assessor could not be required to give a more particular description of the property in listing and assessing it for back taxes when the owner had failed to render same, than the owner was required to give in making the rendition itself. In our opinion the assessor of Franklin county made a legal and valid assessment of the part of appellant's roadbed unrendered by it for the respective years stated in appellant's petition, by giving on the rolls the distance or length of the roadbed not rendered by the appellee for said years, and giving the value thereof as assessed by him, after procuring the required certificate from the comptroller, and all of these facts are shown by appellant's petition. The law providing that the whole length of a railroad through a county may be assessed for taxes by giving the length

thereof and placing a value thereon per mile, in effect, provides for a valuation according to the average value of the entire length of the road through the county; and hence the road is assessed as an entirety and not as so many separate and distinct miles of road nor as separate and distinct parts of the surveys over which it passes. And if, as alleged in appellant's petition, appellee has failed to render a part of its roadbed for taxation in Franklin county, and the assessor has listed and assessed same, as alleged in said petition, appellant would be entitled to a judgment for the amount of the taxes and a decree for the foreclosure of its lien upon an undivided interest in the roadbed of appellant to the extent shown by the assessment as pleaded by appellant. In our opinion appellant's petition was not subject to general demurrer, and the court below erred in sustaining such demurrer.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

#### TERRY v. WEBB et al.

(Court of Civil Appeals of Texas. May 19, 1906. Rehearing Denied June 23, 1906.)

#### SHERIFFS—WRONGFUL ATTACHMENT—LIABILITY TO RIGHTFUL OWNER—WAIVER—ACTION FOR TRESPASS.

Rev. St. 1895, art. 5311, providing a method of trying the right of a third person to property levied on under attachment, declares that a claim made by one intervening under the statute shall operate as a release of damages for making the levy. *Held* that, the statute being in derogation of common law, it will not be extended to claims otherwise made; and hence, where one to whom attached property had been assigned by the debtor was made a defendant in the attachment, and he answered, claiming title and right to possession, a judgment restoring the property to him did not bar an action by him against the sheriff and the sureties on his bond for the trespass.

Appeal from District Court, Dallam County; Ira Webster, Judge.

Action by Eugene Terry against J. N. Webb and others. From a judgment in favor of defendants, plaintiff appeals. Reversed, and remanded for a new trial.

R. F. Stalcup, Del W. Harrington, and Veale, Crudginton & Bailey, for appellant. C. B. Reeder and H. H. Cooper, for appellees.

STEPHENS, J. Amarillo Kemp Grocery Company, a trading corporation, brought an attachment suit in the county court of Dallam county against H. W. Wyman, its debtor, and Eugene Terry, to whom Wyman had assigned and delivered his stock of merchandise. Terry answered in that suit, setting up the assignment and claiming that he was entitled to the possession of the goods under it. The goods were sold as perishable and the money paid into the registry of the court. Failing to recover in the county court, he brought the



case here by appeal, and judgment was entered in his favor, quashing the attachment and directing the proceeds of the goods to be turned over to him. This was not done, however, because when the mandate was returned to the county court the money had already been paid out under the judgment of that court, which, though appealed from and reversed, had not been superseded. This suit was then instituted in the district court of Dallam county by Terry against the sheriff, who had levied the attachment, and the sureties on his official bond, and also Kemp Amarillo Grocery Company and the stockholders of that company, for the sum of \$1,800, the alleged value of the stock of goods seized and converted, and \$250 attorney's fees. The judgment of this court disposing of the appeal from the county court was held to be a bar to the second suit, and from that judgment this appeal is prosecuted.

The question to be decided, then, is whether Eugene Terry, in obtaining a judgment restoring to him the proceeds of the attached property, made an election of remedies that is fatal to the prosecution of this suit. A similar question was thoroughly considered by the Court of Appeals of Virginia in the case of *Sangster et al. v. Commonwealth*, 17 Grat. 124, which case is in all essential particulars parallel to the one before us. In that case it was contended that the party suing the sheriff on his official bond had lost his right of action by claiming the property in the attachment suit, to which, as in this case, he had been made a party defendant. The only difference between the two cases worthy of notice is that the proceeds of the goods sold as perishable in that case and decreed to be paid to the claimant were actually received by him. We cannot do better than make the following quotation from the opinion in that case: "The attachments against the debtor defendant were levied on his (the relator's) property, and thus a trespass was committed by the sheriff who made the levy. The relator, being made a defendant in the case, of course asserted therein his claim to the property, as he could, and no doubt would, have done if he had not been made a defendant. The property, being perishable, was in the progress of the suit decreed to be sold; and afterwards, the question of title being decided in favor of the relator, the proceeds of sale were decreed to be paid to him by the sheriff who made it, but, not being paid, the amount was recovered by motion against him and his sureties. Now, this was altogether a different claim from that of the relator against the sheriff for the trespass. The sheriff was not a defendant to the attachment suits. The main controversy in that case was between the attaching creditors and their debtor, incidental to which was a controversy between the for-

mer and the relator as to whether the property attached belonged to him or their debtor. That controversy was determined in the relator's favor, and of course the proceeds of the property were decreed to be paid to him. They could not be decreed to be paid to the creditors, because the property did not belong to their debtor, nor to the sheriff, because not only did not the property belong to him, but it would have been real injustice, both to his sureties and to the owner of the property, to have made such a decree. The only proper disposition of the money, therefore, was to decree it to be paid to the owner of the property. But such decree and payment cannot extinguish his claim against the sheriff for the trespass, any more than would the return of the property itself to him, either by the sheriff who took it, or by the order of the court in the attachment suits. The only effect of such return would be to mitigate the damages in the action for the trespass, and the decree and payment aforesaid can have no greater effect." In the case of *Moss v. Marks* (decided by the Supreme Court of Nebraska) 97 N. W. 1031, it was held, as stated in a syllabus by the court: "An action for the conversion of chattels and one for the possession thereof are not inconsistent remedies, and one who has sued for conversion may dismiss such action and recover in replevin, if his right is otherwise good." To the same effect is *Sweet v. Bank & Trust Co.* (decided by the Supreme Court of Kansas) 77 Pac. 533, in which this language was used to state the principle governing such cases: "Election goes, not to the form, but to the essence, of the remedy. It applies only where the law supplies to a party two or more modes of procedure predicated upon inconsistent and conflicting theories. If the remedies afforded are predicated upon consistent theories, the suitor may use one or all of the remedies. There can be but one satisfaction. Where the remedies afforded are inconsistent, the election of a remedy operates as a bar. Where the remedies afforded are consistent, the satisfaction of the claim operates as a bar."

Our statute, providing a speedy and informal method of trying the right to property levied on under attachment or execution, declares that a claim made to property under the provisions of that statute shall operate as a release of damages for making the levy; but that is in derogation of the common law, as announced in the above cases, and by a familiar rule of construction will not be extended to claims otherwise made. *Rev. St. 1895, art. 5311; Lera v. Freiberg* (Tex. Civ. App.) 22 S. W. 236, and cases there cited.

The judgment is therefore reversed, and the cause remanded for a new trial.

**J. B. WATKINS LAND MORTGAGE CO. v. THETFORD.**

(Court of Civil Appeals of Texas, June 27, 1906.)

**1. BROKERS — COMPENSATION — NECESSITY OF LICENSE.**

The civil statutes providing for an occupation tax by a real estate broker, and the penal statutes making it a misdemeanor to pursue such occupation without paying the tax, do not render the failure of such broker to pay his tax and obtain a license a defense in an action by him for commissions earned.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 43.]

**2. SAME — SUFFICIENCY OF SERVICES — IRRESPONSIBLE PURCHASER — ESTOPPEL.**

Where a purchaser secured by a real estate broker is satisfactory to the principal, and it contracts with him for the sale at a satisfactory price, it cannot set up his financial irresponsibility as a defense in an action by the broker for his commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 94, 96, 100.]

**3. SAME—RELATION TO PRINCIPAL—CONTRACT WITH OTHER AGENT.**

Where a sale of real estate is made by agents with the assistance of a broker under an agreement to divide their commissions with him, such broker is not entitled to recover a commission for the sale from the owners of the land.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 62.]

**4. SAME—EVIDENCE—SUFFICIENCY.**

In an action by a real estate broker for his commission in securing a purchaser, evidence examined, and *held* to require the submission to the jury of the question whether the broker did not act merely as a subagent of other brokers.

**5. SAME — COMPENSATION — EFFICIENCY — CAUSE OF SALE—INSTRUCTIONS.**

In an action by a real estate broker for his commission in securing a purchaser, an instruction is properly refused which ignores plaintiff's theory that the efficient cause of the sale was the vendor's representative, acting with him and accepting his services with knowledge of his occupation, although such representative may have acted with other agents in some matters respecting the sale.

**6. SAME—AUTHORITY—ESTOPPEL.**

Where a real estate broker makes a sale, the seller, accepting the sale and claiming benefits thereunder, is precluded from setting up, as against the broker's claim for commission, the want of authority in its representative to employ such broker.

Appeal from District Court, Dallas County; Thomas F. Nash, Judge.

Action by Henry M. Thetford against the J. B. Watkins Land Mortgage Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

W. P. Finley, for appellant. U. F. Short, for appellee.

EIDSON, J. Appellee brought this suit in the court below against appellant to recover commissions for his services as a real estate agent in procuring a purchaser for certain real estate owned by appellant and situated in the city of Dallas. The trial before the court and jury resulted in a verdict and judg-

ment in favor of appellee for the sum of \$1,196.

Appellant's first assignment of error complains of the action of the court below in sustaining appellee's special exceptions to that part of appellant's answer which sets up as a defense to this suit the failure of appellee to pay his occupation tax as a land agent or real estate broker prior to the transaction upon which this suit is based, appellant's contention being that under the laws of Texas the failure of the appellee to pay his occupation tax and to obtain a license to pursue the business of real estate agent or broker prevents him from maintaining this suit to recover his commissions, which he alleges accrued to him in the pursuit of such business. We do not think this contention is sound. In our opinion it was not the purpose or intention of the statute providing for the payment of an occupation tax by a real estate agent or broker to make such payment a prerequisite to his right to pursue the occupation. The civil statutes providing for the tax, and the penal statutes making it a misdemeanor to pursue the occupation without paying the tax, were enacted for the purpose of providing a source of revenue for the state and the enforcement of the collection thereof. In the case of *Amato v. Dreyfus*, 34 S. W. 450, the San Antonio Court of Civil Appeals, in a case involving this question, uses this language, which we approve: "It is plain to us that the primary object of the statute is to provide revenue, and that it was not its purpose to repress or prohibit the several occupations it undertakes to license. The provision is that no person shall pursue any occupation unless he has such a receipt, which means that the person is prohibited, not the occupation. No consideration of public policy, nor one looking to the regulation of the business, enters into the statute in question. The purpose sought to be subserved is altogether different. It could, with as much propriety, be asserted that a merchant carrying on business under the same circumstances would not be allowed to enforce payment for goods sold, nor a banker for money loaned." And the Ft. Worth Court of Civil Appeals in the case of *Railway Co. v. Carlock*, 75 S. W. 931, in passing upon the question as to whether a lawyer was entitled to practice his profession without first paying the occupation tax (the statutes with respect thereto applying to lawyers as well as to land agents), held that he was, and referred to the case of *Amato v. Dreyfus*, *supra*, with approval.

Appellant's third, fourth, and seventeenth assignments of error are based upon the proposition that the purchaser procured by the appellee was not able, pecuniarily, to comply with his contract for the purchase of the land, or to respond in damages for a failure so to do, and, for that reason, appellee was not entitled to commissions for procuring such purchaser. Under a different state of case, this proposition might be correct, but the

pleadings and uncontroverted testimony in this case show that the purchaser was satisfactory to appellant, and that it contracted with the purchaser for the sale of the property at a price satisfactory to it; hence the question as to whether the purchaser was able to carry out the contract is not involved in this case. *Conkling v. Krakauer*, 70 Tex. 739, 11 S. W. 117.

The paragraph of the charge of the court complained of in appellant's fifth assignment of error was favorable to it, and it has no ground for complaint.

Appellant's sixth assignment of error is overruled. The appellee and the witnesses Bird and Irwin testified to facts that would authorize the charge of the court complained of in this assignment. There was sufficient testimony to justify the court in submitting the case to the jury and to support the verdict. Hence appellant's seventh and sixteenth assignments of error are overruled.

In our opinion the special charges asked by appellant and refused by the court and which are embraced in appellant's ninth, eleventh, and fourteenth assignments of error should have been given to the jury. If the sale was made by Bird, Robinson & Co. with the assistance of appellee, under an agreement with them to divide their commissions with him, he would not be entitled to recover anything against appellant for his services. There is some testimony in the record tending to support this view of the transaction. Appellee testified that he asked Bird for a price on the lot, and told him that he had some hopes of getting him a buyer; that he knew that Bird, Robinson & Co. were the exclusive agents of appellant; that he understood that the lands of appellant could only be handled through them; that he was privileged to offer this property for sale through them; and that he made the contract in this instance through them. And Robinson testified, in substance, that the sale was made by Bird, Robinson & Co. with the assistance of appellee; that he furnished the customer, but that Bird, Robinson & Co. made the contract of sale; that Higgins, the representative of appellant who came to Dallas and closed the contract with the purchaser, consulted with Bird, Robinson & Co. in the matter, and had nothing to do with appellee in the negotiations which culminated in the contract for the sale of the lot, and appellee did not participate in such negotiations and was only present at some of the interviews on account of his having furnished the purchaser; that appellee asked witness about the commissions he (appellee) would get, and he (witness) discussed the commissions with him and the contract as the contract of Bird, Robinson & Co., and appellee knew that other agents could only get one-half of the commissions. Higgins's testimony is to the effect that, in negotiating and closing the contract of sale with the purchaser, he acted with Bird, Robinson & Co., and not with appellee. This testimony, in

our opinion, was sufficient to require the court to give to the jury said special charges, and the refusal to give them constitutes reversible error.

There was no error in the refusal of the court to give to the jury appellant's special charge No. 6, as it ignored the right of appellee to recover in the event Higgins acted with him in making the contract of sale; or, in other words, it ignored the theory that the efficient cause of the contract of sale was Higgins's acting with appellee and accepting his services as a land agent in the transaction, knowing him to be such agent at the time, although he (Higgins) may have acted with Bird, Robinson & Co. in some matters respecting the sale.

Appellant's thirteenth assignment of error is overruled. If appellee made the sale in question, the fact that appellant accepted it and claimed the benefits thereunder would preclude its setting up the want of authority of Higgins to employ appellee to make the sale.

The issue sought to be injected into the case by appellant's special charge No. 10, not being in any manner involved in the case, said special charge was properly refused.

The testimony, exclusion of which is complained of in appellant's eighteenth assignment of error, was immaterial. What the appellant did do in reference to the transaction in question was material, but what it would have done under circumstances not existing was immaterial.

For the errors above indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

## ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. RUTHERFORD.

(Court of Civil Appeals of Texas. June 27, 1906.)

### 1. CARRIERS — CARRIAGE OF GOODS — OVERCHARGE—EXTORTION.

The act of a carrier in demanding and collecting from a shipper in addition to the freight \$1 a day for the use of a car prior to giving him the use thereof, for the 48 hours allowed by law for unloading, was extortion, under *Sayles' Ann. Civ. St. 1897, art. 4573*, making it extortion for any carrier to demand or receive a greater rate of compensation than that established by the railroad commission for the use of any car.

### 2. SAME—ACTION—BURDEN OF PROOF.

*Sayles' Ann. Civ. St. 1897, art. 4575*, provides that, in an action against a carrier for extortion, defendant may plead and prove as a defense that the overcharge was unintentional or innocently made. *Held*, that an unintentional and innocent extortion is a matter which must be pleaded and proved by defendant.

Appeal from District Court, Franklin County; S. P. Pounders, Special Judge.

Action by J. L. Rutherford against the St. Louis Southwestern Railway Company of Texas. Judgment in favor of plaintiff, and defendant appeals. Affirmed.

Glass, Estes & King and E. B. Perkins, for appellant. R. T. Wilkinson, for appellee.

**EIDSON, J.** This suit was brought in the court below by appellee against appellant to recover the penalty provided by the statute for extortion by railroads in this state, and also to recover for excessive charges alleged to have been collected as demurrage by the agent of appellant at Mount Vernon, Tex., for the use of a car shipped to that place by appellant loaded with brick. The trial before the court without a jury resulted in a judgment in favor of appellee in the sum of \$127, this amount consisting of \$125, the statutory penalty for extortion, and \$2 excessive charges.

By its first assignment of error appellant complains of the action of the court below in overruling its general demurrer to appellee's petition. In our opinion appellee's petition is not obnoxious to a general demurrer. The petition substantially alleges that the appellant charged and collected a greater rate for the use of the car than was fixed or authorized by law, and this was sufficient as against a general demurrer.

Appellant's second assignment of error is overruled. Appellee under the law was entitled to the free and unmolested use of the car for the purpose of unloading the same for 48 hours from and after noon on Saturday, December 14, 1901, exclusive of Sunday; and the court found, and the testimony supports such finding, that appellee was prevented by the acts of appellant from using the said car to unload same for 8 hours within said 48 hours, and that appellant took possession of said car and sealed up same before appellee had unloaded the same or had the use of the same the 48 hours allowed him by law within which to unload same, and would not permit appellee to take possession of the car and resume or complete the unloading thereof until two days thereafter, and after it had demanded of and collected from appellee, over his protest, the sum of \$2 as demurrage, and that appellee had previously paid to appellant the legal charges for the car, including its use in unloading same. When a railroad company makes a contract to transport an article or commodity from one point to another at a certain rate, the contract includes the use of the car during the 48 hours allowed by law for unloading same. The amount fixed by law through the railroad commission for the transportation of the car of brick in question from Sulphur Springs to Mount Vernon being \$10, this amount covered the compensation to the railroad company for the use of the car the 48 hours allowed by law for unloading it; and appellant's act in demanding and collecting from appellee \$1 per day for the use of said car prior to giving him the use thereof the 48 hours allowed by law for unloading same, made it guilty of extortion

as defined by article 4573, Sayles' Ann. Civ. St. 1897.

What has just been said in passing upon appellant's second assignment of error disposes of its third, fourth, and fifth assignment; and, further, it is not necessary, in order to show a railroad company guilty of extortion under the statute, that it be alleged and proven that the excessive charge was knowingly made. If such excessive charge was unintentionally and innocently made through a mistake of fact, it was a matter of defense for appellant to plead and prove, and there was no such pleading by appellant in this case. Article 4573, Sayles' Ann. Civ. St. 1897. We adopt the findings of fact of the court below, the same being supported by the evidence.

All of appellant's assignments of error are overruled, and the judgment of the court below is affirmed.

Affirmed.

#### INTERNATIONAL & G. N. R. CO. v. WRAY.\*

(Court of Civil Appeals of Texas. June 6, 1906.  
Rehearing Denied June 28, 1906.)

##### 1. NEGLIGENCE—ACTION—QUESTION FOR JURY.

Negligence becomes a question of law only when the act complained of is in violation of the statute, or when the undisputed evidence only admits of the inference that the commission of the act in question was negligence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 279-299.]

##### 2. MASTER AND SERVANT—INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — COMPLIANCE WITH COMMANDS.

An act done by a servant in obedience to an order of his foreman was not negligence as a matter of law, unless the danger of obeying the order was so obvious from the servant's standpoint at the time he undertook to obey it that no prudent man would have done so.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1096, 1110, 1112.]

##### 3. SAME—OPERATION OF RAILROADS.

The engineer of a switch engine was ordered by his foreman to run his engine backward upon the main track. He proceeded to do so, meanwhile watching and taking signals from the switchman in front of the engine, and a collision ensued between his locomotive and a train on the main track. *Held*, that he was not guilty of negligence as a matter of law in not discovering the train, and in failing to look for it while he was running backward.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1113-1118.]

##### 4. APPEAL—QUESTIONS REVIEWABLE — FAILURE TO PRESENT QUESTION ON TRIAL—INSTRUCTIONS—REQUESTS.

Appellant cannot complain of an instruction correct so far as it goes, where he requested no special charge correcting the supposed defects.

##### 5. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

A locomotive engineer, having been directed to run his engine backward upon the main track, d.d so and collided with a train on such

\*Writ of error denied by Supreme Court Oct. 11, 1906.

track, and in an action by him for injuries defendant alleged contributory negligence, consisting of plaintiff's failure to notice what was going on about him and running his engine in front of another engine in full view, and the court instructed that if plaintiff failed to exercise ordinary care to observe the situation about him, and discover the train in time to avoid the collision, when by the use of ordinary care he could have done so, and his failure was negligence which in any degree contributed to his injury, he could not recover. *Held*, that such instruction was ample and correct.

#### 6. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

A charge on contributory negligence should be confined to the specific acts of contributory negligence pleaded, and not be general, so as to submit any other acts of negligence.

#### 7. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, the court instructed that in estimating plaintiff's damages the jury might take into consideration plaintiff's time lost, if any, the impairment of his capacity to labor and earn money in the future, if any, and his mental and physical suffering, present and future, if any. *Held*, that the instruction was not erroneous as allowing double damages.

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Action by John L. Wray against the International & Great Northern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

N. A. Stedman, John M. King, and N. B. Morris for appellant. T. M. Campbell, L. A. McMeans, and A. M. Barton, for appellee.

NEILL, J. This is an appeal from a judgment of \$10,000 recovered by appellee for personal injuries alleged to have been sustained by reason of appellant's negligence.

#### Conclusions of Fact.

The evidence is sufficient to sustain the following conclusions of fact: (1) On October 3, 1903, the appellee, John Wray, while in the employ of appellant in the capacity of a switch engineer at Spring, Tex., and in the discharge of the duties of his employment, was ordered by his foreman to run his engine from the roundhouse onto the main line of defendant's railroad, at a time when the foreman, by the exercise of ordinary care, should have known that a collision between appellee's engine and a passenger train would likely occur if the order was obeyed by appellee. (2) Also, that appellee, in running his engine as directed by his foreman, was subject to the orders and direction of appellant's yard switchman, Rogan who, by signals, directed appellee to run his engine onto the main track of appellant's road at a time when said switchman by the exercise of ordinary care might have known train No. 7 was about to arrive at Spring, and that a collision between said train and appellee's engine would probably occur if appellee, in obedience to his orders and signals, ran his engine on the main line of road. (3) That the employees of appellant

operating the engine drawing train No. 7 in entering Spring failed to have said train under control, as required by the rules of appellant, and failed to keep a watchout for the purpose of preventing a collision with appellee's engine. (4) That the orders, signals, and omissions of appellant's servants, stated in the foregoing findings, were in every one of such findings, acts of negligence chargeable to appellant. (5) That such acts of negligence, operating singly or concurring, were, without any contributory negligence on the part of appellee, the direct cause of a collision between train No. 7 and appellee's engine, by reason of which appellee sustained serious and permanent physical injuries to his damage in the amount found by the jury.

#### Conclusions of Law.

1. Our conclusions of fact dispose of the first assignment of error, which complains of the court's refusal to peremptorily instruct a verdict for appellant, at its request. It is too well settled to require discussion that negligence becomes a question of law, only when the act causing damage to another is in violation of statute, or when the undisputed evidence admits of the inference only, that the commission of the act in question was negligence. *Lee v. I. & G. N. Ry.*, 89 Tex. 583, 36 S. W. 63; *Bonn v. G., H. & S. A. Ry.* (Tex. Civ. App.) 82 S. W. 808; *Virginia Portland Cement Co. v. Louck* (Va.) 49 S. E. 582. The appellant was charged with knowledge of the whereabouts of its trains, for it was its bounden duty to know where they were. The plaintiff was charged with no such knowledge or duty. He had the right to rely and act upon information given him by the defendant through its officers or agents ordering and directing his work. With the knowledge, imputed to it by the law, of the whereabouts of train No. 7, the appellant, through its agent, who was appellee's vice principal, ordered appellee to take his engine from the roundhouse and run it onto the main track where a collision between it and train No. 7, would almost inevitably occur. This order was followed by signals from the switchman, which it was appellee's duty to take and obey, given, almost at the point and time of the collision, to appellee to run his engine on the main track. Orders and signals more pregnant with danger, of which appellee was utterly oblivious, can hardly be conceived. And yet, because appellee, who relied upon appellant's discharging its duty not to place him in a position of peril, failed to discover the proximity of train No. 7 to the place on the main track, where the collision occurred, it is seriously contended by appellant that he was guilty of contributory negligence as a matter of law. Where an act is done by one in obedience to an order of his foreman, the law will not declare the act of obedience negligence per se, unless the danger of obeying the order was so

obvious and glaring from the servant's standpoint, at the time he undertook to obey it, that no prudent man would have undertaken it, but will leave it to the jury to say whether he ought to have obeyed it or not. *G., H. & S. A. Ry. v. Puente* (Tex. Civ. App.) 70 S. W. 362; *S. A. & A. P. Ry. v. Stevens* (Tex. Civ. App.) 83 S. W. 235; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863; *Chicago & E. I. R. Co. v. Heerey* (Ill.) 68 N. E. 74; *Western Stone Co. v. Muscial*, 198 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325. As the evidence shows that train No. 7 came up from behind the appellee, and the point of collision was where the main track intersects the track on which his engine was at an acute angle and that he was watching and taking signals from the switchman in front of him, we cannot perceive how he can be held guilty of negligence per se in not discovering the train in time to prevent the collision. Nor can it be said that his failure to look out for the train on the main track, while he was running his engine over the short intervening space between the roundhouse and coal car, standing on a track between the one he was on and the main track, was negligence, as a matter of law, proximately contributing to the collision.

2. The second assignment of error complains of the court's submitting as issues of negligence, on the part of appellant, the order of appellee's foreman, and the signals of his switchman, directing him to run his engine onto the main track, upon the ground that such acts, even if negligent, were not the proximate cause of the collision, appellee's failure to keep a watchout for trains on the main track being an intervening and the efficient cause. This assignment is simply a rehash, in a different form, of the one just considered. Unless it can be said that the evidence shows that appellee was guilty of negligence, as a matter of law, in failing to keep a lookout for train No. 7, and that such failure was the proximate cause of the collision, such failure cannot be said to be an intervening cause which relegates all others, and is of itself the efficient cause of the accident. Therefore this assignment is disposed of in what we have said in passing upon the other.

3. The third assignment of error is directed against that part of the court's charge which submits to the jury the issues as to whether appellant's servants operating train No. 7 failed to have said train under control, or to keep a lookout, and, in event the jury should find they failed in either, or both, to find whether such failure was negligence, and, if negligence, whether it was the proximate cause of the collision, the contention being that the undisputed evidence shows that such servants were not guilty of either of such alleged acts of negligence. We do not think that any other conclusion than that contended for can be deduced from the evidence. Though the servants operating

said train testified that the train was under full control — i. e. its speed did not exceed six miles an hour — the jury may have, from the physical facts shown by the collision, disbelieved them. For, when the effects of the force of the impact are considered, it may be concluded that such effects could not have been produced by a train running at no greater speed than six miles an hour. Though the servants operating the train testified that they did keep a lookout, this testimony may not have been believed, from the fact that appellee's engine was not seen by any of them until run into by their train. The charge complained of by this assignment is correct as far as it goes, and if appellant thought it was not full enough, or omitted anything it wished presented in connection with it, a special charge should have been prepared and requested by it correcting such supposed defects.

4. The fourth, fifth, and sixth assignments of error, which complain of the court's failure to give certain special charges requested by appellant upon the issue of contributory negligence, are overruled because, upon such issue, the court, in its main charge, fully and correctly instructed the jury as follows: "You are further instructed that if you believe from the evidence that the plaintiff failed to exercise ordinary care to observe the situation about him and discover the approaching train with which his engine collided in time to avoid the collision, and you further believe that by the use of ordinary care he could have observed said train in time to have avoided the collision, and that his failure to do so was negligence which, in any degree, contributed to his injury, then he would be guilty of contributory negligence, as a matter of law; and if you so believe, you must return a verdict for defendant; and this is so, although you may believe that any or all the other employes in question were also guilty of negligence concurring with his to produce the injury." Besides, special charges Nos. 5 and 6, involved in these assignments, are too general, in that they make any act of negligence on the part of appellee, contributory to his injury, a defense to his action. Whereas appellant only pleaded his failure "to notice what was going on about him, and running his engine right in front of another engine on defendant's road in full view of him in broad daylight." A charge on contributory negligence, like a charge on any other character of negligence, should be confined to the specific acts of negligence pleaded, and should never be so general as to include the submission of any other acts of negligence.

5. On the measure of damages, the court instructed the jury as follows: "If under the foregoing instructions you find for plaintiff, then in estimating his damages you may take into consideration his time lost, if any, the impairment of his capacity to labor and earn money in the future, if any, his mental

and physical snffering, present and future, if any, and in your dispassionate judgment allow him such a sum as will fairly compensate him in so far as the evidence may have shown you he is entitled to damages in these respects." This is objected to by appellant upon the ground that it allows double damages. We are unable to place such a construction upon it. A fair compensation for injuries sustained is all the damage the charge permits him to recover. In estimating it the jury are allowed to take into consideration certain well-known elements of damages, specified in the charge. No one of these elements includes or runs into any other; the charge does not repeat any one of these elements; nor allow double recovery on a single one of them, nor anything more than just compensation.

6. What we have said in considering previous assignments disposes of all others adversely to appellant.

The judgment is affirmed.

# RABB et al. v. TEXAS LOAN & INVESTMENT CO.

(Court of Civil Appeals of Texas. June 28, 1906.)

## 1. BUILDING ASSOCIATIONS — CONTRACTS — USURY.

A building association sold shares of stock to an individual, subject to the by-laws of the association, and loaned to him a specified sum, for which he executed his promissory note, with 10 per cent. interest, secured by a deed of trust on real estate and by a pledge of the stock. The deed of trust and note required the individual to make monthly payments on the stock, the amount of which was not shown, and stipulated that the failure to pay either the installments of interest or dues on the stock authorized the foreclosure of the lien on the real estate and stock, and that, if the monthly installments of interest on the note and dues on the stock were paid until the maturity of the stock, then on the surrender of the certificate the note should be deemed paid and canceled. *Held*, that the transaction as disclosed by the deed and note was not usurious, there being nothing therein interfering with the right of the individual to pay his note and for his stock, and thus discharge the lien and become the owner of the stock.

## 2. APPEAL — REVIEW — EVIDENCE — STATEMENT OF FACTS.

The court, on reviewing assignments of error, cannot go beyond the statement of facts for the evidence on which the case was tried and the judgment rendered.

## 3. JUDGES — AUTHORITY OF JUDGES.

The fact that a suit filed in the district court of one district was tried in that district by the judge of another district is immaterial on error to review the judgment. The authority of the judge of the latter district to try the case cannot be questioned.

## 4. MORTGAGES — FORECLOSURE — JUDGMENT AGAINST PURCHASER OF MORTGAGED PREMISES.

Where a purchaser of mortgaged premises did not assume the mortgage debt, the court, on rendering a judgment of foreclosure, could not render judgment against the purchaser for the debt.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1596.]

Error from District Court, Galveston County; Robt. G. Street, Judge.

Action by the Texas Loan & Investment Company against W. P. Rabb and another. There was a judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed and rendered in part.

V. A. Collins and Howth & Adams, for plaintiffs in error. S. S. Hanscom, for defendant in error.

REESE, J. The Texas Loan & Investment Company brought this suit against W. P. Rabb and H. C. Marble to recover the amount alleged to be due upon a certain promissory note for \$700, executed by said Rabb, dated July 5, 1895, payable on or before 10 years after date, to plaintiff, with interest from date at 10 per cent. per annum, payable monthly, and 10 per cent. attorney's fee, and to foreclose a mortgage lien on a certain lot of ground in Jefferson county, and also a pledgee's lien upon seven shares of stock, of the face value of \$100 each, in plaintiff company, alleged to have been hypothecated with plaintiff by Rabb as security for the note. It is alleged that defendant H. C. Marble had bought the lot from Rabb, and as part of the consideration for the conveyance had agreed with Rabb and plaintiff to assume and pay the indebtedness aforesaid. Defendants interposed a general demurrer and general denial, and also pleaded that the contract was usurious, and that the pretended sale of the shares of stock and the payment of monthly installments upon the same were a device adopted to cover up the usury in the transaction. It is alleged that the certificate for the shares of stock was at once transferred to the loan company, and that defendants had never in fact been the owners thereof. The plea of usury is sworn to by defendant Marble alone. From a judgment against both defendants for the amount due upon the promissory note, amounting to \$840, including interest and attorney's fees, and for foreclosure as prayed for, the defendants bring error.

The first and sixth assignments of error present the question of alleged error in the judgment for interest. The statement of facts contains only the note and deed of trust sued on and the deed from Rabb to Marble, also the certificate of eight shares of stock and blank transfer thereof, together with certain oral testimony showing the default in payment of interest on the note and installments upon the stock. Whatever evidence of usury there may have been in the contract, if any, must be gathered from these documents. The note recites that it is secured by the deed of trust on the lot, and also by a pledge of the seven membership shares of the loan and investment company, and contains the following stipulation: "Now, if we pay promptly the monthly interest on said sum of seven hundred dollars,

and the monthly dues on said membership shares, and any fines assessed under the rules of said company, and the taxes accruing on the said real estate described in the deed of trust securing this obligation, and the premium necessary to keep the improvements on said real estate insured against fire for such sum as said company may require (not exceeding \$——), until the said shares become fully matured, and of the value of one hundred dollars each, then it is understood that upon the surrender of the certificate representing said membership shares to the said company this note shall be deemed fully paid and canceled. But if we fail to promptly pay any installment or installments of interest when due and payable, or fail to pay said taxes or insurance premiums when due, or if we make default in the payment of monthly dues on said membership shares or fines for a period of six months after the same are due, or any installment thereof is due, then, at the option of the said company or other holder, the whole indebtedness evidenced by this obligation (including any taxes or insurance premiums due, or paid by said company) shall at once mature and become due and payable, and sale under the said deed of trust in the manner therein provided, or a foreclosure thereof in court by suit or other proceedings, may be had." The deed of trust is in the usual form, conveying to the trustee the lot of ground aforesaid, and authorizing a sale by the trustee upon default in payments as provided in the note, which is copied in the deed of trust. Seven shares of stock were pledged to secure the payment of the note according to the recitals therein, but the certificate embraces eight shares and is as follows: "Shares \$100 Each. Texas Loan & Investment Company. Number 7,577. Class A. Series 53. Amount paid, \$8.00. Shares 8. This certifies that W. P. Rabb, of Beaumont, county of Jefferson, state of Texas, is a member of the Texas Loan & Investment Company, and has subscribed for and is the owner and holder of eight membership shares therein of class A. This certificate is issued, accepted, and held subject to all the conditions, rules, regulations, and by-laws of the said company now in force or which may be hereafter enacted. This certificate transferable only on the books of the company. In witness whereof, the Texas Loan & Investment Company has caused its corporate seal to be affixed to this certificate and the same attested by the signatures of its president and secretary in the city of Galveston, Texas, this 1st day of March, A. D. 1895. J. D. Skinner, President. James S. Waters, Secretary." Indorsed on the certificate is a transfer, signed by W. P. Rabb; the name of the transferee and date being left blank.

It will be seen that there is nothing in the record to indicate how much was required to be paid on the stock by way of monthly installments, nor how much had in

fact been paid, except that it is to be gathered from the testimony of the witness Douglass that at the time of filing the suit plaintiffs in error were at least 10 months behind in these payments. If the sale of the stock was a sham and a subterfuge, no title to the same being intended to pass to Rabb, the scheme would be held a mere device to cover what in fact would be a usurious transaction. The effect of such a contract would be that the monthly installments so paid, apparently on the stock, would in fact be payments on the principal of the debt. Ten per cent. per annum interest upon the entire debt, without regard to these monthly payments on the principal, would be usurious, with the consequent penalty of the loss of the interest. In such case the entire contract for interest would be void and all payments would be credited upon the principal. There is nothing upon the face of the documents in the record, and there is no other evidence before us, to authorize this conclusion. The evidence shows a sale of eight shares of stock in the loan and investment company, of the face value of \$100 each, "accepted and held subject to all the conditions, rules, regulations, and by-laws of the company," and a loan of \$700 by the company to Rabb, for which he executed his promissory note, with 10 per cent. interest, secured by a deed of trust on a lot of ground and also by a pledge of the stock. It is to be gathered from the recitals in the note and deed of trust that there were to be certain monthly payments on the stock, the amount of which is not shown, and that the failure to pay either the installments of interest or dues on the stock authorized the foreclosure of the lien on lot and stock. There is a further stipulation in the note that if the monthly installments of interest on the note and of dues on the stock, together with "all fines assessed under the rules of the company" and taxes and insurance, are promptly paid until the stock is matured, "then it is understood that upon the surrender of the certificate representing said membership shares to the company the note shall be deemed fully paid and canceled." This last stipulation, we think, only authorized a cancellation of the note upon a surrender of the certificate for the shares, the other conditions being complied with, but does not require such surrender. There is nothing in the contract, so far as it is evidenced by these instruments, that would interfere with the right of Rabb to pay his note according to the stipulations thereof, pay for his stock in accordance with the terms and conditions of the rules, regulations, and by-laws of the company, and thus discharge the lien on lot and stock and become the absolute owner of the latter. This would be an entirely legitimate transaction, with no taint of usury in it. *Loan Co. v. Mitchell*, 87 S. W. 184, 13 Tex. Ct. Rep. 18.

Much of the brief and argument of plain-



tiffs in error upon these assignments of error are addressed to matters, urged, it is true, by their pleadings, but without support in the statement of facts, beyond which we cannot go for the evidence upon which the case was tried and the judgment rendered. Other assignments of error assail the judgment on various grounds, none of which find any support in the record.

It is contended that plaintiffs in error had been required to pay interest at the rate of \$5.85 per month, which would make the yearly interest \$70.20, instead of \$70. If so small an excess, caused, no doubt, by the voluntary payment of \$5.85, instead of \$5.83%, could be regarded, there is no evidence of such payment; nor is there any evidence that the property mortgaged was the homestead of Rabb or Marble, in support of the complaint that it was error to foreclose a lien on the homestead for the \$70 attorney's fees.

Plaintiffs in error complain that the case was tried without a jury, notwithstanding they had demanded a jury and paid the jury fee. The record does not show any demand for a jury, nor payment of a jury fee. None of the irregularities complained of in the trial of the case out of its order, and without notice to plaintiffs in error, are supported by the record, which discloses nothing upon this point except that the case was called for trial on the 18th of March, 1905; that the plaintiff appeared, and defendants, having filed an answer, failed to appear; that, neither party having demanded a jury, the cause was tried by the court, with the resulting judgment. There was no motion for a new trial. The fact that the suit was filed and tried in the district court of the Tenth district by the judge of the Fifty-Sixth district is of no consequence. The authority of the judge of the latter district to try it cannot be questioned. None of the facts stated by plaintiffs in error tending to show why their counsel was not present to represent them upon the trial are shown by the record. The proceedings appear to have been in all respects regular.

The court rendered judgment against H. C. Marble for the amount of the debt, as well as foreclosure, which is assigned as error. The assignment must be sustained. The deed from Rabb to Marble contains no agreement or contract on the part of Marble to assume or pay the mortgage debt. Nor is there any evidence of such agreement. The judgment of foreclosure against Marble was proper, but there was no authority for the judgment against him for the debt. In case this assignment is sustained, defendants in error in their brief ask us to reform the judgment as to Marble.

We find no other error in the record. The judgment against W. P. Rabb for debt and foreclosure and against H. C. Marble for foreclosure of the mortgage lien is affirmed, but the judgment against Marble for the debt is reversed, and judgment here rendered

in his favor upon this issue. The costs of the appeal are adjudged, one-half against W. P. Rabb and the other half against defendant in error.

Affirmed in part. Reversed and rendered in part.

### GREER v. INTERNATIONAL STOCK YARDS CO. et al.\*

(Court of Civil Appeals of Texas. June 6, 1906.  
Rehearing Denied June 23, 1906.)

#### 1. VENDOR AND PURCHASER—TITLE OF VENDOR—LIMITATIONS.

Under a contract for the sale of land whereby the vendor agrees to give a good and sufficient title, where the record title proves bad, a title by limitation, to be sufficient, must be such as can be proved good as matter of law, and not as depending on a question of fact.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 247.]

#### 2. SAME—APPROVAL OF COUNSEL.

Where vendors of land agree to furnish a good and sufficient title to be approved by a firm of attorneys named, and the attorneys disapprove the title because the record title is bad, and the only title shown is by limitation, the purchaser is not bound to perform the contract.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 260.]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Nat Greer against the International Stock Yards Company and others. From the judgment, plaintiff appeals. Reversed and rendered.

T. A. Falvey and Waters Davis, for appellant. R. F. Burges and Edwards & Edwards, for appellees.

NEILL, J. This suit was brought by the appellant, Nat Greer, against appellees, the International Stock Yards Company, John Caldwell, Julia Caldwell, and Felix Martinez, to recover on the written contract mentioned in our conclusions of fact the sum of \$1,000 advanced by appellant to appellees in pursuance thereof, and the further sum of \$915 as damages stipulated for the failure of appellees to deliver possession of the premises made the subject of such contract within 60 days after the execution thereof. The appellees, after interposing a number of exceptions (all of which were overruled), answered by a general denial and by pleading specially that the title to the property which was the subject of the contract was good, and that the attorneys, to whom, by its terms, the title was to be submitted for approval and acceptance, would have by the use of reasonable diligence decided that it was good; but as soon as the written opinion of said attorneys, disapproving said title and pointing out their objections thereto, was presented to appellees, they (appellees) presented to said attorneys a statement in regard to said title which showed the same was good by the statute of

\*Writ of error denied by Supreme Court Oct. 11, 1906.

limitations, and that all objections made by them to the title were immaterial, or had been obviated by corrections, and that appellant was informed of such facts, and defendants, about the 7th of October, 1904, tendered appellant a good and sufficient title by warranty deed to said real estate and immediate possession of the premises, and demanded that he carry out his contract, which plaintiff declined and refused to do, and that by reason of the premises he is not entitled to recover anything by this suit. They also pleaded that the clause in the contract upon which appellant predicated his action for liquidated damages was intended as a penalty, and not a stipulation for such damages. Julia Caldwell filed a separate plea alleging coverture at the time, and ever since, said contract was made. The case was tried without a jury, and judgment entered, upon conclusions of fact and law found, that the plaintiff recover nothing on his claim for the \$1,000 sued for, and that he have judgment on his demand for liquidated damages against the International Stock Yards Company and John Caldwell for the sum of \$195.54. From the judgment so rendered this appeal is prosecuted.

#### Conclusions of Fact.

The agreement upon which appellant based his suit is in writing, and was executed on the 25th of June, 1904, by the International Stock Yards Company, John Caldwell, Julia Caldwell, and Felix Martinez, parties of the first part, and Nat Greer, party of the second part. After reciting that the International Stock Yards Company, John, and Julia Caldwell are owners of certain described real property situated in the city of El Paso and desire to sell the same to the party of the second part, and that he desires and is willing to purchase the same according to the terms and conditions set out therein, it contains the following agreements and stipulations: "It is therefore agreed and stipulated as follows: That the parties of the first part agreed to sell said property and premises to said party of the second part for the agreed sum of sixteen thousand (\$16,000.00) dollars; one thousand dollars of which is to be paid upon the signing and delivery hereof, and the remaining fifteen thousand dollars to be paid whenever the parties of the first part shall deliver proper deed of conveyance, warranty in form, to said second party, and when Turney & Burges, attorneys for party of the second part, shall accept title to said premises heretofore described and shall approve deed therefor, provided said deed shall be tendered and said title be approved on or before six months from this date. It is agreed and understood that should the parties of the first part fail to make good and sufficient title to said premises, as hereinbefore stipulated, within said space of six months and give full possession to said party of the second part of said premises, then, and in that event, all the parties of the first part agree and bind

themselves to return to said second party said sum of one thousand dollars already paid, and release him from any and all obligations to carry out any of the other terms and conditions of this agreement. However, should said party of the second part fail and refuse to comply with his said agreement already provided for, and fail to accept said deed when tendered him, and said title being approved by his said attorneys, and fails to pay off the balance due under this contract, fifteen thousand dollars, that then and in that event he shall forfeit to the parties of the first part all of said sum of one thousand dollars already paid. It is agreed and understood that the parties of the first part are to have sixty days in which to deliver possession of said premises to said second party without penalty, but should they, the parties of the second part, not deliver possession of said premises to party of second part within sixty days, that then and in that event, for every day after sixty days, such party of the second part is deprived of the premises and possession thereof, and of said property, the parties of the first part agree and bind themselves to pay monthly the sum of seven and 50/100 dollars for each day during which they shall fail to deliver possession of said premises and property to said party of the second part, which payment and liability is to continue for the space of four months after the expiration of said sixty days, provided for herein. [The next succeeding paragraph in the agreement does not seem to be material to any issue in the case, and will be omitted.] The respective parties hereto agree and bind themselves to carry out and perform all the provisions hereof, made binding on them respectively. Said Felix Martinez, however, does not own or hold title to any of said property, but is to receive and hold said sum of one thousand dollars for the use and profit of all the parties of the first part, and is to, as far as he is able, carry out the provisions of this contract made binding upon all the parties of the first part, and, with the others of said parties of the first part, is responsible for the return of said one thousand dollars, should said party of the second part be released from the provisions of the same and should title to said property fall."

The trial judge, after finding that the foregoing contract was executed by the parties, in his conclusions of fact, found: "That thereafter appellees furnished appellant's attorneys, Messrs. Turney & Burges, an abstract of their title to the property described in the agreement. That, after examining the abstract, said attorneys were of the opinion it did not show a good and sufficient title and disapproved the same, giving a written opinion addressed to appellant, indicating defects in the title to the property as it was shown by the abstract, which opinion concluded as follows: 'For the reasons above pointed out we have been unable to approve the title of the International Stock Yards Company to

said property, as shown in the abstract. Respectfully submitted, Turney & Burges.' That Mr. Turney, of the firm of Turney & Burges, informed plaintiff at the time that, although the record title as shown by the abstract was defective, the proposed grantors had a good title to the property by limitation, but advised Greer not to accept a title by limitation, and when on October 3, 1904, a deed to the property was tendered Greer, he rejected the same, and the title as it stood, under the advice of his attorneys. That on the 4th of October, 1904, Messrs. Edwards & Edwards, acting in behalf of the defendants, addressed a letter to Messrs. Turney & Burges, as attorneys for Greer, calling their attention to certain sources of information as to the record title, and also to the fact that the title in defendants had been made perfect by limitation, and also offering to relieve the title of two certain unreleased liens referred to in the letter of Turney & Burges to Greer. That notwithstanding the offer to release the liens, and the fact that there was a perfect title by limitation in the proposed grantors, Turney & Burges advised the rejection of said title, and the same was rejected by Greer on the 3d day of October as well as the conveyance tendered, upon the ground there was no good and sufficient record title shown in the proposed grantors, and that a good title by limitation was not sufficient and did not meet the requirements of said contract, or agreement, above set out and executed by the parties on the 7th day of July, 1904, and that the said Turney advised and informed the said Greer, however, at the same time that, in his opinion, said title of the defendants, the International Stock Yards Company and the Caldwells was a good and provable title by limitation, but that he would not advise him to accept a title by limitation, and that he would not approve any title by limitation. That the record title of the defendants to the said property was defective and did not constitute by itself a good and sufficient title to said property, but that aided by limitation the said title was good and sufficient and a marketable title, and it was admitted by the parties in open court of record that the title held by the proposed grantors of the real estate described in the contract was a good title by limitation at the time the opinion of Turney & Burges set out in plaintiff's petition was given, and that William H. Burges, a member of the firm of Turney & Burges, would testify, if present, that in his opinion the title was good by limitation at the time said opinion was given. The court further finds that on the 7th day of September, 1904, the time at which possession was to be yielded to the said Greer, or the grantors pay liquidated damages for failure to do so, the said Greer was willing to take possession thereof, but that he was unable to secure possession, and possession was not tendered him until October 3, 1904, at which time he refused title and possession, although up to

that time he had been ready to take possession under the contract. The court further finds that on July 17, 1904, plaintiff paid defendants \$1,000 under the terms of this contract, and about January 25, 1905, he demanded the return of said sum, and same is still held by said defendants."

As evidence is found in the record tending to support these conclusions so far as they are in fact, and only the finding that "the title of the International Stock Yards Company and the Caldwells by limitations is good" (which is rather a conclusion of law than of fact, and will be considered and disposed of as such in our conclusions of law), is gainsaid by appellant, they will be adopted as the conclusions of this court.

#### Conclusions of Law.

Upon the foregoing conclusions of fact the trial court found conclusions of law, and upon such findings entered the judgment appealed from.

The second assignment of error is that "the court erred in holding 'that a title perfected by limitation is a good and sufficient title, and falls within the terms and language used in said contract as much so as a good and sufficient record title; that is, the words "good and sufficient title" included a good and sufficient title by limitation as well as good and sufficient record title, or record title made good and sufficient by limitation,' for the reason that such title by limitation was not the title contracted for by the plaintiff." We take it that the principles applicable to specific performance of contracts may be looked to in determining the question presented. If, in view of such principles, in a suit brought by appellees against appellant to compel him to perform his contract to purchase the land, he would be held to its performance, were it not that the damages for such failure were stipulated by the contract, then he should not recover in this action, for the reason the money sued for is the damages stipulated for his failure to do what otherwise he should do under the contract. On the other hand, if, in such a case, it should be held the appellees would not be entitled to a decree of specific performance against him, then he should recover the money sued for, for, in that event, it would be apparent that the damages it was intended to cover had not accrued. In an action for specific performance, "if there arises, either on the face of the pleadings or from the examination made during the progress of the suit, a reasonable doubt concerning the title to be made and given by the vendor, the court, without deciding the question between the parties then before it—which decision might not be binding upon other persons, and therefore might not prevent the same question from being subsequently raised by other claimants of the land—regards the existence of this doubt as a sufficient reason for not compelling the pur-

chaser to carry out the agreement and accept a conveyance." *Pomeroy on Contracts*, "Specific Performance," § 198. This is the rule stated by the eminent author, after an exhaustive examination of the authorities, both English and American, which are cited in a note following its enunciation. While a very few of the cases cited are accessible to this court, an examination of those that are, and others upon the same question, are enough for the deduction of the rule stated. Upon the same subject it is said by *Waterman*, on *Specific Performance* (section 412): "Although no general rule can be laid down as to the kind of doubt which will induce the court to withhold a decree of specific performance, yet it will do so, if a third person has an interest in, or a claim against, the property, however improbable it may be that the right will be exercised, for the decree of the court is in personam, and not in rem, and binds only those parties to the suit, and persons claiming under them. 'Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits, be brought against him, and probably take from him, or his representatives, land upon which money was invested. He should have a title which should enable him, not only to hold his land, but to hold his peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its market value.' When doubts are raised by extrinsic circumstances, which neither the purchaser nor court can satisfactorily investigate, for want of means to do so, the court will refuse its aid. But a threat, or even the possibility of a contest, will not suffice to cast a reasonable doubt on the title. The doubt must be 'considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous, and astute niceties, but such as produce real bona fide hesitation in the mind of the chancellor.' \* \* \* Specific performance will not be decreed, unless the vendor can give a marketable title, even though a court might consider the title good. But there must be some debatable ground on which the doubt can be justified. A title may be doubtful because it depends on a doubtful question of law not settled by any binding authority, or of which different courts may take an opposite view, or where those who may hereafter claim an interest in the property will not be concluded by the decree. A doubtful title cannot be made marketable by an opinion of the court on a case stated between the vendor and vendee. A title depending upon the bar of the statute of limitations may be a marketable title which a purchaser will be compelled to accept, if it clearly appears that the entry of the real owner is barred. Where a contract for the purchase of property is subject to the approval of the title by the purchaser's solicitor, if the latter disapproves the title, the vendor, in the absence of bad faith

or unreasonableness on the part of the purchaser or his solicitor, cannot enforce specific performance of the contract." Again, it is said by *Fry*, on *Specific Performance* (sections 579, 580): "Though the court may entertain an opinion in favor of the title, yet, if it be satisfied that the opinion may fairly and reasonably be questioned by other competent persons, it will refuse specific performance. \* \* \* The court will never compel a purchaser to take title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings. The court will not, to use the favorite expression, compel him to buy a lawsuit." Upon this subject, the Supreme Court of the United States, in *Wesley v. Fells*, 177 U. S. 373, 20 Sup. Ct. 661, 44 L. Ed. 810, after stating the equitable rule that a defendant in proceedings for specific performance shall not be compelled to accept a title in the least degree doubtful, says: "It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail in law. It is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title or rights incident to it. He ought not to be subject, against his agreement or consent, to the necessity of litigation to remove even that which is even a cloud upon his title. \* \* \* Courts of equity do not force the purchasers to take anything but a good title, and do not compel them to buy lawsuits." See, also, *Hedderly v. Johnson* (Minn.) 44 N. W. 527, 18 Am. St. Rep. 521. In *Fahy v. Cavanagh* (N. J. Ch.) 44 Atl. 156, it is held, after an exhaustive examination and consideration of the authorities, that "If the title depends upon a question of fact, which is not a matter of record, and cannot be so made, then the rule is \* \* \* that the court will not compel an unwilling purchaser to take the title. 'In cases where the doubt in relation to title is one of fact, which the court is called on to consider, the general rule has been declared to be that the court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings.'" See, also, *Townshend v. Goodfellow* (Minn.) 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736.

But, from the principles stated, it does not necessarily follow that a title resting upon the statute of limitations is insufficient to support an action for specific performance. Indeed, it has been held, both in England and America, that a title by adverse possession may be so clearly proved, and be so free from doubt, as to be a proper foundation for a decree of specific performance against the purchaser. See *Conley v. Finn* (Mass.) 50 N. E. 461, 68 Am. St. Rep. 399,

and authorities cited. We apprehend the rule to be that, in an action for specific performance upon an ordinary contract for the purchase of realty, where the vendor's title by limitations is so clearly established as to make it a matter of law as distinguished from a question of fact, the contract will be enforced; but when the state of the evidence is such as to make the question of title one of fact which must be submitted to the jury, as is ordinarily the case, specific performance of the contract will not be decreed. Therefore, while the principle "that a title perfected by limitation is a good and sufficient title," stated in this assignment, may be abstractly correct, yet if it does not appear as a matter of law that appellees had such a title, but if the state of the evidence is such as to make the question of title depend upon facts to be determined by a jury, or the court setting as a jury, it would not follow that a good and sufficient title, such as was contemplated by the parties under the contract, had been tendered the plaintiff. The court found that appellees had no title to the property except such as depended upon the statute of limitations. The only evidence introduced to show title by limitations was the affidavits of Allen Blacker and William Treyer. Such affidavits would be no evidence whatever in a suit brought by Milton A. Jones (in whom the abstract furnished appellant by appellees shows an outstanding title to the premises), or those claiming under him, against appellees, or appellant, if he had taken the property, that Jones' title had been extinguished by limitations, and a good and sufficient title had been acquired thereunder against him, which was in the appellees when they tendered appellant a deed thereto. In other words, when appellant pointed out a defect, fatal to appellees' title, apparent from the abstract of title they furnished him, it rested upon them to show that they had title as a matter of law by virtue of the statute of limitations, and, to prove this, they only furnished affidavits to appellant and, afterwards, upon the trial of this case, to the court, which would be no evidence at all in a suit brought against them by Jones, or those claiming under him, for the land. It cannot therefore be said that title by adverse possession was so clearly proved and so free from doubt as to form a proper foundation for a decree of specific performance. But, let it be admitted pro hac vice that such title was so established, it by no means follows that appellees would, under the contract, have been entitled to compel appellant to take the land, had it not contained a stipulation of the damages for his failure to do so. Under the express provisions of the contract, the balance of the purchase money was not to be paid until defendants delivered to plaintiff "proper deed of conveyance, warranty in form, and when Turney & Burges, attorneys for party of sec-

ond part (plaintiff) shall accept title to said premises heretofore described and shall approve deed therefor, provided said deed shall be tendered and said title approved on or before six months from this date," and contains this further stipulation: "It is agreed and understood that, should the parties of the first part fail to make good and sufficient title to said premises, as hereinbefore stipulated, within said space of six months, and give full possession to said party of the second part of said premises, then, and in that event, all parties of the first part agree and bind themselves to return said second party said sum of \$1,000 already paid, and release him from any and all obligations to carry out the other terms and conditions of this agreement."

The undisputed evidence shows that Messrs. Turney & Burges refused to accept title to the premises. It is neither pleaded nor contended that such refusal was either arbitrary, capricious, captious, or fraudulent. On the contrary, the evidence shows that they were governed by the best interest of their client, their understanding of the law, and the exercise of the soundest discretion intrusted to them by all the parties to the agreement. Hear what Mr. Turney, who acted for his firm in the matter, says about it. Referring to the letter of this firm written on October 1, 1904, to plaintiff, he testified: "The firm of Turney & Burges disapproved the title as being a bad title." On cross-examination, in answer to questions asked by appellees' counsel, he testified: "You were never able to satisfy, or did not really satisfy, us about these paragraphs two and three, in our conversation, as I remember it. I told you I would waive everything except the Jones deed and the other deed. If they were not in the title, we would approve the title. \* \* \* You and I discussed the gap in the title on many occasions, and I say to you now I would have been glad to approve the title because of the situation we were in. I will say to you I believe the title by limitation is established; but my instructions from him, and my understanding, was they wanted a merchantable title such as could be conveyed without extraneous objections each time. I don't believe in that. Q. You made up your mind that there was no sufficient title except by limitation? A. I knew there was no title except by limitation. I know that now. Q. How do you know? A. I know it from the condition of the abstract. I knew it from what you and other people told me. Q. You made up your mind at the time you delivered your opinion you would not approve the title unless they showed you a record title? A. Unless it was a good record title, unless I could get a record title. Q. Unless you could get a record title you did not propose to approve it? A. Unqualifiedly that was my opinion. Had to be a legal title; would not approve a limitation title, unless it was litigated as

against all other parties claiming, and, when you told me there had been a suit tried in court against other parties, that did not affect me one iota. Q. And you simply turned down the title because you would not approve a limitation title? A. I will not approve this limitation title, such as you brought and such as they furnished, such as Mr. Greer furnished, or such as anybody furnished. I understood from you and men, that had been used to approving limitation titles here, did not claim adversely your contention here—Judge Caldwell, I understood he claimed adversely to what you claim. Q. And Judge Caldwell later brought suit for these lots? A. When I became acquainted with that fact, it made me more in doubt than ever about your limitation title, in which I took no stock. Q. Did you tell Greer this was a good title by limitation? A. I told Greer that it probably was a good title by limitation. Q. Did you use the word 'probable' in there—didn't tell him it was a good title by limitation? A. I don't think I did. I told him that it could be shown to be good by limitation. It still would be uncertain, because there might be just as much proof on the other side in regard to the occupancy of the property—would be unsafe to buy a limitation title.”

The rule is well settled that where a contract for the purchase of property is “subject to the approval or acceptance of the title by the purchaser's solicitor,” if the latter disapproves of the title, or refuses to accept it, the vendor, in the absence of bad faith and unreasonableness on the part of the purchaser or his solicitor, cannot enforce specific performance of the contract. *Moling v. Mahon* (Tex. Civ. App.) 86 S. W. 958; *Waterman, Spec. Perf.* 550; *Hudson v. Buck, L. R.* 7 Ch. D. 683. As, under the contract, the title was to be approved by Turney & Burges, and the undisputed evidence shows that it was disapproved by them, we can see no escape of the appellees from refunding to the appellant the \$1,000 advanced them under the contract with legal interest from January 25, 1905, the date on which appellant demanded of the appellees the return of the money. But, since the appellant refused to accept title and deed to the property, we can conceive of no principle of law or equity that would permit him to recover anything by reason of appellees' failure to yield him possession of the property at the time specified in the contract. Clearly he was not entitled to the possession after rejecting the title and refusing to accept a deed to it, or, if he had taken possession and afterwards rejected the title and refused to go on with the contract, the appellees would be entitled to recover of him the rental value during the period of such possession.

The judgment of the district court is reversed, and judgment will here be rendered in favor of appellant against all the ap-

pellees, except Julia Caldwell, for \$1,000, with interest at the rate of 6 per cent. per annum from January 25, 1905.

Reversed and rendered for appellant.

### HOUSTON ICE & BREWING CO. v. NICOLINI.\*

(Court of Civil Appeals of Texas. June 6, 1906.  
On Rehearing, June 29, 1906.)

#### 1. APPEAL—INSTRUCTIONS—PREJUDICE.

Where, in an action for commissions under a contract of employment, the court held that the contract standing alone would entitle plaintiff to the excess of commissions over an indebtedness owed to defendant's predecessor if any there was, and it was conceded that the jury correctly construed the contract, defendant was not prejudiced by an instruction that, though the contract standing alone would entitle plaintiff to the excess of commissions, it was the province of the jury under the evidence concerning the execution of the contract and the acts of the parties thereunder to determine whether it was the intention of the parties that any commissions should be paid to plaintiff beyond what was sufficient to pay the debt plaintiff owed to defendant's predecessor.

#### 2. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—ACTIONS—INSTRUCTIONS.

Where, in an action on a contract of employment, the court charged that it was the true intention of the parties, as disclosed by the written instrument and the evidence as to the facts leading up to and attending its execution and the conduct of the parties respecting it, that should govern and not the legal construction of the contract as announced by the court, both as to the original contract and with respect to any renewal, continuance, or adoption thereof, an instruction that if it was the intention of the parties at the time the contract was made that commissions should not be paid after certain notes were satisfied the jury should return a verdict for defendant, was not objectionable as making the construction of the written contract of controlling effect.

#### 3. SAME—MISLEADING INSTRUCTIONS.

Such instruction was not erroneous as misleading and confusing.

#### 4. SAME—CONTRACT OF EMPLOYMENT—HOLDING OVER—PRESUMPTION.

Where one who has been employed under a written contract continues in the same service after such contract has expired by lapse of time, such continuance of service, in the absence of evidence to the contrary, is presumed to be on the same terms as those expressed in the written contract.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 11, 86.]

#### 5. SAME—INSTRUCTIONS.

Where plaintiff was continued by a corporation in his employment after the expiration of the time covered by his written employment contract, and was also continued by the directors of the corporation after its dissolution until its assets were transferred to defendant corporation, an instruction that it was for the jury to determine whether plaintiff was entitled to commissions provided for in the contract against the original corporation between the date of the termination of the written contract and the time the corporation was dissolved was not error.

#### 6. SAME.

Where, after termination of a written contract of employment, plaintiff was continued in the same position without any change, ex-

\*Writ of error denied by Supreme Court Oct. 11, 1906.

cept that his salary was raised, until the corporation by which he was employed was dissolved, a requested charge that he was not entitled to recover commissions after the termination of the original contract, unless a new "express" contract was made for his services, was properly refused.

**7. BILLS AND NOTES — ATTORNEY'S FEES — "SUIT BROUGHT."**

Where, in an action for commissions on an employment contract, plaintiff, in his pleadings, did not allow defendant any credit for certain notes which provided for attorney's fees in case suit was brought thereon, and defendant, in order to obtain credit for the notes, was forced to declare on the notes in its cross-bill, which was filed after the maturity of the notes, and claimed an allowance for the amount thereof and attorney's fees, such cross-bill constituted a "suit brought on the notes," entitling defendant to attorney's fees.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 272.]

**8. TRIAL—INSTRUCTIONS—REFUSAL.**

Where the court charged that the burden was on plaintiff to prove every allegation essential to his recovery, it was not error for the court to refuse an instruction that the burden of proof was on plaintiff to establish his case by a preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-653.]

**9. EVIDENCE—DOCUMENTS.**

Where, in an action for commissions under an employment contract, there was sufficient testimony to raise an issue as to whether a statement concerning plaintiff's claim had been mailed to the employing corporation, which had been dissolved, or had been presented to its managing officers as trustees in dissolution proceedings, the statement was properly admitted in evidence.

**10. CORPORATIONS — DISSOLUTION — TRANSFER OF ASSETS—NEW CORPORATIONS—LIABILITY FOR DEBTS—PLEADING.**

Plaintiff was employed by a corporation which was dissolved by a judicial decree, after which its directors conveyed most of its assets to defendant for a cash consideration, and defendant's assumption of certain debts of the dissolved corporation or its trustees, specified in a certain list attached to the deed, which list did not include any indebtedness to plaintiff. Plaintiff, in a suit against the new corporation, did not allege what assets, if any, of the old corporation had been transferred to the new, nor that the new corporation had received assets of any value from the old corporation. *Held*, that in the absence of such allegations, there was nothing on which an issue charging defendant with the old corporation's indebtedness to plaintiff could rest.

**11. SAME.**

Where a new corporation purchased from the trustees of a dissolved corporation a portion of its assets, the new corporation took the same free from any liens or incumbrances and without liability to pay an indebtedness of the old corporation for employee's services, in the absence of fraud in the sale, as provided by Rev. St. 1895, arts. 682, 683.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2313.]

**12. SAME—LIABILITY OF TRUSTEES.**

Where, on a decree dissolving a corporation, its directors took charge of its assets for the purpose of liquidation and sale of the same to a new corporation, an employee's right to enforce a claim for services rendered the old corporation was against such trustees.

**On Rehearing.**

**13. APPEAL—QUESTIONS REVIEWABLE.**

Where there was no controversy between appellant and the trustees of a dissolved corporation, who were original parties to the suit and no appeal bond was filed by appellee, nor such trustees, a cross-assignment that the court erred in sustaining the plea of privilege of such trustees could not be reviewed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3580.]

**14. SAME—ASSIGNMENT OF ERROR—WAIVER.**

Where appellee preceded a cross-assignment of error by a request that the court consider the same in case, for any reason, it should remand the case for a new trial, such statement constituted a waiver of the assignment in case the cause was not remanded.

Appeal from District Court, Galveston County; R. G. Street, Judge.

Action by C. Nicolini against the Houston Ice & Brewing Company and others. From a judgment for plaintiff, defendant company appeals, and plaintiff filed cross-errors. Judgment modified and affirmed.

Terry, Covin & Mills and Baker, Botts, Parker & Garwood, for appellant. W. C. Oliver and Jas. B. & Chas. J. Stubbs, for appellee.

NEILL, J. On December 9, 1903, the appellee, C. Nicolini, sued appellant, the Houston Ice & Brewing Company, a domestic corporation, and Hugh Hamilton, Joseph F. Meyer, R. L. Autry, and F. Kelb, as trustees of a dissolved corporation known as the Houston Ice & Brewing Company to recover the sum of \$17,192.82, alleged due him for commissions and on his salary. He alleged substantially, as his cause of action: That, on December 1, 1896, the Houston Ice & Brewing Company, a corporation, whose charter was annulled by a judicial decree on December 14, 1901, by a contract in writing, employed him as its agent in Galveston county, Tex., for a term of three years, commencing December 10, 1896, at a salary of \$150 per month, and a commission of 50 cents per barrel upon each barrel of beer thereafter sold by plaintiff as agent of said company, plaintiff engaging by said contract to serve said company during the term thereof, obligating himself to sell for it in Galveston county not less than 6,000 barrels of beer per annum during the period of existence of the contract in accordance with the terms and conditions specified therein. That plaintiff rendered the services as required by said contract, and the renewals thereof, afterwards pleaded. That the written contract, according to its terms, expired on December 9, 1899, and no new written contract was executed by plaintiff and said corporation, but plaintiff by agreement continued to act as agent of said company upon the same terms and conditions expressed in the former contract, except that his salary had been raised during the existence of said contract from \$150 to \$225, and was there-

after raised to \$275 per month without any change of the other conditions of his employment or the other compensation thereunder, it being agreed between the company and plaintiff; that when the commissions referred to in the written contract should amount to enough to extinguish plaintiff's debt (\$14,100) to the company, as expressed therein, the further commissions to be earned by plaintiff should be due and payable to him directly. That said written contract was continued in force without further writing by the continued employment of plaintiff by said company and its successors, as set forth in plaintiff's petition, there being no stipulation changing the terms of the same except as stated. That the Houston Ice & Brewing Company, referred to as the former company of that name, on December 14, 1901, ceased to exist, its charter having been forfeited by the district court of Travis county, Tex., in a suit brought by the state of Texas for that purpose; that from and after the decree of forfeiture, up to January 1, 1902, the defendants Autry, Hamilton, Meyer, and Kalb, and others, directors of said former company at the time it lost its charter, acted under the statute as trustees, holding all of the property and assets in trust for the benefit of the creditors and stockholders of the old company, and said assets were charged with the liabilities of said company, both in the hands of said trustees and thereafter, when the same had been transferred and delivered by said trustees to the present Houston Ice & Brewing Company, defendant herein, and said trustees and the defendant company adopted the contracts and agreements of the old company with respect to employment and compensation of this plaintiff by retaining him in their service under and in accordance with the terms of said former employment, and also agreeing with him that his employment should continue in force; and that said trustees and defendant company not only accepted, recognizing and renewed plaintiff's employment, but received the benefit therefrom, without denial or repudiation of pre-existing terms of compensation. That all of said agreements not expressed in the written contract, were agreed upon by and between the parties to said contract after its execution, and subsequently, by and with the other defendants, it being agreed and understood that such changes and modifications in salary, and otherwise as stated, should have the same force and effect as if written and a part of the original instrument, or of any renewal or extension thereof, whether verbal or in writing. That when said former company ceased to exist as hereinbefore shown, its trustees and the present company renewed, recognized, and continued its engagements and liabilities in force, including those herein sued on. That the number of barrels of beer sold by plaintiff under the said contract and renewals thereof

is set forth in the accompanying written account attached to the petition which is as follows:

"Statement of C. Nicolini of Galveston, Texas, with the Houston Ice & Brewing Company and the Trustees of Houston, Texas.

"As stipulated in contract, the Houston Ice & Brewing Company owes me as follows:

Dec. 10, 1896, to Dec. 9, 1897, beer sold in one year, 11,302 bbls., at 50 cents.....	\$ 5,631 00
Dec. 10, 1897, to Dec. 9, 1898, 11,271 bbls., at 50 cents.....	5,635 50
Dec. 10, 1898, to Dec. 9, 1899, 11,128 bbls., at 50 cents.....	5,664 00
Dec. 10, 1899, to Dec. 9, 1900, 10,586 bbls., at 50 cents.....	5,293 00
Dec. 10, 1900, to Dec. 9, 1901, 12,721 bbls., at 50 cents.....	6,360 50
Dec. 10, 1901, to Dec. 9, 1902, 12,721 bbls., at 50 cents (figuring on the same amount of sales as the previous year).....	6,360 50
July 1, 1898, balance due to Messrs. Adoue & Lobit bank, which should have been paid by Mr. H. Hamilton, for debt as promised.....	750 00
Dec. 10, 1902, due me for 8 months wages, from April 9, 1902, to Dec. 9, 1902, at \$275.00 per month....	2,200 00
<b>Total amount due me.....</b>	<b>\$37,814 50</b>
<b>Amount due by C. Nicolini to the Houston Ice &amp; Brewing Company:</b>	
Dec. 1, 1896, 3 notes for \$4,700.00 each, payable 1, 2 and 3 years respectively.....	\$14,100 00
July 18, 1906, paid to Adoue & Lobit, for my account.....	500 00
Nov. 30, 1900, received on account..	1,300 00
June 12, 1901, received on account	806 00
July 18, 1901, received on account to settle Loan Co.....	1,365 00
April 9, 1902, due to them on open account.....	1,350 70
Dec. 9, 1902, salary paid to D. Rosie, from April 9, 1902, to Dec. 9, 1902, 8 months at \$150.00.....	1,200 00
	<b>\$20,621 70</b>
<b>Difference in my favor.....</b>	<b>\$17,192 80</b>

—with the exception of those from December 10, 1901, until December 9, 1902, during the greater part of which period plaintiff was absent from said county with leave of said company's successors, defendants herein, and plaintiff has no positive knowledge of the number of barrels sold during that time by his subagent, and defendants fail and refuse to advise him of the number, and he, therefore, estimates it upon the basis of sales made during the preceding year, as shown in the exhibit, and he alleges the sales of beer made by him and his subagent for defendants during the year ending December 9, 1902, to have been not less than 12,721 barrels. That the amount due plaintiff for commissions upon all such sales for six years is \$34,864.50, which sum was a fair and reasonable compensation for plaintiff's services rendered defendant and its predecessors in addition to the salary paid and agreed to be paid plaintiff by them during the six years ending December, 9, 1902, and which reasonable value



if plaintiff's services defendants promised and undertook to pay plaintiff, and have wholly failed and refused so to do except as shown by said account, which shows there is still a balance due plaintiff of \$17,192.80, with legal interest from the last day of the respective year in which said commissions were earned; for which plaintiff prayed judgment.

A plea of privilege was interposed by the individual defendants, which was sustained. The defendant Houston Ice & Brewing Company answered, denying owing the plaintiff anything, but claimed an indebtedness against him, and, with its answer filed a cross-bill asking judgment against plaintiff for \$15,328.30 on account of certain open accounts and notes held by it. The case was tried before a jury and the trial resulted in the following verdict:

"Galveston, Texas, July 12, 1903.

"We, the jury, find for the plaintiff on his claim for commissions against the defendant in the sum of \$5,234.50, with interest at 6 per cent. per annum from January 1, 1903 (commission on 10,469 barrels of beer at 50 cents per barrel), and for salary in the sum of \$1,000.00, being the difference between Mr. Rossi's salary and his, with 6 per cent. interest from January 1, 1903, to date. We also find in favor of the plaintiff against the former Houston Ice & Brewing Co., on his claim for commissions in the sum of \$5,293.25, and \$6,305.30, for the years ending December 10, 1900, and 1901, with interest at 6 per cent. per annum from 1st of January, 1901, and January 1, 1902, to July 12, 1905. These being commissions on barrel and bottle beer for above years in full.

"W. F. Breath. Foreman.

"We also find for the defendant against the plaintiff on its cross-bill in the sum of \$1,828.11, being the amount of 13 notes for \$100.00 each, with interest and attorney's fees to date included herein. Also note for \$806.00, with interest and attorney's fees to date, amounting to \$1,068.33, also note for \$1,365.00, transferred by the Texas Loan & Investment Co., with interest to date amounting to \$1,695.10. Also two notes for \$1,000.00 each, dated April 8, 1902, with interest and attorney's fees to date amounting to \$2,773.93 and this amount is an offset against the amount found in favor of the plaintiff against the defendant. Defendant has a mortgage lien for \$1,068.33, above due on note for \$806.00 being the interest and attorney's fees to date on the personal property described in his cross-bill. Also for the sum of \$1,695.10, on the real property described in the cross-bill.

"W. F. Breath. Foreman."

The plaintiff moved the court to enter judgment upon the verdict in his favor against defendant for the amounts found to be due him both by the defendant Houston Ice & Brewing Company and the old company of the same name, after deducting

therefrom the amounts found to be due and owing from plaintiff to defendant and the former company, with interest thereon, but not attorney's fees. He then prayed, "If the foregoing motion should be overruled upon the ground that the verdict does not authorize such a judgment, that it be entered notwithstanding the verdict, as all the facts are before the court, and the new company, under the pleadings and evidence and the law applicable thereto, is liable for the indebtedness of the old company to plaintiff subject to the offsets above mentioned. These motions were denied, and, upon this verdict, the court entered judgment in favor of the plaintiff, C. Nicolini, against defendant, the Houston Ice & Brewing Company, for the sum of \$4,661.92, with 6 per cent. interest from its date; after which, the judgment entered proceeds as follows: "And it appearing to the court from the findings of the jury that all the claims asserted by the defendant in the cross-bill against the plaintiff, except the two notes dated April 8, 1902 (which with interest have been allowed above as a counter claim—not including, however, the attorney's fees) were acquired from the Houston Ice & Brewing Company, or the trustees thereof after maturity; and it further appearing from said findings that said former company is indebted to plaintiff in a larger amount than so found in favor of the defendant, it is adjudged and decreed that said claims, except as above allowed, be disallowed as counterclaims, against the verdict found in favor of the plaintiff." From this judgment the Houston Ice & Brewing Company has appealed, and upon the appeal the plaintiff has filed cross-assignments of error.

#### Conclusions of Fact.

It is undisputed that on December 1, 1896, the contract described in plaintiff's petition was entered into between him and the former Houston Ice & Brewing Company; that said company was dissolved on December 14, 1901, by a decree of the district court of Travis county, Tex; that, upon the dissolution of said corporation, its directors took charge of its property and continued its business until January 1, 1902, when they transferred and delivered the assets of such defunct corporation to defendant, another corporation organized under the laws of the state of Texas, of the same name. In the contract, the Houston Ice & Brewing Company is called "party of the first part" and C. Nicolini, "party of the second part." The contract, after reciting that "the party of the first part desires to secure the services of the party of the second part to act as its agent in Galveston county, Texas; and \* \* \* the said party is desirous of entering the employment of the said first party in the capacity of agent for the first party in Galveston county, Texas," recites "that the

said second party is indebted to said first party in the sum of fourteen thousand one hundred dollars (\$14,100.00), as evidenced by three certain promissory notes of even date herewith, for the sum of four thousand seven hundred dollars (\$4,700.00), each, bearing 6 per cent. interest from date and providing for 10 per cent. attorney's fees if said notes are placed in the hands of an attorney for collection after maturity," then, among others, contains the following stipulations: "The first party agrees to employ the second party, and the second party agrees to act as agent for the first party in Galveston county, Texas, for a term of three years, beginning with the 10th day of December, 1896, at a salary of one hundred and fifty dollars (\$150.00) per month, payable on the last day of each month. And the second party agrees to represent no other interest which will in any wise conflict with or come in competition with the interest of the first party, during the term of this contract. The first party undertakes and agrees to pay, in addition to the salary herein covenanted to be paid, by the first party to the second party, a commission at the rate of fifty cents (50c) per barrel on the number of barrels of beer sold; and that said commission shall be applied as a credit to the principal and interest of the second party's note payable to and held by the first party hereinbefore referred to."

The evidence is reasonably sufficient to show that when said written contract, according to its terms, expired on December 9, 1899, plaintiff, by agreement with said company, continued to act as its agent in Galveston county upon the same terms and conditions as expressed in said contract, save and except that before it expired by its terms his salary was increased from \$150 to \$250 per month, and afterwards, was raised to \$275 per month without any change in the other conditions of his employment or the other compensation thereunder. It being understood and agreed, between said company and plaintiff, that when the commissions referred to in said written contract should amount to sufficient to extinguish his said indebtedness to said company as expressed therein the further commissions to be earned should be due and payable to him directly; and that said contract as renewed, was continued in force by and between the parties thereto for the term of three years, with all the provisions in full force and effect, except as modified by the increase in plaintiff's salary as stated; that when the charter of the company was forfeited, on or about December 14, 1901, the directors thereof, who held the property and carried on the business of said defunct company as trustees of its creditors and stockholders, adopted said contract as renewed between said company and plaintiff and continued him in the service thereunder from the time of its dissolution until January 1, 1902, when they transferred

the assets and business of said company to appellant, the Houston Ice & Brewing Company, which company adopted said contract and agreement of the old company and its trustees with respect to the employment and compensation of plaintiff and agreed that his employment should continue in force according to the terms of the contract of his former employment as modified by the increase in his salary.

Under the written contract with the prior company and the renewal of it, with the modifications stated, the plaintiff faithfully performed all the duties and services thereby required of him, and earned commissions thereby on the barrels of beer sold, which, together with \$2,200 for eight month's salary, amounts to the sum of \$37,314.50, as is stated in this account referred to in our statement of the case. When the indebtedness of plaintiff to the prior company and defendant is subtracted from the sum of said earnings, a balance is left in plaintiff's favor, as shown by said account, of \$17,129.80. Of this sum \$6,234.50, and interest on said sum from January 1, 1903, is owing by appellant, subject to an offset of \$2,773.93, found in its favor by the jury to be due on the two notes of \$1,000 each, including interest and attorney's fees, leaving a balance due plaintiff of \$4,407.17. Some of the evidence upon which these conclusions are based will be noticed in considering appellant's assignments of error, and other conclusions of fact will be stated pertinent to appellee's cross-assignments, when we come to consider them.

#### Conclusions of Law.

The first assignment of error complains of that part of the court's charge which is as follows: "You are instructed that the legal construction of the written agreement of the 10th of December, 1896, between the plaintiff and the old company standing alone entitled the plaintiff to the payment of any excess of commissions over what was sufficient to satisfy and discharge plaintiff's indebtedness to the old company, whether accruing during the term of three years, or any renewal, continuance or adoption of said contract by the old company, by the trustees, or by the present company. But it is your province to determine the true construction of the written contract in that respect between the plaintiff and the several parties named, in the light of all the evidence tending to show the facts and circumstances leading up to and attending its execution, as well as the conduct of the parties with respect to it. It is the true intention of the parties as it may be thus disclosed, if at all, which is to govern, and not the legal construction announced by the court, which must control such real intention. And so, too, with respect to any renewal, continuance, or adoption thereof, if any. In determining the question of the true intent, it is your duty to apply to its solution your own intelligence and common experience

of mankind. And if you shall believe, from all the evidence, that it was not the intention of the parties that any commission should be payable beyond what should be sufficient to pay the debt of plaintiff recited in the agreement, then your verdict shall be against the plaintiff on his claim therefor, and in favor of the defendant on its cross-bill as hereinafter directed. But, if you believe from all the evidence, that it was the intention commissions should continue to be payable after the debt was discharged, then you will determine, from the evidence, whether this written agreement was adopted by the new company, the defendant, on or after the 2d day of January, 1902. And if you should not believe, from all the evidence, that it was so adopted, then your verdict should be against the plaintiff on his claim against the defendant, and in favor of the defendant on its cross-bill. But should you believe it was adopted by the present company, then you will fully determine, from the evidence, whether, as claimed by the defendant, it was superseded, abrogated, or abandoned by mutual consent or acts of the parties on or about the 8th day of April, 1902; if so, commissions would be recoverable only on sales between 2d of January and 8th of April, 1902, and nothing on account of salary, as it is undisputed that salary was paid in full to that date."

Appellant's first proposition under this assignment is that "the construction of the contract of December 10, 1896, was a matter for the court, and not for the jury, to determine, and, by submitting this to the jury, their attention was diverted from the true issues in the case." We think this proposition is fully answered by appellee's counter propositions which are as follows: "First. It seems to be conceded that the jury rightly construed the contract; if so, appellant was not injured. In its third assignment it states that there was no conflict upon 'the issue as to what was the construction of the written contract as it stood between the original parties.' Second. Fault, therefore, is only found in leaving to the jury the question whether or not, in the light of all the evidence, it was the intention of the parties that commissions should be paid to the plaintiff after he had earned enough to extinguish the debt he owed the old company. The court held that the contract, standing alone, would entitle plaintiff to the excess, if any there was, but in view of the incompleteness, if not the silence, of the contract as to such excess, and in view of much oral testimony regarding commissions, the provisions of the writing upon the subject, the reason for their allowance, and, in brief, the matters which led up to and attended the making of the contract, the admission of which testimony is not assigned as error, and which tended, upon the one hand, to prove that the commissions were to cease when plaintiff's original debt should be paid, and, upon the other hand, tended to prove

that commissions were to continue thereafter; in view of all this, we say that the court properly referred the inquiry to the jury. The writing was not explicit or free from ambiguity. Third. This action of the court could not have prejudiced the defendant; on the contrary, it was favorable to it, as an opportunity was thereby given for a verdict in its behalf on this point, which the court's interpretation would have denied to it. The jury might have found, under this submission, that when the debt was satisfied commissions stopped. The court and jury both correctly construed the contract; this is not denied; therefore there was no error; but if there was, it cannot avail defendant, for no error is ground for reversal that favors an appellant. Fourth. The contract required explanation, we think, for it was silent as to what disposition should be made of the surplus of commissions that might be earned after payment of the notes. A minimum of sales was stipulated for, but no maximum. Hence it became necessary to ascertain the intention of the parties with respect to the excess, and to that end, their situation and relations, and the preceding and accompanying facts, were properly put in evidence at the instance of both parties." See *Taylor v. McNutt*, 58 Tex. 73; *Poe v. Brownrigg*, 55 Tex. 137; *G. H. & S. A. Ry. v. Johnson*, 74 Tex. 256, 11 S. W. 1113.

Appellant's second proposition under this assignment is as follows: "By the language of this charge the jury were told that if they believed that it was not the intention of the parties, at the time the contract of December 10, 1896, was made, that commissions should be paid after the notes therein mentioned were satisfied, they should return their verdict against the plaintiff, the court thereby making the construction of this written contract of controlling effect, and ignoring the agreement which both the plaintiff and the defendant testified was made after its expiration, and the charge was misleading and confusing." This proposition is met, and, in our opinion, answered, in appellee's brief as follows: "We respond that appellant entirely overlooks that part of the charge referring to a renewal, if any, of the contract for commissions. After speaking of the terms of the written instrument regarding commissions, and the evidence as to the facts leading up to and attending its execution, and of the conduct of the parties with respect to it, the court proceeds: 'It is the true intention of the parties, as it may be thus disclosed, if at all, which is to govern; and not the legal construction announced by the court to control such real intention. And so, too, with respect to any renewal, continuance, or adoption thereof, if any.' The charge had just before stated that the construction of the agreement of December 10, 1896, standing alone, would entitle plaintiff to the payment of any surplus of commissions over the amount of his debt to the old company, whether accruing during

the term of three years, or during 'any renewal, continuance, or adoption of said contract by the old company, by the trustees, or by the present company.' Here, clearly, the jury are directed to determine whether or not there was a renewal or continuance of the contract, and if so, what was the intention of the parties in such renewal or extension. After all, it is the intention of the parties, as gathered from the writing and their acts in relation thereto, that must control. If the contract allowed commissions beyond the debt, the jury were to inquire whether or not such arrangement was renewed or adopted by the old company after the written contract had ended, and whether or not the trustees and the new company continued it in force. So that the charge read, not in isolated passages, but altogether, and as it was read to the jury, and doubtless so understood by them, requires them to decide, not only as to the meaning of the contract of December 10, 1896, respecting commissions, but also as to the intention of the parties after that period, either under a new contract, or a continuance or adoption of the former one. However, if we accept the interpretation of appellant that the court referred in its charge only to the intention of the parties at the time the contract of December 10, 1896, was made, still if this original agreement or intention so found in said contract to pay commissions was renewed or continued in force after that contract had expired, as to which phase of the case the jury were also instructed, then it is not material whether the original contract is referred to, or whether a continuance or renewal thereof is in mind, as they would all, in this respect, mean the same thing, and as the determining question after all was, was there an agreement between the parties for the payment of commissions? The court did not make the construction of the contract of controlling effect, nor ignore any subsequent agreement, but, upon the contrary, left the question to the jury whether the writing, as expounded by the other evidence, allowed commissions to plaintiff over and above his debt, and if so, whether that arrangement continued, or was renewed, after December 10, 1899." See *Moore v. Moore*, 73 Tex. 383, 11 S. W. 396; *Brooks v. Clark*, 57 Tex. 107; *Rost v. M. P. Ry. Co.*, 76 Tex. 163, 12 S. W. 1131.

It is urged by appellant in another proposition that "the charge was upon an issue not in the case, and was error, there being no evidence of the adoption of the written contract of 1896 by the new company, but both parties testifying that a new contract was made March 4, 1900, after the termination of the written contract, and that this contract, whatever it was, was adopted by the new company." As we take it, one of the issues made by the pleadings and evidence was whether the new contract made on March 4, 1900, excluded the commissions. The contention of plaintiff was that it did

not, and of the defendant that it did. But if it should be conceded that such new contract did exclude commissions, still there was certainly an issue as to whether commissions were due and unpaid under the original contract of 1896, as well as under plaintiff's subsequent employment. It is admitted by the appellant that "the contract of March 4, 1900, whatever it was, was adopted by the new company." If, then, the agreement of that date was, as the evidence tends to show, the same as the written contract as to commissions, it could not be misleading to instruct the jury to find whether the agreement to pay commissions, if the written contract and testimony explaining it warranted such finding, was adopted by the new company or not. For if that provision existed under the written contract, and was not abrogated when appellee's debt mentioned in such contract was extinguished, and appellant adopted it, the effect would be the same as if it were an oral contract made March 4, 1900, and the defendant adopted that. The court did not make the construction of the written instrument of controlling effect, but made the subsequent adoption, if any, of such construction the test; and did not ignore the agreement made after the written contract expired, because such new agreement, in so far as it stipulated for commissions, was only a revival of the old, and it follows that any agreement to pay commissions at any time, if adopted and continued in force by defendant, would render it liable to plaintiff for commissions earned under such agreement. In our opinion the portion of the charge complained of in this assignment correctly presented the law applicable to the pleadings and evidence, and, in no sense, can be regarded as being misleading. This disposes also of the second assignment of error which complains of the same part of the charge.

That paragraph of the charge which instructed the jury to determine whether the plaintiff was entitled to commissions against the old company for the years ending December 9, 1900, and 1901, and directing them, if they should find he was, to specify the amount of the verdict, with interest, etc., is complained of by the third assignment of error. It is urged under the assignment that such part of the charge is erroneous for the reason that, though the proper construction of the written contract may be as contended for by plaintiff, this would not, as a matter of law, entitle plaintiff to recover commissions against the old company for the period between March 4, 1900, and December 14, 1901, the date of its dissolution. It will be observed that the charge leaves it to the jury to determine whether the plaintiff was entitled to commissions against the old company for services rendered during such period, and does not make the slightest intimation that he would be entitled to such commissions, as a matter of law, if the written

contract bore the construction contended for by him. This part of the charge is coupled to, and must be construed in connection with, that which precedes it. It is undisputed that the plaintiff was continued by the old company in his employment after the expiration of the period covered by the written contract, and by its directors after its dissolution until its assets were transferred to defendant corporation. There was evidence that this was done under an agreement, which, except as to the increase of his salary, embraced the terms and conditions of the written contract. Aside from this evidence, it is a presumption of fact that, where one who has been employed under a written contract continues in the same service after it has expired by lapse of time, such continuation of service, in the absence of any evidence to the contrary, is upon the same terms as those embraced in the written contract; or, in other words, that the written contract was impliedly renewed by the parties. The undisputed evidence shows that plaintiff was, except as to the increase of his salary, which was raised before the contract expired, continued in the employment of the old company until it was dissolved. Therefore, we think that the part of the charge complained of by this assignment, when read in connection with the entire charge, is, in view of the pleadings and evidence, free from the objections urged. This also disposes of the fourth assignment of error.

The fifth assignment of error complains of the court's refusal to give, at defendant's request, special charge No. 6, which is as follows: "You are charged that if you do not believe from the evidence that the Houston Ice & Brewing Company, dissolved, made an express contract with the plaintiff after the expiration of the written contract of 1896, for the payment to him, for his services, of both a commission of 50 cents per barrel of beer sold, and a cash salary of \$275 per month, and that this contract, if you find there was such a contract, was continued in force by the new Houston Ice & Brewing Company, you will, in no event, find in favor of the plaintiff for any commissions." This charge was properly refused, because under the pleadings and evidence the liability of the dissolved company for commissions, after the termination of the written contract, was not restricted to the question of whether an express contract was then made by the parties, but involved the question of an implied contract as well. Though the jury may have found that there was no such express contract as is mentioned in the requested charge, yet, if there was an implied contract to the same effect, the plaintiff may have been entitled to recover upon it. If the requested charge had been given he would have been deprived of this right.

The sixth assignment of error is that "the

court erred in rendering judgment upon the verdict in deducting the 10 per cent. attorney's fees from the principal and interest of the two notes of \$1,000 each, dated April 8, 1902, before allowing said notes as an offset against the recovery herein against defendant in favor of plaintiff, and in refusing to allow the amount of said 10 per cent. attorney's fees as well as the principal and interest of said note as an offset against said recovery." Each note referred to in the assignment contains the provision: "In the event default is made in the payment of this note at maturity, and is placed in the hands of an attorney for collection, or suit is brought on the same, then an additional amount of 10 per cent. on the principal and interest on this note shall be added to the same as collection fees." Each was dated April 8, 1902, and due six months after date. In his pleadings the plaintiff did not allow defendant any credit for the amount due upon them; but, in order to obtain such credit the defendant was forced to declare upon them in his cross-bill. This bill alleged the facts which, according to the conditions expressed in the face of the notes, entitled defendant to such attorney's fees. This was a "suit brought on the notes," and, as it was brought after maturity, we can perceive no reason why the defendant should not have been allowed a credit for such attorney's fees as well as for the principal and interest due on the notes. And, therefore, in our conclusions of fact, we have allowed such credit, in accord with the finding of the jury expressed in its verdict; and will here amend the judgment by allowing such fees in accordance with the verdict and our finding.

The seventh assignment of error complains that the court erred in refusing to instruct the jury, at defendant's request, that the burden of proof was upon the plaintiff to establish his case by the preponderance of evidence, and, unless he had done so, to find in favor of defendant. The main charge of the court placed the burden upon the plaintiff to prove every essential allegation to his recovery. This was enough. And it was not error to refuse to repeat the instruction, though in a different form, by giving the charge requested by appellant. The testimony was sufficient to raise an issue as to whether the statement referred to in the seventh assignment had been mailed to the Houston Ice & Brewing Company, dissolved, or presented to the managing officers of said company. This rendered it admissible in evidence, if material or relevant to any issue in the case, and if the defendant questioned the fact of its being mailed to the company or presented to its officers, it should have requested the court to instruct the jury not to consider it as evidence unless they found that it was so mailed to the company or presented to its officers. We cannot, however, from the statement subjoined to

the propositions under the assignment, perceive how appellant could have been in any way injured or prejudiced by the statement, even if it should be conceded that the court erred in admitting it in evidence.

The appellee asks that the judgment be so reformed as to allow him to recover against appellant for the debt due him by the defunct company, and to this end, has filed cross-assignments of error. It will be observed from the verdict that the jury found that the defunct corporation was indebted to the appellee in the sums aggregating \$11,598.55, with interest; and, from the judgment that, save for the purpose of extinguishing certain indebtedness of the plaintiff to the defunct corporation which was transferred by the trustees thereof to the defendant after maturity, this part of the verdict does not enter into the judgment. Now, the proposition is advanced by the appellee that when a corporation transfers its assets to another, and, thus, practically ceases to exist, without having paid its debts, the latter corporation takes such property, subject to a lien in favor of the creditors of the old corporation. This proposition is too general; for the principle it seeks to invoke is not without its limitations. And we think, when the facts pertinent to the cross-assignments are stated, it will be seen that this case cannot be brought within the principle invoked. The Houston Ice & Brewing Company, a corporation organized in 1887, was dissolved by a decree of the district court of Travis county, Tex., on December 14, 1901, in a suit brought for that purpose against it by the state of Texas. Its president at that time was H. Hamilton, and its directors were H. Hamilton, Jos. F. Meyer, B. A. Riesner, F. J. Smith, R. L. Autrey, F. A. Relchart, and Edwin B. Parker. These directors took up the affairs of the company on its dissolution, as trustees for its creditors and stockholders, and continued to manage the same until January 2, 1902, when they made a deed to most of the assets to appellant, the deed reciting the payment by appellant to the trustees of \$300,000 in cash, the assumption by it of the payment of the debts of the dissolved company, or the trustees, of \$27,594.85, but no more, a list of the debts assumed being attached to the deed (which does not include that of appellee), and the agreement on the part of the appellant to make and deliver to the trustees bonds of the par value of \$200,000, bearing interest at the rate of 6 per cent. per annum, payable at the office of the Continental Trust Company, in the city of New York, ten years after date, etc., the bonds to be secured by a deed of trust on the property described in the deed. It will also be observed from our statement of the pleadings that the plaintiff does not allege what assets, if any, of the former corporation were transferred by the trustees thereof to the present Houston

Ice & Brewing Company, nor does it allege any value of assets transferred by the trustees of the dissolved corporation to appellant, or that appellant received assets of any value. In the absence of such allegation there was no basis for the introduction of evidence tending to show a liability of appellant for such indebtedness of the old corporation, or upon which a judgment in favor of plaintiff against defendant for such indebtedness could rest. The appellant, in purchasing from the trustees of the dissolved corporation a portion of its assets took the same free from any liens or incumbrances, and without liability to pay the alleged debt claimed by the appellee, there being no fraud alleged or shown in such sale and purchase. Articles 682, 683, Rev. St. 1895; Thompson on Corporations, §§ 263, 377; Cook on Corporations, §§ 9 and 673; Purdy's Beach on Corporations, § 299; McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022; Campbell v. Farmers' & Merchants' Bank (Neb.) 68 N. W. 344. The trustees were the parties, and not the defendant, to whom, under the evidence disclosed in this case, the plaintiff should look for the payment of the debt due him by the old corporation.

We therefore overrule plaintiff's cross-assignments of error, and, as modified, affirm the judgment.

**Affirmed.**

#### On Rehearing.

Each party has filed a motion for a rehearing in this case. In regard to that of the appellant we will say we considered all the questions presented by it as fully and thoroughly as we could in arriving at our former opinion, and that nothing is presented in it which inclines us to recede from, add to, or qualify anything expressed in it. As to our conclusions of fact, we will say, however, that they are all based upon evidence reasonably sufficient to support them. In view of which we deemed it our duty in deference to the verdict, approved by the trial court, to register such conclusions of fact as our own. Appellant's motion is overruled.

The appellee in his motion complains that we erred in sustaining the plea of privilege of defendants H. Hamilton, Joseph Meyer, R. L. Autrey, and F. Kalb, trustees of the dissolved corporation, as to the jurisdiction of the trial court over their persons. In this, appellee has misapprehended our opinion; for we never passed upon his seventh cross-assignment of error, under which the question is now sought to be raised, for the reason that as there was no controversy between the appellant on the one hand and the trustees of the dissolved corporation on the other, and as no appeal bond was filed by the appellee nor such trustees, they were not before this court, and the cross-assignment could not be considered. *Blackwell v. Farm-*

ers' & Merchants' Bank (Tex. Sup.) 79 S. W. 518; Anderson v. Silliman, 92 Tex. 560, 50 S. W. 576. Besides, in his brief, the assignment of error is preceded by the following request: "If for any reason the court should remand this case, then we ask a determination by it of our seventh cross-assignment [the first in the record]." As the case was not remanded, the reason for which we were called upon to consider the assignment failed and we regarded the question, which would otherwise have been presented by the assignment, as waived by appellee and did not feel authorized to pass upon it. And, since the event upon which it could have been considered never occurred, it cannot now be raised in disregard of the waiver of the assignment contained in appellee's brief. Therefore, without passing upon the question, the motion is overruled.

## INTERNATIONAL HARVESTER CO. OF AMERICA v. CAMPBELL.

(Court of Civil Appeals of Texas. June 13, 1906. On Rehearing, June 20, 1906.)

### 1. MASTER AND SERVANT—ACTION FOR WRONGFUL DISCHARGE—PETITION—SUFFICIENCY.

A petition for breach of contract of employment which alleges that defendant employed plaintiff as a salesman for a period of 12 months beginning June 15th in consideration of paying to plaintiff a specified sum per month, that in pursuance of the contract, plaintiff on and continuously after June 15th tendered his services to defendant, and that defendant has at all times refused to allow plaintiff to enter on his duties, is good as against a general demurrer, for a reasonable intendment of the petition shows that plaintiff accepted the employment of defendant.

### 2. EVIDENCE—PRIVATE WRITING—AUTHENTICITY—MANNER OF PROOF.

The genuineness of a writing may be proved by indirect or circumstantial evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1602-1606.]

### 3. SAME—SUFFICIENCY OF PROOF.

In an action for breach of contract of employment, the evidence showed that plaintiff sought employment from defendant, that its agent wrote informing it of the fact, and plaintiff's references were sent to it. A letter referring to the agent's letter and the references was received by the agent from defendant's office on one of its letter heads, bearing the same signature as other letters of the company to its agent. *Held*, that as no one save defendant could have received the letter and references mentioned in the letter received by the agent, there was evidence of its genuineness sufficient to render proof of its contents admissible.

### 4. TRIAL—OBJECTIONS TO TESTIMONY—TIME.

Objections to evidence must be taken when it is offered, and if not made then, are considered waived.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 183-190.]

### 5. EVIDENCE—SECONDARY EVIDENCE—ADMISSIBILITY.

Where an instrument is such as would naturally be in possession of the adverse party or his agent, and when last seen, was in such possession, and the party after being notified

to produce it on trial, refuses to produce or account for it, secondary evidence of its contents is admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 595-599.]

### 6. PRINCIPAL AND AGENT—PROOF OF AGENCY—ACTS OF AGENT—EFFECT.

Though mere proof that a person assumed to act as the agent of another is not alone sufficient to establish the agency as against the principal, yet, if it is proved that the alleged principal knew of the acts of the alleged agent, and made no objection, or if the acts were so open and notorious that it may be fairly presumed that he knew them, the proof may be sufficient.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 40.]

### 7. SAME—AUTHORITY OF AGENT—QUESTION FOR JURY.

Where, in an action for breach of contract alleged to have been made by an agent of defendant, it was shown that the agent was an agent for some purposes, whether it was within the scope of the agent's apparent authority to make the contract was for the jury, in the absence of evidence of the character of the agency negating such authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 724.]

### 8. APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action for breach of contract of employment, made on behalf of defendant by its agent, the evidence showed that the agent had specific authority to employ plaintiff, the admission of evidence, showing that the agent had employed a third person for the purpose of shipping a stock of goods of defendant, was not prejudicial.

### 9. EVIDENCE—CONCLUSION OF WITNESS.

A statement by a witness that no contract of employment existed is objectionable as a conclusion of the witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2173.]

### 10. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—EVIDENCE.

Where, in an action for breach of contract of employment, the issue was whether a contract had been entered into, evidence of the custom of defendant with respect to entering into contracts employing employes was inadmissible; for if defendant wanted to employ plaintiff, and he wanted to accept the employment, they could, regardless of custom, make a contract of employment.

### 11. APPEAL—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

In an action for a breach of contract of employment made by an agent of the employer, the answer of a witness was: "No ratification was ever made by me, and have no knowledge of any having been made by any one else. The application for employment [by plaintiff] was filed away by me, and was never accepted. \* \* \* I do not know of any officer or any one accepting or ratifying any contract of employment with plaintiff." The objection that the answer was the conclusion of the witness was sustained as to the first sentence; the other part of the answer was allowed to stand. *Held*, that the exclusion of the first sentence of the answer was not prejudicial, as the same fact was embodied in the remaining part.

### 12. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—EVIDENCE—ADMISSIBILITY.

Where on the issue whether plaintiff had been employed by defendant, a witness testified that he had never accepted plaintiff's application for employment, nor employed him, it was immaterial whether the witness intended to accept the application for employment.

## 13. SAME.

The fact that a corporation had adopted a rule providing that all applications for employment should go through an agent, and then be sent to the home office to be accepted before any contract of employment could be made, cannot affect an employee nor prevent the corporation from employing him without regard to the rule.

## 14. APPEAL—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error in excluding evidence is cured, where the same evidence is admitted without objection.

## 15. EVIDENCE—HEARSAY.

A statement of a witness that an agent of a corporation had no authority to employ salesmen for it, based upon information received from some source, is hearsay.

## 16. SAME—INFERENCE OF WITNESS.

A statement by a witness that an agent of a corporation had no authority to employ salesmen for it, based on information deduced from the witness' knowledge of the character of the agent's employment, is incompetent.

## 17. TRIAL—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

A charge submitting the substance of the issues made by the pleadings and evidence sufficiently conforms to the rule requiring instructions to conform to the pleadings.

## 18. FRAUDS, STATUTE OF—PLEADINGS.

In a suit at law or in equity affected by the statute of frauds, the declaration or bill will be sufficient, if it allege a contract generally, without stating whether it is in writing or not.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 353-357.]

## 19. SAME—DEFENSE.

The defense of the statute of frauds must be specifically interposed, which may be done by a general demurrer, where plaintiff's petition shows on its face that the cause of action is within the statute.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 360-362.]

## 20. SAME — REQUEST FOR PEREMPTORY INSTRUCTION.

Where, in an action for breach of contract of employment for one year alleged to have been entered into prior to the commencement of the year, a request for a peremptory instruction for defendant, not disclosing for what reason it was asked, did not raise the defense of the statute of frauds, as it might have been requested because defendant deemed the evidence insufficient to prove the contract.

## 21. APPEAL—REVIEW—QUESTIONS RAISED IN TRIAL COURT—NECESSITY.

The statute of frauds cannot be for the first time invoked on appeal.

## 22. CONTRACTS — REQUISITES — REDUCING AGREEMENT TO WRITING—NECESSITY.

Where an agreement on all the terms of a contract has been reached by the parties, and nothing remains except to reduce the terms to writing, the contract is complete, in the absence of evidence that the contract was not to become effective until reduced to writing, and a breach of it by either party supports an action.

## 23. TRIAL—INSTRUCTIONS AS TO DUTIES OF JURY.

An instruction that the oath administered to each juror when impaneled was that the jury would a true verdict render according to the law as it may be given and to the evidence submitted under the rulings of the court, and that in considering the verdict the jury must not receive or consider any testimony other than that before it, is not prejudicial.

## On Rehearing.

## 24. SAME — INSTRUCTIONS—REQUESTS—NECESSITY.

Where an instruction in an action for breach of contract was good as far as it went, and the defect was one of omission only, a party desiring an instruction supplying the omission must request it.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 623.]

## 25. APPEAL—ASSIGNMENT OF ERROR—REVIEW.

Where neither proposition under an assignment of error presents the question of variance between the pleading and the proof, a consideration of the question of variance is unauthorized.

## 26. PLEADING—PROOF — VARIANCE—MANNER OF RAISING.

Where evidence is admitted without objection, the question of variance between the pleading and the proof cannot be raised by instructions.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1438.]

## 27. FRAUDS, STATUTE OF—DEFENSE—MANNER OF RAISING.

While a general denial is sufficient to let in the defense of the statute of frauds, defendant is obliged to make his defense good by objecting to parol evidence, sought to be introduced to prove the oral contract sued on.

## 28. SAME—WAIVER OF DEFENSE.

A failure to object to parol evidence proving the oral contract relied on to constitute a cause of action operates as a waiver of the statute of frauds, not specially pleaded.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 377.]

Appeal from District Court, Bexar County; A. W. Seellgson, Judge.

Action by R. A. Campbell against the International Harvester Company of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Cobbs & Hildebrand and Wm. Aubrey, for appellant. Davis & McFarland, for appellee.

NEILL, J. This suit was brought by appellee against the appellant to recover \$660 damages for a breach of contract of employment. The appeal is from a judgment for \$570 in favor of the appellee.

The first assignment of error insisted on complains of the court's overruling a general demurrer to plaintiff's petition. The petition alleges: "That defendant on or about June 4, 1903, acting through its duly-authorized agent, J. D. Cameron, while acting as such agent, and within the apparent scope of his authority, and while being held out by the defendant to this plaintiff and the world as such agent, employed plaintiff to sell goods, wares, and merchandise of defendant in the San Antonio territory, in the capacity of a drummer or salesman. That said employment was for the period of 12 months, beginning on the 15th day of June, 1903, and ending on the 15th day of June, 1904. That in consideration of the services of plaintiff as aforesaid, defendant, acting by and through its said agent, agreed, and promised, and contracted to pay plaintiff the



sum of \$95 per month, for each month during the full period of plaintiff's employment. That in pursuance of said contract plaintiff, on, and continuously after, the said 15th day of June, 1903, tendered his services to defendant, and at all times thereafter offered to do and perform any and all work required of him under his contract of employment; but that defendant has, at all times since said agreement and contract was made, failed and refused to allow plaintiff to enter upon his duties as drummer or salesman under said contract, and has failed and refused to pay plaintiff anything whatever by reason of said contract. That at the time plaintiff entered into said contract with defendant, as alleged, plaintiff informed defendant's said agent that he (plaintiff) was then in the employment of Andrews & Co. at San Antonio, Texas, and that he had permanent employment at a salary of \$60 per month. That said agent acting for defendant, and in full line and scope of his duty as such agent, on or about the 4th day of June, 1903, requested plaintiff to give up his said position and be ready to assume his duties for defendant under said contract, and on said 15th day of June, 1903, and that by reason of said contract plaintiff did give up his said position with said Andrews & Co. and was ready to begin work for defendant under said agreement and contract of said date." This is enough of the petition to show the objection made to it under the assignment, which is disclosed by the following proposition, asserted under it in appellant's brief: "In declaring upon a simple contract the pleader must aver the existence of a consideration, and if the consideration consists of mutual promises, these must be alleged, as well as that they are concurrent." The rule is well established that when a pleading is challenged by a general demurrer, every reasonable intendment from the allegations contained, taken as a whole, will be indulged. *Insurance Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 187; *Telephone Co. v. Grimes*, 82 Tex. 94, 17 S. W. 831; *Patterson v. Frazer* (Tex. Civ. App.) 79 S. W. 1079. When this rule is applied to plaintiff's petition, it is apparent that it is good as against a general demurrer. For the intendment is so clear from the allegations that the plaintiff accepted the alleged employment of the defendant, that it could hardly be made plainer by a specific allegation of such fact.

The second assignment of error is that "the court erred in permitting plaintiff to testify, over the objections of defendant that a letter alleged to have been written by defendant to J. D. Cameron was as follows, viz.: 'We have received your letter, also Mr. Campbell's references which are good. You are on the ground, employ him'—as appears more fully by defendant's bill of exceptions No. 1." The bill of exceptions disclose a number of objections to the testimony, but as the prop-

osition under the assignment embraces only one, it alone will be considered. It is: "In order to admit parol evidence of the contents of a letter its genuineness must be established." This proposition involves only the establishment of the genuineness of the letter. If, then, there was sufficient evidence of its genuineness to admit its contents in evidence, the assignment should be overruled, regardless of any other objection that may have been urged upon the trial to the introduction of such testimony, for no other objection is presented for our consideration. The genuineness of a writing may be proved by indirect or circumstantial evidence, as other facts; and in some instances, this is the only character of evidence that can be adduced. Before the testimony complained of was introduced, it was shown by the testimony of appellee that the letter in question was written on one of the International Harvester Company's letterheads; that Mr. Cameron, the agent of the company showed him the letter about the 1st of June, 1903; that the signature was the same as that affixed to a letter he had received from the company a few days before and to other letters of the company written to Mr. Boldie, its traveling agent. The defendant and its attorney had been duly notified to produce the letter upon the trial, or that secondary evidence would be introduced to prove its contents. It was not denied by defendant or its counsel that such letter had been written, or was in their possession. The only challenge to plaintiff was: "You must show the genuineness of such letter before you can prove its contents." These circumstances, when taken in connection with the contents of the letter, fully meet the challenge. Upon the subject of authentication of a writing by its contents, *Wigmore on Ev.* § 2148, observes: "If Doe is the sole person who knows the circumstances of a certain event, and if a letter arrives purporting to be from Doe and stating those circumstances, and the statement appears by subsequent development to be accurate, it would be a simple matter, for the law, as well as for common sense, to deem that sufficient evidence of Doe's authorship had been furnished." Campbell was seeking employment from the company; its agent, Cameron had written informing the company of the fact; Campbell's references had been sent to the company; a letter is received in reply written from the company's office in Chicago, on one of its letterheads, bearing the same signature as other letters of the company to its agent, in which it is said: "We have received your letter, also Mr. Campbell's references, which are good." As no one, save the company, could have received the letter and references mentioned in the letter received by Cameron, and shown to plaintiff, its contents, when taken in connection with other facts, are, under the principle quoted, cogent evidence of

its genuineness. We, by no means, wish to be understood as holding that the mere contents of a written communication, purporting to be a particular person's, are of themselves, sufficient evidence of genuineness, for the contrary is the rule.

The third assignment of error is directed against the action of the court in refusing appellant's motion to strike out that part of the testimony of plaintiff in which he testified that J. D. Cameron, about June 1, 1903, received a letter from P. J. Bedell, in which Bedell wrote him (Cameron) that he was in San Antonio, and to employ plaintiff if he (Cameron) thought he was the right man, and would satisfy defendant. The proposition under the assignment is that "it is error to admit parol evidence of the contents of a written instrument, without proof of the loss, etc., of the original." Before considering this proposition it will be observed that the general rule is that objections to testimony must be taken when it is offered, and if not made then are considered waived, and its admission is no ground for a new trial. *Ann Berta Lodge v. Leverton*, 42 Tex. 18. No reason is or can be shown why the objection asserted in the proposition was not interposed when the testimony was offered. However, eliminating "etc." from the proposition (for "et cetera," which such letters denote, is too indefinite in its specification to permit consideration), the proposition, while abstractly correct, is inapplicable to the question, and should not be sustained. The evidence shows that P. J. Bedell, by whom the letter purported to be written, was the state agent of defendant with office in Dallas, Tex.; that defendant had been notified to produce the letter upon trial; that when last seen it was in Cameron's, defendant's agent's, possession, which was constructively the possession of defendant; that defendant never produced nor disavowed its ability to produce the letter. In view of these facts, it was not necessary to prove its loss in order to prove by parol the contents of the writing. For when an instrument is such as would naturally be in possession of the adverse party or of his agent, and when last seen was in such possession, and the party, after being notified to produce it upon trial, refuses to produce or account for it, secondary evidence is admissible to prove its contents. *Elliott on Ev.* § 1427 et seq.

Upon the trial plaintiff offered to testify that J. D. Cameron was straightening out and shipping a stock of goods of defendant at San Antonio during the month of May, or June, 1903, and employed a man named Scholl for that purpose and that said employee worked three days. The defendant objected to such testimony upon the ground that it was immaterial. The objection was overruled, and the testimony admitted. The admission of such testimony over the objec-

tion is the basis of the fourth assignment of error. The proposition asserted, is that "agency cannot be established by the acts and declarations of the alleged agent." This proposition does not fully embody the rule sought to be invoked. It is stated generally: "Agency cannot be proved by the acts or declarations of the supposed agent which are not shown to have been known by the principal." *Cooper v. Sawyer* (Tex. Civ. App.) 73 S. W. 993. While mere proof that a person assumed to act as the agent of another is not alone sufficient to establish the agency against the principal, yet, if it is further proved that the alleged principal knew of the acts of the alleged agent and made no objection, or, if the acts were so open and notorious that it may be fairly presumed that he knew them, it, together with such further proof, may be sufficient. *Clark & Skyles on Ag.* § 64. That J. D. Cameron was an agent of the defendant for some purposes is shown by defendant's own testimony. Whether it was within the scope of his apparent authority to employ plaintiff, his agency being virtually admitted, would, unless the character of his agency clearly excluded or negatived such authority, be a matter for the jury to determine. If, however, he had direct and specific authority from the defendant to employ the plaintiff, as is indicated by other testimony, it is immaterial whether it was within the scope of his apparent authority to employ him or not. So it would seem, in either event, the testimony complained of in the assignment could not in any way have prejudiced the defendant.

The fifth assignment of error is as follows: "The court erred in sustaining the objection of plaintiff to the answer of the witness, J. W. Blasdale, to interrogatory No. 18, referring to the alleged contract of employment between plaintiff and defendant as follows: 'No such contract ever existed,' said objection being that said answer was the conclusion of the witness." Direct Interrogatory No. 18, referred to in the assignment is as follows: "Had you at any time, as such division manager, or has there passed through your hands as such division manager, or is there known to you, any contract of which plaintiff was employed as canvasser, solicitor, or drummer, for any territory operated by the Plano Division of defendant company during the year 1903? If your answer be 'Yea,' state when, under what circumstances, and attach such contract or copy thereof, if such has ever come into your custody and under your control or within your knowledge." The answer to the interrogatory was: "I had not. There has not been, and there is not such a contract. No such contract ever existed." No objection was sustained to any part of the answer, save the last sentence thereof, which is embodied in the assignment, to which the objection that it was merely a conclusion, was sustained, and we think, properly. The part

of the answer admitted in evidence fully answered the question, and was, evidently, all, if not more, the witness knew about the subject of the inquiry. The sentence excluded was clearly a conclusion or inference of the witness, drawn from what he stated as facts in that part which preceded it. The question is not whether the premise was sufficient to support such statement, but whether it was a conclusion. An inference or conclusion from other facts as premises is, unless it be the opinion of an expert, inadmissible as evidence because the other facts are already, or may be, brought before the jury whose province it is to deduce conclusions from them. It is apparent to any one acquainted with the principles of logic, or right reasoning, that the witness had not stated sufficient facts to form premises for the conclusion that "no such contract ever existed" as was referred to by the interrogatory. If he had, it would have been for the jury to draw the conclusion, not the witness. *Half v. Curtis*, 68 Tex. 642, 5 S. W. 451.

The answers of the witness Blasdale to Interrogatory No. 22 and to cross-interrogatory No. 16, the exclusion of which is the basis of the sixth and seventh assignments of error, after stating the customary method of defendant in employing salesmen, consist simply of an argument of the witness, based upon such custom, to show that defendant never employed plaintiff as alleged by him, because such employment would have been in violation of defendant's custom. If evidence of such a custom were admissible, the argumentative part of the answer would not be. But proof of a contract *vel non* cannot be made by showing the customary method of either party in making contracts of the same character. Customs of a particular corporation or individual, are not, even as to the party who is governed by such customs, as unyielding and inflexible as cast iron. One can conduct his affairs by rules or not, just as he chooses; but he can govern no one else by them. If the defendant wanted to employ the plaintiff, and he wanted to accept such employment, they could, regardless of the customs of either, make a contract in regard to such employment in any way they pleased. We think the answers referred to were properly excluded.

Complaint is made by the tenth assignment of error of the court's sustaining an objection to a part of the answer of defendant's witness, P. J. Bedell, to the seventh interrogatory. The entire answer is: "No ratification was ever made by me, and have no knowledge of any having been made by any one else. The application for employment by Mr. Campbell was filed away by me, and was never accepted. As stated above, I do not know of any officer or any one accepting or ratifying any contract of employment with Mr. Campbell." The objection made to the answer was that it stated the conclusion of the witness. It was sus-

tained as to the first sentence. All the other part of the answer was read in evidence. If the part of the answer excluded was a statement of a fact within the knowledge of the witness, and not obnoxious to the objection that it was merely a conclusion, it is apparent that the defendant was not prejudiced by its exclusion, because the same fact is embodied in and clearly appears from the remaining part of the answer which was introduced in evidence, as well as in other answers of the witness which were read without objection.

The issue in this case is not whether the witness Bedell ever "contemplated or intended to accept the application for employment (referring to plaintiff's application) for any purpose or on any terms," but whether the plaintiff was employed by defendant. The witness having testified that he never accepted the application, nor employed the plaintiff, it is perfectly immaterial what he contemplated or intended about the matter, and no light would have been cast upon the issue by allowing him to testify that he never contemplated, or intended to accept his application for employment for any purpose whatever. Therefore, we overrule the eleventh assignment of error.

What we have said in considering the seventh assignment of error disposes also of the thirteenth, which complains of the court's excluding the following part of the answer of the witness Bedell to cross-interrogatory No. 18, viz.: "All applications for employment for this territory had to come through me and then be sent to the home office, to be accepted, before any contract of employment could be made." Such a rule of the company could not affect the plaintiff, nor prevent the defendant from employing him without regard to such rules.

The witness Bedell was asked by cross-interrogatory No. 15: "How many times during the year 1903, did J. D. Cameron visit Texas, and what were the purposes of his visits, and what did he do for the defendant company while in Texas?" He answered: "Only one time. The purpose of his visit was, as before stated, to compare Chicago records with the records of Dallas and San Antonio offices, and this was what he did for the defendant company." On objection of plaintiff, that the part of the answer stating Cameron's purpose in visiting Texas, and what he did while in San Antonio was hearsay, such portion of the answer was excluded by the court. This ruling is, by the fourteenth assignment, denounced as error. The statement subjoined to the proposition under the assignment is too meager to enable us to determine, with any degree of certainty whether the part of the answer in question is hearsay or not. Not every answer carries with it a test by which it can be determined whether it is hearsay. So, oftentimes matters extrinsic to it must be looked to to determine the question. A moment's thought will

demonstrate this to any lawyer, and render an illustration of it by example unnecessary. If, however, it should be determined that the answer was not obnoxious to the rule inhibiting the admission of hearsay evidence, it is apparent from the record that the defendant was not prejudiced by its exclusion; for the same witness, in his answers to direct interrogatory No. 3, and cross-interrogatories Nos. 2 and 4, testified in the same words to the same matters, and such answers were without objection read in evidence to the jury.

On cross-examination the same witness was asked this question: "Is it not a fact that prior to and subsequent to the employment of plaintiff that J. D. Cameron employed agents and salesmen for defendant company in other places than San Antonio, Texas?" He answered: "Mr. J. D. Cameron had no authority to employ an agent or salesman in any territory in the Plano division of the International Harvester Company of America, and he had never employed any one therein." Upon objection of plaintiff, that the first part of the answer, relating to Cameron's authority, or, rather, lack of authority to employ agents or salesmen, was hearsay, such part of the answer was excluded. This is the predicate for the fifteenth assignment of error. If not hearsay, the part of the answer was clearly an opinion of the witness and inadmissible. It may have been hearsay, but not necessarily so. The witness before, in answer to direct interrogatory No. 4, had testified: "I know of no power vested in Mr. Cameron and recognized none, he being simply bookkeeper sent out from Chicago to compare their records with the records of the Dallas office. I knew of no power or authority that were vested in Mr. Cameron at all." This seems to have been the extent of the witnesses' information upon the subject of the excluded answer. And it is apparent that the part of the answer complained of was either based upon information received from some source, or an inference deduced from his knowledge of the character of Cameron's employment. If hearsay, the objection to it was good. If an inference, the part of the answer excluded was not competent testimony. In the one event, the objection was good, in the other, defendant cannot complain.

The answer of Bedell to the twenty-fifth cross-interrogatory, to wit: "As answered before, Mr. Cameron had no authority to employ any one in any capacity in the Texas territory," is only an inference; and upon such ground, was properly excluded. We, therefore, overrule the seventeenth assignment of error. This also disposes of the eighteenth assignment of error; and what we have said in considering the fourteenth assignment disposes of the nineteenth.

As the substance of issues made by pleadings is all that is necessary to be proven, a

charge which submits to the jury the substance of the essential issues, made by the pleadings and evidence, necessary to plaintiff's recovery sufficiently conforms to the rule which requires it to conform to the pleadings. This was done in the part of the charge complained of by the twenty-second assignment of error. It is, therefore, overruled.

The twenty-fifth assignment of error complains of the court's refusal to give defendant's special charge No. 1, which is a peremptory instruction to return a verdict in its favor. The charge in question does not upon its face disclose the ground upon which it is based. But we gather from the propositions under the assignments and the statements subjoined, it is that the contract sued upon is in violation of the statute of frauds, and, therefore, cannot be enforced. It is well settled, that in a suit at law or in equity affected by this statute, the declaration or bill will be sufficient if it allege a contract generally, without stating whether it is in writing or not. *James v. Fulcrod*, 5 Tex. 515, 55 Am. Dec. 743; *Cross v. Everts*, 28 Tex. 531; *Lewis v. Alexander*, 51 Tex. 585; *Horn v. Shamblin*, 57 Tex. 244; *Gonzales v. Chartier*, 63 Tex. 37; *Robb v. San Antonio St. Ry.*, 82 Tex. 395, 18 S. W. 707; *Tinsley v. Miles* (Tex. Civ. App.) 26 S. W. 999; *Booher v. Anderson* (Tex. Civ. App.) 86 S. W. 956; *Browne on Statute of Frauds*, § 505; *Reed on Statute of Frauds*, §§ 504, 506, 507. As an obverse corollary to this rule, it would seem that the statute of frauds as a defense must be pleaded, else the plaintiff, whose petition is good against any kind of exception, whose suit is affected by the statute, might be defeated without the defendant's having in any way pleaded the matter which destroys his action. And this corollary seems to be a principle of pleading. *League v. Davis*, 53 Tex. 9; *Pool v. Wedemeyer*, 58 Tex. 299; *Patton v. Rucker*, 29 Tex. 411; *Brewing Co. v. Walters* (Tex. Civ. App.) 43 S. W. 549. At least, it is well settled that the defense of the statute of frauds must in some form be specially interposed. See *League v. Davis*, supra; *Brewing Co. v. Walters* (Tex. Civ. App.) 43 S. W. 549; *Booher v. Anderson* (Tex. Civ. App.) 86 S. W. 957. This may be done by a general demurrer, where the plaintiff's petition, though in all other respects sufficient, shows upon its face that the cause of action stated is within the statute of frauds. *Garner v. Stubblefield*, 5 Tex. 561; *Murphy v. Stell*, 43 Tex. 133; *Stovall v. Gardner*, 94 S. W. 218, 15 Tex. Ct. Rep. 756. In the case of *Hart v. Garcia* (Tex. Civ. App.) 63 S. W. 922, while correctly decided, the rule may be stated too broadly to be in perfect harmony with other decisions of this state. In the case at bar the statute of frauds was not in any manner interposed by the defendant in the court below. For it cannot be said that its peremp-

tory instruction, which did not disclose for what reason or on what principle it was asked, raised the question. It might have been requested because defendant deemed the evidence wholly insufficient to prove that a contract, either written or verbal, such as alleged was ever entered into by the parties. Certainly the statute of frauds cannot be for the first time invoked upon appeal.

The evidence was sufficient to carry the case to the jury upon the issue as to whether the contract sued upon was ever made by the parties. If an agreement upon all the terms of the contract was reached by the parties, as the evidence reasonably tends to show, and nothing remained except to reduce its terms to writing, the contract was complete, there being no evidence that it was not to become effective until reduced to writing, a breach of it by either party, causing damage to the other, would support an action for such damage. The principles applicable to the test of a completed contract are: "Although the terms of the contract may all be agreed upon, still, if the parties make it a condition to the existence of a contract that the terms agreed upon be reduced to writing, and signed by them, there is no contract until this is done." 1 Add. Cont. (Morgan's Ed.) § 20. "On the other hand, it is well-settled law that, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing does not negative the existence of the present contract. In other words, if the parties make an agreement which they intend shall be binding from the time it is made, effect will be given it from that time, though they intend it shall be superseded by a more formal written agreement." 2 Whart. Cont. § 645; Beach, Mod. Cont. Law, § 3; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Lowrey v. Danforth (Mo. App.) 69 S. W. 41. Clearly the evidence in this case was not such as would authorize the court to withdraw the issue of whether there was a contract between the parties from the jury and peremptorily instruct a verdict upon it for the defendant.

We are not informed why the court was induced to give the charge complained of in the twenty-fourth assignment of error, which is as follows: "The oath administered to each of you when impeached was that you would a true verdict render according to the law as it may be given you in charge by the court, and to the evidence submitted to you under the rulings of the court. Hence, you are instructed that in considering your verdict you must not receive or consider any testimony other than that now before you." Conditions may have arisen that not only made it proper, but the duty of the court, to give such instruction to the jury. However, whether such conditions obtained or not, we cannot see how either party could have been prejudiced by such charge.

Those assignments which complain of the

court's overruling defendant's motion for a new trial are not well taken.

The judgment is affirmed.

#### On Motion for Rehearing.

It is complained in this motion that we erred in overruling the twenty-second assignment of error which complains of the portion of the charge which submits the issue as to plaintiff's right to recover. The propositions advanced under the assignment are: (1) That a party can only recover upon the contract alleged by him; and (2) that the charge should conform to the pleadings of the parties. In disposing of this assignment in our original opinion, we observed that "as the substance of issues made by pleadings is all that is necessary to be proven, a charge which submits to the jury the substance of the essential issues made by the pleadings and evidence necessary to plaintiff's recovery, sufficiently conforms to the rule which requires it to conform to the pleadings," and, upon this principle, held the charge not obnoxious to the objections raised by the assignment. A reconsideration of the assignment has not induced us to change our opinion on the question presented. This part of the charge may not, in that it fails to embody the express terms of the contract declared on, be full enough. But, save an evident clerical error in its date (which could not possibly mislead the jury), it presents the substance of the issues made by the pleadings and evidence. If defendant desired a more specific presentation of the terms of the contract sued upon, it should have prepared and requested a special charge to that end. The defect in the court's charge, should it be regarded as defective, is one of omission only. The charge is good as far as it goes, and is such as to require the request of a special instruction supplying the omission before advantage can be taken of it on appeal. Neither proposition under the assignment presents the question of variance between the contract alleged and proved, and a consideration of such question would be foreign to it and unauthorized. However, the rule seems to be that where evidence is admitted without objection, the question of variance cannot be raised upon an instruction to the jury. *Moffatt v. Snyder*, 13 Tex. 628; *Huston v. Clute*, 19 Tex. 179; *First Nat. Bank of Rockwall v. Stephenson*, 82 Tex. Rep. 435, 18 S. W. 583; *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783.

That the statute of frauds must in some way be specially interposed in the trial court is well settled by the authorities in this state, some of which are cited in our original opinion. And we can perceive no reason for receding from our original opinion that such interposition was not made by requesting a peremptory instruction to find for the defendant, without stating the ground upon which such instruction was asked. In the case of *Cosand v. Bunker* (S. D.) 50 N. W.

84, it appearing upon the trial that the contract sued on was within the statute of frauds, counsel for defendant requested the court to peremptorily instruct the jury that plaintiff could not recover because the contract was not reduced to writing, the refusal of which being assigned as error, the court in passing upon it held as follows: "We are of the opinion that the refusal to give this instruction was not error, under the evidence in this case. The August agreement as to the surrender of the premises and payment of \$500 was given in evidence, and admitted without objection. It was too late, therefore, after the evidence was closed, and the case about to be submitted to the jury, to interpose the objection. Contracts within the statute of frauds, not reduced to writing, are not illegal, but only incapable of being enforced against a defendant without writing, an immunity which the defendant may waive. And this requirement of the statute may be waived by a defendant by a failure to object to parol evidence of a contract that the statute prescribes shall be in writing to be binding upon a party. This question was fully considered and decided by this court in the case of *McLaughlin v. Wheeler*, 47 N. W. 816. As bearing upon this question, in addition to the cases cited in that opinion, see *Browne*, St. Frauds (4th Ed.) § 135; *Montgomery v. Edwards*, 46 Vt. 151, 14 Am. Rep. 618; *Bommer v. Manufacturing Co.*, 81 N. Y. 468; *Ames v. Jackson*, 115 Mass. 508; *Dock Co. v. Kinzie*, 49 Ill. 289; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Huffman v. Ackley*, 34 Mo. 277; *Houser v. Lamont*, 55 Pa. 311, 93 Am. Dec. 756; *Howard v. Sexton*, 4 N. Y. 157. It is also contended that it was not necessary for the defendant to plead the statute in this case, in order to avail herself of its protection. We agree with counsel in this proposition. Defendant could, no doubt, have objected to the evidence, and it would have been the duty of the court to exclude it; but, as we have before seen, she could waive the protection of the statute made for her benefit." While a general denial is sufficient to let in the defense of the statute of frauds (*Buhl v. Stephens* [O. C.] 84 Fed. 922; *Busick v. Van Ness*, 44 N. J. Eq. 82, 12 Atl. 609; *Metcalf v. Brandon*, 58 Miss. 841; *Tatge v. Tatge*, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121; *Dunn v. Moore*, 38 N. C. 364; *Allen v. Chambers*, 39 N. C. 125; *State v. Waterworks, etc., Co.*, 74 Mo. App. 273; *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113; *Porter v. Citizens' Bank*, 73 Mo. App. 513; *Wiswell v. Tefft*, 5 Kan. 263; *Coquillard v. Suydam*, 8 Blackf. [Ind.] 24; *Suman v. Springate*, 67 Ind. 115), the defendant is still obliged to make his defense good by objecting to parol evidence which is sought to be introduced by the plaintiff to prove the contract (*Crough v. Nurge*, 44 App. Div. 19, 60 N. Y. Supp. 395; *Clement v. Gill*, 59 Mo. App. 482;

*Cosand v. Bunker*, 2 S. D. 294, 50 N. W. 84). And a failure to object to parol evidence when it is introduced operates as a waiver of the statute, if not especially pleaded. *Montgomery v. Edwards*, 46 Vt. 151, 14 Am. Rep. 618; *Pike v. Pike*, 69 Vt. 535, 38 Atl. 265; *Lupean v. Brainard*, 20 App. Div. 212, 46 N. Y. Supp. 1044; *Clement v. Gill*, supra; *Barrett v. Johnson*, 77 Hun, 527, 28 N. Y. Supp. 892; *Jordan v. Greenboro Furnace Co.*, 78 Am. St. Rep. 654, 655, note. From the foregoing citation of authorities, it follows that our conclusion to the effect that the statute of frauds was in no manner interposed by the defendant in the court below, and cannot be for the first time invoked on appeal, expressed in our original opinion, is correct.

We think that the proof was sufficiently certain as to the damages sustained by the plaintiff by reason of the breach of the contract to admit of his recovery.

The motion is overruled.

**MORRISON et al. v. MORRISON et al.\***  
(Court of Civil Appeals of Texas. June 2, 1906.  
Rehearing Denied June 30, 1906.)

**DESCENT AND DISTRIBUTION—ADVANCEMENTS—PRESUMPTIONS.**

Where, prior to intestate's death, she delivered a check to defendant, and directed him from the proceeds thereof, to take \$900 and pay an indebtedness on the purchase price of certain land belonging to him and such amount was more than defendant's share in intestate's estate, such gift would be presumed to have been intended as an advancement.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 426.]

Appeal from District Court, Cooke County;  
D. E. Barrett, Judge.

Action by J. W. Morrison and others against C. C. Morrison and others. From a judgment for plaintiffs, defendants appeal. Reversed and rendered.

Davis & Thomason, for appellants. Oulp & Giddings, for appellees.

CONNER, C. J. Appellants, I. W. Morrison, Thomas H. Morrison, H. A. Morrison and Jane A. Minnis, sons and daughter of Mrs. N. A. Morrison, deceased, joined by the children of a Mrs. Hemphill and a Mrs. Oller, also daughters of the deceased, instituted this suit in the district court of Cooke county against the appellee C. C. Morrison, the remaining child of Mrs. N. A. Morrison, to recover an interest in the estate of the deceased, and to charge as against appellee C. C. Morrison and his wife, also joined in the suit, the sum of \$900, which it was alleged appellee C. C. Morrison had used in paying a vendor's lien upon his homestead. The trial, which was before the court, resulted in a judgment in favor of appellants for the sum of \$181.33, which had been tendered by appellee and was in the hands of the clerk, from which judgment an appeal has been prosecuted.

\*Writ of error denied by Supreme Court Oct. 11, 1906.

The sole question presented is whether the judgment is supported by the facts. It is undisputed that the deceased, who was a widow 84 years of age, sold her farm in Cooke county on the 26th day of June, 1905, for the sum of \$3,066.65 in cash. This farm constituted her entire estate, and was paid for by the purchaser in a check for the amount stated on one of the national banks of the city of Gainesville. After mutations not necessary to notice here, appellee had this amount placed to his credit upon the books of another one of the banks in said city, and on July 27, 1905, drew therefrom the sum of \$900, with which, together with some \$300 of his own money, he discharged a debt secured by vendor's lien upon his homestead. On the same day he also withdrew the further sum of \$168.65, which appellee C. C. Morrison testifies that he gave to his mother, but which (save the amount tendered to appellants in court) he testifies was expended in the payment of her funeral expenses. Six-sevenths of the remaining \$2,000 of the fund appellee afterwards divided among his said brothers and other heirs of the deceased, himself retaining one-seventh. It further appears that Mrs. N. A. Morrison, the mother, who was a resident of Cooke county, died intestate on the 29th day of July, 1905, owing no debts, and that there has never been any administration upon her estate, nor any necessity therefor. Mrs. Zulah Morrison, the daughter-in-law of the defendant C. C. Morrison, testified: "My husband and I stayed at C. C. Morrison's on the night of the 26th of July. We sat up with Grandma Morrison. I just happened into the room when they brought the check to her to sign. My husband had already written the check. Grandma Morrison was in bed at the time. We propped her up in bed to sign the check. I heard her tell Mr. Morrison (C. C.) to pay his land notes off. I saw her sign the check. She said she thought she would get well, and be able to go west to see her grand children out there. The check was signed before breakfast. C. C. Morrison propped her up in bed, and she signed the check. Some time during the morning on which she signed the check, I heard her tell Mr. C. C. Morrison to pay his land out. That was all I heard her say. I did not hear her say what she wanted done with the balance of the money." Luther Morrison, the husband of Mrs. Zulah Morrison, testified: "I saw Mrs. N. A. Morrison sign the check for \$3,066.65. She was sitting in the bed propped up at the time. Grandma said she wanted C. C. Morrison to pay his place out, and to put \$1,000 in the Whitesboro Bank, and \$1,000 in the Sherman Bank, and bring her the balance. She said for him to pay \$900 on his place and bring her \$165. She said be sure and pay your place out. I believe I am going to get well, but if I should die, you would not get it, and I have give you the money and want you to have it."

The question presented is, in substance, whether under the foregoing facts and some other evidence hereinafter referred to, appellee C. C. Morrison was entitled to retain the \$900 given him by his mother and also to receive a distributive share of one-seventh of the remainder of his deceased mother's estate. We think not, and that the court below erred in so finding and adjudging. Rev. St. 1895, art. 1694, provides that "where any of the children of a person dying intestate, or their issue, shall have received from such intestate, or their issue, shall have received from such intestate in his lifetime any real, personal, or mixed estate by way of advancement, and shall choose to come into the partition and distribution of the estate with the other distributees, such advancement shall be brought into hotchpotch with the whole estate, and such party returning such advancement shall thereupon be entitled to his proper portion of the whole estate; provided, that it shall be sufficient to account for the value of the property brought into hotchpotch at the time it was advanced." If, therefore, the \$900 from his mother's estate was received by appellee C. C. Morrison "by way of advancement," he must, before being entitled to participate with other heirs in the distribution of the entire estate, return the same that it may be brought into hotchpotch with the whole estate. It, hence, becomes important to determine from the evidence whether appellee C. C. Morrison received said \$900 by way of advancement within the meaning of the statute, or, as appellees insist, as an "absolute gift." We think it clear from the authorities that, in the absence of circumstances showing a contrary intention, a gift by a parent to a child of money, such as shown in this case, is presumed to be an advancement. See *Lott v. Kaiser*, 61 Tex. 668; *Woessner v. Wells* (Tex. Civ. App.) 28 S. W. 249; *Williams on Executors*, vol. 2, P. 1274; *Rickenback v. Zimmerman*, 30 Am. Rep. 37; *Goodwin v. Parnell* (Ark.) 65 S. W. 427; *Nichols v. King* (Ky.) 68 S. W. 133; *Reynolds' Adm'rs v. Reynolds* (Ky.) 18 S. W. 517; *Steele v. Friarson* (Tenn.) 8 S. W. 652; 14 Cyc. pp. 162, 169. During life, by proper transfer or will a person may dispose of his property as he pleases. He may thus disinherit or prefer one child above another. But, in the absence of a will, and, in the absence of circumstances sufficient to show otherwise, the presumptions referred to obtains. The presumption as well as the statute quoted, tends to produce, as near as may be, equality in the distribution of the estate of an intestate, and is evidently equitable. The utmost effect that we think can be given to the evidence in this case is to hold that Mrs. N. A. Morrison made a gift of \$900 to her son C. C. Morrison, and that to this extent she intended to prefer him over her other children. But it does not follow from this that she intended that C. C. Morrison should also

receive a distributive share of the remainder of her estate. She left no will so declaring, nor is there other evidence of such effect. The \$900 was more than appellee C. C. Morrison's proper portion of his mother's entire estate. To this extent he was preferred. Beyond this we do not think he should be permitted to claim, in the absence of more convincing proof, that his deceased parent so intended. The gift is not inconsistent with the presumption indulged, and the several letters of the deceased referring to her son I. W. Morrison in unkind terms, upon which appellees rely, were in answer to letters written by appellee C. C. Morrison, which were not produced, and in our judgment fall far short of showing a settled purpose on the part of the deceased mother to deprive her son I. W. Morrison of any part of her estate to which she might under the law be entitled, and as to her other children the record discloses not even a temporary absence of a mother's tender regard.

We conclude that the court erred in its finding and judgment to the effect that appellee, without return of the \$900 received by him, was entitled to participate in the distribution of the remainder of the estate. The judgment will, therefore, be reversed and here rendered for appellants against appellee C. C. Morrison for the one-seventh of the \$2,000 of his mother's estate retained by him, viz., the sum of \$285 $\frac{5}{7}$ , with interest thereon from Mrs. Morrison's death, July 29, 1905, at the legal rate, together with all costs of this court, and of the court below, it being further adjudged that the said sum of \$81.33 in the hands of the clerk of the trial court be paid to appellants and which, together with the principle sum herein adjudged against appellee C. C. Morrison, shall be partitioned among appellants in their proper proportion.

#### GULF, C. & S. F. RY. CO. v. COOPWOOD.\*

(Court of Civil Appeals of Texas. June 9, 1906.  
Rehearing Denied June 30, 1906.)

#### 1. CARRIERS—WRONGFUL TREATMENT OF PASSENGERS—ACTION—INSTRUCTIONS.

In an action against a carrier for wrongful treatment of plaintiff and her invalid daughter, the court properly instructed that it was the duty of the carrier's servants to exercise such a degree of care as would reasonably insure the safety of the passengers in view of their physical condition, and a failure to discharge the duty was negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1093, 1096.]

#### 2. EVIDENCE—DECLARATIONS—RES GESTÆ.

In an action against a carrier for wrongful treatment of plaintiff's invalid daughter, evidence that, while the carrier's servants were carrying the daughter to the baggage car, some man, a stranger, walked up and told them not to put her in the baggage car, was admissible as part of the res gestæ.

\*Writ of error denied by Supreme Court Oct. 11, 1906.

#### 3. CARRIERS—WRONGFUL TREATMENT OF PASSENGERS—DAMAGES—EVIDENCE.

In an action against a carrier for wrongful treatment of plaintiff and her invalid daughter, consisting of refusal of the carrier's servants to assist the daughter to alight till after the other passengers had left the train and it was switched into the railroad yards, when the servants knew her helpless condition, and knew that it would be difficult to procure hotel accommodations, evidence that after leaving the train plaintiff and her daughter were compelled to drive to three different places before they could secure lodging, and that this took them a considerable time, was admissible.

#### 4. DAMAGES—MENTAL SUFFERING—PROXIMATE CAUSE.

In an action against a carrier for wrongful treatment of plaintiff and her invalid daughter, plaintiff is entitled to recover for her own mental suffering caused by the carrier's negligence and wrongful treatment of her daughter, where the carrier's servants knew the relationship between them.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 100-103.]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by Mrs. M. J. Coopwood against the Gulf, Colorado and Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwill, for appellant. S. C. Padelford, for appellee.

**TALBOT, J.** This is a suit instituted by appellee against appellant to recover damages for physical pain and mental anguish suffered by her on account of the alleged negligence and wrongful treatment of herself and her daughter, Minnie Coopwood, while appellant's passengers going from Brownwood, Tex., to San Angelo, Tex. Appellant answered by general demurrer and general denial. A jury trial resulted in a verdict and judgment for appellee in the sum of \$1,250, from which appellant has appealed.

The testimony is conflicting, but sufficient to warrant the following conclusions of fact: The appellee, Mrs. M. J. Coopwood, was a widow, and her family on January 1, 1903, consisted of herself, her unmarried daughter, Minnie Coopwood, her widowed daughter, Mrs. Ellis Overton, and little granddaughter, Gladys. Miss Minnie Coopwood was afflicted with consumption, and the family had been residing in Wichita Falls for the benefit of her health. Her condition became so serious in December, 1902, it was decided to take her to San Angelo, Tex., with the hope that her health would be restored or benefited by the climate there. With this object in view appellee, with her two daughters, Miss Minnie Coopwood and Mrs. Overton, and her little granddaughter, Gladys, started from Wichita Falls to San Angelo on the evening of December 31, 1902, and reached appellant's depot at Brownwood about sundown January 1, 1903. Miss Minnie had a chill en route at Ft. Worth, and when she arrived at appellant's



depot at Brownwood was very sick, unable to walk, and practically helpless. She was placed in a chair in appellant's depot house at Brownwood where she, appellee, and Mrs. Overton and little daughter remained until the arrival of appellant's passenger train going to San Angelo, which was probably between 9 and 10 o'clock that night. In the meantime appellee purchased tickets for herself and daughters over appellant's road for San Angelo, paying the amount charged therefor. When the train reached Brownwood the porter and brakeman went into the waiting room of the depot, and appellee told them that her daughter could not walk and asked them if they would carry her on the train, to which they replied they would. About this time Mrs. Overton stated, in the presence of the porter and brakeman, that she would go and secure a seat in the train for her sister. The porter and brakeman picked up the chair Miss Minnie Coopwood was in and carried her out towards the engine and baggage car with the intention of putting her in the baggage car. Miss Minnie Coopwood asked them not to put her in the baggage car, and cried out to her mother to stop the porter and brakeman and not let them put her in the baggage car. Appellee called to them and asked them not to put her daughter in the baggage car, but they proceeded towards the baggage car, and said that was the place for her if she was sick. Miss Minnie Coopwood begged not to be put on the baggage car, and about this time some man, a stranger, walked up and told the porter and brakeman to stop and not put her in the baggage car, to which one of them replied: "Boss, there ain't enough room in the other car for her"—and the stranger remarked: "Make the passengers make room for her." Miss Minnie was then put into a day coach, where she remained in the care of her mother until San Angelo was reached. Shortly before the train got to San Angelo appellee told the conductor that she wanted him to help them off just as soon as the depot was reached, and the conductor said he would when he got through helping the other passengers off the train. As the train was running into San Angelo, Miss Coopwood said to the conductor: "Please help me off now. I am very sick and suffering." And appellee also called to him before he got to the car door and asked him to help them off. To which the conductor made no reply, or, if so, it was not heard by appellee. When the train stopped at San Angelo, and while the conductor was assisting other passengers off, appellee asked him to help her daughter off the train, that she was suffering excruciating pain in her lungs, and that she wanted to get her to a house where she could have her taken care of and give her medical aid. The conductor said that, when he got through helping the passengers off, he would help her off; but, according to appellee's statement, she did not see him any more, and after all the pas-

sengers were off the train, except herself and daughters, the brakeman came in the coach and said the conductor had gone home and the train would have to be switched down into the yards. After this a negro porter came in the car and she asked him to tell the conductor to help them off the train, and he made no reply, but shut the door and left. John Abney, a coach cleaner in the employ of appellant, with whom appellee was acquainted, next came into the car, and he said they would have to switch the coach off of that track. The coaches were then switched down into the yards probably 100 yards distant from the depot, and John Abney ordered a carriage, and appellee and her daughters were put in it, and they left seeking a hotel. The principal hotel of San Angelo had been previously burned, a fact known to appellant's conductor at this time. The passengers who disembarked from the train before appellee and daughters, who were able to do so, had secured lodging in the hotels, and appellee and her daughters were compelled to drive to three different places before accommodations could be secured. Appellee and her daughters remained in the car after the train reached San Angelo, before they secured a carriage and left it, probably a half hour or longer. She and her daughter, Mrs. Overton, were physically unable to carry Miss Coopwood on and off the train, and this fact, as well also as the helpless condition of Miss Coopwood, was well known to appellant's conductor and other employes in charge of the train upon which they were traveling. The relationship existing between appellee and Miss Coopwood was also known to said employes. Appellee sustained damages by reason of the physical and mental pain suffered by her as a result of the acts charged against appellant's servants in the amount awarded by the jury.

Complaint is made of that portion of paragraph 8 of the court's charge in which the jury were instructed: "That it was the duty of the defendant's servants in charge of said train to exercise such a degree of care as would reasonably insure the safety of such passengers in view of their physical condition, and a failure on the part of the defendant through its said servants to discharge said duty was negligence." The objections urged to this charge are: That it is in effect an instruction that the defendant was held to be an insurer of the safety of its passengers and imposed upon the defendant a higher degree of care than that required by law; that under the peculiar circumstances of this case, and the theory upon which a recovery is sought, the failure of the railway company to use even a very high degree of care towards the plaintiff's daughter, Miss Coopwood, would not be negligence towards the plaintiff. We are inclined to the opinion that neither of these objections are well taken. The clause of the charge complained of correctly defines the duty of railway companies, under decisions of this and other

states, towards sick and helpless passengers, and it is not believed that the form of expression misled the jury into the belief that, in accepting appellee and her daughters as passengers, appellant thereby became an insurer of their safety in the sense as contended by its counsel. In the case of *Railway Co. v. Miss Willie Gilmer*, 18 Tex. Civ. App. 680, 45 S. W. 1028, appellee, on account of physical disabilities, was unable to walk, and, while being removed from the train by the conductor, was, through his negligence, injured. The Court of Civil Appeals at San Antonio quotes with approval from *Croom v. Railway* (Minn.) 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557, this language: "But if the company voluntarily accepts a person as a passenger unattended by a servant capable of taking care of and rendering him necessary assistance, whose inability to care for himself is apparent or made known to its servants when he is accepted as a passenger, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise a degree of care commensurate with the responsibility which is thus voluntarily assumed, and such care must be such as will reasonably insure the safety of the passenger in view of his physical condition. This is the duty required by law as well as the dictates of humanity." *Weightman v. Railway* (Miss.) 12 South. 586, 19 L. R. A. 671, 35 Am. St. Rep. 660; *Railway Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 810, 10 N. E. 70, 58 Am. Rep. 387. Appellant, in this case, accepted appellee and her daughters as passengers knowing the relationship existing between them and the helpless condition of the daughter. It knew through its servants in charge of the train that the mother was incapable of carrying her daughter on and off the train, and of the natural affection she bore her. Under the circumstances, appellant assumed the duty of exercising such care as would reasonably insure or secure appellee and her daughter immunity from negligent, harsh, or improper treatment by its employes during their transportation to the point of destination. This was the duty placed upon appellant by the charge in question and was a correct application of the law to the facts, and the failure to discharge such duty was negligence on its part and rendered appellant liable to appellee for such damages as proximately resulted to her from a breach of such duty.

There was no error in permitting plaintiff to testify that, as the employes of defendant were proceeding to the baggage car with her daughter, over her protest, some man, a stranger, walked up and told them to stop and not put that lady in the baggage car. This was a declaration or exclamation uttered by a bystander or person present at the time of the transaction to which it related and calculated to throw light upon the purposes and intention of the parties to it, and

was clearly admissible as a part of the res gestae. *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

Appellant's third and fifth assignments of error complain of the court's action in permitting appellee and Mrs. Ellis Overton to testify, over its objection, to the effect that, after leaving appellant's train at San Angelo, they, including Miss Coopwood, were compelled to drive to three different places before they could secure lodging for the night, and that it seemed like an hour after they got in the carriage at San Angelo before they found a place to stop. It is contended that the railway company is not responsible for the length of time appellee was riding around in a carriage looking for a hotel, nor for the suffering of appellee as a consequence thereof. The question is not free from difficulty and doubt; but, in view of all the facts, the conclusion is reached that the testimony was admissible, and that, whether appellee's delay in securing lodging for herself and daughter, and any physical or mental suffering endured by appellee by reason thereof after she succeeded in leaving appellant's train, was proximately caused by the negligence of appellant's servants, were issuable facts for the determination of the jury. As shown by our conclusions of fact appellant's conductor was informed that Miss Coopwood was suffering excruciating pain and was requested by both her mother and herself to put them off the train just as soon as San Angelo was reached, in order to secure rooms where Miss Coopwood could receive proper care and medical attention. The conductor himself testified, in substance, that he knew Miss Coopwood was not able to get on and off the train, and that appellee was not able to assist her off; that the Langdon hotel at San Angelo had been burned, and that good rooms were very scarce and hard to get there at that time; that he knew the drummers were making a run for the hotels and had such information at the time appellee and her daughter were asking to be put off the train. He further stated that he knew it was necessary for appellee and her daughters to take a carriage as soon as they could in order to get the best room and did not request the drummers to stand aside and let the sick lady get off; that he did not have time to do this. According to appellee's version, the conductor not only failed to promptly assist her and her daughter off the train, but neglected to do so altogether, and suffered the car in which they were riding to be switched down into the railroad yards some hundred yards from the depot and away from the hotels and boarding houses, proximately resulting, as the jury might fairly conclude, in the difficulty and delay experienced by appellee and her daughters in securing lodging for the night, and of appellee's mental distress occasioned thereby.

Appellant's seventh assignment of error is as follows: "The court erred, in para-

graph No. 8 of its charge to the jury, in submitting to the jury as an issue and question as to whether the servants and employes of the defendant were negligent in their treatment of the plaintiff's daughter, Miss Minnie Coopwood, and as to whether by reason thereof the plaintiff was caused to suffer physical or mental suffering, and authorizing the jury to find in favor of the plaintiff any sum as damages by reason of any such suffering, because such damages, if any, were too remote, speculative, and uncertain to form the basis of any cause of action in favor of the plaintiff against the defendant, and were not and could not reasonably have been within the contemplation of the parties at the time of entering into the contract of passage with plaintiff and her said daughter, and because in no event could the plaintiff recover of the defendant any sum as damages for mental anguish sustained by her by reason of any mistreatment of, inattention to, or neglect of, her said daughter by any of the agents, servants, or employes of the defendant." This presents the central question arising on the appeal and is involved in several of appellant's assignments. That the physical or mental pain suffered by Miss Coopwood, on account of any personal injury or wrong inflicted upon her by the negligence of the servants and employes of appellant, is not an element of damages which her mother is entitled to recover, seems to be well settled, and the jury were instructed by the trial court to that effect. Pullman Pal. Car Co. v. Trimble, 8 Tex. Civ. App. 335; 28 S. W. 96; Railway Co. v. Martino, 2 Tex. Civ. App., 634, 18 S. W. 1066, 21 S. W. 781; Railway Co. v. Gregory (Tex. Civ. App.) 73 S. W. 28; Railway Co. v. Woods, 15 Tex. Civ. App. 612, 40 S. W. 846; City of Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519; Railway v. Trimble, 8 Tex. Civ. App. 336, 28 S. W. 96. But the question is: Was appellee's own mental anguish suffered by reason of the inattention to, mistreatment of, or neglect of, her afflicted and helpless daughter, independent of the daughter's suffering, an element of her damages? In numerous telegraph cases decided by the appellate courts of this state, it has been held that mental anguish incurred from witnessing the suffering of a sick wife or child, or otherwise occasioned by the negligent failure of a telegraph company to promptly deliver a message addressed by the husband or parent to a physician requesting him to come to the relief of the afflicted one, was an element of actual damages recoverable for a breach of such contract. The following are a few of the cases in which the principle has been applied in cases of this character: Telegraph Co. v. Richardson, 79 Tex. 649, 15 S. W. 689; Telegraph Co. v. Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148; Tel. Co. v. Cavin (Tex. Civ. App.) 70 S. W. 229; Womack v. Tel. Co. (Tex. Civ. App.) 22 S. W. 417; Tel. Co. v.

Kendzora (Tex. Civ. App.) 26 S. W. 245. In the last cited case the ground of recovery relied on was that appellee, the husband, suffered mental anguish by reason of the fact that his wife had been deprived of medical attention and advice in her last moments in consequence of the negligence of appellant in failing to deliver a telegram calling a physician to her bedside. It was alleged that the husband was compelled to see his wife grow worse and die without medical attention; that he was greatly shocked and harassed in body and mind by reason of the fact that she had no medical attention in her dying hours, and suffered poignant grief and deep sorrow of mind, etc., on account thereof. A judgment in favor of the husband was affirmed on appeal by the Court of Civil Appeals of the Second District; Judge Stephen remarking in substance: That in the case of Telegraph Co. v. Cooper, 71 Tex. 512, 9 S. W. 598, 1 L. R. A. 723, 10 Am. St. Rep. 772, relied on by the appellant in support of its contention that such character of mental distress was not recoverable, apparently tends to support that contention; but, if so, it was overruled by the subsequent case of Telegraph Co. v. Richardson, 79 Tex. 649, 15 S. W. 689. But aside from this class of cases we have the case of Railway Co. v. Anchonda (Tex. Civ. App.) 68 S. W. 743, 75 S. W. 557, which is more nearly in point on the facts. In that case the wife of the appellee purchased of the railway company's agent tickets for herself and two children, the agent looking at the children to see if they were entitled to half fare tickets; but nothing was said as to the relationship existing. When the train upon which the mother and children expected to take passage arrived at the station, the two children were placed upon the train; but the train was not stopped long enough to enable the mother to board it, and her children were carried away on the train, and separated from her. It was held by the Court of Civil Appeals at San Antonio, that, if the railway company knew of the relationship of the mother to the children, the husband was entitled to recover for the mental anguish suffered by the wife as a direct result of the negligent separation of her from her children, without proof of any physical injury. We are unable to distinguish in principle the case under consideration from those discussed and cited, and think it may be sustained upon like grounds. Especially may this be said with reference to Anchonda's Case.

The record here discloses a contract between appellant and appellee by which appellant undertook, for a valuable consideration, to transport appellee and her sick daughter from Brownwood to San Angelo, assuming thereby the duty of exercising that high degree of care, as before stated, to avoid

injury to them. That Miss Minnie Coopwood had reached her majority does not alter the case. She was still a member of the family, a helpless invalid, and the object of her mother's tenderest care and solicitude. Appellant's agents, knowing the relationship, were chargeable with knowledge of those natural ties of affection which bound this mother to her afflicted child and of the fact that mental distress would probably result to the mother from an indignity or insult to the daughter or from other improper treatment or willful neglect of her as a natural consequence thereof. Such a result from such cause or causes, under the circumstances, must necessarily have been within the contemplation of the parties when the contract of carriage was made. In such case wrongful and negligent acts of the carrier's servants toward the sick and dependent daughter of such a character as to occasion mental anguish to the mother would be a violation of the duty imposed by law upon the carrier, and a breach of its contract with the mother as much so as if such wrongful or negligent acts were personal to her. For such a violation of duty and breach of contract, or tort grounded upon such breach, we think the carrier should be held liable in damages for the mother's own mental anguish emanating therefrom. *Railway Co. v. Gilbert*, 64 Tex. 536; *Railway v. Smith* (Tex. Sup.) 1 S. W. 565. The principle of such liability rests upon the fact that the wrong done the child under such circumstances, is a wrong inflicted upon the mother herself, and a failure on the part of the railway company to exercise that degree of care required by law to guard and protect the mother, as its passenger, from either physical or mental pain. The rule, as stated, would not allow the mother to recover as an element of her damages the physical or mental pain suffered by the child as a result of the wrong complained of, nor perhaps, for such mental anguish as may have been caused her by sympathy for her child. Her recovery must be restricted to such mental anguish as may have been caused her as a direct result of such wrongful or negligent acts, independent of the child's suffering. In the case at bar appellant's rights were carefully guarded in this respect. The jury were fully instructed by the court that in no event could they find any damages for appellee for any suffering, physical or mental, endured by Minnie Coopwood, nor for any mental suffering resulting to appellee from sympathy, etc., for her child on account of the treatment received by her at the hands of appellant's agents. We conclude the court did not err in submitting, as an element of appellee's damages in this case, her own mental anguish arising from the acts of appellant's servants, as charged in her petition, and appellant's assignment of error complaining of the same is overruled.

Appellant's other assignments of error relate to, and complain of, evidence admitted and charges given and refused. All of said assignments have been examined and carefully considered. Some of them have been disposed of by what has already been said, and those not so disposed of do not, in our opinion, disclose any reversible error.

We think the court's charge fairly submitted the issues raised by the evidence, that the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

#### TEXAS & P. RY. CO. v. STEWART.

(Court of Civil Appeals of Texas. June 9, 1906.  
Rehearing Denied June 30, 1906.)

##### 1. CARRIERS—CARRIAGE OF LIVE STOCK—DELAY—ACTION—INSTRUCTIONS.

In an action against a carrier for delay in transporting horses whereby plaintiff was prevented from consummating a sale of the horses and whereby he was obliged to sell them at the market value, an instruction that the measure of damages was the difference in the market value of the horses at their destination delivered at the time and in the condition in which they were and their market value at their destination delivered at the time and in the condition in which they should have been, was erroneous.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 963, 964.]

##### 2. EVIDENCE—OPINION EVIDENCE—SUBJECTS—VALUE AND CONDITION OF ANIMALS.

It was not error to permit plaintiff to testify that a sale was conditional on the horses comparing favorably with a previous shipment, and that they did compare favorably, there being no question as to the qualification of the witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2257.]

##### 3. CARRIERS—CARRIAGE OF LIVE STOCK—INJURIES—ACTION—PLEADING—ISSUES AND PROOF.

In an action against a carrier by a shipper of horses, an allegation of rough handling is not sufficient to admit proof of a defective car.

##### 4. EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY.

In an action against a carrier by a shipper of horses, plaintiff's testimony that defendant's delays prevented him from consummating a sale of the horses at the destination of the shipment was not contradictory of the written contract of shipment, stipulating that the horses were not to be transported within a specified time, nor in season for any particular market, where it appeared that the shipment would have reached destination in time to have consummated the sale, but for the carrier's negligence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1861.]

##### 5. CARRIERS—TRANSPORTATION OF ANIMALS—DELAY IN DELIVERY—MEASURE OF DAMAGE.

Plaintiff shipped horses to M. in order to consummate a sale at M. conditioned on their arrival on a certain day, but the shipment failed to reach M. in time to consummate the sale, and the horses were shipped pursuant to another contract of sale to T., but, owing to delays in transportation, were not delivered in time to consummate the contract at T., and plaintiff was forced to sell at T. at the market value. *Held* that, if the carrier was liable for

the loss of the first sale only, the measure of damages was the difference between the contract price of the horses at M. and the sum brought on the second sale.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 963, 964.]

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Action by J. Y. Stewart against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Ed W. Smith, for appellant. F. G. Thurmond and R. G. Smith, for appellee.

SPEER, J. This is the second appeal in this case, and an examination of the opinion of the first appeal, reported in 86 S. W. 631, will disclose the nature of the case.

We must again reverse the judgment of the trial court for errors in his charge. The eighth paragraph of the court's charge in part reads: "Therefore you are charged that if, under the preceding paragraphs of this charge, you have found defendant not liable for the inability, if any, of the plaintiff to fill both the Pinkerton and the Dees contracts, that the measure of damages in this case is the difference, if any, in the market value of said horses at their destination, delivered at the time and in the condition in which they were, and their market value at their destination delivered at the time and in the condition in which they should have been." This is construed by both parties, and properly so we think, to mean that the measure of appellee's damages would be as indicated in the event the jury found that appellant was not liable for the loss of either the Pinkerton or the Dees contract. This is erroneous for the reason that appellee sought only to recover the special damages incident to a loss of the sales under these contracts, and nowhere made a case entitling him to recover for depreciation in the market value of his horses. Indeed, it is nowhere alleged that the contract price of \$27.50 per head at Mineola, or \$20 per head at Texarkana, represented the market value of the animals at those places if delivered with proper care, or that they would have had a market value at all. For aught that appears from the pleadings, these contracts of sale may have been very advantageous ones, exceeding the real market value of appellee's animals, and indeed, he may have actually realized their full market value when they were finally sold. Since appellee alleged no other loss than that of the sales under the Pinkerton and Dees contracts, he should not have been permitted to recover any other.

It is insisted by appellant that notice to the foreman of its stockyards at Ft. Worth of the sale to Dees prior to the shipment of the stock from Ft. Worth to Texarkana, would not be binding upon it, since such agent had no authority in the premises. But upon another trial the extent of this agent's authority may be shown, and this question thus eliminated. It seems that appellee's sale of the horses to Pinkerton at Mineola was conditioned upon their comparing favorably with a previous shipment, and on the trial he was permitted to testify that they did. It is true that this involved a conclusion or opinion of the witness, but that is no valid objection to the testimony, since such fact is altogether a question of opinion evidence. No point is made that the witness was not qualified to give his opinion upon the subject.

Upon another trial, if appellee desires to prove that the car in which his horses were shipped was defective and resulted in injury to them, he should amplify his pleadings. It can hardly be said that a general allegation of rough handling would be sufficient to admit proof of a defective car. We cannot see, however, that proof of such fact would be at all relevant to any issue under the pleadings as they now stand, since undeniably the injured condition of the horses had nothing to do with the loss of either sale.

Appellee's testimony to the effect that appellant's delays caused him to miss the sale to Pinkerton at Mineola was not contradictory of the written contract of shipment stipulating that the stock were not to be transported within any specified time, nor to be delivered at any particular day, nor in season for any particular market, because he alleged, and the evidence tended to show, that he would have reached Mineola in time to have consummated the sale to Pinkerton but for the negligence of appellant.

In view of another trial, we suggest that appellant's sixth assignment of error raises a point that should be observed in the charge. If the contract price under the Dees contract was \$20 per head and freight, and the jury should find that appellant was liable for the loss of the Pinkerton sale only, then the measure of damages would be, as we indicated in the former opinion and as charged by the court, the difference between the contract price of the horses at Mineola and the sum brought at Ft. Worth—\$20 per head and freight.

For the error in the court's charge, the judgment is reversed, and the cause remanded.

**HEFFINGTON et al. v. JACKSON & NORTON.**

(Court of Civil Appeals of Texas. June 30, 1906.)

**1. INFANTS—CONTRACTS—VALIDITY.**

A minor may avoid a note executed by him.  
[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 128.]

**2. SAME—NECESSARIES—BUGGY.**

A buggy is not necessary for an infant not engaged in any business requiring the use of a buggy, nor attending school, so as to make it necessary for him to ride to and from school.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 114, 118.]

Appeal from Dallas County Court; Hiram F. Lively, Judge.

Action by Jackson & Norton against George Heffington and another. From a judgment for defendants, plaintiffs appeal. Reversed, and judgment rendered for defendants.

Ed. T. Harrison and Graham B. Smedley, for appellants.

**BOOKHOUT, J.** This suit was instituted in the justice court of Dallas county by plaintiffs, Jackson & Norton, against George Heffington, a minor, and Mrs. S. A. Heffington, his mother, upon a note executed by the said George Heffington for \$61.25, in part payment for a buggy and harness sold by plaintiffs to the said George Heffington for the sum of \$103.75. From a judgment in favor of plaintiffs for \$76.55 defendants appealed to the county court. Plaintiffs sought to recover against George Heffington upon the ground that the buggy and harness sold him were necessities, and against Mrs. S. A. Heffington upon the same ground, and that she failed to supply him with the same, and upon the further ground that she constituted the said George Heffington her agent to purchase said buggy and harness, and after the purchase thereof ratified his act. Mrs. S. A. Heffington answered with a plea of general demurrer and general denial. George Heffington pleaded infancy in avoidance of the payment of said note, tendered to plaintiffs the buggy and harness for which said note was executed in part payment, and prayed judgment against plaintiffs for the following sums: \$25 money paid plaintiffs on said buggy and harness; \$25, the value of a second-hand buggy traded plaintiffs in part payment for the buggy and harness purchased from them; and for the cancellation of said note of \$61.25. From a judgment of the county court in favor of plaintiffs for \$61.25 against both defendants and against George Heffington on his counterclaim, defendants appealed.

J. A. Jackson, one of the plaintiffs, testified in behalf of plaintiffs as follows: "My name is J. A. Jackson. I live at Renner, and am one of the plaintiffs in this case. I know George Heffington and his mother, Mrs. S. A. Heffington. I sold George Heffington on or about January 20, 1904, the buggy and harness for the sum of \$103.75, being \$90 for the

buggy and \$13.75 for the harness. He gave me this note for \$61.25 and a second-hand buggy and \$25 in money. I sold him the buggy at Renner, Tex., some time in January, 1904, and about a month after he paid me \$25 in money, delivered the old buggy to me, and executed this note. This was at Renner, at my place of business. The first conversation I remember having had with George about selling him the buggy was one day at a blacksmith shop at Renner. He had his old buggy there to have it repaired, and I proposed to sell him a new buggy, and take his old one as part payment. I asked how much cash he could pay. He said he thought he could get \$30 from his mother and would pay that much, and I told him if he could pay that much and put in his old buggy, I would sell him the new one. We agreed on this, and set a day to go to Dallas to select the buggy. I have known George Heffington all his life, and at the time I sold him the buggy, I knew he was not of age. He made no representations to me about his age, because I knew he was a minor. I knew he was buying the buggy for himself, and for his own use. I did not understand that he was acting for his mother, and knew that he was not buying the buggy for her but for himself. I sold the buggy to him and not to his mother, and was expecting him to pay for it. I did understand that he was to get \$30 from his mother to pay on the buggy, but I was looking to him to pay for the buggy and not to his mother. He told me at the time he bought the buggy that his mother would not pay for it, but that she knew he wanted it, and he thought he could get \$25 from her to pay on it. I knew George was living at home with his mother at the time he bought the buggy."

Defendant George Heffington is a minor, and was a minor when he executed the note sued on. Such being the case he could avoid the note. A recognized authority, speaking of the right of an infant to avoid his contracts, states the rule thus: "The right of an infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant, in exercising the right, is guilty of fraud." 16 Am. & Eng. Enc. Law, p. 287. The principle announced is recognized in this state in *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849. However, there are exceptions to the rule, as where the contract is for necessities for the infant. *Parsons v. Keys*, 43 Tex. 559, or, where the infant has been guilty of some

fraud in creating the debt. In this case there is no contention that the minor was guilty of fraud. The plaintiffs had known him from infancy, knew that he was a minor when they solicited him to purchase the buggy for which the note was executed, knew that he was living with his mother on her farm; knew that he then had a buggy, knew that he was not engaged in any business demanding the use of a buggy, and knew that his mother would not pay for it.

The question arises: Was the buggy a necessary to a person situated as was George Heffington? He was not engaged in any business requiring the use of a buggy, nor was he attending school, which made it necessary for him to ride to and from school. It was held in the case of *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189, that a horse purchased by an infant who is engaged in farming is not a necessary. Horses, saddles, bridles, pistols, liquors, fiddles, and chronometers have been generally excluded as necessities. *McKanna v. Merry*, 61 Ill. 177. The case of *Howard v. Simpkins*, 70 Ga., 322, is cited by the appellant as holding that a buggy is not a necessary. The case is not accessible to us, and, hence, we do not feel authorized to cite it. The facts do not show wherein a buggy is necessary for the defendant George Heffington. He had a buggy when he was solicited by Jackson to purchase the one for which the note was executed. The appellees sold the buggy to George Heffington and not to his mother, knowing that Mrs. Heffington did not intend to pay for it. They knew that George lived with his mother on her farm. They knew he was a minor, and relied on him to pay the note given for the balance due on the vehicle. The case was tried by the court below without a jury and in rendering judgment for plaintiffs there was error.

The judgment will be reversed, and under the statute it becomes our duty to render such judgment as the trial court should have rendered. Judgment will be here rendered for appellants, canceling the note sued on, and in favor of George Heffington for \$42.50, the amount paid by him to appellees on the buggy, with interest at 6 per cent. from July 15, 1906, the date of tendering back the buggy by George Heffington in the justice's court, and that upon his returning to the appellees, or tendering to them said buggy and harness, execution may issue for said amount. *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194.

Reversed and rendered.

#### TEXAS & P. RY. CO. v. WHITELEY.\*

(Court of Civil Appeals of Texas. June 2, 1906. Rehearing Denied June 30, 1906.)

#### 1. CARRIERS—INJURY TO PASSENGER—INSTRUCTIONS.

In an action against a railroad company for injuries sustained by a passenger while alighting from a train which was still in motion,

an instruction that the suggestion of defendant's employes to alight would not alone justify plaintiff in alighting, but was a circumstance to be considered with all the other evidence to determine whether he was in the exercise of due care in attempting to alight, while perhaps on the weight of the evidence because stating that the suggestion of defendant's servants would not alone justify plaintiff in alighting, contains nothing of which defendant could complain.

#### 2. SAME — CONTRIBUTORY NEGLIGENCE — ALIGHTING FROM MOVING TRAIN.

The act of a passenger in alighting in the nighttime from a train which was still in motion was not negligence per se.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1891-1393, 1402.]

#### 3. TRIAL—INSTRUCTIONS—BURDEN OF PROOF.

An instruction to decide all the issues by a preponderance of the evidence is not objectionable as indefinite and misleading, where the issues submitted embraced the material allegations of plaintiff's petition.

#### 4. CARRIERS—AUTHORITY OF EMPLOYEES—EVIDENCE.

In an action by a passenger injured while alighting from a moving train, evidence that the porter who directed plaintiff to get off the train at the time he did assisted in helping passengers off at stations such as that where plaintiff alighted was sufficient to justify a finding that it was within the scope of the porter's duty to direct passengers to alight.

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action by J. F. Whiteley against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wagstaff & Davidson, for appellant. T. S. Whiteley and J. F. Cunningham, for appellee.

**SPEER, J.** This is a personal injury suit in which appellee recovered judgment against appellant for the sum of \$1,000.

The following paragraph of the court's charge is complained of as being on the weight of the evidence: "If the jury believe from the evidence that the plaintiff, J. F. Whiteley, attempted to get off the train at Elmdale station while the train was moving, with or without a suggestion from defendant's employes for passengers to then alight at Elmdale station, the jury will determine, from all the evidence as to the circumstances and conditions existing at the time, whether so alighting was an act which an ordinarily cautious and prudent person would or would not usually attempt under such or similar circumstances. The suggestion of defendant's employes, if any, for him to alight not alone justified him in alighting, but being a circumstance to be considered with all the other evidence to determine whether he was in the exercise of such care as above stated in attempting to alight from the train when he did. If upon the whole evidence you find that plaintiff, J. F. Whiteley, in attempting to alight from the train when and in the manner that he attempted to alight, did not observe that degree of care which an ordi-

\*Writ of error denied by Supreme Court Oct. 11, 1906.

narly prudent and cautious person usually exercises under the same or similar circumstances to those then existing, and that such want of care either in the particulars alleged by the defendant or in any other particulars, as plaintiff pleads that the injuries occurred without negligence on his part, and that such want of care was the proximate cause or contributed directly to the injury, if any, that he received, you will return a verdict for the defendant." The particular part of the charge objected to is that which instructed the jury that the suggestion from appellant's employes for appellee to alight, if any was made, was a circumstance to be considered with all other evidence in determining whether or not he was in the exercise of proper care in alighting. On the whole, the charge was probably on the weight of evidence in saying that the fact of such suggestion alone would not justify appellee in his course, when, as a matter of fact, the jury might have concluded that it would. The rule was properly stated in the latter half of the charge quoted, that "upon the whole evidence" the jury would determine the question of appellee's contributory negligence. We find nothing in the charge of which appellant can justly complain.

We also rule against appellant upon its contention that the act of appellee in alighting from the train under the circumstances shown, if he did so without a suggestion from its employes, constituted contributory negligence per se under the circumstances of this case, and that the charge above quoted was erroneous for this further reason.

The court further instructed the jury to decide all issues submitted to them by a preponderance of the evidence, and this is objected to because "indefinite and uncertain, and the charge should have required the plaintiff to establish the material allegations in his petition by a preponderance of the evidence." But this criticism we think is entirely wanting in merit, since the issues submitted embraced the material allegations in appellee's petition, and if they further included the issue of contributory negligence made by appellant's answer such inclusion was not only justifiable, but proper.

We cannot hold that the verdict and judgment in appellee's favor are not supported in the law under the evidence. It is true he stepped off a moving train in the nighttime while the ground was covered with snow and ice, and was injured in consequence. But it has never been held, so far as we are aware, that the act of stepping on or off a slowly moving car is contributory negligence as matter of law. The act must be viewed in the light of all the surrounding circumstances, and tested by the conduct of a reasonably prudent person under such circumstances. The speed of the car, the character of the ground upon which the passenger is to alight, his opportunity or lack of opportunity

for seeing where he is to alight, the instructions of the carrier's employes to the passenger are elements which properly enter into the consideration in passing upon the issue of one's contributory negligence in alighting from a moving train.

It is suggested that the train porter who directed appellee to get off the train at the time he did had no authority to assist passengers in getting on or off trains, and was therefore not acting within the scope of his duty at the time he gave such directions. But appellant's conductor testified that at a place like Elmdale, where there is no agent, the train porter does get out and help passengers off. This evidence, we think, is sufficient to support the verdict and judgment upon this issue.

We find no error in the judgment, and it is affirmed.

### SAN JACINTO OIL CO. et al. v. CULBERSON et al.

(Court of Civil Appeals of Texas. June 9, 1906. Rehearing Denied June 30, 1906.)

#### 1. APPEAL—HARMLESS ERROR.

Where the proper result was reached, errors in the admission of evidence and in instructions are harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4033, 4153, 4219, 4225, 4229, 4230.]

#### 2. REFERENCE—RIGHT TO JURY TRIAL—CLAIMS AGAINST INSOLVENT.

Rev. St. 1895, art. 1485, requires in receivership proceedings the appointment of a master. Article 1493 provides that in matters relating to the appointment of receivers and to the powers of the court in relation thereto, the rules of equity shall govern. In receivership proceedings, the court appointed a master in chancery, to ascertain the debts and file his report from time to time, providing for a hearing by any party interested on exceptions to the same. The insolvent debtor appeared before the master and contested the issues joined in proceedings to establish claims. *Held*, that after the determination by the master the defeated party was not entitled to a jury trial, but was limited to presenting his objections to the master, and, on his failure to correct the findings, to require the master to certify with his report the evidence on which his contested conclusions were found, so that the court could review the findings.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, § 145.]

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

In the matter of the receivership proceedings against the San Jacinto Oil Company. From a judgment allowing the claims of J. J. Culberson and others, interveners, the San Jacinto Oil Company and others appeal. Affirmed.

Capps & Canty and A. B. Flanary, for appellants. A. M. Carter, for appellees.

CONNER, C. J. The judgment appealed from in this case is one in accord with a report of the master in chancery in the re-



ceivership proceedings against the appellant oil company. It appears that on January 18, 1903, at the instance of a complaining creditor, the district court of Tarrant county for the Seventeenth Judicial District appointed a receiver to take charge of all property and assets of the San Jacinto Oil Company. Neither the regularity nor validity of the appointment of the receiver is questioned, and hence it needs no further notice. On the 7th day of March thereafter, said court also duly appointed a master in chancery, who was directed, among other things, to ascertain and report, to the court the nature, validity, and amount of all debts, claims, and demands against the oil company, of which it appears there is a large number, and to investigate and report his conclusions of law and fact upon all pleas, motions or interventions then on file or that might thereafter be filed in the receivership cause. The master was required to give due notice of the time and place of his hearings, and was given power to compel the production of evidence. The order of reference contains the following further, special, provision, viz.: "It is further ordered and decreed that said master in chancery shall file his report herein from time to time as he may complete the same, and that any party or parties interested in this suit, may and shall be heard upon exceptions to the same, provided that such exceptions shall have been made before the master in chancery upon the rendition by him of his conclusions in the premises covered by his report, and upon the failure of any or all of the parties interested in any of the matters pending before said master to take exceptions to his conclusions or report before him, then upon the filing of any such report by the master the same shall stand confirmed."

On April 24, 1903, appellees, J. J. Culber-son, the Paris Oil & Cotton Company, the West Cotton Oil Company, the Ladonia Cotton Oil Company, the Celeste Cotton Oil Company, the Waxahachie Cotton Oil Company, the Decatur Cotton Oil Company, the Corsicana Cotton Oil Company, the Rosebud Cotton Oil Company, and the Shreveport Cotton Oil Company, by leave of court granted, intervened in the receivership cause, and alleged the execution of a contract with the appellant oil company by the terms of which it agreed to furnish the appellee cotton oil companies all the crude oil in tank car lots necessary for their use as fuel for the term of one year beginning June 28, 1902, at 10 cents per barrel of 42 gallons each. The contract as exhibited in the petition for intervention was voidable by acts of God, accidents to oil wells, failure of oil wells, or governmental interference. Interveners charged that the contract had been breached by an entire failure and refusal of the San Jacinto Oil Company to supply crude oil, and damages were laid in the sum of \$52,000 for each of the intervening companies. The rec-

ord fails to disclose the time or circumstances of the hearing before the master in chancery, but it does appear from his report, filed in the court on August 12, 1904, that he did, without objection, hear appellees' plea of intervention upon an answer of the San Jacinto Oil Company excusing its nonperformance of the interveners' contract on the ground of a failure of its oil wells to furnish sufficient oil to supply the requirements of the contract. The master found and reported in favor of interveners. He found as a matter of fact, without certifying, however, the evidence upon which his findings were based, among other things, the execution and breach of the contract as alleged, and reported that: "From the foregoing findings of fact I conclude that said interveners are entitled to have judgment severally against defendant as follows: Paris Cotton Oil Company \$1,772.01, Waxahachie Cotton Oil Company \$2,719.53, Rosebud Cotton Oil Company, \$1,680, Celeste Cotton Oil Company \$278.55, Ladonia Cotton Oil Company \$607.20, Shreveport Cotton Oil Company \$2,530.20. I find that the other interveners, viz., West Cotton Oil Company, Corsicana Cotton Oil Company, and the Decatur Cotton Oil Company are not entitled to recover any sum there being no testimony introduced by them in support of their intervention." No exception or objection before the master appears to have been made to his said findings, but on the same day his report was filed in the court appellants also filed with the clerk of the court numerous objections contesting substantially all of the master's conclusions. No further action appears to have been taken until March 23, 1905, when there was a trial before a jury which returned a verdict for appellees and upon which the judgment was rendered, as stated in the beginning.

The errors assigned all relate to the proceedings on the trial before the jury, and while we incline to the opinion that the court erroneously admitted the master's report in evidence and erred in instructing the jury that the burden was upon appellants to disprove it, we nevertheless conclude that all such errors are harmless, on the ground that no other final result could have been properly reached. The original error of the court was in failing to approve the master's report after it was filed, and in submitting the cause to the jury at all. The correct practice in such cases does not seem to be very well crystalized in our own adjudicated cases, nor can it be said to be entirely uniform in the courts of other states. But article 1485, Rev. St. 1895, in every case of the appointment of a receiver, requires the appointment of a master in chancery "who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as a master in chancery has in a court of equity." Further, article 1493, Rev. St. 1895, provides

that: "In all matters relating to the appointment of receivers, and to their powers, duties, and liabilities, and to the powers of the court in relation thereto, the rules of equity shall govern whenever the same are not inconsistent with the provisions of this chapter and the general laws of the state." We find no other statute of controlling effect, and hence are relegated to the general rules of equity for the proper practice. Under our law, it is doubtless true that a party litigant is entitled to a trial by jury in all cases of equitable as well as of legal cognizance. This right, however, must be seasonably applied for. It would be an unreasonable extension of the right to hold that a party whose cause, as here, was without objection referred to a master in chancery for findings, and who appears before such master and contested the issues joined, could thereafter demand a trial de novo before a jury merely because he is dissatisfied with the master's conclusions. *Freeland v. Wright* (Mass.) 28 N. E. 678; *Henderson's Chancery Practice*, art. 424. The author cited, in the second paragraph of the section referred to, says: "The right to ask that an issue, or issues, of fact be made by the chancellor and submitted to a jury for determination is one that may be waived, and is treated as waived unless seasonably asserted; and it is now settled that, after the whole cause has been referred to a master and his report has been filed, it is too late to insist upon a trial by jury as of right. The application should be made before the cause is referred, because a trial of all the issues of fact is inconsistent with a trial by jury. Questions of fact in equity are tried by the court in the first instance; or by a master, and, upon exceptions to his report, by the court, or upon issues submitted to a jury. They are in no given case, however, tried but in one mode, except where, on coming in of the master's report, the finding appear unsatisfactory, and the nature of the evidence disclosed presents a case which the court in its discretion ought to hear or send to a jury. They are in no given cases, however, the court has no right to complain of the court for refusing to allow him to subject the other party to further delay and expense by appeal from a master to a jury. It would be unreasonable to permit a party to go to trial before a master and take his chances of a favorable report, and then, dissatisfied with the result, have another trial before a jury and thereby put the other party to unnecessary expense and trouble." While as indicated in the above quotation, and as plainly stated in other parts of the section from which it is taken, it is under certain circumstances within the court's discretion to order an issue to be submitted to a jury, even after the coming in of the master's report, but it is said that "this course should never be pursued except good reason appears therefor," and nothing in the record before us, in our

opinion, shows that this controversy comes within any exception to the general rule or was referred to a jury in the exercise of the court's discretion.

The proper practice, as applied to the facts of this case, was for appellants to have presented their objections to the master to the end that he might have opportunity to correct his findings, and in event of his failure to do so, then to have the master certify along with his report the evidence upon which his contested conclusions of fact were founded, so that the court could review the findings. By the great weight of the authorities, in the absence of exceptions before the master, and in the absence of the evidence upon which his conclusions of fact are based, the court as a general rule will only review such errors as are apparent on the face of the master's report. See *Fletcher's Equity Pleading & Practice*, articles 601 and 607; 16 Cyc. pp. 446 and 448; 19 Cent. Dig. cols. 1478 and 1486 and authorities cited. In our judgment the authorities referred to, as well as to the order of reference hereinbefore quoted, require the conclusion, under the circumstances of this case, that the report of the master in chancery is conclusive and the court below should have approved it without referring the issues to the jury.

The verdict and judgment, however, being to the same effect as the master's report, the judgment will be affirmed.

#### MCKINLEY et al. v. WILSON.

(Court of Civil Appeals of Texas. May 26, 1906. On Rehearing, June 30, 1906.)

#### 1. FRAUDS, STATUTE OF—PRESUMPTION AS TO WRITING.

Where a complaint in an action to cancel a vendor's lien alleged that defendant agreed to release the same, it was presumable that the agreement was in writing.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 373.]

#### 2. SAME—REAL PROPERTY—AGREEMENT TO RELEASE VENDOR'S LIEN.

Under the statute of frauds relating to "contracts for the sale of lands," an agreement to release a vendor's lien need not be in writing.

#### 3. SPECIFIC PERFORMANCE—CONTRACTS WITHIN STATUTE OF FRAUDS.

Where plaintiff, who contemplated purchasing land from an insolvent grantor, conferred with the owner of a vendor's lien hereon, who agreed that if plaintiff purchased he would release the lien, and plaintiff did so on reliance of such understanding, equity would enforce specific performance of the agreement, even though it should be considered as within the statute of frauds.

#### 4. CONTRACTS—CONSIDERATION—DETIMENT TO PROMISEE.

Where the owner of a vendor's lien upon land agreed with plaintiff, who contemplated purchasing a portion of the land, to release the vendor's lien as to the land purchased by plaintiff on payment of a certain sum by plaintiff's grantor, and plaintiff's grantor paid such sum, the agreement with plaintiff to release the lien was not without consideration on the

theory that plaintiff's grantor had only done what it had been obligated to do, as the payment of the purchase price by plaintiff was a consideration.

**5. JUDGMENT — CONCLUSIVENESS — PERSONS CONCLUDED.**

The owner of a vendor's lien on lands agreed with plaintiff, that if plaintiff would purchase a portion of the land, on payment by plaintiff's grantor of a certain sum, the owner of the lien would release it as to the lands purchased by plaintiff. Plaintiff purchased and his grantor made the payment in question and thereafter plaintiff sued to cancel the lien as to his lands. *Held*, that a former judgment in which the owner of the lien had established his lien against the lands, including those purchased by plaintiff was not binding on plaintiff, who was not a party to such action and in possession of his lands at the time.

**On Rehearing.**

**6. ESTOPPEL — EQUITABLE GROUNDS — RELIANCE ON REPRESENTATIONS.**

Defendant who owned a vendor's lien on land, agreed with plaintiff that if plaintiff would purchase a portion of the land, on payment by plaintiff's grantor, a corporation, of a certain sum to defendant, defendant would release the vendor's lien as to the lands purchased by plaintiff. Plaintiff purchased and plaintiff's grantor paid the sum in question, but plaintiff gave as a part of the consideration stock of his grantor. *Held*, in a suit by plaintiff to cancel the vendor's lien, that if defendant should establish his right as a creditor to an equitable lien, he could do so only to the extent of that portion of the value of plaintiff's land paid for in the stock, and if defendant attached no importance to the nature of the consideration paid by plaintiff, he could not assert any such equitable lien.

Appeal from District Court, Archer County; A. H. Carrigan, Judge.

Action by C. G. McKinley and others against L. F. Wilson. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded, and, on rehearing, motion overruled.

H. L. Eads, W. E. Forgy, and Huff Barwise & Huff, for appellants. Matlock, Miller, & Dycus, for appellee.

SPEER, J. C. G. McKinley and F. M. McKinley filed suit in the district court of Archer county against L. F. Wilson to cancel a vendor's lien held and claimed by the latter against certain lands owned by the former. In substance it was alleged by the plaintiffs that before purchasing the lands in controversy from their vendor, the American Tribune New Colony Company, they learned that defendant held a vendor's lien against the same and conferred with him relative to their proposed purchase, when he assured them the Colony Company had made arrangements to pay him the sum of \$20,000 upon its indebtedness to him, upon the payment of which he agreed to execute to them a release of his lien as to their lands; that he directed them to go ahead and close up their trade with the Colony Company and that he would prepare and send them the necessary releases; that on the strength of these promises and assurances plaintiffs purchased the lands and

paid the Colony Company, part in cash and part in certain stocks, but that defendant failed and refused to execute any release whatever, although the Colony Company paid to him the full sum of \$20,000 at the time agreed on. The defendant answered setting up that one M. B. Wilson, of Indianapolis, Ind., who had become the purchaser of the lands at a foreclosure suit instituted in the federal court at Fort Worth, was a necessary party to this suit; the general denial; and specially that the contract whereby plaintiffs acquired the lands from the American Tribune New Colony Company was void, because such company had accepted in part payment for the same its own stock upon which as a creditor for a large sum of money he had an equitable lien, and furthermore that the contract was without consideration in that the stock referred to was worthless, and that not exceeding the sum of \$1,000 was paid by plaintiffs to the Colony Company, which amount was so grossly inadequate as to be no consideration at all. A jury was impaneled to hear the cause, but, after the evidence was introduced, the court peremptorily instructed them to return a verdict in favor of the defendant.

We are informed in appellants' brief, though upon this point the record is silent, that the court's peremptory instruction was given upon the theory that the alleged agreement of appellee Wilson to release the vendor's lien was not in writing, and therefore in violation of the statute of frauds. The fact that appellee seeks now to support the charge upon this ground lends color to appellants' statement, and we will consider that question. In the first place, there is no plea seeking to avail the appellee of the benefits of the statute of frauds. We have carefully examined the pleadings and it is nowhere expressly declared that such agreement was not in writing. Indeed, the presumption arising upon the pleadings is that it was. But if we treat the issue as being raised by the pleadings, as the parties themselves have done, we are constrained to hold that the ruling of the court cannot be supported upon this theory. In *Doggett v. Patterson*, 18 Tex. 158, it was held that an agreement in effect to assign the vendor's lien is not within the statute. It is there said: "His interest in the land was only the vendor's lien and a mere contingent interest dependent upon the payment of the purchase money at maturity. This he contracted to transfer to the defendant. It was not a 'contract for the sale of lands,' and was not required to be in writing by the statute of frauds of this state." See, also, *Johnson v. Portwood*, 89 Tex. 249, 34 S. W. 596, 787. Counsel for appellee have cited us to cases holding that an agreement to release the vendor's lien is within the statute of frauds, while on the other hand, counsel for appellants have cited us to others holding the

contrary view. This apparent contrariety of holdings is probably based upon a different wording of the statutes of the various states. The distinction between our own statute and that of the English statute, which results in a great restriction upon its operation, is pointed out in the case of *Doggett v. Patterson*, supra. Our statute embraces "contracts for the sale of lands" only, whereas the English statute and those of some of the other states embrace all contracts, not only for the sale of lands, but "any interest in or concerning them."

But if it be conceded that the agreement under consideration, which was shown to be not in writing, is within the statute of frauds, yet, under the circumstances, to permit the appellee to benefit by the statute would be to countenance a fraud, in that appellants, upon the strength of appellee's promise to execute a release, have been induced to pay to the American Tribune New Colony Company, a corporation shown to be wholly insolvent, the entire consideration for the lands purchased by them. In such a case equity would enforce the specific performance of the agreement, for otherwise the statute would be made to facilitate that which it was designed to prevent. The doctrine is well established that where one party, relying upon the verbal promise of another, has been induced to do an act whereby his position has been so changed for the worse that he would be defrauded by a failure of the other to comply with his contract, equity will enforce a performance at his instance. *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538; *Hand v. Nix* (Tex. Civ. App.) 87 S. W. 204. The general rule that payment of the purchase money is not such part performance under an oral contract to convey land as will take it out of the statute of frauds is predicated upon the conception that the party paying has his remedy over against the other to recover back the money. But here the American Tribune New Colony Company, to whom appellants paid their money, is shown to be insolvent; but if it were not, yet appellants would hardly be able to recover from it the money paid, since they got from it all they contracted for. There is no default upon its part which would entitle them to a rescission of their contract with it.

The appellee relies also upon the proposition that the evidence fails to show a consideration for the contract and asserts that the payment by the American Tribune New Colony Company of \$20,000 on its mortgage indebtedness, being an obligation for which the company was already bound, was no consideration for his promise to release the lien on appellant's lands. But counsel for appellee overlook the fact that, as between appellee and appellants, the payment by the latter of the purchase money of the lands to the Colony Company constituted a sufficient consideration to support appellee's

promise. For the promisee to suffer a detriment is as much a consideration as for the promisor to receive a benefit. We think the evidence tended to show a valid contract between the parties based upon a sufficient consideration and one, too, which ought equitably to be enforced, even though it comes within our statute of frauds. Appellee asserts that the transaction between the Colony Company and appellants was void, inasmuch as a part of the consideration paid consisted of stock of the Colony Company and was therefore void as contrary to public policy. But we do not think this is a matter to appellee's advantage in any event, since if he entered into a binding agreement to execute a release, and on the strength of it appellants have acted and changed their position in any respect for the worse, he should not be permitted to deny their right to a specific performance.

There remains yet another reason why appellee says the judgment should be affirmed. It is this: Through a judgment of the Circuit Court of the United States at Ft. Worth, appellee established and foreclosed his vendor's lien for \$52,000 against certain lands in Archer county, including those of appellants, and one M. B. Wilson became the purchaser at the foreclosure sale, and this judgment is set up as *res adjudicata* of the present controversy. But we think this judgment is of no binding force whatever on the appellants, since they were in no wise parties to that suit, and were at the time in actual possession of the lands, and there is no question of innocent purchaser raised in the case. There is a line of cases in this state which holds that a vendor in an executory contract for the sale of land, who has sued his vendee to enforce the lien without making a subsequent purchaser a party, and has bought the land under a decree of foreclosure in such suit, may recover the land from such purchaser. *Ufford v. Wells*, 52 Tex. 612; *Foster v. Powers*, 64 Tex. 247; *Cattle Co. v. Boon*, 73 Tex. 548, 11 S. W. 544. But in such a case the plaintiff is entitled to recover by virtue of his original title, and not by virtue of any title he has acquired at the foreclosure sale. *Bradford v. Knowles*, 86 Tex. 509, 25 S. W. 1117. The subsequent purchaser not made a party to the foreclosure suit is in no sense estopped or bound by the judgment, but to all intents and purposes stands in the shoes of his grantor, the original vendee, and may plead such equities as would defeat the plaintiff's right to recover the land upon the strength of his superior title. *Pierce v. Moreman*, 84 Tex. 596, 20 S. W. 821. The effect of the holding of the line of decisions referred to is merely that the purchaser at a foreclosure sale against a vendee of land in an executory contract, holding as he does the superior title, may recover the land as against a subsequent vendee not made a

party to the foreclosure suit, unless such subsequent vendee establishes such equities as to defeat the recovery. The foreclosure suit bars the equity of redemption of the original vendee but not of the second. Any other holding would obviously be in conflict with the universally accepted doctrine that none but parties or their privies to the suit are bound by the judgment. While in the case of *Pierce v. Moreman*, *supra*, the equitable right of the defendant sustained was to redeem by a payment of the purchase money, still we think the equities asserted by appellants are equally entitled to protection. If their allegations are true, and the contract with appellee is enforceable, as we have held it to be, then equitably appellee held no lien against their land, and not being parties to the foreclosure suit at Ft. Worth, they are not bound by the decree rendered therein.

It follows from what we have said that the court erred in instructing a verdict for the defendant, for which error the judgment is reversed, and the cause remanded for another trial.

#### On Rehearing.

It is earnestly insisted on this motion for rehearing that the effect of our decision is to deprive the appellee of his right, on another trial, to establish an equitable lien as a creditor of the American Tribune New Colony Company against the lands of appellants. And such is probably the effect of

some of the language used in our opinion. To the end that this question may be left open for determination on another trial, we will modify the language of the original opinion which would have the effect of preventing such a course. In a general way we think that appellants' transaction with the American Tribune New Colony Company, whereby they became the owners of the lands in controversy, is not void by reason of their having paid in part with the stock of such company, but, at most, appellee, if he should establish his right as a creditor to an equitable lien, could do so only to the extent of that portion of the value of the land paid for in such stock. Appellee, as a creditor of the American Tribune New Colony Company, presumably got the benefit of whatever cash was paid to that company by appellants, and it would be altogether inequitable not to take an account of this in the present controversy. On the other hand, if the evidence should establish the fact to be that appellee attached no importance to the nature of the consideration to be paid by appellants for the land, and was willing and agreed for them to have the same irrespective of the consideration to be paid, and thus assented to the disposition of the property to them, and they bought under the circumstances alleged by appellants, he would be in no position to assert even his creditor's equitable lien as against a proper plea of estoppel.

With the exception herein indicated, motion for rehearing is overruled.

**CHOCTAW, O. & G. R. CO. v. STROBLE.**  
(Supreme Court of Arkansas. July 23, 1906.)

**1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE—QUESTION FOR JURY.**

Whether it was negligence for a railroad company to furnish employes a hand car with a defective brake with which to haul ties a short distance along the track is a question for the jury; there being testimony that it was customary in doing such work to use push cars without brakes or other appliances for stopping them or checking their speed, and that a load of ties would be so high that, if there was a brake, it could not be reached by the men pushing it along.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1010-1020.]

**2. TRIAL—CURING INSTRUCTION BY SUBMISSION OF INTERROGATORY.**

Error in an instruction in telling the jury that an employe injured by a hand car with which ties were being moved was entitled to recover, if it had a defective brake to the knowledge of the master, is not cured by the submission to the jury of the interrogatory, answered by them in the negative: "Was authorizing or permitting the use of the car under the circumstances the exercise of due care on the part of defendant for the safety of its employes?"

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by Phillip Stroble against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

E. B. Pierce and T. S. Buzbee, for appellant. Robt. J. White, for appellee.

**McCULLOCH, J.** The plaintiff, Phillip Stroble, sues the railroad company to recover damages for personal injuries received while working for the company. He recovered a judgment for \$950 damages, and the defendant appealed. The plaintiff was working for the railroad company as section hand, and at the time of the injury was engaged, with his co-laborers under direction of the section foreman, in trucking ties; that is, loading cross-ties upon hand cars, and hauling them a short distance across a trestle, and unloading them. The ties were piled upon the cars, and pushed by the men down the track to the place where they were unloaded. Two hand cars were in use at the place, and the brake on one of them was so defective that it could not be used. The plaintiff was working with the sound car. When the cars were partially loaded a warning was given to the men that a train was approaching, and to hurry across the trestle. Plaintiff and his companions (four or five) at the front car were pushing it across the trestle and two of the hands were also on the car working the lever. Plaintiff was pushing, but the speed of the car became so fast that he was left behind and the car with the defective brake following after them struck him and knocked him off the trestle. It is claimed, on the part of the plaintiff, that by reason of the defective brake the men or boys on the hand car were unable to check its speed,

and prevent running against the plaintiff. Negligence on the part of the defendant is alleged in permitting the use of the hand car with the defective brake. Evidence was introduced by the defendant tending to show that it was customary in doing this kind of work to use push cars without brakes or other appliances for stopping them or checking the speed, and that it was reasonably safe to use such cars for that work not equipped with brakes. It is argued, therefore, that it was not negligence to permit the use of a hand car with a defective brake, as it was, in that condition, as serviceable and safe as a push car.

The court, over the defendant's objection, gave the following instruction: (1) "If there was a defective brake on defendant's hand car, and defendant knew of this defect, or in the exercise of due care ought to have known it, and by reason of such defective brake, if it existed, the plaintiff, while pursuing his duties as an employe of defendant, was knocked down and injured at a time when plaintiff was exercising due care for his own safety, you will find for the plaintiff." This instruction, as applied to the proof in the case, was clearly erroneous. It made the plaintiff's right to recover depend solely upon the fact that he was injured by a defective brake on the hand car, and that the defendant knew of the defect, leaving out of consideration the evidence introduced by defendant tending to show that it was not negligent to use cars without brakes.

One of defendant's witnesses testified that it was customary to use push cars not equipped with levers or brakes in doing this kind of work, and that it was not necessary in that kind of work to use cars with brakes on them. He stated as a reason for this that in loading a car the ties were piled up on it so high that the lever and brake could not be reached by the men using it—that the men pushed it along, and controlled it by hand. If these statements of the witnesses were true, it was not negligence on the part of the company to furnish to its servants for this work either push cars without brakes or a hand car with a defective brake. It is not necessarily negligence on the part of the master to permit the use of tools or machinery with defects therein. The master is only required to exercise ordinary care in supplying machinery, tools, and appliances that are reasonably safe for the use intended. *Railway v. Duffey*, 35 Ark. 602; *Railway Co. v. Gaines*, 46 Ark. 567; 1 Labatt, *Master & Serv.* p. 86; 4 Thompson on Neg. §§ 3980, 3991. There being some evidence to sustain this contention, it should have been submitted to the jury, and not eliminated from the case by the above-quoted instruction. This error was emphasized by instruction No. 2 given by the court, wherein the jury were told that the defendant was required to exercise due care to ascertain whether there was a defect in the brake or other appliance, etc.

The defendant requested the following instruction on this phase of the case, which the court refused: "(7) If you find that a man of ordinary prudence in the conduct of his own business would have used said hand car in the condition in which it was, and for the purposes for which it was used, then defendant was not guilty of negligence in that regard." The instruction correctly stated the law as applicable to defendant's contention and the testimony which had been introduced in support of it, and the same should have been given. It was error to refuse it.

It is claimed that these errors were cured by the following interrogatory propounded by the court to the jury at the close of the argument, to which the jury, in the special verdict, made answer in the negative: "Was authorizing or permitting the use of the car under the circumstances the exercise of due care on the part of defendant for the safety of its employes?" This did not cure the error in the previous instruction. The jury were told in the previous instruction that the plaintiff was entitled to recover if there was a defective brake on the hand car which the defendant had knowledge of, or in the exercise of due care ought have known of, and which caused the injury. In other words, it declared that knowingly permitting the use of a hand car with a defective brake was an act of culpable negligence. The interrogatory just quoted left the jury free, after having thus been erroneously told that this constituted negligence on the part of the defendant, to say whether or not the defendant was exercising due care in permitting the use of the car by its servants. It did not qualify the previous instruction at all, but left it in full force with the jury.

Counsel for appellee contends that, notwithstanding the fact one of the witnesses testified that it was customary to use push cars without brakes in hauling ties and that it is not necessary or practicable to make use of brakes in handling hand cars loaded with ties, we should declare it to be negligence per se to use such cars without brakes in hauling ties across a trestle. That was a question for the jury to determine from the evidence. The court cannot say that the use of the cars under such circumstances was necessarily negligent.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

HILL, C. J., not participating.

REDFORK LEVEE DIST. et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. July 23, 1906.)

1. LEVEES—ASSIGNMENTS AND TAXES—RAILROAD PROPERTY.

Acts 1891, p. 169, creating the Redfork levee district, as amended by Acts 1893, p. 253,

provides in section 14 for the levying and collection of a levee tax on all alluvial lands in the district benefited by levees, and that the board of inspectors shall ascertain the lands in their respective districts subject to such tax, cause a list thereof to be filed with the clerk of the county court, and for the extension by such clerk of the tax so levied. Section 15 provides that the board of inspectors shall fix the rate of tax necessary for the current year, which rate shall be certified to the county court, and by the latter levied as other taxes are levied, and extended by the clerk of the county on the tax books. Acts 1893, p. 319, creating the Desha levee district, contained sections of the same import. Acts 1905, p. 543, providing for the assessment of railroads, rights of way and railroad property, etc., within the Desha levee district provides in section 1 that the boards of inspectors of levee districts shall levy annually on the increased value of betterment estimated to accrue from the protection given against floods by the construction of levees in such districts, and upon all lands, railroads, etc., in such districts, according to increase in value, such tax as may be levied on other property in said districts, which assessment may be made per mile instead of per acre. Section 2 (page 544) provides that such assessment shall be made as prescribed by law for the assessment of betterments on the property situated in such respective districts. *Held* that, as the act of 1893 expressly required the board of inspectors of the levee district to ascertain what lands in the district would be benefited by the levee and to cause a descriptive list thereof to be filed with the clerk of the county court, the attempted ascertainment and extension of taxes by the county clerk on failure of the board of inspectors to comply with such act, was wholly unauthorized, and the assessment as made was void.

2. SAME—APPLICABILITY.

Said act of 1905 (Acts 1905, p. 543), not naming the Redfork levee district, had no application thereto.

Appeal from Desha Chancery Court; James C. Norman, Chancellor.

Actions by the St. Louis, Iron Mountain & Southern Railway Company against the Redfork levee district and against the Desha levee district. From separate decrees entered in both cases in favor of plaintiff, both defendants appeal. Decrees in both cases affirmed.

F. M. Rogers, for appellants. M. A. Austin and B. S. Johnson, for appellee.

MCCULLOCH, J. The St. Louis, Iron Mountain & Southern Railway Company, appellee, instituted two suits in equity against the board of inspectors for the Desha levee district of Desha county, and the board of inspectors for Redfork levee district of Desha county, respectively, to restrain and prevent the enforcement of collection of levee taxes alleged to be illegally assessed for the year 1905 against its property situated in said districts. In the complaint against the Desha levee district it is alleged that the taxes illegally assessed and extended for the year 1905 against the railroad property amount to the sum of \$3,425.50, whereas a legal assessment against said property would not exceed \$986.88; and in the complaint against the Redfork levee district it is alleged that the taxes illegally assessed and extended

against the railroad property amounts to \$2,317.90, whereas a legal assessment would not exceed the sum of \$542. The respective amounts of taxes alleged to be legally due were tendered to each of said defendants in the complaint, and the collection of any additional amount is sought to be prevented. Answers were filed in both cases and the pleadings raised substantially the same question in each case. By express agreement entered of record, both cases were consolidated and heard by the chancellor upon the same evidence, and separate decrees were entered in both cases in favor of the plaintiff, restraining the said defendants from enforcing the collection of taxes for that year in excess of the respective sums authorized. Both of the defendants appealed and the two cases have been heard together by the court.

The Redfork levee district was created by a special act of the General Assembly at the session of 1891 (Acts 1891, p. 169), and, as amended at the session of 1893 (Acts 1893, p. 253), contained the following sections:

"Sec. 14. There shall be levied and collected in said districts annually on all alluvial lands therein that now are and would be benefited by levees and which now are or shall become taxable for state revenue, a levee tax not exceeding two per centum of the assessed value thereof. That said board of inspectors shall ascertain in such manner as they may provide the lands in their respective districts that are subject to tax under the provisions of this act, and cause a list thereof to be filed with the clerk of the county court in the county in which said lands are situated on or before the second Monday of October of each year and the clerks shall extend the tax levied for said district against said land.

"Sec. 15. It shall be the duty of the boards of inspectors at the regular October meeting to fix and determine the rate of percentage of tax necessary to be levied for the year then current which rate of percentage shall be certified to the county court of the county in which said lands are situated and said courts shall proceed to levy the rate per cent. so certified at the time and in the manner other taxes are levied and the same shall be by the clerk of the county extended upon the tax books of the county in a separate column to be provided for that purpose. Said board shall have power and it is hereby made their duty at their meeting in October to hear and determine all questions as to whether any given tract of land is legally taxable for levee purposes under the provisions of this act and all corrections or changes made in the list of lands subject to such tax shall be certified to the county court at the time the list is certified."

The Desha levee district was created by a special act passed at the session of 1893 (Acts 1893, p. 319), and contained sections of precisely the same import and almost identi-

cally the same language as the two sections above quoted. The General Assembly at the 1905 session (Acts 1905, p. 543), enacted a special statute, entitled "An act to provide for the assessment of railroads, rights of way and railroad property, right of way, train roads, roadbeds and railroad property situated within the boundaries of the Desha levee district" and certain other levee districts therein named, which said statute contained the following sections:

"Section 1. That the boards of directors of levee inspectors of Cotton Belt District No. 1, Phillips county, Arkansas, Laconia levee district of Phillips and Desha counties, Arkansas, and the Desha levee district in Desha county, and the Linwood and Auburn levee district, in Lincoln and Desha counties, Arkansas, be and they are hereby authorized and directed, through the proper authorities as now prescribed by law, to assess and levy annually upon the increased value of betterment estimated to accrue from the protection given against floods from the Mississippi river and its tributaries by reason of the construction and maintenance of levees in said districts and upon all lands, railroads, tramroads, rights of way, roadbeds and appurtenances in said levee districts, according to the betterment and increase in value, such tax as may be levied upon other property in said districts, and said assessment may be made per mile instead of per acre. Provided, that no error in the name and residence of the owners of railroads, or tramroads or land, or the description thereof, shall invalidate said assessment, if sufficient description is given to ascertain where the property sought to be taxed is situated.

"Sec. 2. That said assessment shall be made in the manner and form and by the authority now prescribed by law for the assessment of betterments 'on property situated in said respective districts.'"

The Redfork levee district is not mentioned in the last-named statute, and the same has no application thereto.

The facts of both cases are practically undisputed. The board of inspectors of Redfork levee failed to file with the clerk of the county, as required by the act of 1893, a descriptive list of the lands in the district ascertained to be subject to levee tax, and the board of inspectors of the Desha levee district filed such list, but the same did not contain any description of the railroad property. These facts are agreed upon. The board of inspectors of the Desha levee district took no action with reference to assessment of railroad property further than to pass and certify to the county court a resolution ordering that "a tax of eight mills be levied on each and every dollar of the assessed value of real estate, including railroad beds, subject to taxation." Neither the number of miles of railroad track, nor description of other railroad property in the district was



certified by the board of inspectors. The county clerk ascertained, according to his own method, from maps in his office, the number of miles of railroad track situated in the levee districts and extended the same according to the rate fixed by the board of inspectors and the value per mile fixed by the state board of railroad assessors. The buildings on railroad right of way and the value thereof were ascertained by the clerk in the same way and the taxes so extended.

This did not constitute a valid assessment of the railroad property. The act of 1893, hereinbefore quoted, expressly required that the board of inspectors of the levee district should ascertain what lands in the district would be benefited by the levee and therefore subject to tax, and to cause a descriptive list thereof to be filed with the clerk of the county court in the county where the lands are situated. It does not authorize any other person or board to make such ascertainment, and the attempted ascertainment and extension of taxes by the county clerk was wholly unauthorized. The assessment as made was void and not enforceable. Nor does the act of 1905 authorize such procedure by the clerk. That statute obviously contemplates some action of the board of inspectors with reference to the ascertainment of the particular property to be taxed and the value thereof. This much is certain, though the meaning of the act, so far as it is applicable to the Desha levee district, is somewhat obscure. Without undertaking to further construe this statute—it is unnecessary to do so in this case—we hold that there was no valid assessment of levee tax on the railroad property in the Desha levee district, and that the act does not apply to the Redfork levee district.

No descriptive list of railroad property subject to levee taxation having been filed by the board of inspectors in either of said districts in accordance with the provisions of the act of 1893, the assessments cannot be sustained under those statutes.

The decrees in both cases are affirmed.

## STATE v. INTERNATIONAL HARVESTER CO.

(Supreme Court of Arkansas. July 2, 1906.)

**MONOPOLIES—CORPORATIONS—CONSPIRACY TO CONTROL PRICES—VIOLATION—WHAT CONSTITUTES—PENAL STATUTES—CONSTRUCTION.**

Act Jan. 23, 1905 (Acts 1905, p. 6, § 7), providing for the punishment of pools, trusts, and conspiracies to control prices, requires the Secretary of State to each year send to each corporation in the state a letter of inquiry as to whether the said corporation has all or any part of its interest or business in or with any trust, combination, or association of persons or stockholders as named in the preceding provision of the act, and to require an answer under oath by the president, secretary, or treasurer, etc., of the company, and provides that on refusal to make such answer within 30 days from the mailing thereof, the prosecuting attor-

ney shall proceed against such corporation, if a domestic corporation, for the recovery of the penalty provided for in the act, and also for the forfeiture of its charter, and if a foreign corporation for the recovery of the penalty and for forfeiture of its right to do business in the state, but does not in express terms require corporations to make answer, or to answer such inquiry, nor declare that the failure of the officers of a corporation to answer the same shall constitute an offense on their part or on that of the corporation itself. *Held*, that said section created no offense, and that the mere failure or refusal to file the affidavit did not constitute a violation of the statute.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by the state against the International Harvester Company. Judgment for defendant, and the state appeals. Affirmed.

Robt. L. Rogers, Atty. Gen., Lewis Rhoton, Pros. Atty., DeEd. Bradshaw, and T. E. Helm, for the State. Rose, Hemingway, Cantrell & Loughborough, for appellee.

McCULLOCH, J. This is an action against appellee, a foreign corporation doing business in this state, to recover the penalty for an alleged violation of the act of January 23, 1905 (Acts 1905, p. 1), providing for the punishment of pools, trusts, and conspiracies to control prices, in failing to file an answer under oath to the written inquiry required, by section 7 of that statute, to be propounded to all corporations doing business in the state. The section in question is as follows:

"It shall be the duty of the Secretary of State on or about the first day of July each year, to address to the president, secretary or treasurer of each incorporated company doing business in this state, a letter of inquiry as to whether the said corporation has all or any part of its interest or business in or with any trust, combination or association of persons or stockholders as named in the preceding provisions of this act, and to require an answer under oath, of the president, secretary, or treasurer, or any director of said company. A form of affidavit shall be enclosed in said letter of inquiry as follows:

### "Affidavit.

"State of Arkansas, County of ———,

"I, ———, do solemnly swear that I am the ——— (president, secretary, treasurer, or director) of the corporation known and styled ———, duly incorporated under the laws of ——— on the ——— day of ———, and now transacting or conducting business in the state of Arkansas, and that I am duly authorized to represent said corporation in making this affidavit; and I do further solemnly swear that said ———, known, styled as aforesaid, has not since the ——— day of ——— (naming the day upon which this act is to take effect) created, entered into or become a member of or a party to, and was not on the ——— day of ———, nor at any day since that date, and is not now a member of or a party to any pool, trust agree-

ment, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, either in this state or elsewhere, to regulate or fix in this state, or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation, to fix or limit in this state or elsewhere the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer or employé or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured products thereof, in the hands of any trustee or trustees, with intent to fix or limit the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

“(President, Secretary, Treasurer or Director.)

“Subscribed and sworn to before me, a \_\_\_\_\_ within and for the county of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 1\_\_\_\_\_.

“[Seal.] \_\_\_\_\_.

“And on refusal to make oath in answer to said inquiry, or on failure to do so, within thirty days from the mailing thereof, the Secretary of State shall certify said fact to the prosecuting attorney of the county wherein said corporation is located, or has its agent or principal place of business, and it shall be the duty of such prosecuting attorney, at his earliest practicable moment, in the name of the state and at the relation of said prosecuting attorney, to proceed against said corporation, if a domestic corporation, for the recovery of the money forfeit provided for in this act, and also for the forfeiture of its charter or certificate of incorporation. If

a foreign corporation, to proceed against such corporation for the recovery of the money forfeit provided for in this act, and to forfeit its right to do business in this state. Provided, that within sixty days after the passage of this act all foreign corporations desiring to do business in this state shall file a new bond, as the statute directs; and such sureties and bondsmen shall be liable for the penalties and forfeitures, including costs, provided for in this act.”

Acts 1905, p. 6, § 7.

It is contended in behalf of the prosecution that doing business in the state by the corporation after failure or refusal to file the affidavit constitutes a violation of the statute and falls within sections 2 and 3 thereof, which provide, as punishment for any violation of this act, a forfeiture of a sum of money not less than \$200 nor more than \$5,000 for each offense, and also forfeiture of corporate rights and franchises. Counsel for defendant argue that this section creates no offense and amounts merely to a mandatory direction to the Secretary of State to demand the affidavits from corporations doing business in the state, and to the prosecuting attorneys to institute, against corporations failing to furnish the affidavit, proceedings to recover the penalties prescribed for violation of other sections of the act prohibiting the formation of monopolies, pools, trusts, and conspiracies to control prices. It will be observed that the section in question does not, in express terms, require corporations to make answer to the inquiries, but it does provide that the Secretary of State shall send by mail to each corporation “a letter of inquiry, as to whether the said corporation has all or any part of its interest or business in or with any trust, combination or association of persons or stockholders as named in the preceding provisions of this act, and to require an answer under oath of the president, secretary or treasurer or any director of said company.” Nor does it declare that the failure of such officers of a corporation shall constitute an offense on their part or on the part of the corporation itself. If we should say, as contended by learned counsel for appellant, that the act does require an answer to such inquiry by the officers of the corporation and makes the failure of such officers to comply therewith an offense on the part of the corporation itself, we would plainly be reading into the statute something which the Legislature did not see fit to place there. The principle that penal statutes and statutes which impose burdens and liabilities unknown at common law must be strictly construed in favor of those upon whom the burden is sought to be imposed, and that nothing will be taken as intended that is not clearly expressed, has been so often declared that it is elemental. *Hughes v. State*, 6 Ark. 131; *Grace v. State*, 40 Ark. 97; *Stout v. State*,

43 Ark. 414; Casey v. State, 53 Ark. 334, 14 S. W. 90; Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234; Railway Co. v. Oppenheimer, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353; State v. Lancashire Insurance Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348; State v. Arkadelphia Lumber Co., 70 Ark. 329, 67 S. W. 1011; Brown v. Haselman (Ark.) 95 S. W. 136; Sutherland on Statutory Inter. § 208.

The section in question is substantially a copy of an Illinois statute on the same subject, except that the latter, instead of requiring the state's attorney to proceed against the corporation "for recovery of the money forfeit provided for in this act," etc., provides that he shall "proceed against such corporation for the recovery of a penalty of \$50 for each day after such refusal to make oath within the thirty days from the mailing of said notice." The Illinois Supreme Court in *People v. Butler Street Foundry*, 201 Ill. 236, 66 N. E. 349, construed that statute to make the failure of a corporation to file the affidavit in reply to the letter of inquiry an offense, and to prescribe a penalty of \$50 for each day after such failure or refusal. That case is pressed upon our attention by learned counsel for the state as decisive of the question now presented for our consideration. The question of construction of the statute on this point does not appear to have been raised in the argument of counsel in the Illinois case and received only a passing notice in the opinion; other questions raised in the case being urged as controlling. But the difference just noted in the phraseology of the two statutes warrants a radically different construction. It is plain from the language used in the Illinois statute that the framers thereof intended to make the failure or refusal to furnish the affidavit after demand a punishable offense. The brief discussion of this point in the opinion in the Illinois case would seem to lead to a construction that the mere failure to furnish the affidavit, without doing business in the state thereafter or being guilty of any other act in the state is an offense. We are not willing to concede that this is sound, though it is unnecessary to discuss that question here, as counsel for the state argue that an offense is committed by the corporation only by attempting to do business after failure to furnish the affidavit. This concession on the part of learned counsel that the doing of business in the state after failure to furnish the affidavit is an essential element of the offense furnishes, we think, one of the strongest arguments that can be made against their contention that this section of the statute prescribes a penalty. The statute is silent as to doing business after such failure, and the Secretary of State is required, immediately after the expiration of the 30 days allowed for filing the affidavit, to certify the fact to the prosecuting attorney, and that officer is re-

quired, "at his earliest practical moment," to proceed against the corporation for the recovery of the money forfeit, etc. Proceed for what offense? The doing of business before the corporation has done any more business or had time to do any? That contention leads to an absurdity. The fact that the Secretary of State is required to immediately certify the failure to file the affidavit, and the prosecuting attorney to immediately institute proceedings, evidently means that the corporation should be proceeded against for some act already committed which is declared by the statute to be unlawful—not some act thereafter to be committed.

We conclude that the complaint set forth no cause of action against the defendant, and the circuit court properly sustained a demurrer thereto.

Affirmed.

## FT. SMITH LIGHT & TRACTION CO. v. SOARD.

(Supreme Court of Arkansas. June 18, 1906.)

### 1. WATERS AND WATER COURSES—OBSTRUCTION—STREET RAILROADS—LIABILITY.

An ordinance of a city authorizing the construction of a street railroad required that the company should construct its tracks with suitable bridges, drains, or pipes at all gutters, so as to permit a flow of water under the same. The constructing company built the roadbed across a depression or drain which crossed a street without putting in a culvert, and thus forced more water to pass under a bridge over a creek, which was also partially obstructed by the placing of a bent under the bridge to strengthen the same, after which the creek became still more obstructed by brush and dirt, whereupon, during a heavy rain, it overflowed and caused damage to plaintiff's building. Held that, the railway company having altered the flow of the water, it was bound to see that the creek should not become further obstructed and to provide against its overflow from such obstruction.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 46, 128.]

### 2. SAME—SALE OF RAILWAY—LIABILITY OF PURCHASER.

Where an ordinance under which a street railway was constructed required that the line should be "constructed and maintained with sufficient openings for the passage of water," both by the constructing company and its successors and assigns, a purchaser of the line of the constructing company assumed the burden of complying with such ordinance, and was bound to exercise ordinary care in examining the roadbed and track to see that the required openings had been constructed, and that they were not allowed to become filled.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 48.]

### 3. NEGLIGENCE—ACTIONS—EVIDENCE—SUBSEQUENT ACTS TO PREVENT RECURRENCE.

Where, in an action against a street railway company for injuries to plaintiff's property by surplus water, plaintiff alleged negligence in the railway's failure to provide a culvert for the passage of water as required by city ordinance, evidence that defendant put in the culvert in front of plaintiff's premises after the injury was incompetent for the purpose

of showing that defendant was guilty of negligence in not doing so before.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 255.]

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by J. F. Soard against the Ft. Smith Light & Traction Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. F. Soard had a grocery store in the city of Ft. Smith, which was also his residence. The store was located on North Eleventh street, near its intersection with Twelfth street. North Eleventh street runs northeast, and plaintiff's store is south of this street. About 200 feet northeast of the store of plaintiff the street crosses a brook, or small stream, which flows northward. There is a bridge on the street over this stream. Not far from the bridge the street crossed another depression or drain, where in times of rain water flowed across the street. Afterwards the Ft. Smith Traction, Light & Power Company, by permission of the city, constructed its track along North Eleventh street. In doing so it raised the bed of the street, and left no drains or other openings for the escape of the water, except where the bridge crossed the stream. This bridge was built by the city of Ft. Smith, but, when the company obtained permission to construct its line across it, the company put in what the engineer who testified called "a bent," with posts to support it. This was done to strengthen the bridge. This bent under the bridge obstructed the flow of the water to some extent. The ordinances of the city under which the street car track was constructed required the company, its successors and assigns, to construct and maintain its tracks with "suitable bridges, drains, or pipes at all gutters so as to permit the flow of water under the same." After the track was constructed the Ft. Smith Traction, Light & Power Company sold its franchise and property to the Ft. Smith Light & Traction Company, and this company continued to operate its track without changing the same. The brook, when it passed under the bridge, became partially filled with dirt, sand, and debris deposited by the water, and during a heavy rain, which occurred in March, 1904, the opening under the bridge was insufficient to carry all the water, and it was forced back and entered plaintiff's store, causing him damage to the extent of \$300. He brought this action to recover damages for the injury. The defendant answered, and denied about every material allegation of the complaint. On the trial there was a verdict and judgment in favor of plaintiff for the sum of \$300, and defendant appealed.

Mechem & Mechem, for appellant. A. A. McDonald, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal by the defendant company from a judgment rendered against it in favor of plaintiff for damages for negligently and wrongfully obstructing the natural flow of water and causing it to back up and enter the plaintiff's store. Counsel for defendant in their argument for reversal say that the track of the street railway owned by it was constructed along a public street, and contend that, if any injury happened through the wrongful construction of the street or bridge, it was the fault of the city, and not of the defendant company. It is true that the company is not responsible for the work done by the city. But there was evidence tending to show that the company which constructed this street car track was permitted to construct the track along the street on any grade the company chose, though it was not allowed to change the height of the bridge. In constructing its track across a depression or drain not far from the store of plaintiff, it built up a solid roadbed, on which the track was laid, higher than the street was before, so that the water that formerly crossed the street at this drain could not afterwards do so. The company also put in a bent under a bridge over a stream near plaintiff's store, in order to strengthen the bridge, and this, with the supports on which the bent rested, to some extent obstructed the water. By obstructing a natural drain the company forced more water into the creek that flowed under the bridge, and at the same time by putting a bent under the bridge they lessened the capacity of the creek to carry off the water. After having completely obstructed a natural drain and partially obstructed the stream at the bridge, the company allowed the creek to become still further filled by brush and dirt. It declined to remove such obstructions on the ground that it was the duty of the city, and not the company, to keep this creek open. But the ordinance of the city under which this road was constructed required that the company should construct its tracks with suitable bridges, drains, or pipes at all gutters, so as to permit the flow of water under the same. If the company had done nothing but cross a bridge constructed by the city, there might be serious question as to its liability. But, as before stated, this is not the case, for it built its roadbed across a depression or drain which crossed the street without putting in a culvert or drain for the water to pass through. It thus forced more water to pass under the bridge, where it also partially obstructed the creek by placing a bent under the bridge, with the supports resting in the bed of the creek. Having altered the flow of the water in that way, it became its duty to see that this creek should not become further obstructed, and the contention that the company that constructed this track was

guilty of no wrong in this respect cannot be sustained.

But the defendant company itself did not construct the track, but is the successor of the company that constructed it. Its counsel now contends that, as the defendant did not construct the roadbed or erect the posts and bent under the bridge, it cannot be held responsible for the injury, in the absence of notice that the solid roadbed and the bent under the bridge obstructed the water and were nuisances. But this contention does not seem to be sound, for the reason that the ordinance of the city under which the street railway was constructed required of the company constructing the road, "Its successors and assigns," that the roadbed should be constructed and maintained with suitable bridges, drains, and pipes to permit the flow of water under the same. As a general rule, a grantee is not responsible for the erection of an injurious structure by his grantor when he has had no notice thereof, and when there has been no request to remove. But there are exceptions to this rule, and it does not apply in a case of this kind, where it became the duty of the grantee to maintain its roadbed and track with sufficient drains and openings to admit the passage of water. As before stated, the city ordinance under which the street railway was constructed required that it should be "constructed and maintained" with sufficient openings for the passage of water. When it purchased this railway and took charge of it, the defendant assumed the burden of complying with this ordinance. It cannot escape by saying that it had no notice. It was its duty to exercise ordinary care in examining its roadbed and track, and in seeing that it had the required openings, and that such openings or drains as were already there were not allowed to become filled up and obstructed, so that the water could not pass through. If it failed to exercise due diligence in this respect, it was guilty of negligence, and must pay the damages caused by such negligence.

But, while we think the evidence was sufficient to support the verdict, we are of the opinion that the court erred in permitting the plaintiff to show that the defendant put in a culvert in the dump in front of plaintiff's place after the injury to plaintiff had happened. The fact that the defendant put in this culvert did not legitimately show that it was guilty of negligence in not doing so before. This question was discussed in the case of *P. & N. R. R. v. Smith*, 70 Ark. 183, 67 S. W. 675; *St. L. S. W. R. R. Co. v. Plumlee* (Ark.) 95 S. W. 442.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

HILL, C. J., not participating.

PLANTERS' MUT. INS. CO. v. NELSON  
et al.

(Supreme Court of Arkansas. July 23, 1906.)

EXECUTORS AND ADMINISTRATORS—PRESENTING CLAIMS—LIMITATIONS—FRAUD.

A claim against a decedent's estate, not having been presented in the two years from granting of administration provided therefor, is barred by the statute of nonclaim, so that action thereon cannot be maintained against the heirs to whom distribution was made, though the claim was based on fraudulent representations of deceased that title to land was in him, when it was in certain of his heirs, where there was no concealment by such heirs of the title being in them, but the deed was of record, and their claim to such title was openly asserted during all of such two years.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 828-831.]

Appeal from Clay Chancery Court; E. D. Robertson, Chancellor.

Action by the Planters' Mutual Insurance Company against Peter Nelson and others. From an adverse judgment, plaintiff appeals. Affirmed.

G. B. Oliver and J. W. & M. House, for appellant. D. Hopson and Hawthorne & Hawthorne, for appellees.

HILL, C. J. This is a suit against the heirs at law of Wm. Nelson and grows out of these facts: The appellant insurance company issued a policy of fire insurance to Wm. Nelson on the 6th of March, 1896, covering a barn and certain personal property. The barn was destroyed by fire April 11, 1896. Nelson made proof of loss and it was subsequently adjusted at \$1,300, which sum the insurance company paid on April 28, 1896, being \$1,040 for the barn and \$260 for the personal property. In the application for the policy Nelson stated that he was the sole owner of the property to be insured, and that the title to the land on which the buildings stood was in his name; and he made these statements warranties. He made similar statements as to the ownership when the loss was adjusted. Nelson had prior to said time conveyed the land to three of his minor children, and had the deed recorded. The answer alleges this was done in the nature of a distribution of his estate, but that he retained dominion and control of the property, and his minor children resided with him. It is also shown that the defeat of certain lawsuits for personal injuries, at one time pending against him, may have been the inducing cause for the transfer. Whatever may have been the reason, the title stood in the name of the children when the application was made, the policy issued, the fire occurred, and the loss paid. Wm. Nelson died on 7th of October, 1897, his will was probated, and letters testamentary granted to Peter Nelson on 24th of October, 1897. In December, 1899, the secretary of the insur-

ance company, which is domiciled at Little Rock, received a letter from an attorney in Clay county asking what representations Nelson had made in his application as to the ownership of the property insured. Litigation had broken out among Nelson's heirs, and this attorney was wanting evidence of Nelson's statements to use in that litigation. This information led to the company discovering the fact that the statements in the application and like statements in proof of loss, that the title stood in him, were not true. The secretary submitted the matter to the company's attorney, and, after investigating the facts further, the attorney for the company presented on the 14th of July, 1900, the claim of the insurance company for the refunding of said \$1,300 to the executor of Wm. Nelson's estate, who disallowed it. On the 29th of November, 1900, the insurance company instituted suit against Peter Nelson as executor, and on 28th of May, 1902, complaint was amended so as to make Peter Nelson individually as an heir at law of Wm. Nelson, and the other heirs at law of Wm. Nelson parties. That suit was dismissed, and within a year it was renewed. The present suit, alleging the closing of the administration, and that the heirs at law who were the parties defendant had received from the estate of Wm. Nelson more than the sum sued for.

Many questions are presented and discussed in brief and at bar, but only one will be discussed here, for it is sufficient to be decisive of the case. Whether Wm. Nelson was guilty of deceit entitling the insurance company to recover against him, or whether he was liable to it in an action for money had and received, need not be decided, for, if these points are decided in favor of the insurance company, it is barred by the statute of nonclaim. Appellant, to defeat the operation of this statute, shows that the fraud of Nelson, treating the mistake as such, although that is a contested point, was not discovered until more than two years after the grant of letters testamentary on his estate, and that the statute could not run until the discovery of the fraud, that started, not the statute of nonclaim which had run its course, but the general statute of limitation. There are two lines of decisions on the starting point of the statutes against frauds, one holding where the fraud is consummated that it operates as a continuing cause of action until discovery, when the statute starts; under this theory, the fraud is presumed to conceal itself. The other theory is that where the fraud is consummated the statute starts unless there is concealment or a continuation of the fraud preventing discovery. The authorities on these views may be found in briefs of coun-

sel. But this conflict does not enter here. If the harshest rule be invoked against Wm. Nelson, his concealment of the fraud terminated at his death; then, other rights intervened, and to protect those rights the statute of nonclaim came into play on the grant of letters, and it cleared the estate of unrepresented demands except that class described in *Walker v. Byers*, 14 Ark. 246. Inchoate and contingent claims or demands, or dormant warranties accruing after two years from grant of letters, may not be enforced against the administrator or executor, but may be enforced against the heir or distributee from the property received by him from the ancestor; but all claims or demands which the statute contemplates should be exhibited to the executor or administrator within two years are claims capable of being asserted in a court of law or equity existing at the death of the deceased, or coming into existence within two years, are barred, whether due or not, if running to certain maturity, unless presented within two years. *Walker v. Byers*, 14 Ark. 246. It has been 53 years this month since Mr. Justice Scott worked out the above construction of the statute of nonclaim, and it has been followed times innumerable since, never questioned, never added to nor taken from.

Counsel for appellant seek to bring their case within the exceptions and argue that until the fraud was discovered it was like an unbroken covenant for title; and an action arose only after discovery like it arose only on breach of the covenant. The argument is unsound for many reasons; one, that the discovery of the fraud is only important on the question of limitation and has nothing to do with the cause of action; it merely suspends, not creates, an action. If the argument was good as to Wm. Nelson it would not be good as against his heirs; they have not concealed the fraud; this action is against them to the extent of property fallen to them, and there is nothing to stop the running of the statute which should be worked against them. If the fraud was concealing itself, or was actively concealed, there would be another question if this suit was against Nelson; or even in its present form, it would present a different aspect if there were elements of concealment in it; but such elements are conspicuous by their absence. Nelson recorded the deed to his children; one of his children contested his will, and the fact of the deed to these children being made was litigated in the courts, and talked on the countryside during the whole period the statute of nonclaim was running. Any view that may be taken of the case precludes the maintenance of the action after the statute of nonclaim ran.

The judgment is affirmed.

**BATES et al. v. BIGELOW.**

(Supreme Court of Arkansas. July 23, 1906.)  
**VENDOR AND PURCHASER — BONA FIDE PURCHASERS — BURDEN OF PROOF.**

Where a deed recited payment of the price in full, though in fact vendor's lien notes were taken, in an action to foreclose the notes, a purchaser from the vendee had the burden of showing that he was an innocent purchaser without notice of the lien.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 604, 792.]

Appeal from Columbia Chancery Court; E. O. Mahony, Chancellor.

Action by H. W. Bigelow against J. R. Bates and another. From a decree in favor of complainant, defendants appeal. Affirmed.

C. W. McKay, for appellants. Stevens & Stevens, for appellee.

**McCULLOCH, J.** Bigelow sold and conveyed to appellant J. R. Bates a tract of land in Columbia county containing 82 acres. The deed recited the payment of the price in full, but all of it was not, in fact, paid, Bates executing to Bigelow two notes each in the sum of \$50 for the unpaid part. Bates subsequently sold and conveyed to appellant W. W. Simpson this and another tract of land, his deed reciting a cash consideration paid in full. Bates' notes to Bigelow have not been paid, and the latter brought this suit against Bates and Simpson to recover of Bates the amount of the notes with accrued interest, and to foreclose the vendor's lien on the land. The notes have been lost, and Bates, in his answer, alleged that they have been paid in full, but in his testimony admitted that this was not true, and that he still owed the notes. Simpson pleaded that he purchased the land from Bates without notice of the outstanding incumbrances, and both he and Bates testified that he (Simpson) knew nothing of the outstanding unpaid notes when he purchased the land; that he purchased upon the faith of the recital of full payment in the deed from Bigelow to Bates. Bigelow testified that Simpson admitted to him that when he bought from Bates the latter informed him that the land was incumbered to the extent of about \$100. Another witness whose deposition was taken by appellee testified that Simpson told him that he (Simpson) knew, when he bought the land, that the purchase-money notes were outstanding, but that he had to buy the land from Bates in order to collect a debt which the latter owed. The consideration of the conveyance from Bates to Simpson was \$350, of which \$235 was in satisfaction of a pre-existing debt, and the balance of \$115 was paid in cash.

The only point in the case is as to whether Simpson had notice of the outstanding notes and lien. The chancellor made a special finding that Simpson did have notice at the time of his purchase from Bates. The testimony is about evenly balanced—Bates and Simpson

testifying one way, and Bigelow and witness Henderson the other. The burden of proof was upon Simpson to show that he was an innocent purchaser without notice of the outstanding lien. *Steel v. Robertson*, 75 Ark. 228, 87 S. W. 117. With this burden upon the defendants, and the testimony being so evenly balanced, we cannot say that the finding of the chancellor is clearly against the preponderance of the evidence.

Decree affirmed.

**FLOYD et al. v. STATE.**

(Supreme Court of Arkansas. July 23, 1906.)

**1. CRIMINAL LAW—FORMER JEOPARDY.**

A plea, on a prosecution for robbery, of a former conviction of petit larceny founded on the same facts, is good.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 387.]

**2. SAME.**

A plea of former jeopardy, based on a conviction under a former indictment for the same offense, which conviction was set aside on motion of defendants, a nol. pros. being thereupon entered by the prosecuting attorney, is not good.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 372-375.]

**3. INDICTMENT AND INFORMATION — OFFENSE AGAINST UNKNOWN PERSON — ALLEGATION AND PROOF.**

The state must prove the allegation of the indictment that the robbery was committed on a person to the grand jury unknown.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 527-530.]

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

Henry Floyd and another appeal from a conviction. Reversed, and new trial ordered.

The defendants, Henry Floyd and Isaiah Bogan, two negroes, were indicted by the grand jury of Phillips county for the crime of robbery. The indictment alleged that the robbery was committed on a person whose name was unknown to the grand jury and that the defendants forcibly and feloniously took from such person "forty dollars of gold, silver, and paper money, currency of the United States." The defendants entered pleas of former conviction and not guilty. A demurrer was sustained to the pleas of former conviction, and they were tried on pleas of not guilty. They were convicted of robbery, and sentenced to be imprisoned for the term of five years in the penitentiary. Defendants appealed.

W. G. Dunning, for appellant. Robt. L. Rogers, Atty. Gen., and G. W. Hendricks, for the State.

**RIDDICK, J.** (after stating the facts). This is an appeal by Henry Floyd and Isaiah Bogan from a judgment convicting them of robbery and sentencing them to imprisonment in the penitentiary for a term of five years.

The first question presented arises on the plea of former conviction filed by the defendants. This plea set up that they had, prior to the finding of the indictment in this case, been convicted before a justice of the peace for the crime of petit larceny, and fined \$10 each, for the same act complained of in this indictment. The state demurred to their plea of former conviction, and the court sustained the demurrer. It is well settled that an acquittal or conviction for a minor offense included in a greater will bar a prosecution for the greater, if on an indictment for the greater the defendant could be convicted of the less. *State v. Smith*, 53 Ark. 24, 13 S. W. 391; *Southworth v. State*, 42 Ark. 270; *Powell v. State*, 89 Ala. 172, 8 South. 109; *People v. Defoor*, 100 Cal. 150, 34 Pac. 642; *Morey v. Commonwealth*, 108 Mass. 433; 17 Am. & Eng. Enc. Law (2d Ed.) 599. Tested by this rule, the plea of former conviction set up in this case was good. A conviction of a lower offense, fraudulently procured by the defendant for the purpose of shielding himself against a prosecution for a higher offense, would, of course, constitute no valid defense. *Bradley v. State*, 32 Ark. 722. But there is no charge of fraud or collusion in this case, for the question arises on a demurrer to the plea of defendant, and the only question is whether a former conviction for petit larceny will bar a prosecution for robbery founded on the same act. As a charge of robbery includes larceny, and as these defendants under the indictment in this case can be convicted of petit larceny, the same crime as that for which they have already been convicted, it follows that a trial on this indictment would be a trial for the offense for which they have already suffered punishment. They cannot be convicted of robbery without proof of larceny, for there can be no robbery without larceny. But they have already been convicted of larceny and punished, and cannot be convicted of that crime again. It follows, therefore, that they cannot be convicted of robbery, for a conviction of robbery would be a conviction of larceny also. *Keeton v. State*, 70 Ark. 163, 66 S. W. 645; *Bowlin v. State*, 72 Ark. 530, 81 S. W. 838. The court, therefore, in our opinion erred in sustaining the demurrer to the plea of former conviction before a justice of the peace; for, if the allegations thereof are true, defendants have a good defense against the indictment for robbery.

The demurrer was properly sustained to the other plea of former conviction. This plea was based on the fact that these defendants had been convicted on a former indictment for the same offense, which conviction was afterwards set aside on motion of the defendants, a nol. pros. entered by the prosecuting attorney, and a new indictment returned against defendants. The judgment of conviction on the first indictment being set aside on motion of defendants, the case stood as if there had been no trial or conviction,

and the entry of the nolle prosequi did not bar a subsequent prosecution for the same offense. *Kirby's Dig. § 2424*; 17 Am. & Eng. Enc. Law (2d Ed.) 595.

But the second indictment, on which the present conviction rests, alleged that the robbery was committed upon a person whose name was unknown to the grand jury. The state introduced no evidence to prove this allegation, and in this respect the proof was defective. *Boles v. State*, 58 Ark. 35, 22 S. W. 887; 18 Enc. Plead. & Prac. 1222. It is further said that the evidence did not show that the money taken was money of the United States, as charged in the indictment. The law on that point was discussed by this court in the recent cases of *Marshall v. State*, 71 Ark. 417, 75 S. W. 584, and *Johnson v. State*, 73 Ark. 101, 83 S. W. 651. As a new trial must be granted, we need only call attention to those cases.

There are other points discussed by counsel, but we find it unnecessary to notice them.

For the errors stated, the judgment will be reversed, with an order for the circuit court to overrule the demurrer to the plea of former conviction, and for a new trial.

#### HERMAN KAHN CO. v. A. T. BOWDEN & CO. et al.

(Supreme Court of Arkansas. July 23, 1906.)

##### 1. PARTNERSHIP—THE RELATION—EVIDENCE.

In an action against two persons as partners, evidence that one of them had made declarations to the effect that he was a partner of the other was sufficient to sustain a finding that he was a partner.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 425, 427.]

##### 2. SAME — ACTION AGAINST PARTNERS—INSTRUCTIONS.

Where, in an action for goods sold against two persons as partners, the only evidence that one of them was the partner of the other was his declarations to such effect, and it appeared that plaintiff had sold the goods in reliance on such declaration, it was error to instruct that, before the jury could find the declarant a partner they must find that he was interested in the business, sharing in the profits and losses, and had some money in the business.

##### 3. SAME.

An instruction, given at the request of plaintiff, stated that if the declarant held himself out as a member of the firm, and plaintiff sold goods to the firm, plaintiff was entitled to a verdict; and at the request of defendant the court instructed that, before the jury could find for plaintiff on the ground that the declarant had held himself out as a partner, they must find that he so represented himself to plaintiff, and that plaintiff relied upon his representations. Held, that the instructions, taken together, were erroneous, since it was not requisite to the declarant's liability that he should have made representations directly to plaintiff.

##### 4. SAME—AS TO THIRD PERSONS—ESTOPPEL.

The mere fact that one held himself out as a partner does not estop him from showing that he was not a partner, except as against those who knew of such holding out and dealt with the firm in reliance thereon.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 49-53.]



Appeal from Circuit Court, Chicot County; Z. T. Wood, Judge.

Action by the Herman Kahn Company against A. T. Bowden & Co. and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

The court gave the following instructions at the request of plaintiff: "(1) The jury are instructed that a person can be a partner, whether the plaintiff knew of it or not; and if the jury believe from the evidence that the defendant W. S. Jennings held himself out to be a member of the firm of A. T. Bowden & Co., that the plaintiff sold goods to said firm, and that said firm is now indebted to plaintiff therefor, then the plaintiff is entitled to a verdict against said defendant Jennings for said indebtedness. (2) If the jury believe from the evidence that the defendant W. S. Jennings made statements to the plaintiff, or its agent, he was a member of A. T. Bowden & Co., and a partner of said Bowden in said firm, and that it sold goods to said firm upon the faith of said statement, and that said firm is now indebted to said plaintiff therefor, then the jury will find for the plaintiff."

The court also gave the following instructions at the request of the defendant: "(1) That you are instructed that the burden of proof is upon the plaintiff to show that W. S. Jennings was a partner in the business of A. T. Bowden & Co. and before you can find that he is actually a partner you must find that he was interested in the business, sharing in the profits and losses, and had some money in it. He cannot be a partner without having money in the business, without sharing in the profits, and being responsible for the losses; and this the plaintiff must show to you by a fair preponderance of the testimony. You cannot hold W. S. Jennings as a partner unless plaintiff has shown by a fair preponderance of the testimony that he owns a part of the business, shared in the profits, and must stand the losses. (2) The court instructs the jury that, while it is true that one may hold himself out to the world as a partner by inducing third parties to believe that he owned an interest in the business, and was a partner, yet, before you can find upon this theory that W. S. Jennings was liable as a partner, you must find that he so represented himself to the Herman Kahn Company, and they relied upon his representation, and sold him the goods upon the faith of his being a partner; and the burden of proof is upon the plaintiff to show that he so held himself out, and that the goods were sold to A. T. Bowden & Co. upon that faith that Jennings was a partner before he can be held, unless you believe that he actually owned an interest in the business."

To the giving of each of these instructions the plaintiff objected at the time, and, his objections being overruled, he saved his ex-

ceptions. There was a verdict in favor of the defendant, and judgment accordingly, from which plaintiff appealed.

Morris M. Cohn (El. A. Bolton, of counsel), for appellant. H. W. Wells, for appellees.

RIDDICK, J. (after stating the facts). This is an action by the Herman Kahn Company, a corporation, against A. T. Bowden and W. S. Jennings, to recover the sum of \$1,658.09, which the plaintiff alleges is due it for goods and merchandise sold to A. T. Bowden & Co., of Dermott, Ark. Jennings filed an answer denying that he was a member of that firm, and whether he was a partner, or had held himself out as a partner in such a way as to make himself liable for the debt due plaintiff, were the only issues presented in the trial of the case. A number of witnesses testified that Jennings had on divers occasions stated to them that he was a member of the firm of A. T. Bowden & Co. Some of these witnesses were agents and salesmen of plaintiff, and they testified, further, that, relying on those statements, the plaintiff sold to the firm the goods and merchandise for the price of which suit was brought in this case. On the other hand, the defendants A. T. Bowden and W. S. Jennings both testified that Jennings was not a member of the firm, and Jennings testified that he had never at any time held himself out as such. There is a sharp conflict between the testimony of the witnesses for plaintiff and defendants as to the facts, and the case here turns on the question as to whether the instructions of the court properly presented the issues to the jury.

Before noticing these instructions we will call attention to the meaning of the word "partnership," though, judging from the decisions, it would seem impracticable to give a single definition of that term that will cover all cases. It was said in *Culley v. Edwards*, 44 Ark. 427, 51 Am. Rep. 614, that, so far as the liability to creditors was concerned, the test of partnership was "whether the business has been carried on in behalf of the person sought to be charged as a partner; i. e., did he stand in the relation of the principal towards the ostensible traders by whom the liabilities have been incurred, and under whose management the profits have been made?" This statement of the law by Judge Smith was an attempt to formulate into a general rule a statement of Lord Cranworth, made in the celebrated case of *Cox v. Hickman*, 8 H. L. C. 306. In that case a certain firm, becoming embarrassed, had under an agreement with its creditors turned over its business to trustees, to be carried on and the profits applied to the payment of the debts of these creditors. The trustees in the course of this business contracted an indebtedness with another person, and he sued the other creditors, claiming that, as they were to receive the profits of the business on their

debts, they were liable for the debts of the business while carried on by the trustees. In reply to this argument Lord Cranworth said: "It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf; i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." *Cox v. Hickman*, 8 H. L. C. 306. Now it will be seen that Lord Cranworth was by this language not endeavoring to lay down a general test of partnership, but to show that it was illogical and incorrect to say that the right to share in the profits of a business rendered one liable for the debts of the business; for these things do not depend on each other, but both depend upon and result from the fact of partnership. Later English and American cases have pointed out that the question of agency is not a proper test of partnership, for the reason that the agency of the different partners follows from the partnership, and not the partnership from the agency. "To say that a person is liable as a partner who stands in the relation of principal to those by whom the business is carried on adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent." *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835; *Pooley v. Driver*, 5 Ch. Div. 458; *Johnson v. Rothchild*, 63 Ark. 518, 41 S. W. 996. But it is unnecessary to attempt a definition of "partnership" that will cover all cases. Sir George Jessel, M. R., in *Pooley v. Driver*, above cited, after quoting the definition of "partnership" given in the Civil Code of New York, that a "partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them," said that this definition, though simple, was accurate as far as it went, and as a general rule was sufficient. We concur in this statement, and, taking a somewhat fuller definition, we will say that so far as this case is concerned a partnership may be defined as the relation existing between two or more persons who have agreed to carry on a business together and to share the profits thereof as joint owners of the business. 22 Am. & Eng. Enc. Law (2d Ed.) 2; *Pooley v. Driver*, 5 Ch. Div. (Eng.) 458; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835.

If W. S. Jennings and A. T. Bowden were carrying on the saloon business together as joint owners thereof, with the intention to share in the profits of the business as such owners, they were partners. But it does not follow that the plaintiff must introduce

evidence to show a specific agreement between these parties covering all these points before the jury can find that Jennings was a partner. For instance, it has often been held that participating in the profits of a partnership is of itself cogent proof that the person who does so is a partner, and, if unexplained, this may be conclusive proof. *Johnson v. Rothchild*, 63 Ark. 518, 41 S. W. 996; *Rector v. Robins*, 74 Ark. 437-442, 86 S. W. 667; *Pooley v. Driver*, 5 Ch. Div. 458-476. Now in this case the evidence introduced by plaintiff to show that defendant was a partner consisted mainly of his own admissions and statements that he was a partner. If the jury believed from the evidence that Bowden had carried on the business at Dermott under the firm name of A. T. Bowden & Co., and that Jennings had admitted to the witnesses introduced by plaintiff that he was a member of that firm, it was within the province of the jury to conclude from that testimony alone that he was a partner, and if he was a partner it would follow as a matter of law that he was liable for the debts of the firm. Jennings did not attempt to explain the admissions testified to by plaintiff's witnesses. He simply denied that he had made them. If his testimony was true, there was no partnership; while, if the witnesses for plaintiff told the truth, there was strong evidence of a partnership. It was therefore within the province of the jury to pass on this conflicting testimony and determine whether Jennings was a partner or not. But the first instruction given by the court at request of defendant for the guidance of the jury on this point seems to be misleading, for it told the jury that before they could find that Jennings was a partner they must find that "he was interested in the business, sharing in the profits and losses, and had some money in the business." Now, it may be correct to say that these things are generally true of partners; but, as we have said, it was not required that the plaintiff should prove, or that the jury must find, all of them, in order to believe that defendant was a partner. But this instruction was calculated to create the impression on the jury that there must be evidence tending directly to show all of those things before they could find that Jennings was a partner. As before stated, the fact that Jennings was a partner might be proved by his admissions that he was a partner, and the other matters which the instruction says must be proved would follow as a matter of law from the partnership. Again, this instruction also told the jury that Jennings could not "be a partner without having money in the business." This was clearly incorrect, for one may engage in a business as a partner and furnish his services against the money furnished by his partner, or he might furnish the use of the building in which the business was carried on against the capital of his

partner. If he was wealthy, the other members of the firm might agree to give him a share of the profits to induce him to enter the firm and lend the credit of his name to the firm, without requiring him to put any money in the business. So, as before stated, the statement of the law was clearly wrong. For these reasons we think the court erred in giving this instruction.

Again, on the second issue, as to whether, if Jennings was not a partner, he had acted in such a way as to estop him from denying the fact and to make him liable for the debt of the plaintiff, there seems to us to be some conflict between the instructions given at the request of the plaintiff and those given for the defendant. For instance, the first instruction given at the request of the plaintiff told the jury that if Jennings "held himself out to be a member of the firm of A. T. Bowden & Co., and plaintiff sold goods to the firm for which the firm is now indebted to plaintiff, the plaintiff is entitled to a verdict against Jennings for that indebtedness." This is not strictly correct, for the mere fact that Jennings may have held himself out as a partner would not estop him from showing that he was not in fact a partner, except as to those who knew of such holding out and in reliance thereon sold goods to the firm. *Wilson v. Edmonds*, 130 U. S. 472, 9 Sup. Ct. 563, 32 L. Ed. 1025; *Fletcher v. Pullen*, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355; *Ruhe v. Burnell*, 121 Mass. 450; 22 Am. & Eng. Enc. Law, 59. On the other hand, the court at the request of the defendant instructed the jury that, before they could find for the plaintiff on the ground that Jennings held himself out as a partner, they must find "that he so represented himself to the Herman Kahn Company, and that it relied upon his representation and sold him the goods upon the faith of his being a partner." Now, both of these instructions, the one given for the plaintiff and the other for the defendant, must be read together. When so read, they mean in substance, that, even though Jennings was not actually a partner, he might become liable for the debts of the firm if he held himself out as a partner; but to make him liable in this case it must be shown that he held himself out as such partner to Herman Kahn Company, the plaintiff, and that in reliance upon such representation the plaintiff sold the firm the goods, for the price of which this suit is brought. But this statement of the law is too narrow. A person who holds himself out as a partner of a firm is estopped to deny such representation, not only as to those as to whom the representation was directly made, but as to all others who had knowledge of such holding out and in reliance thereon sold goods to the firm, provided they exercised due diligence in ascertaining the facts. The cases go even further, and hold that, if one has knowledge that he is being held out to the

world as a partner and fails to contradict the report, he may become liable to those crediting the firm on that account. *Campbell v. Hasting, Britten & Co.*, 29 Ark. 513; *Fletcher v. Pullen*, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355. It follows, therefore, for much stronger reasons, that, if the party himself puts out the report that he is a partner, he will be liable to all those selling goods to the firm on the faith and credit of such report. *Dickinson v. Valpy*, 10 B. & C. 128; *Wilson v. Edmonds*, 130 U. S. 472, 9 Sup. Ct. 563, 32 L. Ed. 1025; *Thompson v. Toledo First National Bank*, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507; *Levy v. Alexander*, 95 Ala. 101, 10 South. 394; *Webster v. Clark*, 34 Fla. 637, 16 South. 601, 27 L. R. A. 126, 43 Am. St. Rep. 217; *Ruhe v. Burnell*, 121 Mass. 450; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; *Brown v. Grant*, 39 Minn. 404, 40 N. W. 268, 22 Am. & Eng. Enc. Law (2d Ed.) 58. For the reasons stated we think there was error in the instructions.

As the judgment must be reversed and a new trial ordered on that account, we need not notice the point made as to argument of counsel for defendant, further than to say that we concur in the ruling of the trial judge that this argument was improper. The statement of counsel made in reference to two witnesses for plaintiff, as follows: "I have known Joe and Gabe Lyons for years, and two bigger liars and scoundrels never walked the face of the earth"—was in effect an attempt to impeach these witnesses by the unsworn statement of counsel. It has been repeatedly held that statements of that kind by counsel in reference to facts not in evidence are improper and prejudicial. These statements would have been wrong coming from the mouth of a sworn witness, much more so from the unsworn lips of counsel. But as they were probably made in the heat of argument, and as the circuit judge held that they were improper on objection being made, we need not notice them further here, as they will probably not be made again.

For the reasons stated, the judgment is reversed, and a new trial ordered.

#### LITTLE ROCK & FT. S. RY. CO. v. GREER.

(Supreme Court of Arkansas. Jan. 6, 1906.  
On Rehearing, July 9, 1906.)

#### 1. PUBLIC LANDS—GRANTS—RAILROADS—RIGHT OF WAY.

Act Cong. March 3, 1877, granting a right of way to the Hot Springs Railroad Company through the Hot Springs reservation, conferred on the railroad company only a pre-emption right "to the land occupied," and did not pass the fee in streets on which the railroad tracks were laid, which was expressly reserved in the government for the use of the public.

**2. EMINENT DOMAIN — CONDEMNATION OF LAND—RAILROAD RIGHT OF WAY—RIGHTS OF VENDEE.**

Where a railroad company having the power of eminent domain has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner, a subsequent vendee of the latter takes the land subject to the burden of the railroad, and cannot recover damages to his land, provided there has been an actual taking of the property, consisting of an invasion thereof or for the infliction of some physical injury.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 407-416.]

**3. SAME—DAMAGES—EXTENT.**

Under the express provisions of Const. 2, § 22, and Kirby's Dig. § 2899, the owner of land taken for railroad purposes, is entitled, before or at the time of the taking, to compensation for all damages, present and prospective, which he sustains by reason of the construction of the railroad.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 237, 238.]

On Rehearing.

**4. SAME — RECONSTRUCTION OF RAILROAD — DAMAGES—ABUTTING OWNERS.**

Where plaintiff by his purchase of certain property fronting on a street on which defendant's railroad tracks were laid took title to the center of the street in front of his lot, subject to the public easement, he was entitled to recover damages caused by the reconstruction of the railroad's roadbed in the street in front of his premises by the building of an embankment on plaintiff's side of the center of the track, narrowing the street to a width of 18 feet, and impairing plaintiff's right of access, etc.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 310.]

Appeal from Circuit Court, Conway County; Wm. L. Moose, Judge.

Action by Robert L. Greer against the Little Rock & Ft. Smith Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed. Rehearing denied.

Plaintiff alleged that since January 1, 1902, he had been the owner of a dwelling house fronting on Railroad avenue in the city of Morrillton, Conway county, Ark., which he uses as his family residence; that he was entitled to the enjoyment of the avenue leading to and in front of his dwelling, and to an unobstructed passage along and across the same; that the avenue from time immemorial had been a public highway on which defendant was engaged in operating a railroad in front of plaintiff's premises, and that defendant had filled in its roadbed and right of way with a great quantity of earth, raising an embankment which obscured and cut off the view, and light, and air, and made plaintiff's dwelling uncomfortable and unfit for habitation; that the embankment had also obstructed the street, impairing plaintiff's right of access, and damaged his property to the sum of \$500. Defendant answered that it had acquired a right of way 100 feet wide along the property in question, and that, long subsequent to the acquisition of such right of way and the construction of its road, plaintiff acquired his property and

constructed his residence with knowledge of the existence and operation of the railroad; that defendant's board of directors determined to change the grade established by the original construction, and that, in order to do so, it was necessary to make the fill complained of, which was accomplished with ordinary care. Defendant denied that plaintiff's light and air had been cut off or that it had in any manner obstructed or interfered with the public highway to plaintiff's damage.

The case was tried on the following agreed statement of facts:

"The plaintiff, R. L. Greer, is the owner of a certain lot or tract of land fronting and abutting upon Railroad avenue, one of the principal streets in the city of Morrillton. The property is about 70 feet front and about 365 feet back. The plaintiff acquired title to the same by deed of conveyance from M. D. Shelby, on the 22d day of April, 1896. That he entered into possession of the same, and improved it by remodeling a certain house then standing upon it, and fixed his residence and began to reside upon and does now reside upon the same. That prior to the time the plaintiff acquired his property in the premises, and prior to the time when the defendant constructed its line of road along and near to said premises, there was a public highway established and maintained along the north side of what was appropriated by defendant. That the city of Morrillton, after the construction of said railroad, was laid out and built up along both sides of said railroad for a distance of about one mile. Within this distance of one mile is situated the premises of the plaintiff, but said premises were not regularly laid out and platted as any portion of said town of Morrillton. That the said public highway afterward became known and recognized as the said 'Railroad Avenue' above referred to. That the said Railroad avenue has been, since time prior to the construction of said railroad, continuously used as a public highway and as Railroad avenue. The plaintiff's property is more particularly described in memorandum attached hereto, marked 'Exhibit A.' That the defendant's road was constructed along said highway in the year 1871.

"It is agreed: That a thorough search of the proper records of Conway county fails to disclose that the defendant railroad ever acquired any right of way along said road or avenue, either by a grant or condemnation proceeding; and fails also to show that any profile or map of said route was ever filed with the clerk of the county court of said county as contemplated by section 2765 of Sandels & Hill's Digest. That the said defendant company originally constructed its road along the south side of the old public highway now known as 'Railroad Avenue,' practically on the surface level, just opposite the plaintiff's

property there being a slight cut, and continued to maintain and operate its said road along said line, claiming a right of way of 49½ feet on each side from the center of the same, which is more clearly shown in a plat hereto attached, marked 'Exhibit B.' That along in front of plaintiff's premises the ground was practically level out to where the defendant's cut began, which was 6½ feet from the end of the ties. That in the early spring of 1902 the defendant railroad company elevated its grade line at the point in controversy to a height of 11 feet. That in the elevation of the grade line it constructed an embankment or dump upon which to operate its road; that the said dump, at its top, is about 24 feet wide—that is to say, 12 feet wide on either side of the center line of the track; that the base of said dump on the north side and next to the plaintiff's premises is 26 feet wide, measured from a perpendicular line dropped from the center of the track. That there is yet between the base of said dump and the sidewalk in front of plaintiff's premises a space of 18 feet, along which space the public highway, Railroad avenue, now runs. Immediately next to plaintiff's premises there is now a sidewalk of six feet wide. The plaintiff's house is set back from the north of said sidewalk a distance of 28½ feet to the front porch. It is 14 inches high from the ground, which is practically on a level with the said street. That the residence portion of the city of Morrilton is practically divided by the railroad at the point in controversy. That before the construction of the embankment above mentioned the railroad could be crossed by pedestrians at any point opposite the plaintiff's dwelling. That it can now be crossed only by climbing over the said embankment, which rises at an angle of 45 degrees, or else by going 240 yards along said highway to the west, at which point the railroad company has constructed an underground crossing for persons, animals and teams; this is in an opposite direction from the business portion of the town, and just outside the corporate line, a distance of 20 or 30 feet. That persons crossing at the underground crossing mentioned are compelled to cross the property of an oilmill, located on the south side of the railroad, near said underground crossing, and go a distance of 750 feet to Church street, in order to turn back east one block toward the business portion of town and turn north in order to reach the dwellings on the south side of the railroad opposite plaintiff's property. That before the construction of the present embankment there had been maintained for a long number of years a public crossing over defendant's railroad at a point 180 feet east of plaintiff's property. That said crossing has been closed by the construction of said embankment, and has not since been opened. That since the construction of said embankment it is impracticable to cross the same

with vehicles of any kind. The nearest open crossing at this time at which the railroad may be crossed east of Greer's property, and toward the business part of the city, is 400 yards.

"It is agreed: That the directors of the Little Rock & Ft. Smith Railway, having decided that it was impracticable to operate its line of road and promptly move the traffic offered to it for shipment on its present degree of curvature and on its established maximum grade line, in April, 1902, passed at their annual meeting in the city of Little Rock, Ark., a resolution authorizing the re-establishment of its line of road on the same and different alignment and on a maximum of six-tenths of 1 per cent. grade line; that in pursuance to this resolution the large embankment in front of plaintiff's premises was constructed; that in the exercise of the highest degree of care and skill in engineering this large embankment was necessary to the perfect construction of defendant's line of road on the newly established maximum grade line; that said embankment was constructed after the most approved modern method, in the most skillful manner possible; that for a number of years the defendant has been unable to move promptly the vast amount of freight offered to it for shipment for interstate points and locally; that, when defendant's line of road has been constructed according to the present plans adopted by its engineering department, each engine and crew of train hands will be able to move approximately 60 per cent. more freight than such engine and crew has been able to move over the old line, operated with the most consummate skill. In the construction of the embankment in front of plaintiff's premises, defendant did not interfere with or injure physically the premises of the plaintiff; that the public highway still exists along the base of said embankment and in front of plaintiff's premises, and that wagons and vehicles of standard width are able to travel along and pass each other on said highway at any point. That whatever right of way defendant owns in front of plaintiff's premises, it owned long before plaintiff bought said property or improved the same. That Cherokee street railway crossing, which was closed by the obstruction of said embankment, is within the city limits of Morrilton, and that the city authorities have taken no steps to re-establish said crossing, save to attempt to compel the railway company to open again the same. When the defendant's plans for the reconstruction of its road have been fully carried out it will only be necessary for defendant to operate about half as many trains as at present, and the defendant will reduce fully 50 per cent. the chances of injuries to persons and property by the movement of trains."

Oscar L. Miles, for appellant. Reld & Strait, for appellee.

WOOD, J. The Constitution provides that: "Private property shall not be taken, appropriated or damaged for public use without just compensation therefor." In *R. R. Co. v. Williamson*, 45 Ark. 429, it was contended that "where the fee of the streets is in the city, and it grants a right of way to a railroad company to construct its road along a street, pursuant to an act of the Legislature, authorizing such use of the street, and the track is laid in a proper and skillful manner," the railroad company is not liable to abutting lot owners for consequential damages. In disposing of that question, this court held (quoting syllabus): "The owner of premises abutting upon a street in a city or town may recover from a railroad company the damages resulting to his premises by the construction of its roadbed, or other structures on its right of way along the street, in such manner as to obstruct access to the premises, though he have no interest in the fee of the street, and no part of his premises be taken and the road or other structure be skillfully built." That case rules this, and the learned and exhaustive opinion of Chief Justice Cockrill has left nothing more for us to say upon the question. But counsel for appellant, while conceding that the doctrine of that case "is perfectly sound," yet says: "It can have no application to the facts in this case," for, says he, "In the case at bar the railway company is not occupying a public highway. The public highway yet remains intact. In the case at bar the plaintiff owns no fee in any part of the ground occupied by the dump of the railway, nor has he any property interest whatever in any portion of the company's right of way; and in the case at bar it must be clearly understood, and all the time remembered, that the railway company not only had acquired its right of way, but had constructed its line of road upon that right of way 25 years before the plaintiff had acquired title to the property for which he now seeks to recover damages."

A glance at the facts of the two cases will show that, in the essential particulars upon which the doctrine in the *Williamson* Case was announced, there is no difference between that case and this. Learned counsel for appellant mistakes the facts and the law when he says that, in the *Williamson* Case, *Williamson* was the owner in fee of the soil to the center of the street upon which he owned lots abutting. The act of Congress of March 3, 1877, only gave to the claimants of the lands of the United States government at Hot Springs a pre-emption right to the land occupied by them. The fee in the streets never passed to individual claimants. It was expressly reserved in the government for the use of the public at Hot Springs. See *Williamson* Case, *supra*. The decision in *Ry. Co. v. Williamson*, *supra*, upon the question now under consideration was bottomed upon the fact that *Williamson* was not the owner of the fee in the soil when the rail-

way company secured its right of way and built its road over it. Judge Cockrill says: "Now the fundamental law is that private property shall not be taken, appropriated, or damaged for public use without just compensation." Under this enlarged provision, our inquiry is no longer limited to the question, has private property been taken for public use? and it is useless to recur to cases which are confined to the interpretation of a clause containing that limitation only. A provision similar to that in our Constitution is found in the Constitutions of Illinois, Colorado, Georgia, Nebraska, California, West Virginia, and Pennsylvania, and in each of these states it has been held by the courts of last resort that this addition to the old provision against taking private property without compensation was intended to afford redress where none could be had before"—citing many cases. And, continuing: "An examination of the cases will show that it may now be taken as settled that, where this provision prevails, it is no longer necessary that there should be a physical invasion or spoliation of one's land in order to give a right of recovery." Had *Williamson* been the owner of the fee in the land taken, this language would have been inappropriate. Moreover, the cases cited in the opinion show clearly that the ruling was based upon the idea that *Williamson* was not the owner of the land taken, yet, as he was the owner, at the time the railroad was built, of land that had been injured by its construction, he was allowed to recover. Some of the strongest cases cited were those where the land damaged was not even situated on the street or highway taken for railroad purposes. Counsel for appellant invokes the well-settled doctrine "that where a railroad company having the power of eminent domain has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such land, a subsequent vendee of the latter takes the land subject to the burden of the railroad; and the right of payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages if the entry was unauthorized, belongs to the owner at the time the railroad company took possession." And he cites *Roberts v. Railroad Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; *McFadden v. Johnson*, 72 Pa. 335, 13 Am. Rep. 681; *Navigation Co. v. Decker*, 2 Watts (Pa.) 343; 2 Wood on R. R. 994; *McLendon v. Atlanta & West Point R. R.*, 54 Ga. 293; *Allen v. Railroad Co.*, 107 Ga. 838, 33 S. E. 696; *T. W. & W. Ry. Co. v. Morgan*, 72 Ill. 155; *Ill. Central R. R. Co. v. Allen*, 39 Ill. 205; *Indianapolis, Bloomington & Western Ry. Co. v. Walter McLaughlin et ux.*, 77 Ill. 275. We have examined these authorities, and find that the doctrine is applied only in cases where there has been a taking of the property; where the corpus of the property was invaded and suffered some physical injury.

It is a well-established rule of law that the owner of land taken for railroad purposes is entitled, before or at the time of the taking, to compensation for all damages, present and prospective, which he sustains by reason of the construction of the railroad. Const. art. 2, § 22; Kirby's Dig. § 2899. Such damages include the value of that part of the land which is taken, as well as the damages consequent upon such taking to the residue. The doctrine invoked by appellant has its rationale in the presumption that, in the absence of proof to the contrary, the owner, who is entitled to such compensation, received same before or at the time his land was charged with the servitude; that this was considered and settled when the owner conveyed the land to the railroad, or when the railroad acquired its title by condemnation; or that the owner was barred from claiming such compensation where the railroad had acquired title by prescription. 23 A. & E. Enc. Law, 714.

For obvious reasons the doctrine urged could not apply to one whose property had never been taken, and who was not therefore entitled to set up a claim for damages as one whose property had been taken. By limiting the right to recover for damages to those whose property had been taken under the old rule prior to the adoption of the Constitution of 1874, great injustice and inequality often arose. As is shown by Judge Cockrill in *Ry. v. Williamson*, supra, it was to obviate this that the constitutional provision was broadened so as to give compensation to the one whose property was damaged (although not taken) for public use, as well as to the one whose property was taken. It is under this provision as construed by this court in *Ry. v. Williamson*, supra, that appellee seeks and is entitled to recover. Under this provision the cause of action accrues when the damage is done, and accrues to the one who is the owner of the land at the time of the construction which causes the injury or damage. As shown in one of the citations from *Ry. v. Williamson*, to warrant a recovery in all cases where the property is damaged but not taken, by the obstruction in a street, it must appear that there was some "physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." *Rigney v. Chicago*, 102 Ill. 64. This doctrine was recognized in *Ry. v. Newman*, 73 Ark. 1, 83 S. W. 653, but in that case the complainant and appellant could not recover, for the reason that he had not sustained any special damage. In this case the facts show that appellee sustained damage that was special and peculiar to him, not shared in by the general public. The building of the embankment along the street

ex adverso appellee's premises produced special injury to him, as shown by the proof, which gave him a cause of action. *Ry. v. Williamson*, supra; *William P. Abendroth v. Manhattan R. R. Co.* (N. Y.) 11 L. R. A. 634, notes.

Affirmed.

#### On Rehearing.

MCCULLOCH, J. The principle is made clear in the original opinion that where a railroad corporation lawfully acquires a right of way over land, either by grant, prescription, or condemnation, such acquisition covers all damages, present and prospective, resulting to the owner whose land is invaded. This upon the theory that full compensation is allowed at the time, and can be recovered only once. This principle applies, however, only to one whose lands have been invaded and to the extent only of such invasion. One whose land has not been previously taken, under voluntary grant, prescription, or condemnation, may recover compensation for damages whenever the same accrues; and, where there is a new or additional taking, damages therefor may be recovered. According to the agreed statement of facts in the case, the railroad company never acquired a right of way by grant or condemnation. Its acquisition by prescription was therefore only to the extent of the actual taking, which was the land covered by its roadbed, and no more. *St. L. & S. W. Ry. Co. v. Davis* (Ark.) 87 S. W. 445. It is said in the agreed statement of facts that the company claimed a right of way 49½ feet on each side of the center of the track; but it is not shown that the claim was asserted in a manner sufficient to give it the right by prescription. There was no actual occupancy of the ground, and no map and profile of the route was ever filed. The company, in recently reconstructing its roadbed, has encroached upon the public street in front of plaintiff's property by building a dump 11 feet high and 26 feet wide on that side from the center of the track, thus narrowing the street to a width of 18 feet. Damages are now sought for this encroachment. The plaintiff, by his conveyance from Shelby, took title to the center of the street in front of his lot subject to the public easement. *Dickinson v. Ark. City Improvement Co.* (Ark.) 92 S. W. 21. It is not important to consider whether or not the present encroachment by the company fell within the limits of that part of the street to which plaintiff held the title. In either event he is entitled to all damages incurred by reason of the encroachment since he obtained title to the abutting lot. Whether he owns the fee to the street or not, he can, as the owner of the abutting lot, recover compensation for the damages caused by obstructing the street. *Ry. Co. v. Williamson*, 45 Ark. 429. It is not entirely clear whether or not the strip of land covered by the roadbed was a part of the

public highway when it was originally taken. The agreed statement of facts merely recites that "said defendant company originally constructed its road along the north side of the old public highway now known as 'Railroad Avenue.'" It is not important, however, whether the land originally taken was a part of the highway, or not. The fact that the company had previously taken and occupied a part of the street before the plaintiff became the owner of the abutting lot would not deprive him of the right to recover the damages caused by the new taking.

Rehearing denied.

**MATTHEWS v. W. F. TAYLOR CO.,**  
Limited, et al.

(Supreme Court of Arkansas. July 9, 1906.)

**APPEAL—PROBATE MATTERS—TRIAL DE NOVO.**

Though Kirby's Dig. § 144, authorizing the probate court to refer the account of an administrator and exceptions thereto to an auditor, provides that the auditor shall be governed according to the rules laid down for the government of a master in chancery in auditing accounts, and subsequent sections assimilate the proceedings to the statutes governing masters in chancery, an appeal in such matter to the Supreme Court is not to be treated as a chancery appeal, so as to authorize a trial de novo.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3628.]

Appeal from Circuit Court, Columbia County; Chas. W. Smith, Judge.

Proceedings between S. P. Matthews, administrator, and the W. F. Taylor Company, Limited, and others. From the judgment of the circuit court on appeal from the probate, said administrator appeals. Affirmed.

Stevens & Stevens, for appellant. Magale & McKay, for appellees.

HILL, C. J. S. P. Matthews, the appellant, was appointed administrator of the estate of John H. Bolger, deceased, and filed an annual account, which was confirmed. He filed a second annual account which was met by exceptions from the appellee and others, creditors of the Bolger estate. The probate court, pursuant to section 144, Kirby's Dig., referred the account and exceptions to an auditor. The auditor took testimony on the matters in issue and restated the account, charging the administrator with \$1,531.41 as against \$614.64, the amount the administrator charged against himself. The auditor also filed a statement of the account as received by the administrator under the evidence in accordance with section 6333, Kirby's Dig. According to this statement the administrator should be charged with \$580.65. The administrator excepted to various findings of the auditor, and the exceptions were heard on the evidence adduced before the auditor by the probate court, and the auditor's account was confirmed and entered of record as provided in section 147, Kirby's

Dig. The administrator appealed to the circuit court. The case was heard in the circuit court by agreement on the account stated by the auditor, the exceptions of the administrator and creditors to that account, and the evidence taken before the auditor and reduced to writing under his direction. The circuit court held the amount found by the auditor was the correct amount and adjudged accordingly. The administrator appeals to this court. The appellant insisted that this cause should be determined, as chancery appeals are determined in this court, on the weight of evidence, and not as a mere review of errors, as in law appeals.

Section 144, Kirby's Dig., prescribing the reference to an auditor of accounts and exceptions, says: "And such auditor shall be governed according to the rules laid down for the government of a master in chancery in auditing accounts." Subsequent sections assimilate the proceedings to sections 6326-6341, the statutes governing masters in chancery. The argument is made that as it is expressly provided that the practice shall be governed by the rules laid down for the government of accounts stated by masters in chancery that the appeal from the circuit court should be treated as a chancery appeal and the trial here be de novo. In considering the nature of appeals in probate matters, Judge Woerner says: "On appeal to a court not of last resort, the appellate court proceeds as if it had original jurisdiction of the matter brought before it by appeal, which vacates and annuls, for the purposes of such trial, the judgment of the court below. Such appeals removing a cause from an inferior court to a superior court, for the purpose of obtaining trials de novo are unknown to the common law, and can only be prosecuted when expressly given by statute.

\* \* \* It is a settled rule, that the issue tried in the appellate court must be the same, and no other, than that which was tried in the court below, and the appellate court will grant such relief and such only, as the court below should have given; it acquires no jurisdiction of a subject-matter by the appeal of which the court appealed from had none; but in matters of practice follows its own rules." 2 Woerner on Administrators, § 550.

It follows from this statement of the status of the appellate tribunal that the circuit court, when exercising its appellate jurisdiction over the probate court, is proceeding as if it had original jurisdiction over the subject-matter, and is empowered to do all things the probate court could do in the matter, and none other than the probate court could do, but that is a question of power, not of practice. Its practice is its own, shaped, of course, to fit the probate subject. It does not follow that statutes assimilating probate practice to chancery practice, which doubtless confer like powers on the circuit court on appeal in such matters, turn the circuit court into a chancery court when



hearing such appeals. In *Schuman v. Sanderson*, 73 Ark. 187, 83 S. W. 940, it was argued that in election contests where the evidence must be taken by depositions that this court had the same opportunity to weigh the evidence that the circuit judge had, and that no conclusiveness should be attached to his findings as was done in cases where circuit judge or jury hears the witnesses orally. The court there pointed out the inherent difference between appeals in law and equity cases, and concluded as follows: "The questions for review from law courts are only questions of law, and they must be reviewed and ruled on in the trial court before review here. There is no trial de novo in such cases, as in chancery appeals. The only questions presented in appeals in law cases on the facts is whether the evidence is legally sufficient to sustain the verdict or finding. Therefore, the inquiry in this case is merely whether there is in each instance evidence equally sufficient to sustain the finding, and the finding must be sustained if there is such evidence, notwithstanding a decided preponderance may be against it." Applying this settled rule to the facts of this case the issue here is narrowed to a review of whether upon each matter presented the evidence is legally sufficient to sustain the finding of the circuit court irrespective of the weight of evidence upon the point in issue.

It would serve no useful purpose to review the numerous items and accounts in controversy, and the evidence bearing thereupon. The court has gone over each item carefully, and weighed the evidence to sustain each finding of the auditor, whose report has been accepted by both probate judge and the circuit judge, and the court fails to find it without legally sufficient evidence to sustain it, and that is as far as the court can go into it, and therefore the judgment is affirmed.

#### GROOMS v. NEFF HARNESS CO.

(Supreme Court of Arkansas. June 18, 1906.  
On Rehearing, July 9, 1906.)

#### 1. PRINCIPAL AND AGENT—POWERS OF AGENT—IMPLIED AUTHORITY—SALES—CANCELLATION OF AGENT'S DEBT.

An agent with power to sell and receive payment has no apparent authority to accept as payment the cancellation of his own debt, due one who knows, or by the exercise of reasonable diligence could know, that his debtor is acting as agent.

[Ed. Note.—For cases in point, see vol. 40, Cent Dig. Principal and Agent, §§ 278, 298-303.]

#### 2. SALES — BONA FIDE PURCHASERS — PURCHASE IN GOOD FAITH.

The manager of a corporation gave his personal creditor property belonging to the corporation in satisfaction of the debt, and on learning of the transaction the corporation brought replevin against the creditor, and after the dismissal of such action the creditor sold the property to another, who had knowledge of the pendency of the suit. *Held*, that the latter was

in no position to claim that he was an innocent purchaser.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 686-691.]

#### 3. REPLEVIN—INSTRUCTIONS.

The manager of a corporation gave some of its property to an individual creditor in payment of his debt. The creditor sold the property, and the corporation brought replevin against the purchaser. *Held*, that an instruction that plaintiff was entitled to recover, unless the corporation knew that its manager was dealing with its property as his own, and allowed him to do so, and the creditor had no reason to believe that the manager was acting as agent, was proper, though the creditor was not a party to the replevin suit.

#### On Rehearing.

#### 4. TRIAL—TAKING CASE FROM JURY—DEMUR- RER TO EVIDENCE.

A demurrer to the evidence as a means of challenging its sufficiency is unknown to the Arkansas system of practice.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 349.]

#### 5. SAME—DIRECTION OF VERDICT.

A defendant, at the close of plaintiff's evidence, may test its sufficiency by a request for a peremptory instruction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 376-380.]

#### 6. SAME — WAIVER OF ERRORS — RULING ON SUFFICIENCY OF EVIDENCE.

Where, after denial of a peremptory instruction at the close of plaintiff's evidence, defendant introduces evidence sufficient to sustain a verdict against himself, he waives any error in refusing the peremptory instruction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 933.]

#### 7. REPLEVIN—BURDEN OF PROOF.

The manager of a corporation gave some of its property to an individual creditor in payment of his debt. The creditor sold the property, and the corporation brought replevin against the purchaser. *Held*, that, plaintiff's evidence having shown that the transfer by the manager was unauthorized, the burden was on defendant to show that the one under whom he claimed was innocent of knowledge of the manager's lack of authority, and that defendant was an innocent purchaser for value and without notice of defects.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Replevin, §§ 280-284.]

Appeal from Circuit Court, Pulaski County;  
Edward W. Winfield, Judge.

Action by the Neff Harness Company against A. S. Grooms. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. H. Carmichael, for appellant. W. C. Adamson, for appellee.

MCCULLOCH, J. Appellee, Neff Harness Company, is a domestic corporation engaged in the business of selling harness, buggies, and other vehicles in Little Rock. W. B. Neff, who was secretary of the corporation and manager of the business, was indebted to W. L. Grooms in the sum of \$82 on account for groceries and meat, and sold him a surrey in part payment of the debt. Grooms was also to deliver a secondhand buggy in exchange to cover a part of the price of the surrey, and the

balance of the price was to be taken out by purchase of more groceries and meat from Grooms by Neff; but it appears that the old buggy was never delivered. The price of the surrey was charged to Grooms on the books of the company. Shortly after the transaction, Neff severed his connection with the company, and the latter repudiated the sale of the vehicle to Grooms in payment of individual indebtedness of Neff. W. L. Grooms disposed of the surrey to his father, A. S. Grooms, and, after making demand for payment of the price, which was refused, Neff Harness Company brought replevin to regain possession of the vehicle and to recover damages for detention. The suit was first brought against W. L. Grooms, but was dismissed before final judgment, and the present suit is against A. S. Grooms. There was evidence tending to show that none of the other officers had any information at the time of the sale of the vehicle to Grooms, that it was made in satisfaction of individual indebtedness of W. B. Neff, and as soon as information of that fact was received the corporation repudiated the transaction, and demanded payment of the price or return of the vehicle. There was also evidence tending to show that Grooms, when he purchased the vehicle from Neff, had no actual knowledge of the fact that the business was owned by a corporation, but thought that it was owned by Neff.

It has been decided by this court that "an agent with power to sell and receive money in payment for his principal has not the apparent authority to accept the cancellation of his own debt due to a vendee who knows, or by the exercise of reasonable diligence could know, that his debtor is acting as agent," and that the principal, upon discovery of such unauthorized sale, may repudiate it and recover possession of the article attempted to be sold. *Smith v. James*, 53 Ark. 135, 13 S. W. 701. This principle is so well settled by the authorities that further citation is unnecessary. It is contended, however, that the evidence in this case is insufficient to warrant the jury in finding that Grooms was aware, or by the exercise of reasonable diligence could have ascertained, that he was dealing with one who was acting as agent for another; in other words, that Grooms believed Neff to be the owner of the business, and was unaware of the corporate existence of the Neff Harness Company. It is true that Grooms testified that he thought Neff owned the business, but we cannot say that there was entire absence of evidence to justify the finding of the jury. The plaintiff was a corporation duly organized under the laws of this state. Its articles of incorporation were on record in the office of the Secretary of State and in the office of the county clerk of Pulaski county. It was openly doing business under its corporate name, and Grooms was doing business in the same city, and had previously had repeated transactions with the company. He was re-

peatedly in and about the place of business of the company and came in contact with other employes of the company. The fact that plaintiff was doing business under its corporate name did not necessarily carry information to all who dealt with it that it was a corporation; but we cannot say, under all the circumstances of the transactions with Grooms, that the jury were warranted in concluding that he knew or had information sufficient to put him on inquiry that he was dealing with an agent. It was not necessary that he should have known the precise limitations upon Neff's authority. He was bound to know, when he knew that he was dealing with an agent, that the latter had no authority to sell the goods of his principal in satisfaction of his own debt.

The court, among other instructions given at the instance of each party, gave the following at the request of the plaintiff. "The court instructs the jury that if they find from the evidence that at the time of the transaction between W. L. Grooms and W. B. Neff that the surrey in controversy was the property of the Neff Harness Company, and that the transaction was entered into between W. L. Grooms and W. B. Neff for the purpose of paying or securing payment of Neff's private debt, then you will find for the plaintiff, unless you further find that Neff Harness Company knew that Neff was dealing with the property, its property, as his own, and allowed him to do so, or that W. L. Grooms did not know, and had nothing to excite his suspicion, that Neff was acting as agent." The instruction is objected to on the ground that W. L. Grooms is not a party to the suit, and that it leaves out of consideration the claim of A. S. Grooms that he was an innocent purchaser of the surrey from his son, W. L. Grooms. It is true that W. L. Grooms is not a party to this suit, but the sale was made to him, and the right of the plaintiff to recover the surrey is dependent upon the terms and circumstances of that transaction. A. S. Grooms, according to the undisputed evidence, was not an innocent purchaser, and can claim no greater rights than those of his son and immediate vendor. He confesses that he bought the surrey from his son after the commencement and dismissal of the first suit. He had actual knowledge of the pendency of the suit, was present in court for the purpose of making defense for his son when the suit was dismissed. He therefore knew, when he received the surrey from his son, that the plaintiff had repudiated the sale and was claiming title and right to possession of the surrey.

Other instructions given at the instance of plaintiff were objected to by the defendant, but for the reasons already stated we think the objections were not well founded. Upon the whole, we think that the case was submitted to the jury upon instructions quite as favorable to appellant as the evidence war-

ranted, and that the evidence was sufficient to justify the verdict.

Appellant also urges as grounds for reversal alleged improper conduct of counsel for the plaintiff in stating, in his closing argument to the jury, that W. B. Neff had never paid for his stock in the corporation, when there was no evidence in the record of that fact. The fact of Neff having failed to pay for his stock was immaterial and could not have influenced the jury in arriving at a verdict. It was undisputed that Neff was acting in a representative capacity, and had no power to sell goods of the corporation in payment of his individual debt. Therefore it detracted nothing from his authority as agent and officer of the corporation to say that he had not paid for his stock.

We find no prejudicial error in the record, and the judgment is affirmed.

#### On Rehearing.

The defendant requested the court at the close of the plaintiff's testimony to peremptorily instruct the jury to return a verdict in his favor. This was refused, and the defendant introduced testimony. We held on the consideration of the case that the evidence was sufficient to warrant the verdict, but counsel for appellant ask us now to say whether the plaintiff's testimony, without being supplemented by that introduced on behalf of defendant, was sufficient to sustain the verdict, and, if it was not, to reverse the judgment because of the court's refusal to give the peremptory instruction. They contend that the defendant did not waive his exception to the court's refusal to give a peremptory instruction at the close of plaintiff's evidence by introducing evidence which supplied the defects in the proof and justified the verdict.

A demurrer to the evidence, as a means of challenging its sufficiency, is unknown to our system of practice. The defendant may, however, at the close of the plaintiff's evidence, test its legal sufficiency by a request for a peremptory instruction in his favor. If, after a denial of the request, he introduces evidence which, together with that introduced by the plaintiff, is legally sufficient to sustain the verdict, he waives the error of the court in refusing to give the instruction. After verdict the only method of challenging the sufficiency of the evidence is to assign in the motion for new trial as grounds therefor that "the verdict is not sustained by sufficient evidence." On appeal this raises that question, and in testing the sufficiency of the evidence the court must consider all the evidence, whether introduced by the plaintiff or by the defendant. So, in testing the correctness of the trial court in denying a request for peremptory instruction, regardless of the time when the request is made, this court must look to all the testimony introduced, and will not reverse the case on account of the trial court's refusal to give the

request, even though the evidence was insufficient at the time the request was made, if upon the whole case there is sufficient to sustain the verdict. This is but another way of saying that the defendant, by introducing evidence sufficient to sustain a verdict against himself, waives an error of the court in refusing his request for a peremptory instruction at the close of the plaintiff's evidence. This is the rule of practice adopted and steadily adhered to in the federal courts and which we think is correct. *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Accident Ins. Co. v. Grandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

The evidence introduced by the plaintiff was sufficient to justify the verdict in its favor. It established the fact that the sale made by Neff to W. L. Grooms in satisfaction of his own debt was unauthorized. This cast the burden upon the defendant, A. S. Grooms, of showing that W. L. Grooms was innocent of knowledge of Neff's lack of authority, and also that he (defendant) was an innocent purchaser from W. L. Grooms for value and without notice of any defects in his title. He attempted to prove these facts but failed. So at all stages of the trial there was evidence sufficient to sustain a verdict for plaintiff.

Rehearing denied.

#### GIBBERSON v. WILSON et al.

(Supreme Court of Arkansas. July 9, 1906.)

##### STIPULATIONS—LIMITING ISSUES.

A stipulation in an adverse suit, under Rev. St. U. S. §§ 2325, 2326 [U. S. Comp. St. 1901, pp. 1429, 1430], to settle conflicting rights in a mining claim, that the parties waive all other points raised by the pleadings and submit the sole issue whether plaintiffs under their location resumed work on the claim, after forfeitures, before defendant's location, is valid, and dispenses with proof of other matters.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Stipulations, §§ 2, 6, 23.]

Appeal from Marion Chancery Court; T. H. Humphreys, Chancellor.

Action by A. S. Wilson and others against E. S. Gibberson. Judgment for plaintiffs. Defendant appeals. Affirmed.

W. S. Chastam and Jno. B. Jones, for appellant. Horton & South, for appellees.

HILL, C. J. This is an "adverse suit" authorized by sections 2325, 2326, Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430], to settle conflicting rights in a mining claim. The complaint did not contain all the allegations necessary to make out a case for the plaintiff, but did contain general allegations sufficient to make the complaint a proper basis for a good complaint if objection had been taken to its form. It was answered on the merits, and then this stipulation entered into:

"And both parties in open court waived all other points raised in the pleadings and submitted the cause to the court upon the sole issue as to whether or not plaintiffs, under their said location, had resumed work on said claim in the year 1899, and after the forfeiture in 1898, and before the location under which the defendant claims title, which was made June 20, 1899." On the sole issue tried before the court there was a conflict, and such a conflict that it cannot be said that the chancellor's findings are against the weight of the evidence.

The appellant contends that the evidence fails to show that the plaintiff made out all the necessary proof to entitle him to patent under the laws of the United States, and that this stipulation would not do away with the necessary allegations and proof of all facts necessary to make out a case entitling him to a patent. The nature of these suits are fully explained in *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276, and *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864. The Congress has not attempted to regulate the practice in the state courts in these cases. It merely has relegated the litigation to the courts, instead of litigating the questions before the departments, as formerly. Treating the case as any other litigated matter between individuals, the stipulation was binding, and not improper practice. It is entirely competent for parties to a litigation to stipulate that the only issue is the one therein stated. Such is the whole object of pleading, to eliminate the undisputed matters and narrow the issue to the material point of difference. This stipulation merely performed that office, and necessarily implied that all other facts necessary on either side to make out the respective contentions were undisputed. Taking this view of the case, it was not necessary for plaintiff to prove facts other than on the point of issue. Whether the United States land officers will accept a judgment based on an issue thus limited is a matter for their consideration, not for this court. There is nothing to indicate that the issue was a feigned one, for the fraudulent purpose of deceiving either the court or Land Department of the government.

The judgment is affirmed.

#### GREEN v. ROBERTSON.

(Supreme Court of Arkansas. July 9, 1906.)

GARNISHMENT — PRIORITIES BETWEEN GARNISHMENT AND ASSIGNMENT OF FUND.

Kirby's Dig. § 358, after prescribing the manner in which orders of attachment containing clauses authorizing the summoning of garnishees may be executed on different kinds of property, provides that, when the property to be attached is a fund in court, execution of the order of attachment shall be by leaving with the clerk of the court a copy thereof with a no-

tice specifying the fund. *Held*, that where a commissioner on a mortgage sale, on which there was a surplus, was summoned as garnishee in an order of attachment before confirmation of the sale, on confirmation, the garnishment took precedence of an assignment of the surplus by the mortgagor, made after service of the writ and before confirmation.

Appeal from Pulaski Chancery Court; Jesse O. Hart, Chancellor.

Action by B. W. Green against J. F. Reid (F. A. Garrett, garnishee), in which T. N. Robertson intervened. From a judgment in favor of Intervener, plaintiff appeals. Reversed.

Tom T. Dickinson, for appellant. Robertson & Martineau, for appellee.

BATTLE, J. B. J. Brown instituted a suit against J. F. Reid in the Pulaski chancery court to foreclose a mortgage executed by the defendant to the plaintiff to secure certain indebtedness. On the 29th day of March, 1905, the chancery court rendered a decree in favor of the plaintiff against the defendant for \$3,241.80, the amount of the indebtedness secured, and ordered the land described in the mortgage to be sold to satisfy the judgment, and appointed F. A. Garrett the clerk of the court, the commissioner to make the sale. On the 21st day of April, 1905, the day appointed for the sale, the commissioner offered the lands to the highest bidder, at public vendue, and sold the same to W. H. Schaer for \$3,485, which he paid to the commissioner.

On the 21st day of April, 1905, B. W. Green commenced an action before a justice of the peace of Pulaski county against J. F. Reid on a promissory note and sued out an order of attachment, and on the 26th day of April, 1905, as a part of the attachment proceeding sued out from before the justice of the peace writs of garnishment, alleging therein that F. A. Garrett, who was clerk of the Pulaski chancery court, and F. A. Garrett, the same person, as commissioner, was indebted to Reid, the defendant, for a surplus from a sale. The writs were directed to any constable of Pulaski county, and commanded him to summon F. A. Garrett and F. A. Garrett as commissioner, as garnishee, to appear before the justice of the peace on the 6th day of May, 1905, to answer what goods, chattels, moneys, credits, or effects he may have in his hands or possession belonging to the defendant, and to answer such further interrogatories as may be propounded to him. The writs were served on the same day. Thereafter, on the same day, Reid made an assignment of all his right, title, and interest in and to the purchase money that might accrue to him from the said sale to T. N. Robertson. On the same day Robertson filed a petition in the chancery court, in *B. J. Brown v. J. F. Reid*, stating that the assignment had been made to him, and asking that his rights be protected.

On the 28th of April, 1905, the commissioner, Garrett, reported to the court that he had sold the lands to Schaer, and that he (Schaer) had paid the purchase money; and asked that he be allowed \$50 for his services; all of which the court approved; and on the same day the court allowed Schaer, the purchaser, \$46.20, as a credit for taxes paid by him on the lands.

On the 2d day of May, 1905, Commissioner Garrett, in pursuance of the order of the court, paid to Brown the amount due on his judgment against Reid, out of the proceeds of the sale under the decree of foreclosure.

On the 4th day of May, 1905, Green filed his petition in the chancery court, stating that he had caused the writs of garnishment to be issued and served before the assignment to Robertson, and asking that an order be made directing the commissioner to hold the money arising from the sale under the decree of the court and remaining in his hands, and not disbursed under previous orders of the court, "in obedience to the writs of garnishment."

On the 6th day of May the petitions of Robertson and Green were presented to the court, and on the 13th day of May the court adjudged, ordered, and decreed "that the F. A. Garrett as commissioner is not subject to the writ of garnishment; that there is not now nor has there been in the hands or possession of F. A. Garrett or F. A. Garrett as commissioner any goods, chattels, moneys, credits, or effects belonging to J. F. Reid as surplus from the foreclosure sale subject to the garnishment; that B. W. Green be forever enjoined and restrained from the further prosecution of the garnishment proceedings against F. A. Garrett as commissioner; that T. N. Robertson, by virtue of the assignment to him by J. F. Reid, is the lawful owner of the balance of the purchase money from the foreclosure sale, amounting to \$—— now remaining in the custody of this court and not disbursed by its previous orders; that said amount is hereby ordered to be paid over to him, the said T. N. Robertson, as the lawful owner." And Green appealed.

Was so much of the proceeds of the sale of the lands under the decree of the court as would be due to Reid, after the payment of the judgment in favor of Brown and all other claims thereon, subject to garnishment or attachment at the time the writs of garnishment were served on Garrett? This is the only question presented by the appellant and appellee for our consideration and decision.

The proceeds of the sale, when paid by the purchaser became conditionally a fund in court. It was subject to the control or disposition of the court. The purchaser or bidder could not, without permission of the court, regain possession of it. On the contrary, it was within the power of the court,

by summary orders and proceedings, to compel him to act in pursuance of the decree under which the sale was made. *Porter v. Hanson*, 36 Ark. 591, 606. The only condition on which it could cease to be a fund in court was a disapproval of the sale by the court. When the sale was confirmed it absolutely became a fund in court, and the confirmation related back to the day of sale.

In the absence of a statute authorizing it, a fund in court is not subject to garnishment or attachment until the purposes for which it is held as such have been accomplished, and the only duty of the officer holding the same is to pay the money to the defendant in the garnishment or attachment. *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331; *Weaver v. Davis*, 47 Ill. 235; *Willard v. Decatur*, 59 N. H. 137; *Wilbur v. Flannery*, 60 Vt. 581, 15 Atl. 203; *Rood on Garnishment* §§ 27, 31-34; 2 *Shinn on Attachment and Garnishment*, §§ 506, 507.

We have, however, a special statute in this state authorizing the attachment of funds in court. After prescribing the manner in which orders of attachment, containing clauses authorizing the summoning of garnishees, may be executed upon different kinds of property it says: "When the property to be attached is a fund in court, the execution of the order of attachment shall be by leaving with the clerk of the court a copy thereof, with a notice specifying the fund and where several orders of attachment are executed upon such fund on the same day they shall be satisfied out of it ratably." *Kirby's Dig.*, § 358. The time when it can be attached is not specified. So long as it exists it can be attached at any time.

We are not without precedents sustaining this construction: "In the absence of a special statute, it was an undisputed rule of law that an executor or administrator could not, in his official capacity, be held liable as a garnishee at the suit of a creditor of the decedent, or of one who was a legatee or distributee, or other creditor of the estate." 2 *Shinn on Attachment and Garnishment*, § 510. In Massachusetts a statute provided "that any debt or legacy due from an administrator and any other goods, effects or credits in the hands of an administrator or executor, may be attached by the trustee process." In *Wheeler v. Bowen*, 20 Pick. (Mass.) 563, it was held, that, under this statute, "the interest of an heir at law in a distributive share of an intestate estate, in the hands of the administrator, is subject to be attached on the trustee process, before a decree of distribution, and although it may be uncertain whether there will be any assets for distribution; and the suit may be continued until sufficient opportunity has been given for the settlement of the administrator's account and a decree of distribution." See to the same effect *Strong v. Smith*, 1

Metc. (Mass.) 476; Hoar v. Marshall, 2 Gray (Mass.) 251; Sinnickson v. Painter, 32 Pa. 384; Simonds v. Harris, 92 Ind. 505; 2 Shinn on Attachment and Garnishment, § 511, and cases cited.

In *Strong v. Smith*, 1 Metc. (Mass.) 476, Chief Justice Shaw, speaking for the court, said: "The trustee process," under the Massachusetts statute, "operates as a species of compulsory statute assignment, by which a creditor may obtain that by operation of law, which his debtor might voluntarily assign to him, in payment of his debt."

In the case before us the writs of garnishment were a part of an attachment proceeding, the legal effect of the execution of which was to attach the fund in court in controversy, at the time they were executed, which being prior in time to the assignment to Robertson, he takes nothing until the debt secured by garnishment is satisfied.

The decree of the court is reversed, and the cause is remanded, with directions to the court to enter an order commanding the commissioner to hold the said surplus subject to the garnishment.

#### BIRCH et al. v. WALWORTH.

(Supreme Court of Arkansas. July 9, 1906.)

**TAXATION—CERTIFICATE OF LIST OF LANDS TO BE SOLD—TIME FOR MAKING.**

Under Kirby's Dig. § 7086, requiring the clerk to certify the published list of lands to be sold for taxes, the certificate must be made before the day of sale.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1281.]

Appeal from Desha Chancery Court; Marcus L. Hawkins, Chancellor.

Suit between Thomas W. Birch and others and Douglass Walworth. From the decree, the former appeal. Affirmed.

J. W. Dickinson, for appellants. Baldy Vinson, for appellee.

HILL, C. J. Appellants rely upon a tax title based on a tax sale of June 11, 1894. It was attacked, *inter alia*, for failure of the clerk to make the certificate required by section 7086, Kirby's Dig. The certificate found in the transcript complies with the certificate therein first mentioned, but the second certificate, the one to be at the foot of the record, stating in what newspaper published, etc., is not there found. In another connection a certificate containing the substance of this requirement is found; but it is dated 13th of June, 1894, and that is fatal. *Hunt v. Gardner*, 74 Ark. 583, 86 S. W. 426, covers the point entirely.

Appellants claim that appellees do not show an interest in the land at time of sale and hence are not qualified to attack the tax title. The evidence of this title is of record except as to two deeds, and their existence, and the inability of appellees to

produce them were proved by parol evidence. The evidence is not at all strong nor satisfactory; but, doubtless, the best attainable under the circumstances, and, in the absence of any countervailing evidence, is sufficient to sustain the chancellor's finding.

Other questions are presented; but, as these are decisive of the case, it is unnecessary to discuss them.

Judgment affirmed.

#### VAUGHAN v. KENDALL et al. SAME v. MOORE, Auditor. SAME v. HAMILTON.

(Supreme Court of Arkansas. July 9, 1906.)

**TAXATION — COLLECTORS — APPOINTMENT BY GOVERNOR—CONSTITUTIONAL LAW.**

Under Const. art. 7, § 46, declaring that the electors of each county shall elect one sheriff, who shall be *ex officio* collector of taxes unless otherwise provided by law, Act March 13, 1905, (Acts 1905, p. 207), creating the office of collector of Madison county, and authorizing the Governor to appoint a collector, is constitutional and valid.

Appeal from Madison Chancery Court; T. H. Humphreys, Chancellor.

Separate actions by Ben Vaughan against Lem Kendall and others, against A. E. Moore, as auditor, and against I. P. Hamilton. From judgments for defendants, plaintiff appeals. Affirmed.

The following is the statute (Acts 1905, pp. 207, 208) referred to in the opinion:

"An act to create the office of tax collector in Madison county, Arkansas, and for other purposes."

"Be it enacted by the General Assembly of the state of Arkansas:

"Section 1. That the office of tax collector of Madison county is hereby created, which said officer shall be elected and shall qualify as other county officers, and shall hold his office for a term of two years, and give bond for the faithful performance of his duties, as now required by law; and shall receive as compensation for his services such fees as are now, or may hereafter be allowed by law to *ex officio* collectors.

"Sec. 2. That the Governor shall appoint a tax collector, as herein provided, whose term shall expire October 31, 1906.

"Sec. 3. That this act take effect and be in force from and after October 31, 1905.

"Approved March 13, 1905."

Harris & Ivie and Myers & Bratton, for appellant. Johnson & Combs and Walker & Walker, for appellees.

HILL, C. J. These three appeals in different ways raise the same question, *viz.*, the validity of an act of the General Assembly, approved March 13, 1905 (Acts 1905, p. 207), creating the office of collector of Madison county. Under this act, J. P. Hamilton was appointed collector. Ben Vaughan

had been elected sheriff, and had qualified as such and as ex officio collector. This act took the office of collector away from him in the middle of his term, and authorized the Governor to appoint a collector. The act will be set out in the statement of facts. The clause of the Constitution is as follows: "The qualified electors of each county shall elect one sheriff, who shall be ex officio collector of taxes unless otherwise provided by law." Article 7, § 46. The natural meaning to be attached to this is that the sheriff shall be the collector until the Legislature otherwise provides. The sheriff takes office with this constitutional menace to his tenure on the collectorship staring him in the face, and has no legal cause of complaint if the Legislature exercises its power. It is contended that this clause should be construed to have reference to the status at the time the sheriff is elected, and should not affect his tenure of the collectorship which was perfect when he was elected sheriff. Even if this construction was placed upon it, the appellant's case would not be helped. This could not be possibly taken as forbidding the Legislature to separate the offices, and the collectorship is an incident to the sheriff's office which is not itself a constitutional office. *Falconer v. Shores*, 37 Ark. 386. The election or appointment to office creates no contract between the officer and the state which is protected by the federal constitutional inhibition against impairing the obligation of contracts. *Humphry v. Sadler*, 40 Ark. 100; *Vincenbeller v. Reagan*, 69 Ark. 460, 64 S. W. 278; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. Ed. 1187. Certain offices have constitutional safeguards against decreasing salaries during the term of office, but sheriff is not one of them, and, a fortiori, the collector is not. *Humphry v. Sadler*, 40 Ark. 100. The Constitution "leaves the office of collector under legislative control." *Falconer v. Shores*, 37 Ark. 386. The Legislature, having no constitutional inhibitions in its way, was sovereign in dealing with the office of collector of taxes, and, having the power to take it away from the sheriff in the middle of his term, proceeded to do so.

The judgments are affirmed.

#### STINSON v. RAY.

(Supreme Court of Arkansas. July 9, 1906.)

#### REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE.

Where a draughtsman misunderstood the contract between a grantor and grantee and erroneously described the land, and the grantor executed the deed without discovering the error, she was entitled to a reformation.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 43-46.]

Appeal from Saline Chancery Court; A. Curl, Chancellor.

Suit by Elizabeth Ray against E. Y. Stinson. From a decree in favor of complainant, defendant appeals. Remanded, with direction for modification.

Mehaffey & Armistead, for appellant. J. M. Westbrook, for appellee.

BATTLE, J. Elizabeth Ray brought this suit against E. Y. Stinson in the Saline chancery court to reform a deed executed by her to him on the 22d day of November, 1900.

In the month of November, 1900, plaintiff, in consideration of the sum of \$250, agreed to sell and convey to the defendant certain real estate, situate in the town of Benton, in Saline county, Ark., described and bounded as follows: "Beginning at a point on the north line of block 13, in said town of Benton, 20 feet east of the northwest corner of said block, run thence east, along the north line of said block, 20 feet; thence south 61½ feet; thence west 20 feet; thence north 61½ feet to the place of beginning, on the north line of said block"—and at the same time agreed to convey to him a right of way extending from the street on the west side of block 13 east a distance of 40 feet, "and so as to cover the south side of the property she agreed to sell and convey, and to furnish an outlet from the south end of said property to Depot street."

Plaintiff executed to the defendant a deed by which she conveyed to him the lot she agreed to sell and the right of way as a part thereof, in fee simple, and described the same as follows: Commencing 20 feet east of the northwest corner of block No. 13 in Benton, Ark.; thence running east 20 feet; thence south 69½ feet; thence west 40 feet to the west line of said block 13; thence north 8 feet; thence east 20 feet; thence north 61½ feet to the place of beginning.

Upon the hearing of the cause the chancery court found "that in the drafting and writing of said deed, the land to be conveyed thereby was erroneously described so as to embrace the property agreed to be sold, and in addition thereto an additional strip or parcel of land 8 feet wide, north and south, and extending from Market street, otherwise called Depot street, east 40 feet, and lying south of and adjacent to the land so agreed to be sold; that, on the 22d day of November, 1900, the plaintiff, without knowledge of the fact that said deed embraced more land than she had contracted and agreed to sell to the defendant, executed the deed without the error having been corrected; that the deed so executed and containing the error as to the land embraced therein, was filed for record in the office of the recorder of Saline county, Ark., and appears of record at page 76, in Book S, of the Records of Deeds of the county."

And adjudged and decreed:

"First. That the deed executed by the plaintiff, Elizabeth Ray, to the defendant, E.

Y. Stinson, on the 22d day of November, 1900, and filed for record with the recorder of Saline county, Ark., on the 22d day of November, 1900, and appearing of record at page 76, of Book S, of the Records of Deeds on file in the office of the recorder of said county, be and is so corrected as to embrace the following property, and none other, to wit: Beginning at a point on the north line of block 13, in the town of Benton, in Saline county, Ark., 20 feet east of the northwest corner of said block; run thence east, along the north line of said block 13, 20 feet; thence south 61½ feet; thence west 20 feet; thence north 61½ feet to the north line of said block and the place of beginning.

"And that the defendant be, and is, enjoined from setting up, or claiming title to any property described in said deed, except that hereinabove designated.

"It is further considered, adjudged, and decreed by the court that an alley six feet wide, extending from Market street, otherwise called Depot street, east 40 feet, and lying south of and adjacent to the above-described tract or parcel of land, be opened by the plaintiff, and kept perpetually open, as an outlet, and for the accommodation and use of the defendant and all others that may have occasion and desire to use the same. And the same is hereby decreed to be a public alley."

The undisputed facts in the case show that the additional strip of land, 8 feet wide, was to be used as an outlet, a way of ingress and egress to and from the lot conveyed, and for no other purpose. Plaintiff and defendant so understood and agreed. According to the terms of their agreement a right of way 8 feet wide, north and south, and extending due east from Depot street a distance of 40 feet, and lying south of and adjacent to the land sold should have been conveyed. The draughtsman who drew the deed, evidently, did not understand the contract of the parties; and the grantor executed it without discovering the error. The evidence adduced at the hearing, clearly, unequivocally, and decisively prove these facts. For the law of the case see *McGulgan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Goerke v. Rodgers*, 75 Ark. 72, 86 S. W. 837.

The cause is remanded, with directions to the chancery court to modify its decree in accordance with this opinion.

#### ARKANSAS & TEXAS GRAIN CO. v. YOUNG & FRESCH GRAIN CO.

(Supreme Court of Arkansas. July 9, 1906.)

#### 1. SALES—WAIVER OF RIGHT TO DAMAGES—ALLOWING INSPECTION.

One who sells a car of corn does not waive his right to damages for wrongful rejection, by his giving the purchaser, after the arrival of the car, the right to inspect the corn; he having refused to accept unless this was granted.

#### 2. SAME—RESALE ON REJECTION.

There is no waiver of plaintiff's right to damages for defendant's wrongful rejection of a car of corn bought by it from the fact that plaintiff's agent, sent to resell the corn when it was rejected, resold it to defendant; its offer being the best made.

#### 3. SAME—NOTICE OF RESALE.

Formal notice of intention to resell a car of corn, wrongfully rejected by the purchaser, need not be given him by the seller; the resale being made to such purchaser.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 919.]

Appeal from Circuit Court, Miller County; James S. Steel, Judge.

Action by the Young & Fresch Grain Company against the Arkansas & Texas Grain Company. From an adverse judgment, defendant appeals. Affirmed.

L. A. Byrne and B. A. Lewis, for appellant.  
W. H. Arnold, for appellee.

RIDDICK, J. This is an appeal by the Arkansas & Texas Grain Company from a judgment rendered against it in favor of the Young & Fresch Grain Company for damages for breach of a contract to purchase two car loads of corn. The corn was shipped from St. Louis to defendants at Texarkana. The defendants on arrival of the corn at Texarkana refused to accept it unless first allowed to inspect it. This permission was granted and defendant after inspecting the corn rejected it. Thereupon plaintiff sent an agent from St. Louis who took charge of the corn and resold it to defendant for a lower price, defendants having offered the best price that could be obtained in that market. But the corn had become heated and injured after shipment and by reason of the refusal of defendants to accept and the consequent delay, the corn had sustained further injury and the price received was below the contract price and plaintiffs brought this action to recover the difference. The case was submitted to the court sitting without a jury, and he found that the corn was of the kind ordered by defendant, and that it was in good condition at the time it was delivered to the railway company in St. Louis. The court further found that one of the conditions of the sale was that the liability of the plaintiff to defendant should cease when the corn was delivered in good condition to the railway company for transportation to Texarkana, and that, by the terms of the contract, the plaintiff was not responsible for the heating of the corn after delivery to the carrier, he therefore found in favor of plaintiff and gave judgment against defendant for the sum of \$180.

The evidence was sufficient to support the finding made by the court, which, like the verdict of a jury, is conclusive on all questions of fact upon which the evidence is conflicting. Nor do we find any error of law that requires a reversal of the judgment.

The contention of appellants that the per-



mission to inspect the corn included the right to reject cannot be sustained. Plaintiffs granted the right to inspect after the corn had already arrived at Texarkana because defendant refused to accept unless inspection was granted. This was done in an effort to induce defendants to accept the corn and did not amount to a waiver of the right of plaintiff to claim damages for wrongful rejection. *Riendeau v. Bullock*, 147 N. Y. 289-275, 41 N. E. 561.

Neither did the fact that the agent of appellee came down to Texarkana and resold the corn to defendant amount in itself to a waiver of that right. It was his duty to obtain the best price possible, and, as the best offer came from defendants, plaintiff did right in accepting the offer. The circumstances in proof justified the circuit court in finding that there was no waiver by plaintiff of the original contract, nor of its right to seek damages for breach of the contract. *Riendeau v. Bullock*, 147 N. Y. 269, 41 N. E. 561; *Lewis v. Greider*, 51 N. Y. 237; *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; *Benjamin on Sales* (Bennett's Ed.) 828. As the resale of the corn was made to the defendant company there was no necessity to give formal notice of the intention to resell. Under such circumstances the defendant could be in no way injured by the want of such notice. *Benjamin on Sales* (Bennett's Ed.) p. 829; *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167; *Clore v. Robinson* (Ky.) 38 S. W. 687.

On the whole case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

#### CRAWFORD et al. v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST.

(Supreme Court of Arkansas. July 9, 1906.)  
EQUITY—REMEDY AT LAW.

Where one to whom land is devised for her life or widowhood, with power of testamentary disposition, but with remainder over in the event of her marrying or dying intestate, deeds a right of way for a levee, and the same is built, neither the trustees named in the will to hold the title and manage the property in the event the widow should die intestate or marry, nor the cestuis que use, as holders of the interest in remainder, may maintain a suit in equity against the levee district for a cancellation of the conveyance, as it does not affect their right, and, they having failed to prevent the construction of the levee, their remedy is limited to an action for damages.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 121-140.]

Appeal from Lee Chancery Court; E. D. Robertson, Chancellor.

Suit by W. J. Crawford and another against the board of directors of St. Francis levee district. Complaint dismissed, and plaintiffs appeal. Affirmed.

W. A. Compton and Carroll & McKellar, for appellants. H. F. Roleson, for appellee.

McCULLOCH, J. Julius A. Taylor of Memphis, Tenn., owned a large plantation fronting on the Mississippi river in Lee county, Ark., and by his last will and testament devised it to his widow, Louise C. Taylor, during her life or widowhood, with power to dispose of same by last will, but with remainder over, in the event of her marriage or death intestate, to the children of said testator. Certain trustees were named in the will to hold the title to the property and manage the same in the event that the widow should die intestate or marry. Mrs. Taylor executed to the board of directors of the St. Francis levee district a deed for a nominal consideration, conveying a right of way through said plantation for a levee, and the levee was duly constructed. W. J. Crawford and W. H. Carroll, the trustees under the will of Julius A. Taylor, instituted this suit in equity against said board of directors to cancel said conveyance executed by Mrs. Taylor, and to recover damages caused by the construction of the levee through said plantation. They allege and undertake to prove that said conveyance was executed by Mrs. Taylor upon the representations made by certain officers of the board of directors to the effect that the levee would be constructed straight down the bank of the river, thus affording protection to said plantation against overflow; that it was not so constructed near the bank of the river, leaving the greater part of the land in cultivation in front of the levee and unprotected. They allege and prove that about 85 acres of valuable land on the plantation were taken and used in the construction of the levee, and that the remaining lands were greatly damaged. Mrs. Taylor was not a party to the suit. The chancellor dismissed the complaint for want of equity, and the plaintiffs appealed.

There is no equity in the complaint, and the chancellor properly dismissed it. Neither the trustees nor cestuis que use, as holders of the interest in remainder, can demand a cancellation of the conveyance executed by the life tenant, as the same does not affect their rights. They might have prevented the taking and damage to the land without compensation for their interest, but the levee has been built by the board of directors, and their only remedy would be to recover damages for the taking and injury. The execution of the conveyance did not cut off that right, and the remedy at law is complete and adequate.

Judgment affirmed.

#### JETT v. THEO. MAXFIELD CO.

(Supreme Court of Arkansas. July 9, 1906.)

#### 1. PLEADING — MOTIONS — STRIKING OUT CAUSE OF ACTION.

Under the express provisions of Kirby's Dig. § 6081, the court may, on motion of defend-

ant before defense, strike out a cause of action improperly joined.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1147-1162, 1165.]

## 2. SAME—ELECTION BETWEEN COUNTS.

In an action by a corporation, one count was for goods sold by plaintiff, and the second for goods sold by another corporation; plaintiff alleging that the stockholders in both corporations were the same, and that plaintiff owned the latter account. *Held*, that a motion to strike out the second count, or to compel an election should have been sustained, as an open account is, under the statute, not assignable, and an assignee cannot sue on it alone without joining the assignor.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1199, 1200.]

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Action by the Theo. Maxfield Company against C. E. Jett. From a judgment in favor of plaintiff, defendant appeals. Judgment on the first count of the complaint affirmed, and on the second, reversed.

J. B. Baker, for appellant. Wright & Reeder, for appellee.

RIDDICK, J. This was an action by the Theo. Maxfield Company against C. E. Jett to recover the amount due on two accounts for goods and merchandise sold and delivered. One of these accounts was for goods sold to defendant by the plaintiff Theo. Maxfield Company, a corporation doing business at Batesville. The other account was for goods sold to the defendant by the Maxfield Grocery Company, a corporation formerly doing business at the same place. Plaintiff alleged that, though the latter was a separate corporation, the stockholders in both corporations were the same, and that the plaintiff was now the owner of the account of the Maxfield Grocery Company. There was no denial of this allegation in the answer, but before filing his answer the defendant filed a motion objecting to the complaint on the ground of a misjoinder of parties and actions, and asking that the second paragraph of the complaint be stricken from the complaint, or that plaintiff be compelled to elect on which count of its paragraph it would proceed to trial. This motion to strike out the cause of action improperly joined, was proper practice under our statute. Kirby's Dig. § 6081; Waldo v. Thweatt, 64 Ark. 126, 40 S. W. 782.

We are of the opinion that the motion to strike out the second count in the complaint or compel an election should have been sustained. An open account is, under our statute, not assignable, and the party to whom it is sold or transferred cannot sue on it alone but must make his assignor a party to the action. *Railway v. Camden Bank*, 47 Ark. 541, 1 S. W. 704. It follows that the Maxfield Grocery Company was a necessary party to an action to recover the amount due on the second account, and for that reason a suit on this account could not

be joined with an action on the first account, the parties plaintiff not being the same. *Meehan v. Watson*, 65 Ark. 211, 47 S. W. 109.

There are other points discussed, but we are of the opinion that the rulings and judgment of the circuit court on the first paragraph of the complaint were correct. That paragraph was based on the account of the Theo. Maxfield Company against defendant for \$306.42, but the circuit court found that one item of \$79.66 was improperly charged on that account.

We are of the opinion that the judgment of the circuit court for the balance due on that account with interest, after deducting the sum named, should be affirmed. The clerk of this court will make the computation, and enter judgment accordingly. But the judgment on the second paragraph of the complaint for the account of the Maxfield Grocery Company will be reversed, and the action thereon dismissed, without prejudice to another suit.

## AMES v. AMES.

(Supreme Court of Arkansas. July 9, 1906.)

**ESTOPPEL—TO ASSERT ACCEPTANCE OF DEED.**

Where A., who had bought land of and received a deed therefor from G., returned to G., told him the deed was not as he had thought it to be, and that he had not accepted it, but had destroyed it, and thereby induced G. to execute a deed of the land to S., wife of A., and likewise his subsequent grantee is estopped to assert against S. that the deed of G. to A. was accepted.

Appeal from Benton Chancery Court; T. H. Humphreys, Chancellor.

Action by Clara Ames, by next friend, against Lina Ames. Decree for plaintiff. Defendant appeals. Affirmed.

McGill & Lindsey, for appellant. J. A. Rice, for appellee.

McCULLOCH, J. Appellee, Clara Ames, an infant suing by next friend, instituted an action in ejectment against appellant, Lina Ames, to recover a tract of land containing 40 acres situated in Benton county. The cause was by consent of parties transferred to equity, and the chancellor rendered a decree in favor of the plaintiff, canceling the defendant's claim of title, and awarding the land to the plaintiff. The plaintiff, Clara Ames, is the daughter of one D. D. Ames and his former wife, Sophronia, and the defendant Lina Ames is the divorced wife of D. D. Ames. Ames has been married three times, and as many times divorced. Sophronia, the mother of Clara, was his second wife, and defendant, Lina, was his last or third wife. In 1893 he purchased the land in controversy from H. A. Gramling and Elizabeth Gramling, and they executed and delivered to him a deed conveying the land to him. A few weeks later he went

back to the Gramlings, and represented to them that the deed was not satisfactory to him because he wanted and expected them to convey the land to his wife Sophronia and children by her, and that he had not accepted it. He represented to them that he had destroyed the former deed, and thereby induced them to execute a new deed conveying the land to Sophronia for life, or as long as she remained his wife or widow, with remainder over to the issue of their marriage. Subsequently, the plaintiff, Clara, was born. Ames obtained a divorce from his wife Sophronia on account of her misconduct, and intermarried with the defendant Lina Ames. This marriage occurred in 1897, more than four years after the execution of said deeds. In January, 1898, D. D. Ames and his wife Lina joined in the execution of a deed to one Cross, purporting to convey the land, and on the same day Cross executed a deed to Lina purporting to convey the land to her, and she now claims title under said deed. Prior to the commencement of this suit D. D. Ames obtained a divorce from defendant, Lina. The deed executed by the Gramlings to D. D. Ames was not recorded until about the time that he executed the deed to Cross. The deed from the Gramlings to Sophronia Ames for life with remainder over to her children was recorded shortly after its execution.

The case turns upon the question whether or not the title passed to D. D. Ames under the first deed executed by the Gramlings. Appellant claims that the deed was delivered, that the title passed thereby, and that the subsequent agreed surrender of the deed to the Gramlings did not reinvest them with the title so as to enable them to convey it to Sophronia and her child. D. D. Ames testified that he did not accept the deed. He stated, on examination as a witness, that he intended to have the conveyance made to his wife Sophronia, but that the notary public who prepared the deed and took the acknowledgment left it at his house with his wife during his absence; that on his return home the same day he read it, and told his wife to destroy it, as the title was not conveyed in accordance with his wishes; that he left home the next day, and was absent on business for about a month; that immediately upon his return he saw H. A. Gramling, and told him the deed was destroyed, and that he wanted them to execute a new deed in accordance with his wishes, which they (the Gramlings) agreed to execute, and did execute, as before stated; that he thought his wife had destroyed the old deed until several years afterwards when the defendant Lina found it, and induced him to join in the conveyance to Cross. He also testified that he told the defendant of the deed to Sophronia and the child, but that she recorded the old deed,

and insisted on his joining in the deed to Cross, which he says he did "for the sake of peace." Mr. George, the notary public, testified in contradiction of Ames' statement; that the first deed was prepared in accordance with Ames' instructions, and that the latter accepted it in that form without objection. The chancellor found that the first deed was delivered to and accepted by Ames, but that he elected to cause the land to be conveyed to his wife Sophronia and daughter, and that though the last deed executed by the Gramlings was ineffectual to convey the legal title, D. D. Ames held the legal title as trustee for his wife Sophronia and child Clara, the plaintiff.

It is settled by repeated decisions of this court that where the title to land passes by delivery and acceptance of a deed of conveyance, the same cannot be revested in the grantor by surrender or cancellation of the deed. *Strawn v. Norris*, 21 Ark. 80; *Cunningham v. Williams*, 42 Ark. 170; *Diver v. Friedheim*, 43 Ark. 203; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; *Watters v. Wagley*, 53 Ark. 509, 14 S. W. 774, 22 Am. St. Rep. 232. It is equally well settled that an acceptance of the deed by the grantee is essential to the passage of the title. 13 Cyc. p. 570 and cases cited. The evidence is conflicting as to whether or not D. D. Ames ever in fact accepted the first deed when it was executed and delivered to him, but it is undisputed that in a short time thereafter he went to the grantors, and, asserting that he had destroyed the deed and had never accepted it because it had not been executed in accordance with his wishes and directions, demanded the execution of a new deed to his wife, and her children. The grantor accepted his statement as true, and executed and delivered the new deed. Can he or his grantee, where no rights had intervened between the dates of the two deeds, be heard to assert now that he had, in fact, accepted the deed, and that the title had passed to him thereunder? We think not. His statement which induced the execution of the new deed must now be conclusively held to have been true. He and his grantee are estopped to deny its truth. There are many cases to the effect that where a grantee surrenders his deed to the grantor, and induces him to execute a new deed to another purchaser for value, he is estopped to assert title under the old deed because to do so would be to perpetrate a fraud. This court has so held. *Strawn v. Norris*, 21 Ark. 80; *Neal v. Speigle*, 33 Ark. 63; *Tallaferro v. Rolton*, 34 Ark. 503. In those cases there was no claim on the part of the grantee, as an inducement to the grantor to execute another deed, that he had not accepted the deed. The surrender was for the sole purpose of revesting the title in the grantor to enable him to make a new deed. In the case at bar the facts are much stronger.

Though the second deed was not made to a purchaser for a new consideration, the grantee Ames represented to the grantor that he had never accepted the first deed. Now, the acceptance or nonacceptance of a deed by a grantee is, under doubtful circumstances, a matter largely within the knowledge of the party himself, and where he afterwards plainly and unequivocally manifests his nonacceptance, and thus influences the conduct of his grantor, it ought to close the door to further inquiry on the subject, whether the rights of innocent purchasers for value have been built up under the new deed or not. Neither he nor his grantee should be permitted to say thereafter that he had, in fact, accepted the deed, and that the title passed to him thereunder.

The decree must therefore be affirmed. It is so ordered.

#### HARRIS v. UMSTED.

(Supreme Court of Arkansas. July 2, 1906.)

##### 1. PARTNERSHIP—RELATION—AGREEMENT.

A mere agreement by two persons to buy an article together does not amount to an agreement to form a partnership.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 7, 14, 16.]

##### 2. TENANCY IN COMMON—SALE BY CO-TENANT—ACCOUNTING.

Where a tenant in common sold property owned by himself and his co-tenant, and received the proceeds thereof, the co-tenant could ratify the sale and recover his share of the proceeds.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 27, 132, 136.]

##### 3. EQUITY—JURISDICTION—WAIVER OF OBJECTIONS.

Where no motion to transfer an action at law brought in equity was made, the right to object to the jurisdiction of equity to hear the cause was waived.

##### 4. PARTNERSHIP—RELATION—AGREEMENT—EVIDENCE—SUFFICIENCY.

Plaintiff and defendant, engaged in buying and selling pearls, agreed, for the purpose of preventing competition in the buying of a pearl belonging to a third person, to go to the residence of the third person and attempt to buy the pearl. Defendant stated that the only agreement made was that they would not bid against each other on that occasion, and that if either bought the pearl on that trip it should be for the benefit of both. The pearl was not bought at that time. Plaintiff claimed that the agreement was not limited to the particular occasion, but, though he knew of defendant purchasing the pearl at another occasion, made no claim to an interest therein, nor offered to pay any part of the purchase price, until after a year afterwards, when he learned that the pearl had been sold for a large price. *Held*, that the agreement to purchase the pearl did not extend beyond the occasion the persons went together for the purpose of buying it, and defendant, buying it at a subsequent occasion, was not obliged to account for the proceeds of a sale thereof.

Appeal from Jackson Chancery Court; George H. Humphries, Chancellor.

Suit by Walter Harris against Thomas P. Umsted. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Jno. W. & Jos. M. Stayton and C. T. Coleman, for appellant. Stuckey & Stuckey and J. M. Bell, for appellee.

RIDDICK, J. This is a suit in equity, brought by Walter Harris against Thos. P. Umsted to recover one-half of the profits arising from the purchase and sale of a pearl. Harris and Umsted both lived in Newport, Ark. Harris was a pearl buyer, engaged in the business of buying and selling pearls. Umsted was a member of the firm of T. P. Umsted & Co., composed of himself and his brother, G. B. Umsted, which firm was engaged in the same business. During the morning of June 6, 1902, Harris and T. P. Umsted each received at Newport information by telephone that one De Vault, of Bradford, had found near there, in White river, a valuable pearl which he desired to sell. Each of these parties learned, also, that the other had received this information and was desiring to buy this pearl. Bradford, where the owner of the pearl lived, was about 20 miles from Newport, and, as the morning train going south from Newport had passed before they received the information about the pearl, they were compelled, in order to reach Bradford that day, to go by horse and buggy. To avoid a race between them from Newport to Bradford and subsequent competition in buying the pearl, they agreed to go together in a buggy to Bradford and to purchase the pearl together or jointly, if it could be obtained at a fair price. They went to Bradford, but failed to obtain the pearl. The owner at first demanded over \$2,000 for the pearl, but finally offered to take as low as \$1,350, while Harris and Umsted offered \$1,300 for it. That was the highest price offered, and they returned to Newport without having purchased the pearl. The next day Umsted returned to Bradford on the train and purchased the pearl, paying therefor \$1,410. On the day following this purchase Harris was informed of the purchase by Umsted, and he asked Umsted if he (Harris) was not interested with him in the purchase. Umsted replied that he did not understand it that way; that he had purchased the pearl for the firm of T. P. Umsted & Co. It was over a year afterwards before Harris mentioned the subject to Umsted again. He then tendered Umsted one-half of the money he had paid for the pearl and notified him that he claimed a one-half interest in the proceeds of the sale of the pearl, for in the meantime Umsted & Co. had sold the pearl in New York City for \$6,700, and the fact that the pearl had been sold for a large sum had become generally known in Newport, and Harris knew it at the time he made the tender. The chancellor found that there was not sufficient evidence to sustain the allegations of the complaint, and dismissed the complaint for want of equity. The appeal of plaintiff brings the case before us for review.

If we take the evidence of the plaintiff himself as true, it is doubtful if it is sufficient to support the allegation in his complaint that he and the defendant "formed a co-partnership between them for the purpose of buying and selling a valuable pearl." It is true that he testified that they agreed to go down to Bradford and "buy it together." And in response to the question of his own counsel as to whether they agreed to buy the "pearl in partnership" he responded "Yes." But his testimony shows only an agreement to go to Bradford and buy the pearl together; in other words, to become joint purchasers of the pearl. But an agreement by two or more persons to buy a piece of property together does not amount to an agreement to form a partnership, when there is no agreement for a joint sale of the property and a sharing of the profits. Nothing was said by these parties about selling the pearl and sharing the profits, and if the testimony of this witness be taken as literally true, and they had purchased the pearl under that agreement, they would have owned the pearl in common, but not as partners. *Baldwin et al. v. Burrows et al.*, 47 N. Y. 199; *Stevens v. McKibbin*, 68 Fed. 406, 15 C. C. A. 498. But the question of partnership is not very material in this case; for if these parties were owners of this pearl in common, and one of them sold it and received the proceeds thereof, the other can ratify the sale and recover his share of the proceeds. While this action was brought in a court of equity, no motion to transfer the case to the law court was made, and the right to object to the jurisdiction of the court of equity to hear the case was thus waived. *Cribbs v. Walker*, 74 Ark. 104-122, 85 S. W. 244.

The main question in the case is whether the agreement which these parties made to purchase the pearl together or in common extended beyond the time of the trip to Bradford on which occasion it was made. After considering the matter a majority of us are of the opinion that the evidence supports the finding of the chancellor that this agreement did not extend beyond that day. These parties made the agreement on that occasion to prevent competition between them and to enable them to buy the pearl at a lower price, as they were the only two buyers going to Bradford that day. But there were other pearl buyers at Newport and Memphis, who had been informed that the pearl was for sale, and there was no special reason why these parties should prolong their agreement to buy together beyond this trip; for such an agreement would not keep other parties from bidding. The testimony of Harris, it is true, tends to support the allegations of his complaint that he and Umsted agreed to purchase the pearl together, and that the agreement was not limited to the particular occasion on which they went to Bradford for that purpose. But this testimony is contradicted by that of Umsted, who states positive-

ly that the only agreement made was that they would not bid against each other on that occasion, and that if either bought the pearl on that trip it should be for the benefit of both. As the pearl was not bought at that time, the agreement to purchase together, according to the testimony of Umsted, came to an end. The long delay of Harris in making a definite claim to an interest in the pearl is also a circumstance to be considered. Although he knew, within 24 hours after the purchase of the pearl by Umsted, that Umsted denied his right to an interest therein, he made no definite claim to an interest, nor offered to pay any part of the price, until over a year afterwards, when it was known that the pearl had been resold for a large price. This conduct is a circumstance against his present claim. The case, as we see it, turns on a question of fact, where the evidence is conflicting, but, taken as a whole, seems to favor the finding of the chancellor.

The judgment is therefore affirmed.

HILL, C. J. (concurring). Taken as a whole, the evidence convinces me that a partnership in handling the pearl was contemplated by both Harris and Umsted, and that Umsted's conduct and statement led Harris into delaying the purchase, believing Umsted would not be his competitor, and that they would profit by waiting, instead of purchasing when only the sum of \$50 split the trade, and that Umsted took advantage of thus leading Harris away from a joint purchase and acquired the pearl himself. There was no partnership between them, for nothing was done under the agreement therefor, but there was a right to a partnership in the venture; but to acquire that right Harris must offer, not only to share the initial cost of the venture, but the effort and money to make it a success, and also to share the possible losses. According to his own statement he did nothing beyond a bare assertion of his right until 15 months after the purchase and 12 months after the sale, when he tendered one-half of the initial cost. This is insufficient to let him in on the profits. Umsted was much in the case of the "merchantman, seeking goodly pearls, who, when he had found one pearl of great price, went and sold all that he had and bought it." To make a success in securing a profit on this "pearl of great price," distant markets had to be sought. Consequent labor, expenses and intelligent effort were required. Harris offered to share none of these burdens until long after the enterprise proved a great success, and herein is the essential weakness of his case. As there was no partnership in fact, but a right to one, according to his testimony, Harris should not only have promptly asserted his right on learning that Umsted had acquired the pearl, but should have followed that assertion by bona fide offers to do his share of the work and to

bear his share of the expenses and losses, and then enforced his rights by suit within a reasonable time, if his rights were denied after he offered to share the burdens. Right to participate in a venture of this kind cannot be preserved by a bare assertion of such right. The party must put himself in position to become poorer, as well as richer, by the enterprise. He cannot rest on bare assertion and wait till the efforts and money of the other party demonstrated the success or failure of the enterprise, and then enforce his right in the partnership if it has proved a profitable enterprise. Harris never put himself in position to become liable for the losses, should the enterprise prove disastrous, and he cannot be permitted to sit by and wait while Umsted has "borne the burden and heat of the day," and then compel Umsted to bear all the losses or halve the profits, according to the turn of the speculation.

WOOD, J., concurs herein.

#### ARKANSAS & L. RY. CO. v. LEE.

(Supreme Court of Arkansas. July 2, 1906.)

##### 1. TELEGRAPHS AND TELEPHONES—NEGLIGENCE IN TRANSMITTING MESSAGE—EVIDENCE.

Where an operator did not reach his office until near 11 o'clock on a Sunday morning, though the Sunday office hours were between 8 and 9, whereby the sending of a message was delayed, and an intermediate operator received the message at 10:57, and, while it required one minute to transmit it, it failed to reach the receiving office until 11:50, such delay showed negligence.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 33, 61.]

##### 2. SAME—ACTIONS FOR DAMAGES—MENTAL ANGUISH.

Kirby's Dig. § 7947, making telegraph companies doing business in the state liable for mental anguish for negligence in receiving, transmitting, or delivering messages, was applicable to a case where the message was received in Arkansas, addressed to a point in Louisiana, and the delay in delivery was owing to delays in transmission in Arkansas.

##### 3. SAME—RECEIPT AND ACCEPTANCE OF MESSAGE.

In an action against a telegraph company for damages owing to negligent delay in the sending of a message, it was no defense that the message was delivered to the station clerk, who informed the sender that the operator would not be there for an hour, where the clerk was assistant to the agent, who was also the operator, and he was in charge of the office and received the message and accepted the toll.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

##### 4. SUNDAY—SUNDAY TELEGRAM—DELAY IN DELIVERY—LIABILITY.

Kirby's Dig. § 7947, makes telegraph companies doing business in the state liable in damages for mental anguish for negligence in receiving, transmitting, or delivering messages. *Held*, that the sender of a message was entitled to recover under the statute, though the message was sent on Sunday.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Sunday, § 59.]

Appeal from Circuit Court, Howard County; James S. Steel, Judge.

Action by John W. Lee against the Arkansas & Louisiana Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

On Sunday, January 17, 1904, the following message was delivered to an agent of the Arkansas & Louisiana Railway Company, hereinafter referred to as the "Railway Company," reading as follows: "Pa died last night. Wire me what time you can reach here. W. D. Lee." The Railway Company does a telegraph business for hire. It has a line of railroad and telegraph from Nashville to Hope, and at Hope the operator is common to the Railroad Company and the Western Union Telegraph Company, to which company the Railroad Company delivers all messages going beyond Hope. Meadows was station agent and telegraph operator at Nashville. O. N. Lee was station clerk under Meadows, but was not an operator. John W. Lee is a brother of W. D. Lee. Taking the evidence most favorable to support the verdict, these are the established facts of the case: The message was delivered to O. N. Lee about 8 or 8:30 a. m. Sunday. O. N. Lee said the operator was not there, but would be there in about an hour, and he received the message and placed it on the operator's hook for transmission. The Sunday hours at Nashville were a few minutes before and after the arrival and departure of the trains. The train left at 8:30 a. m. and returned on Sunday at 6:30. On week days there was another train reaching Nashville at about 1 p. m. O. N. Lee was at the station and in charge thereof from 8 o'clock until 10 or 15 minutes after the train left, and the operator had not appeared up to that time. The operator had sat up late the night before and was asleep in a hotel across the street from the station at this time. W. D. Lee heard that his message had not been transmitted, and went to the station about 11 o'clock and the operator was not there, but O. N. Lee told him it had been transmitted within 10 minutes of its receipt. This statement was denied by O. N. Lee, but he does not deny the absence of the operator at the time of W. D. Lee's visit. The Nashville operator testifies that he reached the station between 9:30 and 10, and at once tried to raise the Hope operator but could not until about 11 o'clock. The Hope operator says that Nashville did not call that office between 9:30 and 10; and that 10 o'clock was closing time there, but, owing to the nature of the message, it was received when sent by the Nashville office, at 10:57 a. m. The joint agent at Hope received the message at 10:57, and it was received at Shreveport, La., at 11:50. The time required for transmission from Hope to Shreveport is about one minute. At Shreveport it was delayed until 3:25, when it was received at Leesville from Shreveport. The reason of this delay was that the opera-

tors were usually given from 11:30 to 3 o'clock by the dispatchers on Sundays. The operator at Leesville ascertained that John W. Lee had left town, and he located him over long-distance telephone, and gave him the message a few minutes after its receipt by him. John W. Lee started for Nashville on the first train after receiving the message, and telephoned from Shreveport to his brother that he had started and would get to Nashville as soon as possible. He got to Nashville at 6:30 p. m. Monday. His father had been buried that afternoon. Had he received the telegram any time prior to 1:20 p. m. Sunday, he would have reached Nashville not later than 1 p. m. on Monday, in time for his father's funeral. He sent no communication after notifying his brother from Shreveport that he was on the way. John W. Lee sued both companies and recovered a verdict for \$300 against them jointly, and the companies have appealed.

B. S. Johnson and Rose, Hemingway & Rose, for appellant. W. D. Lee and Feazel & Bishop, for appellee.

HILL, C. J. (after stating the facts). 1. It is argued that the "mental anguish" statute does not reach to this case; that there was a contract to deliver the message in Louisiana; that a failure to promptly deliver in Louisiana was the cause of action, and this statute was not in force there, and hence from a failure to obey it without the state no cause of action arose. The facts do not support the argument. The statute in question predicates the action on "negligence in receiving, transmitting or delivering messages." Kirby's Dig. § 7947. If this action was based on negligence in the delivery of the message, it would have to be dismissed for want of evidence to sustain it. The undisputed facts in that regard are: The message was received at Shreveport, La., from Hope, Ark., at 11:50 a. m. That the Sunday rest hours begun at 11:30 a. m. and extended to 3 p. m. That this was a reasonable regulation has not and cannot be gainsaid. That the message was received at Leesville from Shreveport at 3:25 p. m. That the train which Mr. Lee would have taken had he received the message in time left Leesville at 1:20 p. m. That the operator promptly ascertained Mr. Lee's whereabouts in another town to which he had gone on train leaving Leesville at 1:20 and delivered the message over long-distance telephone, and this promptness and kindness of the operator enabled him to catch the next train. The Western Union received the message at Hope, Ark., at 10:57, and, while it required only one minute to transmit it, yet it failed to reach Shreveport until 11:50. Although called upon for an explanation, the operator is unable to account for this delay. Had the Hope operator promptly transmitted the message, it is clear that it would have reached Shreveport before 11:30, the begin-

ning of the Sunday rest hours, and would have reached Mr. Lee in ample time to have enabled him to have attended his father's funeral. The only evidence of negligence against the Western Union, and there is this substantial negligence against it, occurred in transmitting from Hope to Shreveport. The evidence leaves but little doubt that the operator at Nashville did not come to his office until near 11 o'clock, although the Sunday office hours were between 8 and 9 o'clock, and the message was delivered to the station clerk in charge of the office within those hours. Hence the Railway Company's negligence was in transmitting from Nashville to Hope. In *W. U. Tel. Co. v. Ford* (Ark.) 92 S. W. 528, this court recently decided where a message was sent from Missouri into Arkansas and there was negligence in failing to deliver in Arkansas that the cause of action arose in Arkansas, and this statute was applicable. That case is controlling here. The negligence was not in the delivery in Louisiana, but in the transmission in Arkansas, and therefore the cause of action arose in Arkansas and the statute applies.

2. The next argument presented is that there was no proof of negligence against the Railway Company in sending the message. The discussion of the preceding proposition develops the opinion of the court that there was abundant evidence, in fact practically undisputed evidence, of great negligence in both the Nashville and Hope operators. The jury could not have well returned a verdict other than the one they did return so far as the question of negligence is concerned.

3. It is insisted that there should be no recovery because the message was delivered to the station clerk, who informed the sender that the operator would not be there for an hour. The station clerk was assistant to the agent who was also operator. He was in charge of the office and received the message for transmission and accepted the toll therefor. A statement of these facts is sufficient answer to this argument.

4. It is insisted that because the message was sent on Sunday that there can be no recovery, on the theory that a contract made on Sunday is void and no cause of action can grow out of it. If the company had refused to receive the message because it was Sunday, and it would not compel its employees to labor on the Sabbath, or if this action was based on a contract, then the company could raise the question it desires to raise herein; but that question cannot enter into this case because the action is purely on the statute and the action created by the statute is for negligence in receiving, transmitting, or delivering a telegram. When a message is received for transmission by the proper agents of the telegraph company, for negligence in these particulars aforesaid a cause of action is created, and it is upon that cause of action, and not any contractual rights, that this action is predicated.

Other questions have been presented in argument, and have been fully considered, but, as they present no questions of law applicable to the facts, a discussion of them would not be profitable.

Judgment is affirmed.

### CASTEVENS v. STATE.

(Supreme Court of Arkansas. July 2, 1906.)

#### 1. CRIMINAL LAW—INSTRUCTIONS—ASSUMPTION OF FACTS.

On a prosecution for larceny of a bicycle, the wheel found in possession of defendant was brought into court, and the court instructed that, in arriving at the value of the bicycle, the jury should not consider the value of the wheel in its then condition, but its value when stolen. *Held*, that the instruction was not erroneous on the ground that it assumed larceny, and that the wheel in court was the one stolen; the jury having been instructed not to convict unless they were satisfied, beyond a reasonable doubt, that the wheel was stolen, and that defendant was the guilty party.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1758.]

#### 2. SAME—HARMLESS ERROR.

On a prosecution for larceny of a bicycle, a wheel found in possession of defendant was in court, and there was a wire nail inserted in a broken rivet in the chain. A witness testified that the wheel in court looked like prosecutor's because, among other things, witness found a nail in the chain, and on cross-examination he stated that he did not know there was a nail in the chain, except from the fact that prosecutor had told him so. *Held*, that it was error not to have pointed out the hearsay, and instructed the jury to disregard it; but, prosecutor having testified to placing the nail in the link of the chain, the error was harmless under Kirby's Dig. § 2605, making the erroneous admission of "important" evidence reversible error, and section 2229, providing that no judgment shall be affected by any defect not prejudicing the substantial rights of accused on the merits.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3138.]

Appeal from Circuit Court, Garland County; A. M. Duffie, Judge.

Scott Casteven was convicted of larceny, and he appeals. Affirmed.

C. V. Teague, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

HILL, C. J. Appellant was tried and convicted on the charge of stealing a bicycle, the property of Cleveland Smith. The state's evidence tended to prove that a bicycle was stolen from Smith, that it was found in possession of appellant, that it had been mutilated by appellant to change its appearance, and that it was over the value of \$10. A bicycle found in possession of appellant was brought into court, and witnesses identified it as Smith's by various marks and peculiarities distinguishing it, one of which was a wire nail inserted in a broken rivet in the chain. The evidence of the appellant tended to prove that he had bought the wheel in question before Cleveland Smith lost his,

that it was not the Cleveland Smith wheel, and that it was of little value in its present condition, and if in good condition was worth less than \$10. Two errors are alleged to have been committed:

First. The court gave this instruction: "You are instructed that, in arriving at the value of the bicycle, you are not to consider the value of the wheel in its present condition; but you must base your verdict upon its value at the time it was stolen." This instruction is criticised as assuming that there had been larceny of a bicycle, and that the one in court was the stolen one. Standing alone, it does carry such impression, but read in connection with the other instructions that impression is removed. The jury were fully instructed that they must not convict unless they were satisfied, beyond a reasonable doubt, that the wheel was stolen, and that appellant was the person who actually stole it. The jury were cautioned against attaching undue force to unexplained possession of recently stolen goods, and in other ways the rights of the appellant were carefully preserved, and the true issue sent to the jury. This instruction only went to the ascertainment of the grade of larceny in the event the appellant was found guilty. While this should have been more clearly shown, yet, taken in connection with the other instructions, it is sufficiently plain to save it from misleading a jury of average intelligence.

Second. Ben Rush, a witness for the state, had worked for Cleveland Smith's father, and had ridden Cleveland's wheel, and he was called to inspect the wheel in court. He could not positively identify it, but said it looked like Cleveland's, and he found a nail in the chain. He said that at one time he had found Cleveland with his wheel broken down, and the next time he saw the wheel he (Cleveland) had placed the chain with a nail. His failure to positively identify it as Smith's was fully brought out on cross-examination. On redirect this occurred: "You mean to say that you did not know the nail was there before it was stolen? No, sir; I did not know it was there. Just had Cleveland's word for it." Appellant moved the court to exclude what Cleveland had said, and the court refused. The court should have excluded it; but is it prejudicial error? Rush had previously stated that he knew the wheel had broken down, and had said in that connection that Cleveland placed it with a nail; then the cross-examination and this redirect examination developed the fact that he had intermingled a statement from Cleveland with his own knowledge. This broke the force of his evidence on the identification from the nail. Of course, the court should have pointed out the hearsay and told the jury to disregard it. Cleveland Smith had testified in detail about fixing the nail in the link of the chain, and



this evidence merely showed that the witness derived his knowledge of the nail from Smith, and not from his own observation.

The Criminal Code fixes the errors of law appearing to a defendant's prejudice which constitute cause for reversal, which, so far as pertinent here, is as follows: "An error of the circuit court in admitting or rejecting important evidence." Section 2605, Kirby's Dig. This evidence, as shown, could not be considered important. It is further provided in the Criminal Code that no indictment is insufficient, nor can the trial, judgment, or other proceeding thereto be affected, by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits. Kirby's Dig. § 2229.

Applying this provision to the two errors found, it is held that they did not prejudice any substantial rights of the appellant on the merits of his case, and the judgment is affirmed.

#### BEENE v. STATE.

(Supreme Court of Arkansas. July 2, 1906.)

##### 1. HOMICIDE—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

On a prosecution for murder, an erroneous instruction, requiring the jury to find the absence of both premeditation and deliberation in order to reduce the crime to murder in the second degree, was harmless, where the court instructed that if defendant, with malice aforethought, and after premeditation and deliberation, killed decedent, he should be found guilty of murder in the first degree, and the jury found him guilty of murder in the first degree.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 718, 720; vol. 15, Cent. Dig. Criminal Law, §§ 3096, 3158, 3161.]

##### 2. SAME—MURDER—EVIDENCE—SUFFICIENCY.

On a prosecution for murder, it appeared that defendant and decedent, his wife, engaged in a quarrel, in which he threw her down, and that he then procured a gun and loaded it, and that while holding it under his arm it was discharged, inflicting the fatal wound; that defendant had stated that the shooting was accidental, but that the wife had stated shortly before her death that defendant had told her he was going to kill her. *Held*, that the evidence was sufficient to sustain a verdict of murder in the first degree.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 480.]

Wood, J., dissenting in part.

Appeal from Circuit Court, Union County; C. W. Smith, Judge.

Charlie Beene was convicted of murder in the first degree, and he appeals. Affirmed.

Jesse B. Moore, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

BATTLE, J. The grand jury of Union county, at the March, 1906, term of the Union circuit court, returned an indictment against Charlie Beene accusing him of murder in the first degree. He pleaded not guilty, was tried, and found guilty as charged.

The evidence adduced in the trial before the jury, which supported the verdict, tended to prove, substantially the following facts: The defendant and Susie Beene were husband and wife. They had many quarrels and he frequently threatened to kill her. On or about the 14th day of December, 1905, in the evening about 7:30 o'clock, the defendant, wife, and two daughters were seated in front of a fire. The wife said to him, as a witness related it: "'Charley I will have to quit cutting wood. My arm hurts me.' And he says, 'If you do, you had better get your duds and leave,' and she says, 'Well, I can't cut no more wood,' and he says, 'Shut up,' and he hit her in the mouth with his fist. She got up and says, 'Charley, you hit me,' and he caught her and threw her down by the fire place, and me and Eddie Bell pulled him off of her, and then he threw her down near the foot of the bed behind the front door, and we pulled him off again, and he went to the rack and got his gun and taken the squirrel shot out, and loaded it with buck shot." He then walked out of the room in which they had been sitting—walked out backwards—at the same time holding the gun with the "hammer cocked" under his left arm. His wife followed and went to the water bucket, and started to get a drink of water, and had the dipper in her hand, when he said to her "Get back," and, she refusing, he shot her. In so doing, he did not put the gun to his shoulder, but held it, as witness expressed it, "under his arm sorter." She fell. He ran into the house, got his hat and coat, said that he did not intend to kill her, kissed her, and left, going for her neighbors and a doctor. Soon after she was shot, she said to a neighbor that she was "bound" to die. When told that the defendant had gone for a doctor, and had said he had shot her accidentally she replied, "No; \* \* \* he did not shoot me accidentally. He told me he was going to kill me." She lived about an hour, and died. This statement was made, substantially, by more than one witness.

The court over the objections of the defendant instructed the jury, in part, as follows:

"(2) The jury are instructed that if they find from the evidence in this case, beyond a reasonable doubt, that the defendant, Charlie Beene, in the El Dorado district of Union county, Ark., unlawfully, willfully, feloniously, with malice aforethought, and after premeditation and deliberation, killed Susan Beene by shooting her with a gun, as alleged in the indictment, you will find the defendant guilty of murder in the first degree.

"(3) The jury are instructed that if they find from the evidence in this case, beyond a reasonable doubt, that the defendant, Charlie Beene, in the El Dorado district of Union county, Ark., within three years before the return of the indictment herein into court,

unlawfully, willfully, feloniously, and with malice aforethought, but without premeditation and deliberation, shot and killed Susan Beene with a gun, as alleged in the indictment, you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the penitentiary of the state of Arkansas for some period not less than five nor more than 21 years.

"(4) The jury are instructed that in order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that this intention be conceived for any particular length of time before the killing. It may be formed deliberately and executed in a very brief space of time. If it was the conception of a moment, but the result of premeditation and deliberation, reason being on its throne, it would be sufficient. The law fixes no time in which such specific intent to take life must be formed, but leaves its existence to be determined by the jury from the evidence."

The defendant insists that the verdict of the jury should be set aside and a new trial granted to him for the following reasons:

First. "That the record does not affirmatively show that appellant (defendant) was present when and at the time the jury returned into court, and the trial was resumed to hear their report, and at the time the verdict herein was rendered, as required by the statute and the adjudications upon the same by this court.

Second. "That the court erred in giving over appellant's exceptions the third instruction asked by the appellee, \* \* \* wherein the jury were expressly told that of they believed, beyond a reasonable doubt, that the defendant shot and killed the deceased, unlawfully, willfully, feloniously, and with malice aforethought, but without premeditation and deliberation, etc., then they may find him guilty of murder in the second degree; that is to say, in effect, that the jury must find the absence of both premeditation and deliberation before they could reduce the crime to murder in the second degree; whereas, we contend that the finding of the absence of either one of these elements is sufficient.

Third. "That the court erred in giving the second and fourth instructions upon murder in the first degree \* \* \* because they were abstract and improper under the evidence adduced in this cause."

Fourth. Because the verdict is not supported by the evidence.

As to the first contention the record is as follows: "Comes H. S. Powell, Esq., prosecuting attorney, and comes the defendant, Charlie Beene, in his proper person in custody of the sheriff, and by his attorneys and comes also the trial jury herein, and after hearing the rest of the evidence introduced in this case, the instructions given by the

court and the argument of the counsel, retire to their room in charge of a sworn officer to consider their verdict, and afterwards came into court, and read the following to wit: 'We the jury find the defendant, Charlie Beene, guilty of murder in the first degree. [Signed] W. N. Hayes, foreman.'

The object of this record, as it appears to us, is to show that the defendant was present when the proceedings mentioned took place. Prisoners, as a general rule, are brought into court only for the purpose of witnessing proceedings in their cases. The defendant came, and then the proceedings followed, among which was the return of the verdict. The proceedings following his presence plainly indicates the purpose for which he was brought into court; and it is apparent that the idea the record intends to express is, that he was present when the verdict was returned, and we so construe it. There is nothing said in the motion for a new trial about his being absent when the verdict was returned.

Appellant's second contention is substantially correct. Cannon v. State, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128. But the court instructed the jury, that if they find from the evidence in this case, beyond a reasonable doubt, that "the defendant, Charley Beene \* \* \* unlawfully, willfully, feloniously, with malice aforethought, and after premeditation and deliberation, killed Susan Beene by shooting her with a gun, as alleged in the indictment, you will find the defendant guilty of murder in the first degree." The jury found him guilty of murder in the first degree, and necessarily found that the killing was done after premeditation and deliberation; and, so finding, the instruction objected to was not prejudicial.

The appellant's objection to the second and fourth instructions upon murder in the first degree, which is stated in his third contention, is not tenable. There was evidence upon which to base them, and it was sufficient to sustain the verdict of the jury.

Judgment affirmed.

WOOD, J., thinks that appellant was guilty of murder in the second degree, and that this court should so find, and direct that his punishment be assessed accordingly.

#### STRANGE v. BODCAW LUMBER CO.

(Supreme Court of Arkansas. July 2, 1906.)

##### 1. NEGLIGENCE—DANGEROUS PREMISES—DUTY OF ONE CAUSING SAME.

Where one damming water causes it to back up beside a highway, so as to be dangerous to travelers thereon, it is his duty to do whatever is reasonably necessary to protect the public from the danger, and this though he was given permission by the county judge to back the water; and, if guard rails are so reasonably necessary, it is no excuse for his not erecting them that he has no authority to erect them on

the highway, at least where he has not asked and been refused permission.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 54.]

## 2. SAME—CONCURRENT CAUSES.

One who backs water up beside a highway, making it dangerous for travel, is not relieved of liability, on account of his failure to erect guard rails, for the loss of a horse which backed into the water, because of the fact that the horse was frightened by goats on the road, if the accident would not have happened but for the absence of guard rails, and he was negligent in not erecting them; his negligence being a concurrent proximate cause.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 74, 75.]

## 3. PLEADING—IMMATERIAL FACTS—NECESSITY OF PROOF.

Immaterial facts, unnecessarily alleged in a complaint, need not be proved.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1224.]

Appeal from Circuit Court, Lafayette County; Chas. W. Smith, Judge.

Action by F. A. Strange against the Bodcaw Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The facts in this case are stated in the opinion. On the trial the circuit judge gave among other instructions the following over the objection of the plaintiff and to the giving of each of which the plaintiff duly saved exceptions at the time: "(5) The jury are instructed that though they should believe from a preponderance of the evidence that there were defects in said roadway, and that the alleged accident was rendered possible thereby, yet if they believe that the proximate cause of said accident was that said horse became frightened at a pair of goats driven to a sled by one Leo Couch, and that but for said horse becoming so frightened at said goats so driven to a sled, said accident would not have happened, your verdict should be for the defendant." "(7) The jury are instructed that if they believe from a preponderance of the testimony that the roadway where said accident is alleged to have happened was in a reasonably good and safe condition, and that but for the fact that said horse became frightened at the pair of goats and sled driven by Leo Couch, said horse and buggy would have gone safely over said roadway without accident, then their verdict should be for the defendant."

Searcy & Parks and W. E. Atkinson, for appellant. Moore & Moore, for appellee.

RIDDICK, J. (after stating the facts). This is an action by F. A. Strange against the Bodcaw Lumber Company to recover \$100 of the company as damages for causing the death of plaintiff's horse. The company owns a sawmill plant near the town of Stamps, in Lafayette county of this state. The town was west of the mill plant and a public road that entered the town from the east passed not far from the mill and crossed

a small stream called "Crooked Creek" before reaching the town. In 1893 the lumber company made a large pond by constructing a dam across the valley of this creek. The public road crossed the creek above where the dam was constructed. To prevent the water from overflowing the public road, the road was straightened and a roadbed several feet high was constructed across the valley of this stream with a bridge across the channel of the creek. This work was done by the lumber company with the consent of the county judge and with the assistance of the road overseer. This elevated roadbed was about 20 feet wide, and near the creek was over 10 feet high. After the company had erected its dam across the creek the water backed up around this public road, and at places was 8 or 10 feet deep on both sides of the road. When the roadbed was first constructed, posts with connecting rails were placed along the edge of the roadbed to prevent wagons and teams from running off the dump into the pond. But as the roadbed was raised from time to time by placing loads of dirt and sawdust thereon, the surface of the roadbed was finally raised about the rails so that nothing but the posts were left above the surface of the roadway. After this roadbed was constructed it was under the control of the road overseer as one of the public roads of the county, until, by an extension of the limits of the town of Stamps, it came within the limits of the town and passed to the control of town authorities as a public street. On the 5th of September, 1904, while this road or street was in this condition, Alvin Strange, a brother of the plaintiff, drove the horse of plaintiff to the town of Stamps to attend services at a church. In the buggy with him were his sister and another young lady. It was night and while they were crossing this road and approaching the bridge over the creek the horse became frightened at a pair of goats hitched to a sled which a boy had driven over the bridge. The horse, on being frightened by the goats, began to back, and before he could be stopped he backed the buggy over the side of the roadbed into the water, which was at that place about 10 feet deep. The occupants of the buggy got out and escaped, but the horse was drowned. The plaintiff, as the owner of the horse, brought this action against the mill company, as before stated, to recover damages for the death of his horse. The jury returned a verdict for the defendant, and a judgment was rendered accordingly, and the appeal taken by the plaintiff brings the case before us for review.

We will state at the outset that the defendant cannot be held responsible for the condition of the roadway itself. It cannot be held responsible for the fact that

the road at this point was elevated on an embankment several feet high, for this was a public road and defendant had no right to reduce the height of this embankment or to change it. In order for the plaintiff to recover he must show that the water which defendant placed around and against this road was so dangerous to travel that barriers were necessary to protect the public against danger, and that the failure of the defendant to erect them caused the injury. The law is now well settled that it is unlawful to make an excavation or to put a dangerous obstruction of any kind adjoining a public highway, and leave it in a condition to endanger the safety of those who are traveling thereon and who themselves are in the exercise of ordinary care. When one makes an excavation of that kind on his own grounds adjoining the public highway, he should exercise due care to protect the public against the danger to accidents caused by such excavations, and if necessary should erect a fence or guard rails for that purpose. This question was discussed and the law clearly stated in the case of *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175. See, also, *Barnes v. Ward*, 9 C. B. (Eng.) 392; *Hadley v. Taylor*, L. R. 1 C. P. 53; 1 *Wood on Nuisances* (3d Ed.) § 271, and cases cited. The rule would be the same if one, after making an excavation adjoining the public highway, should fill it with water and thus make a deep pond adjoining the highway. If such pond was dangerous to travelers on the highway who were exercising ordinary care, it would be the duty of the owner to erect barriers or guard rails or do whatever might be necessary to protect the public against the danger he had created. And his duty would be the same whether the pond was caused by making an excavation adjoining the highway and filling it with water, or by damming a stream which crossed the highway thus causing the water to back up on both sides of the highway. In either case it would be his duty to so exercise his own rights as to avoid injury to the public; and if the danger was such that it could be foreseen that a fence or railing was required to guard the public against danger, it would be the duty of the owner to put them up.

Now, in this case, it is admitted that the defendant constructed an embankment across a stream and thus backed up the water on both sides of the public highway where it crossed the valley of the stream. If the presence of this water added nothing of danger to travelers on the highway, who themselves exercised ordinary care, then the defendant was guilty of no wrong and was not responsible for this injury. But if the water made the road more hazardous to travelers it became the duty of the defendant company to do what was reasonably necessary to guard

the public against any danger caused by this act of damming the stream. If the danger was such that guard rails were required to protect travelers they should not only have been provided, but kept in repair so as to serve the purpose intended. And if, by reason of the failure of the company in this respect, a traveler along the public highway, or his property, was injured, the traveler or owner of the property can recover damages for the injury unless his own carelessness, or that of his agent in charge of the property, contributed to the injury. The case then turns first on the question of whether the presence of this water on either side of the public road was a source of danger to travelers on the highway who themselves exercised due care. If this was so it was the duty of the company to erect guard rails or do whatever was reasonably necessary to protect the public against the danger, and if it failed to do so, and by reason of such negligence the plaintiff's horse was drowned, the company is liable unless the driver of the horse was guilty of negligence contributing to the injury. The fact that the pond was put there by permission of the county judge does not alter the case, for the permission of the county judge cannot authorize acts dangerous to the public or relieve the defendant from the consequences of its own negligence. Nor is it any defense for defendant to say that it had no authority to enter on the public highway to erect guard rails or barriers. If the danger to travel on the highway from this pond was of such a nature as to make it necessary to erect barriers to protect the public from danger, then defendant would either have to erect the barriers or drain the pond. But it is not shown that it applied for permission to erect barriers, nor is there any ground to believe that a request of that kind would have been denied had it been made to the proper authorities, so we need not speculate upon what would have been the position of defendant if, before the accident happened, it had applied for permission to erect barriers between the pond and the highway and this permission had been refused.

The instructions given by the court at the request of the plaintiff were somewhat too stringent, for if the pond was shown to be dangerous to travel, the instructions declared, as a matter of law, that the defendant should erect guard rails, while, in our opinion, if the pond was dangerous to travel on the highway, the defendant was then required to do what was reasonably necessary to protect the public from this danger, and it was for the jury to say whether under the circumstances, guard rails should have been erected or not, and whether such injury might have been foreseen and avoided. On the other hand, the fifth instruction and other instructions given at the request of defendant were too favorable to defendant, for they told the jury that if the proximate cause of the accident was that the horse became frightened at a

pair of goats hitched to a sled, and that, "but for said horse becoming frightened at the goats driven to the sled, the accident would not have happened," they should find for defendant. As the undisputed evidence shows clearly that the accident would not have happened but for the fact that the horse became frightened at the goats this fifth instruction was virtually an instruction to find for the defendant. The fact that the horse became frightened at the goats was no doubt one cause of the injury, but that did not necessarily relieve the defendant from liability. The horse did not run away. He began to back and became to a certain extent uncontrollable, but he did not get completely beyond the control of the driver until the buggy was backed over the edge of the roadway and went into the pond, dragging the horse after it. Horses, when frightened, often back away from the object that alarms them, but on being encouraged by their driver frequently regain their composure and move on again. So, under the facts of this case, it was for the jury to say whether if there had been guard rails or something to prevent the buggy from going into the pond this accident would have happened. If, notwithstanding the fright of the horse, the accident would not have happened if there had been guard rails, and if the absence of guard rails was due to the fault of the defendant, then its negligence, as well as the fright of the horse, is a proximate cause of the injury. If that was so, then as the plaintiff was not responsible for the presence of the goats on the bridge, or the fright of the horse, he can recover if the driver of the horse was guilty of no negligence contributing to the injury. We are therefore of the opinion that the fifth instruction and some of the other instructions given for the defendant were misleading and erroneous. *St. L. Ry. Co. v. Aven*, 61 Ark. 141, 32 S. W. 500. Counsel for the defendant have cited *Hill v. New River*, 9 B. & S. 303, and other cases which hold under similar instructions that no recovery can be had for the reason that the fright of the horse and not the absence of barriers is the proximate cause of the injury. But these cases were considered by this court in case of *Railway Co. v. Aven*, cited above, where it was held that the fright of the horse and the absence of barriers were both causes directly contributing to the injury, and if one of these contributing causes was due to the fault of the defendant, the plaintiff could recover for the injury caused thereby, when he himself was free from negligence. This case is stronger for the plaintiff for the reason that the horse was not, in this case, running away, nor completely beyond the control of the driver, but was only backing away from the object that alarmed him.

The first instruction given for the defendant was too long, and involved and submitted questions to the jury, some of which were not

controverted and others immaterial. It is true that there was some excuse for this instruction, in that it followed, to some extent, the statements in the complaint, which contains a number of allegations which were unnecessary to make in the complaint. The complaint should allege the substantive or issuable facts, and it is unnecessary to set out the evidence, or a history of the transactions leading up to the essential or issuable facts. *Bliss on Code Plead.* (3d Ed.) § 208. But the fact that matters of evidence and other unnecessary allegations were set out in the complaint does not justify the court in telling the jury that such allegations must be proved when they are immaterial. Among other allegations which the instruction told the jury that the plaintiff must prove to make out his case was that "the defendant erected across the stream and overflowed ground a bridge and dump and roadway," and continued up to the time of the accident "to maintain and have supervision of the keeping up of said dump and highway," etc. But this was not correct, for the right to recover in this case depends not on whether the defendant constructed and maintained this roadway, but on whether it by banking this water around a public highway created a danger to the public and then negligently failed to take proper precautions to guard the public against injury.

For the errors indicated the judgment is reversed, and cause remanded for a new trial.

#### **FORDYCE & MCKEE v. WOMAN'S CHRISTIAN NAT. LIBRARY ASS'N.**

(Supreme Court of Arkansas. July 2, 1906.)

##### **1. CHARITIES — CORPORATIONS — CHARITABLE TRUST.**

A corporation was organized for the purpose of establishing and maintaining a library at a health resort. The constitution presented with the petition for the organization recited that "we whose names are annexed, desiring to form an association to organize a \* \* \* library for own benefit, and that of \* \* \* people who visit" the resort. *Held*, that the corporation was a charitable trust; the phrase "for our own benefit" not being understood as confined to the persons who signed the petition for a charter, but intended to embrace all persons who should thereafter contribute to the support of the library.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, § 18.]

##### **2. PUBLIC LANDS—PATENT—TITLE ACQUIRED.**

A corporation was a charitable trust. Congress authorized it to purchase certain lots for the uses and purposes of the corporation. The lots were entered by the corporation and a patent was issued to it, containing no limitations or conditions, except one forbidding the boring for hot water on the lots. *Held*, that the patent conveyed an estate in fee.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 314.]

##### **3. CHARITIES—TORTS OF AGENTS OR TRUSTEES—JUDGMENT—EXECUTION.**

The property of a charitable trust cannot be sold under execution issued on a judgment

rendered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, § 103.]

#### 4. SAME—QUESTION OF EXEMPTION—CONCLUSIVENESS OF JUDGMENT.

A judgment against a charitable corporation is conclusive on the amount of the demand, but it does not conclude the question as to the liability of any property of the corporation to seizure under an execution issued under it.

#### 5. SAME.

Kirby's Dig. § 943, providing that corporations for benevolent purposes shall have such powers of suing and being sued as may be necessary to their efficient management and the promotion of their purposes, indicates that the management and promotion of the purposes of a charitable corporation are to be kept steadily in view, and a judgment rendered against it does not prevent it from asserting that its property is exempt from execution.

McCulloch, J., dissenting.

Appeal from Circuit Court, Garland County: Alexander M. Duffie, Judge.

Action by the Woman's Christian National Library Association against Fordyce & McKee. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Wood & Henderson and Ratcliffe & Fletcher, for appellants. R. G. Davis, for appellee.

ROSE, Special Judge. On the 14th day of June, 1902, several ladies filed a petition in the Garland circuit court, praying that they might be incorporated under the name of the "Woman's Christian National Library Association for the purpose of establishing, providing, and keeping in the city of Hot Springs, Garland county, Ark., a library for the free use of the public generally, and of soliciting and receiving donations and aid for said purposes." The constitution presented with the petition was preceded by the following preamble: "We, whose names are annexed, desiring to form an association to organize a reading room and library for our own benefit, and that of the multitude of people who visit our city in search of health and pleasure, do pledge ourselves to be governed by the following constitution." Then follow provisions as to membership: Any lady might become a member by paying an initiation fee of \$2 annually and 25 cents monthly dues. Persons of either sex might become honorary members for life on payment of \$50; and any one might become a "life patron" on payment of \$250. The object of the association was further stated as follows: "The object of this association shall be to provide books, newspapers, and magazines of such character as will afford instruction and diversion; but such books and papers as are demoralizing in their tendency or subversive of religion shall not be admitted; also to provide a suitable and attractive building where the literature of the association may be permanently lodged, and where suitable lectures on such subjects as are not in the field of political or theological controversy and other entertain-

ments not in conflict with the objects of the association may be given."

Having been duly incorporated, application was made by the association to Congress for leave to erect a library building on the government reservation at Hot Springs. This was refused. But Congress passed an act approved July 8, 1882, authorizing the association to purchase "for the uses and purposes of such association" lots 11 and 12 in block 127 in the city of Hot Springs. 22 Stat. 155, c. 282. These lots having been previously appraised by the United States, were now entered by the association on payment of \$100, and a patent was accordingly issued by the President. The patent contains no limitation or condition except one forbidding the boring for hot water on the lots conveyed. Preparatory to building a house on these lots for the proposed library the association employed one Murray to excavate the rock on the mountain side, so as to secure a proper foundation; and while this work was in progress resort was had to blasting, whereby one Thomas had his leg broken by a shattered piece of rock thrown out into the street. To recover damages for this injury Thomas brought suit against the association in the United States Circuit Court held at Little Rock, in which he recovered a judgment for \$7,642 on the 21st of December, 1893. Execution having issued on this judgment the lots were sold under it, and were bought by Wood & Henderson for \$5,000, and in due time they received the marshal's deed therefor. Wood & Henderson afterwards conveyed the lots to the appellants Fordyce & McKee. On the 21st of June, 1902, the library association brought an action in the Garland circuit court against Fordyce & McKee to recover the lots, alleging that the association was merely a trustee, holding them for a public and charitable use, having no beneficial interest that could be seized or sold under execution to satisfy a judgment against the association for the negligence or torts of its agent; and that the defendants intended to divert the property from its charitable uses, and to apply it to the uses of a street car line. The defendants demurred. The demurrer was sustained, and the plaintiff appealed to this court, which reversed the judgment of the court below; but as there was not a full bench, and the judges were not agreed as to the grounds of reversal, the merits of the cause were not fully passed upon. See *Woman's Christian National Library Association v. Fordyce* (Ark.) 86 S. W. 417. On a second trial in the court below the plaintiff recovered a judgment for the lots and \$200 for damages by reason of their detention, and defendants appealed.

1. We are convinced that this is a case of a charitable trust. We are referred to the decision in *Old South Society v. Crocker*, 119 Mass. 1, 20 Am. Rep. 299; but that is not in point. In that case the court found

that a trust was declared for "the beneficiaries, which were the grantees themselves, and such as they should associate to themselves." The court was influenced by the further limitation in the deed "to their heirs and successors" implying "that the grantor contemplated a permanence of association of the cestuis que trust." The court added: "Gifts for the erection of houses of public worship or for the uses of the ministry may constitute a public charity, if there is no definite body for whose use the gift was intended capable of receiving, holding and using it in the manner intended. To give it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards either the public at large, or some part thereof or an indefinite class of persons." Page 22. In this case one of the objects of the association is to "organize a reading room and library for our own benefit and that of the multitude of people who visit our city in search of health and pleasure." This clause does designate an indefinite class of persons. It is plain enough that the phrase "for our own benefit" is not to be understood as confined to the persons who signed the petition for a charter, but was intended to embrace all persons who should thereafter contribute to the support of the library by becoming members of the association. This was also an indefinite class of persons. It certainly does not change the nature of the charity that the members of the association may also enjoy the privileges of the library along with other beneficiaries. It is clear from the rules as to the admission of new members that the object is to increase the utility of the association by an appeal to the public for an extension of its influence and for its support. The English statute of 43 Eliz. c. 4, is in force in this state. In it schools and free schools are mentioned, but not libraries. The statute was, however, only remedial and ancillary, and did not affect, in any wise, the jurisdiction of the chancery court as it previously existed. *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450; *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432. That a free public library is a charity there has never been any doubt. *Duggan v. Slocum* (C. C.) 83 Fed. 244; *Pickering v. Shotwell*, 10 Pa. 23; *Cottman v. Grace*, 41 Hun (N. Y.) 345; *Fairbanks v. Lamson*, 99 Mass. 533; *Drury v. Natick*, 10 Allen (Mass.) 169; *Jones v. Habersham*, 107 U. S. 189, 2 Sup. Ct. 336, 27 L. Ed. 401. The importance of a public library at a great health resort where many invalids congregate in search of health, often despondent and sad hearted from the effects of disease, loneliness, and melancholy forebodings, cannot be questioned. We may suppose that of those who go there for pleasure the majority will not be indifferent to the pleasure to be derived from reading.

A distinguished writer of the eighteenth century has said: "An author may be considered as a merciful substitute to the Legislature. He acts, not by punishing crimes, but by preventing them."

A public library not only tends to the diffusion of knowledge, but also to public improvement in morals. The charter of the association in this case provides that demoralizing books shall not be admitted into the library; but if that clause had been omitted, the result would have been the same. This principle of selection, in ordinary public libraries, operates automatically, since men and women having children to bring up, and many other persons having the public good at heart, will not patronize or help to support a library in which pernicious books form a part. It goes without saying that whatever contributes to the advance of public morals and that of civilization tends to the support of law and order, and the prevention of crime. The library association is organized purely for charitable purposes. It has no capital stock, no provision for making dividends or profits, and is as unselfish as any enterprise can be. *McDonald v. Mass. General Hospital*, 120 Mass. 432, 21 Am. Rep. 529. Whatever it receives from any source it holds in trust for the purposes mentioned in its charter; that is, for sustaining the library and "increasing its benefits to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public charity. Its affairs are conducted for a great public purpose. "Id.; *Powers v. Mass. General Hospital*, 109 Fed. 299, 47 C. C. A. 122, 65 L. R. A. 372. By our Constitution "buildings, grounds and materials used exclusively for public charity" are exempt from taxation. Article 15, § 5. See, also, *Kirby's Dig.* § 6887. Further, in order to encourage institutions of that kind, and to diffuse their usefulness through all time, ample provision is made by statute for the incorporation of charities. *Kirby's Dig.* § 937. By our statutes cities of the first and second class are "empowered to establish and maintain public libraries" and to levy a tax for that purpose. *Kirby's Dig.* § 5543.

2. It seems clear that the patent to the library association conveyed an estate in fee simple. To create a limitation or a condition the intent must be clearly shown; and the mere expression of a purpose in a conveyance will not debase a fee; *Stuart v. Easton*, 170 U. S. 394, 399, 18 Sup. Ct. 650, 42 L. Ed. 1078; *Wright v. Morgan*, 191 U. S. 55, 24 Sup. Ct. 6, 48 L. Ed. 89. This question has been discussed; but we do not perceive its relevancy; for if the patent conveyed an estate subject to a condition or limitation there would have been an estate in the patentee until the limitation attached or the condition was enforced. A lease or qualified fee during its continuance has all the in-

cidents of a fee simple. It is descendible and assignable, and the owner, while his title continues, has the same right to the exclusive use and enjoyment of the land, and as complete dominion over it, as though he held it in fee simple. 16 Cyc. 603. Such an estate would be as liable to seizure and sale under execution as if it were a larger estate. In order to see whether the library association is a charitable one or not, we need not examine the patent; but we must look to its charter to discover to what uses its property is dedicated.

3. The authorities on the subject of liability of charities for the negligence of agents or employés are extremely divergent. There are at least four classes of cases: (1) Cases holding that the property of a charity cannot be sold under execution. Of these we shall speak presently. (2) Cases construing charities unfavorably, and assimilating them to private corporations organized for profit, as in the cases of *Presbyterian Congregation v. Colt*, 2 Grant Cas. 75, and *Davis v. Central Congregational Society*, 129 Mass. 372, 37 Am. Rep. 368. (3) Cases holding that trustees of a charity, though not answerable for the negligence of its agents, were liable for want of ordinary care in their selection. This seems to be a compromise between two irreconcilable principles. Such was the case of *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224. The case of *Union Pacific Ry. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581, is not in point. In that case it was held that a hospital maintained by a railroad company for the free treatment of its employés, supported partly by the monthly contributions of all its employés and partly by the company, and not maintained for profit, is a charitable institution; and that the company is not responsible for injuries caused by improper treatment by a physician or attendants employed in the hospital by the railway company by which the plaintiff, an employé of the company, was injured, where the master had exercised ordinary care in selecting such physician or attendants. Various similar cases are to be found in the books; and several are cited in *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 800; 47 C. C. A. 122, 65 L. R. A. 372. They are all railway cases; and railway companies are not charitable corporations. If in any one of these cases the judgment of the trial court against the company had remained unreversed, and an execution issued upon it had been levied on the hospital buildings of the railway company, then the question now under discussion might have been presented; but such was not the case in any of them.

4. Cases holding that on a judgment against a charitable organization the grounds and buildings of the defendant cannot be sold under execution, but that any of its unappropriated funds may be applied to the satis-

faction of the judgment. Such was the case of *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, decided on the authority of *Mersey v. Docks*, 11 H. L. 686; though that was not a case of a charity; but was a suit against a public board, charged with the duty of keeping certain docks in order, for negligence in performing their public duties. As we shall see no such suit could be sustained in this state. The decision in the *Glavin Case* seems also to be based on a compromise. The court said that the buildings and grounds of the hospital were "subject to so strict a dedication that it could not be diverted to the payment of damages," but "that funds which were applicable generally to the use of the hospital" might be so diverted. And yet it would seem plain that funds not invested in buildings and grounds would be as strictly dedicated to public uses as any other species of property. Charities must have funds on hand to meet expenses. They cannot live on the wind, and that which takes away the means of living takes away life. All sums received by a charity, from whatever source, "are held upon the same trust as those which are the gifts of pure benevolence." *McDonald v. Massachusetts General Hospital*, 120 Mass. 435, 21 Am. Rep. 529. "The donations, if any are ever made, must be used according to the terms of the gift." *Benton v. Boston City Hospital*, 140 Mass. 17, 1 N. E. 836, 54 Am. Rep. 436. We are of opinion that in this state the property of a charity cannot be sold under execution issued on a judgment rendered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees. It would be difficult to overestimate the benefits that have been derived, directly and indirectly, from charities having their origin in private benevolence. Our common-school system and all laws for the relief of the poor and destitute in England and in this country have no other source. 2 Perry, Trusts, § 691. Consequently charities are much favored in the law, and they are upheld wherever possible. *Duggan v. Slocum* (C. C.) 83 Fed. 246; *Ould v. Washington Hospital*, 95 U. S. 313, 24 L. Ed. 450. The same rule was applied in the Roman law. 1 Domat. Tit. 1, § 2, 14. And it is from that law that our doctrine of charities is largely derived. 2 Sto. Eq. § 1137. A hundred years ago Lord Eldon said: "It has been urged for the defendants, over 200 years ago it would have been urged with great effect, that no distinction ought to be made in the proceedings between a charity and an individual. But at this time it is much too late, with reference to a great many doctrines, to insist upon that; for the court does not hold out relief to charities under circumstances in which it would not give relief against defendants in ordinary cases. *Atty. Gen. v. Jackson*, 11 Ves. 367. So in a charity case if the bill prays the wrong relief the court will give the proper relief. *Atty. Gen. v. Whitely*, Ves. 246. Thus.



in *Atty. Gen. v. Stanford*, a bill affecting a charity was dismissed; but the court of its own motion entered a decree establishing the charity. In this respect charity cases differ from all others. *Atty. Gen. v. Jeanes*, 1 Ark. 355; *Atty. Gen. v. Bucknall*, 2 Id. 328." Being public utilities of a very high order, charities are intimately associated with the state, which exercises over them through its courts a watchful supervision, so that their property, funds, and revenues shall not be diverted to any improper purpose, and that trustees and agents shall perform the duties assigned to them with honesty and fidelity, and for the best advantage of the charitable uses designated by the donor or donors. For these ends the chancery courts have an original and an inherent jurisdiction. *Vidal v. Girard*, 2 How. 195, 11 L. Ed. 205. If the estate is misapplied the remedy is not forfeiture, but a suit to enforce a trust. *Brown v. Meeting Street Baptist Society*, 9 R. I. 186. It is the duty of the courts to correct all abuses in the management of the trust and to preserve the property. *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502. The trustees can always be required to account for the distribution of the funds, and they can be dealt with by the court for any bad faith or breach of the trust. 2 *Perry, Trusts*, §§ 712, 719. If a donor makes a gift for a particular charity, and appoints no trustee, the charity will not fail; for the court will appoint a trustee. *Reeve v. Atty. Gen.*, 3 Hare, 191. So if the devise is to a corporation not yet in existence it will pass to one that may be afterwards organized. *Inglis v. Trustees*, 8 Pet. 99, 7 L. Ed. 617. Devises for charitable purposes that are void at law are often sustained in chancery. 2 *Sto. Eq.* § 1170. Where a literal execution of a charitable devise becomes inexpedient or impracticable the court will execute it as nearly as it can according to the original purpose. *Id.* § 1169. The court will supply all defects of conveyances where the donor has capacity to convey unless the mode of donation contravenes some statutory provision. *Id.* § 1171.

The chancery court has jurisdiction over the trustee of charities, as it has over all trustees, to see that they do not commit a breach of their trust, or apply the fund in bad faith, or to purposes that are not charitable. 2 *Perry, Trusts*, § 719. So intimate is the connection between the state and organized charities that it is the duty of the Attorney General to intervene in all cases where there is a violation of duty by the trustees that endangers or impairs the charity. *Id.* § 744. And in such cases strict rules of practice cannot be insisted upon. *Id.* A public charity is not within the rule as to perpetuities. *Biscoe v. Thweatt*, 74 Ark. 548, 86 S. W. 432. The doctrine of liability of the principle for the acts of his agent performed within the scope of his authority, as expressed in the maxim "respondeat superior," is not of universal application. It does not apply either

to the state or the federal government. *Belknap v. Schild*, 161 U. S. 17, 16 Sup. Ct. 443, 40 L. Ed. 599; *Broom, Leg. Max.* p. 865. With us a municipal corporation is not liable in a civil action to one who is injured by reason of a defective street, although the statute requires that the municipality shall keep the streets in good repair. *Arkadelphia v. Windham*, 49 Ark. 139, 4 S. W. 450, 4 Am. St. Rep. 32; *Ft. Smith v. York*, 52 Ark. 84, 12 S. W. 157. The same rule applies to counties. *Granger v. Pulaski County*, 26 Ark. 37. So of school districts and other quasi public corporations. *School District v. Williams*, 38 Ark. 454. *Collier v. Ft. Smith*, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237. The reason given for the exemption of the property of cities, counties and other public corporations from sale under execution is that they are public agencies of the state; The state itself is merely a trustee for the public good. It has no other excuse for being. Counties, towns, school districts, and similar public bodies, being a part of the machinery of the state government hold their property of whatever kind subject to the same trusts, so that it cannot be diverted to individual uses, the whole object of the government being to confer the greatest good on the greatest number. In this work charities are important helpers and co-workers, relieving the state of a large part of its burdens. In every community there are schools, colleges, hospitals, and churches that are fruitful in good works that could not be performed by the state with the aid of any number of policemen or that of a standing army. In their several ways charities are more efficient in promoting the public good than the state could be acting without their aid. Whatever privileges or exemptions may be granted to such charities by the state are not gratuities; for without schools, hospitals, churches, and libraries we should soon relapse into a state of semi-barbarism, which would not be for the public good.

The immunity of the property of a charity from sale under execution vests on special grounds. The property of a corporation organized solely for charitable purposes is exclusively dedicated to public uses, as much so as the streets and alleys of a town or city; for this purpose the corporation is a mere trustee. *Benton v. Boston City Hospital*, 140 Mass. 13, 18, 1 N. E. 836, 54 Am. Rep. 436. It is of primary importance to the public that the trust shall be perpetuated. The trustees or the corporation are usually unsalaried agents, devoting their time and labor to the use and benefit of the public. For their own wrongs and misdeeds they are personally answerable, just as are the physician and the attendants in a hospital. If the doctrine of respondeat superior is applied to them it follows that along with their other powers, they possess an implied power to destroy, by a willful violation of their duties, by collusion, or by negligence, the pub-

lic interests that they are selected to preserve. Any conclusion that tends to support that view must leave out of consideration the public; that is to say, the party most deeply interested. To say that the trustees may by their negligence destroy the charity is simply to say that they may do indirectly and by inadvertence what they cannot do directly. The doctrine that the principle of respondeat superior has no application in this class of cases when the trustees willfully abuse their authority, and that it does apply in a single species of negligence, would seem to be merely the result of another effort to find a compromise. Nor do we think that an illogical compromise of that sort would tend to the public advantage. A judge or a jury might be convinced after a case of negligence had occurred that due judgment and discretion had not been used in the selection of experts and other agents, when perhaps they themselves, if put to it, in a similar case, would do no better, and might do worse; and it seems to us that if our schools, churches, hospitals, and other charities could be sold out on such vague matters of opinion, about which men would naturally differ, the result would be extremely unfortunate. In the case of *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745, the court, as to this question decided that the charity was not liable, saying: "It would be carrying the doctrine of respondeat superior to an unreasonable and dangerous length. That doctrine is, at best, as I once before observed, a hard rule. I trust and believe it will never be extended to the sweeping away of public charities; to the misapplication of funds, specially contributed for a public charitable purpose, to objects not contemplated by the donors. I think it may be safely assumed that private trustees, having the control of money contributed for a specific charity, could not, in case of a tort committed by any one of their members, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise. This doctrine is hoary with antiquity, and prevails alike in this country and in England, where it originated as early as the reign of Edward V, and it was announced in the yearbook of that period."

This point was involved in *Heriot's Hospital v. Rose*, 1 Cl. & F. 506. In that case Lord Cottenham said: It is obvious that it would be a direct violation, in all cases, of the purpose of a trust if this could be done; for there is not any person who ever created a trust that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be

the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose." Lord Brougham said: "The charge is that the governors of the hospital have illegally and improperly done the act in question, and therefore because the trustees have violated the statute, therefore—What? Not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the court below must be reversed." Lord Campbell said: "It seems to have been thought that if charity trustees have been guilty of a breach of trust, the persons damaged thereby have a right to be indemnified out of the trust funds. This is contrary to all reason, justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would, in that case, be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. Damages are to be paid from the pocket of the wrongdoer, not from a trust fund. A doctrine so strange as the court below has laid down in the present case ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it. No foreign or constitutional writer can be referred to for such a purpose. \* \* \* Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but if he convert them to his own use, the law punishes him as a thief. How much better than a thief would be the law itself were it to apply the trust's funds, contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustees. The latter is legally responsible for his own wrongful acts." It is true that some of the courts have treated this case as having been overruled by that of *Mersey Docks v. Gibbs*; but that was not a case of a charity, but one of a public corporation supported by government funds. It is true that Lord Brougham in his remarks in the *Heriot's Hospital Case* speaks of charities and public corporations as if they were governed by the same rules; an error that has led to much confusion. In England the rules relating to charities and to public corporations were not the same. The case of *Mersey Docks v. Gibbs* related only to public corporations; and the decision in the *Heriot's Hospital Case* had never been overruled. Moreover, the decision in *Docks v. Gibbs* has never been the law in this state. With us public corporations and charities are however governed by the same rules as to the matter now under consideration, because, the doctrine of respondeat superior does not apply either to charities or to public cor-

porations. The principle upon which the law proceeds in cases of this sort is well expressed in *Downs v. Harper Hospital*, 101 Mich. 556, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427. "If, in the proper execution of the trust, a trustee or an employé commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the Legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employés, though such acts result in damage to an innocent beneficiary."

Various other cases to the same effect are cited in the opinion delivered in this cause on the former appeal. "A valid vested estate in trust (for charitable purposes) can never lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right as well as the duty of the sovereign, by its courts and public officers, as also by the Legislature (if needed) to have the charities properly administered." *Girard v. Philadelphia*, 7 Wall. 15, 19 L. Ed. 53. "With regard to the liability of charitable corporations or their trustees for the negligence of their agents or employés, there is some difference of opinion, but the decided weight of authority denies such liability; this on two grounds; first, that if this liability were admitted, the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in nowise responsible; second, that since the trustees cannot divert the funds by their direct act from the purposes for which they were donated, such funds cannot be indirectly diverted by the tortious or negligent acts of the managers of the funds or their agents or employés." 5 Enc. Law (2d Ed.) p. 923.

5. Then the question arises whether the present suit is debarred by the judgment rendered in favor of Thomas under which the lands were sold. If a defendant permits a judgment to go against him which he might have successfully defended, he may still claim his homestead and other exemptions. Though a judgment is rendered against a railway company, yet its franchise or other property necessary to the operation of its road cannot be sold under execution, because that would interfere with the public good. *East Alabama Ry. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 186; 1 Freeman, Ex. § 179. The fact that a city or county is by statute liable to be sued does not nec-

essarily imply that its property may be taken in execution. This has been repeatedly decided. *Commissioners v. Martin*, 4 Mich. 557, 69 Am. Dec. 333; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *White v. Bond*, 58 Ill. 297, 11 Am. Rep. 65; *Russell v. Steuben*, 57 Ill. 35; *Hill v. Boston*, 122 Mass. 352, 23 Am. Rep. 332. The judgment is conclusive of the amount of the debt or demand, but it does not conclude the question as to the liability of any property to seizure under it. That is a question that may never arise. If it does arise it will be collateral and subsequent. The statute provides that corporations for benevolent purposes "shall have such powers of suing and being sued \* \* \* as may be necessary to their efficient management and the promotion of their purposes." Kirby's Dig. § 943. This provision, so far from supporting the contention of the appellants, indicates with sufficient clearness that the efficient management and promotion of the purposes of the charity are to be kept steadily in view. If this were not the case there would be no difference between charitable corporations and those organized for purposes of private gain. But if the latter clause of the above section of the statute had been omitted the result, in our opinion would not be different.

It is familiar law that the property of a municipal corporation is not subject to execution, although it may be sued, and in a proper case judgment may be rendered against it. "It is the settled doctrine of the law that not only the public property, but also the taxes and the public revenues of such corporations cannot be seized under execution against them either in the treasury or when in transit to it." 1 Dill. Mun. Corp. § 100. Neither can such property be subjected to garnishment. *Burnham v. Fond du Lac*, 15 Wis. 193, 82 Am. Dec. 663. The reason is that "municipal corporations are instituted by the supreme authority of the state for the public good." Dill. Mun. Corp. supra. Such being the case, let us see where the doctrine of liability of the property of charitable organizations to levy and sale under execution would lead us. In every city of any considerable size may be found one or more hospitals organized and maintained by the city for charitable purposes and one or more hospitals maintained by private benevolence, under the control of trustees appointed or elected as the donors may direct or the statute may require. But a devise to a city for charitable purposes is valid. *McDonogh v. Murdoch*, 15 How. (U. S.) 367, 14 L. Ed. 732; *Perin v. Carey*, 15 How. (U. S.) 465, 16 L. Ed. 701. Let us suppose then that a city had two hospitals, one created and supported out of the municipal revenues and another dependent upon a charitable gift and the donations of private individuals under the control of the city as a trustee. According to the doctrine contended for in behalf of the appellant the former could not be sold

under execution because it belonged to the city, and the latter could be thus sold because the city was only a trustee; and this notwithstanding both were charities instituted "for the public good." Such a distinction cannot be supported except by ignoring the general public interests common to both of these cases. The question is not as to who holds the property in trust, which is merely a personal consideration, a matter of policy and expediency; but it relates to the objects for which all charitable uses are created, and on account of which they are highly favored by law. A discrimination based, not on the character of the trust, but on the character of the trustee, would be false and misleading. The property of a public corporation, such as a railroad or bridge company, essential to the exercise of its corporate franchise and the performance of its duties toward the public, cannot without statutory authority, be sold to satisfy a common-law judgment either on execution, or in pursuance of an order or decree of court. *Overton Bridge Co. v. Means*, 33 Neb. 537, 51 N. W. 240, 29 Am. St. Rep. 514, and note, and cases cited. *Ammant v. Railway (Pa.)* 13 Serg. & R. 210, 15 Am. Dec. 593.

Exemption laws apply to judgments rendered in favor of the state, though the state is not mentioned in them. *State v. Williford*, 36 Ark. 155, 38 Am. Rep. 34. We need not dwell further on these matters. Almost every point arising in this case was decided on full consideration. *Grissom v. Hill*, 17 Ark. 183, was a much stronger case than that now under consideration, since in that instance the property had been sold on a judgment under the mechanics' lien law in which it was specifically described and condemned. *English, Dig. St. p. 715, § 12.* Moreover, the Mechanics' Lien Law is liberally construed. *Murray v. Rapley*, 30 Ark. 568; *White v. Chaffin*, 32 Ark. 69; *Anderson v. Seamans*, 49 Ark. 478, 5 S. W. 799. To hold that the judgment, whatever may be its form, prevents all inquiry as to the liability of property to be sold under it would be to indulge in a technicality; but in dealing with charitable trusts "courts disregard all technicalities." 2 *Perry, Trusts*, § 746. In the case of *Grissom v. Hill* there could be no doubt but that the trustees of the church had authority to erect a building for public worship; but the court held that they had no power to charge the property of the charity with a lien that might destroy the charity itself. The facts in the case were these: Hill had conveyed a lot in a town to trustees for the benefit of a church. The deed contained in the habendum the following phrase: "But said lot of land is never to be sold, or to be used in any other way only for the use of a church, for the benefit of said Protestant church." The lot was afterwards sold in a proceeding instituted by Grissom

to enforce a mechanics' lien for work and materials furnished for the purpose of building a church on the lot, and was bought by him. Grissom entered into possession, and excluded Hill and the trustees of the church. Hill filed a bill in chancery against Grissom and the trustees; setting up the above facts, and praying that the title of the trustees be declared forfeited and re-vested in him, and that the title of Grissom be set aside and declared void; and it was so decreed. Grissom alone appealed. The clause in the deed above mentioned cut no figure in the case whatever; and what was said in the opinion as to the effect of the deed was pure surplusage, because the trustees acquiesced in the decree rendered in the court below, and did not appeal. This the court said explicitly: "The trustees having acquiesced in the decree of the court below, all controversy as to their rights as between them and Hill must be regarded as at an end, and the questions to be determined upon this appeal arise between Grissom and Hill. \* \* \* But whether this is technically an estate upon condition such as upon failure to observe the conditions on the part of the trustees the lot will absolutely revert to the donor, and thereby cut off, on account of the acts of the trustees the beneficial interests of the cestui que trusts, the denomination for whose use the trust was created, it is not necessary to decide, as no one is representing or claiming anything for them on this appeal unless it be Hill. \* \* \* That Hill who made the grant for the use of the church, and who was entitled to have the property appropriated to the charitable uses of the church, had the right to apply to equity to set aside the sale to Grissom, and divest his title and possession there can be but little question. On this appeal no other question is properly presented; and, inasmuch as the appellant has no cause of complaint, the decree must be affirmed." The deed being, then, out of the way, the ground of the decision is clearly stated: "If the trustees could, by improvident contracts, involve the property in debt, and thereby subject it to be sold under execution, the intention of the donor might be defeated in that way as well as by a voluntary sale on their part; because the purchaser could appropriate the lot and church in either case to his own private purposes, and prevent the use of it for religious purposes; as it seems was done in this case. The trustees would hardly be allowed to do indirectly that which they have no power to do directly."

It may be said that under this ruling hard cases must occur. They will not, however, be so numerous as those arising under the law exempting towns, cities, and school districts from liability for the negligence or torts of their agents committed within the

scope of their authority. On the other hand, still harder cases would occur under the opposite rule, by which the will of charitable donors would be defeated, and the public interest would be thwarted. Very many of the greatest charities of the present day have grown from very obscure and feeble beginnings. If they had been sold out in their infancy for some trivial sum on account of the carelessness of an agent or the mistake of a trustee, thus preventing the constantly accumulating benefits of centuries, it could not be truthfully said that the public good was promoted by the sacrifice. Much of the time of our courts is rightfully taken up with the enforcement of contracts and the collection of debts; but the state, which is not exclusively a collection agency for creditors, has many other interests to look after; and the principle of respondeat superior, like other legal principles, has its limitations. The decision in *Grissom v. Hill* was rendered just a half century ago. It is not supported by all the authorities. Neither is any other view of this question supported by all the authorities; indeed, the diversity of opinion on this subject is probably not exceeded in any branch of the law. To attempt to reconcile the adjudications would be a hopeless task. *Grissom v. Hill* is sustained by many of the most respectable adjudications to be found in the books. We believe that the case was rightly decided; but if we thought otherwise we should think it inexpedient to reverse a rule of property so long acquiesced in. The Legislature can change the rule if it likes; but it has shown no desire to do so. On the contrary, the tendency to foster and protect charities has become stronger. As stated in *Grissom v. Hill* they were subject to taxation when that case was decided. Now they are expressly exempted by a constitutional provision. Const. art. 16, § 5. The discrimination is sharp and decisive, because the Legislature is prohibited from passing any law exempting any other property than as provided in the Constitution. Id. § 6.

6. As to the allowance of \$200 by the court below for damages for detention of the lots, the judgment must be modified by canceling this allowance for want of evidence to support it. Subject to this modification the judgment is in all things affirmed.

McCULLOCH, J., dissents on the grounds stated in the report of this case on former appeal. 86 S. W. p. 417.

#### ST. LOUIS SOUTHWESTERN RY. CO. v. McNEIL et al.

(Supreme Court of Arkansas. July 2, 1906.)  
CARRIERS—DELAY IN FURNISHING CAR—BILL OF LADING—NOTICE OF DAMAGES.

The provision in a bill of lading that, as a condition to collection of damages for any loss or injury to live stock "covered by this

contract," the shipper shall give notice before removal of the stock, does not apply to damages occasioned by failure to furnish a car in time.

Appeal from Circuit Court, Clay County; Allen Hughes, Judge.

Action by J. N. McNeil and others against the St. Louis Southwestern Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

S. H. West and J. C. Hawthorne, for appellant. J. H. Hill, for appellees.

BATTLE, J. "On the 31st day of December, 1903, the plaintiff instituted this action and alleged on the 12th day of November, 1903, they shipped one car load of hogs from Rector, Ark., to St. Louis, Mo.; that they were delivered to the defendant in good condition, and on account of the carelessness and negligence of its agents in transporting the car they were damaged in the sum of \$50, on account of the depreciation in prices and shrinkage.

"They further alleged that on the 16th day of December, 1903, they delivered a car load of hogs in good condition at Rector, Ark., for shipment to St. Louis, Mo., and on account of unusual delay and carelessness, and on account of an insecure car, six of the hogs were lost.

"The defendant answered the first paragraph of the plaintiff's complaint and denied that it or its agents were guilty of negligence in transporting the car load of hogs, and denied that the plaintiff was damaged in the sum of \$50 or any other sum by reason of delay caused by the defendant, and alleged that at the time of the shipment of said hogs it did not carry freight to St. Louis, Mo., and delivered the hogs in question to its connecting carrier at Delta, Mo. It received the car on the 12th day of November, 1903, and delivered it 10 hours later to its connecting carrier.

"The defendant answered the second paragraph, and denied that the shipment of the hogs was delayed, or that the car they were shipped in was insecure, and denied that six of the hogs, or any other number were lost, and alleged that they delivered the hogs in question to its connecting carrier at Delta, Mo., 10 hours after they were received by it.

"The defendant filed an amendment to its answer, in which it alleged that, at the time the stock was delivered to it, there was an agreement entered into whereby it was agreed that, in the event of the loss or damage to the hogs, the plaintiff should give a written notice of their demand for damages to the agent of the defendant before the stock was removed, or within one day after the delivery of the stock, to the end that the damage to the same might be examined and ascertained; that no notice was given until long after the hogs had been disposed of."

J. N. McNeil, one of the plaintiffs, testified that on Saturday, the 7th day of Novem-

ber, 1903, plaintiffs demanded that defendant furnish them with a car at Rector, a station on its railway, on Tuesday following, for the transportation of a car load of hogs from that station to St. Louis, Mo. On Tuesday morning the 10th day of November, 1903, they delivered to the defendant in its stock pen at Rector a load of hogs for shipment. The hogs remained there in the pen until Thursday following, about 4 o'clock p. m. when they were loaded on defendant's car and shipped. Witness testified, over the objection of the defendant, that plaintiffs were damaged by the failure to ship the hogs on Tuesday and the delay until Thursday following; that there was a shrinkage in the weight of each hog while in the stock pen of three to six pounds for each day's delay; and that plaintiff's damage by reason of the delay in the shipment was at least \$50.

The bill of lading given by the defendant to plaintiffs for the hogs was read as evidence. It shows that 110 hogs of plaintiffs were shipped by the defendant on the 12th of November, 1903. It has the following stipulation: "That as a condition precedent to the collection of any damages for any loss or injury to live stock covered by this contract, the second party [plaintiffs] will give notice in writing of the claim therefor to some general officer, or to the nearest station agent of the first party [railroad company], or to the agent at destination or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

Other witnesses, among them Howard Allen, testified.

The defendant asked the court, and it refused to instruct the jury, in part, as follows:

"(3) You are instructed that under the sixth clause of the contract under which contract the shipments were made, it is incumbent upon the plaintiffs, should loss or damage occur in the shipment, to give notice to defendant on the delivery line, in writing, of such claim, within one day, and if you find that such notice was not given, then you will find for the defendant."

The jury returned a verdict in favor of the plaintiffs for \$40.

The defendant filed a motion for a new trial, one of the reasons for which is as follows: "That the court erred in permitting witness Howard Allen to testify as to the damages sustained on account of the defendant's failure to furnish a car immediately." We do not find that Allen testified to the effect stated.

The motion for a new trial was overruled, and the defendant appealed.

The stipulation in the bill of lading, which provides that appellees shall not be entitled to recover damages to the hogs unless they give to the carrier notice in writing of their intention to claim damages does not apply to the damages incurred in this case by the failure to furnish a car in time. It is expressly confined to damages covered by the bill of lading, and damages incurred while the hogs were in a stock pen awaiting shipment is not covered by it. *St. L., I. M. & Sou. Ry. Co. v. Law*, 68 Ark. 218, 57 S. W. 258. The latter damages were the principal part if not all of the damages recoverable in this action. The instruction asked for by appellant, copied above, if it had been given, would probably have defeated the recovery of any damages, it applying to all damages, and was properly refused.

The exception to the testimony of McNell, not having been incorporated in the motion for a new trial, was waived. 1 Crawford, Ark. Dig. 122.

Judgment affirmed.

#### SHIREY v. SHIREY.

(Supreme Court of Arkansas. July 2, 1906.)  
DIVORCE—ALIMONY—ALLOWANCE PENDING  
SUIT—APPEAL—FINAL JUDGMENT.

A judgment allowing suit money and alimony pending a suit for divorce is a final judgment for purposes of appeal.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 764.]

Appeal from Lawrence Chancery Court; George T. Humphreys, Chancellor.

Suit by A. W. Shirey against Fair Belle Shirey. From a judgment, plaintiff appeals. Affirmed.

A. W. Shirey, appellant, brought suit for divorce against Fair Belle Shirey, appellee, February 26, 1906. He alleged in his complaint such indignities to his person as to render his condition intolerable. Appellee answered March 19, 1906, and denied specifically the allegations of the complaint. She also on same day filed her written motion for "suit money" and alimony pending the suit for divorce. She alleges that she is without means of support and without money to pay attorney's fees and costs for obtaining the depositions of witnesses by whom she expects to prove the allegations of her complaint, etc. She alleges that appellant is worth the sum of \$200,000 as she is advised and prays for a reasonable amount to be allowed her for the purposes indicated supra. The appellant filed his response February 22, 1906, denying that appellee was without means, and denying that he was worth the amount alleged by appellee, and alleging that there was a suit for divorce pending in the same court, embracing the same subject-matter, and that appellant had

already paid a large sum of money for support and attorney's fees, etc., under decree of the court in that suit, and he alleges that appellee is therefore not entitled to any further sum for such purpose. The court, after hearing evidence on the issue raised by the motion and response, ordered that the appellant pay to appellee \$250, as attorney's fees, and \$50 to be paid to the clerk, to be used for expenses in conducting the suit, and the further sum of \$25 per month, beginning from the date of the order, for appellee's temporary alimony, and the appellant appealed.

Campbell & Suits and W. E. Beloate, for appellant. Cunningham & Smith, for appellee.

WOOD, J. (after stating the facts). It is unnecessary to discuss the evidence which was the basis of the court's order. We have examined it, and think it is amply sufficient to sustain the court's finding. The divorce proceeding, in which the former order was made allowing suit money and alimony, it appears, was dismissed after the allowance had been made and the judgment therefor had been affirmed by this court. This is an allowance in another and subsequent suit for divorce instituted by appellee after the prior suit had been dismissed. The judgment of the court allowing suit money and alimony during the pendency of the suit for divorce is a final judgment on that matter from which an appeal will lie. *Hecht v. Hecht*, 28 Ark. 92; *Countz v. Countz*, 30 Ark. 73; *Glenn v. Glenn*, 44 Ark. 46.

The judgment is therefore affirmed.

The petition for alimony, attorney's fees, and costs in this court is overruled, except as to the \$11.50 paid by her to the clerk.

#### MARION COUNTY v. ESTES.

(Supreme Court of Arkansas. July 2, 1906.)

APPEAL—REVIEW—FINDINGS BY COURT—CONFLICTING EVIDENCE.

On appeal from a judgment of the circuit court, on appeal from the county court, allowing a jailer his claim for feeding prisoners, the evidence being conflicting; but the findings and judgment sustained by legally sufficient evidence, the judgment will not be disturbed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3935.]

Appeal from Circuit Court, Marion County; E. G. Mitchell, Judge.

Appeal by H. R. Estes, as jailer of Marion county, from a judgment of the circuit court allowing him his claim for feeding prisoners. Affirmed.

Woods Bros., for appellant.

McCULLOCH, J. Appellee, H. R. Estes, was jailer of Marion county, and this is a controversy as to the amount of his compensa-

tion chargeable against the county for feeding prisoners. He presented an account claiming 75 cents per day for feeding each prisoner but the county court allowed only 50 cents per day. He appealed to the circuit court where, on conflicting testimony as to reasonable compensation, the amount claimed was allowed him. Judgment was entered accordingly and the county appealed.

The statute provides that "whenever any person committed to jail upon any criminal process, under any law of this state shall declare on oath that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner the food necessary for his support, for which he shall be allowed a reasonable compensation, to be fixed by the county court." Kirby's Dig. § 4402. Appeals are allowed from all final orders and judgments of the county court to the circuit court (Kirby's Dig. § 1487), and on such appeals the circuit court proceeds to try such cases de novo as other cases at law. Kirby's Dig. § 1492; *Phillips County v. Lee County*, 34 Ark. 240; *Dodson v. Ft. Smith*, 33 Ark. 508; *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 550; *Freeman v. Lazarus*, 61 Ark. 247, 32 S. W. 680. The evidence was conflicting, but the findings and judgment of the circuit court are sustained by evidence legally sufficient, and we do not feel at liberty to disturb them.

Affirmed.

#### MAYO et al. v. MAYO.

(Supreme Court of Arkansas. July 2, 1906.)

1. EVIDENCE—PAROL EVIDENCE—CONTRADICTING INSTRUMENTS—ADMISSIBILITY.

A testator directed his executors to pay his debts either by selling the personal or real estate, and disposed of his property to his children after the payment of the debts. Testator died insolvent. At the time of his death, his children were of age, and they executed an instrument stipulating that one of the executors named in the will should qualify and execute the powers conferred thereby. *Held*, in an action by the children to recover lands of the testator, that parol evidence showing an agreement between them and the creditors, whereby the executor should not sell the lands, but should run them and undertake to pay the debts out of the rents and profits, was not inadmissible as contradicting the written instrument executed by the children.

2. EXECUTORS AND ADMINISTRATORS—CLAIMS OF SALE OF LAND—LACHES.

Creditors, executors, and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights are barred.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 1376-1378.]

3. SAME.

In 1890, a few days after the death of testator, his heirs, who were adults, and his creditors, agreed that the property should be run by the executor for the purpose of paying the debts out of the rents and profits. The executor managed the property until 1902, when the heirs brought action to recover the same. *Held*, that

the delay on the part of the executor and creditors in subjecting the lands to sale to pay the debts did not deprive them of the right to subject the lands to their debts; a reasonable cause for the delay being shown.

Appeal from Circuit Court, Monroe County; George M. Chapline, Judge.

Action by Rosebud Mayo and others against R. D. Mayo, administrator of the estate of W. M. Mayo, deceased. From a judgment for defendant, plaintiffs appeal. Affirmed.

Thomas & Lee, H. A. & J. R. Parker, and N. W. Norton, for appellants. Manning, Moore & Bayne and T. K. Riddick, for appellee.

GREENLEE, Special Judge. This is an action commenced in December, 1902, by appellants against appellee, to recover lands which descended to them from their ancestor, W. M. Mayo, who died in October, 1890, leaving him surviving, his widow, Jane E. Mayo, and seven children—F. A. Mayo, R. D. Mayo, Laura M. Boyce (née Mayo), Nannie J. Bond (née Mayo), Wm. J. Mayo, Fannie M. Black (née Mayo), and Lily M. Black (née Mayo). W. M. Mayo left a will in which he said: "It is my desire that all my debts be paid as my executors may think to be the best for the interest of my estate, either by selling of my property, either personal or real estate, in the way and manner and time they may think, or by running and leasing the same at their discretion for the same purpose. After my debts are paid, I desire one-third of my both real and personal estate property to be allotted by three commissioners to my beloved wife during her natural life; and at her death the same is to go to my children, or if any of them be dead, to their children in the same proportion they would be entitled to; and the balance of my property, both real and personal estate property, I desire to be equally divided between my children or their children if any of them be dead previous to the division; the same to be allotted by commissioners appointed by the judge of the probate court of Monroe County. \* \* \* And I hereby appoint my beloved sons, F. A. Mayo and R. D. Mayo to be the executors of this, my last will and testament, and having full and complete confidence in their integrity and capacity I hereby declare that it is my will and desire, that they shall not be required to make any reports to any court, of their transactions in the executorship, or shall any order of any court be required for the selling or conveying of any property of mine, either real or personal property; that they, my executors, F. A. Mayo or R. D. Mayo, shall have full power to manage, control, bargain, sell or convey any of my property, both real and personal property to pay my debts, support and educate my beloved children." The testator was the owner of 2,510 acres of land in Monroe county, of which there were about 1,100 acres cleared and in a state of culti-

vation. He was heavily in debt. Claims amounting to more than \$20,000 were probated against the estate. At the time of the death of W. M. Mayo, all his children were of age, and the next day after his funeral said children met at the home of the testator and entered into a written agreement which is as follows: "Be it known that, whereas, W. M. Mayo departed this life, having made his last will and testament in which he named and appointed F. A. Mayo and R. D. Mayo his executors, without bond or security; and whereas, the said F. A. Mayo is not eligible to the office of said executorship on account of being a nonresident; and whereas, we, being the heirs at law of the said Wm. M. Mayo, desire that the said R. D. Mayo shall qualify as sole executor of the will of Wm. M. Mayo and that he shall as such executor prepare said estate for division among the heirs: We and each of us agree and direct the said R. D. Mayo, as executor as aforesaid, to sell, exchange, or dispose of the personal property belonging to the estate in any manner he may think best and to purchase property in payment of debts due the estate at his discretion, to compromise and settle, in any way he may deem best, all demands due the estate, and also to carry out in any manner he may deem best all agreements made by his testator with any and all his tenants and laborers as to furnishing supplies or otherwise, and also to purchase and sell cotton or other produce from said tenants or laborers in payment of the claims due the estate and sell same in any manner or place he may deem best, and to the end of these directions and instructions we agree to only exact ordinary diligence from the said executor aforesaid, and we further agree to hold him liable for gross negligence in the management of the affairs of said estate. Witness our hands and seals this the 28th day of Oct., 1890. F. A. Mayo. Fannie M. Black. Lillie M. Black. Nannie J. Bond. W. J. Mayo. Laura M. Boyce." On the same day the heirs, and most of the creditors, discussed among themselves the amount of the indebtedness against the estate, the value of the lands, and the best method to adopt for paying the debts. Not one of them thought that the lands would sell for enough to pay the debts, and appellee stated that he desired to manage the estate as they thought best, and that he would sell, lease, or "run" the lands, just as they wished. The undisputed evidence was that all the heirs, without a dissenting voice, at that time agreed that appellee should not sell the lands, but that he should lease or run them and undertake to pay the debts out of the rents and profits thereof. The creditors, who were present, agreed to this course of conduct and those creditors who were not present, were notified of the agreement and they consented thereto. Within a few days after this consultation among the heirs and agreement among them about the



management of the lands, appellee qualified as sole executor, took charge of the lands, and undertook to pay the debts out of the rents and profits thereof; but by reason of a succession of disastrous overflows, appellee did not make much more than enough to keep up necessary repairs on the place and to pay the taxes. It was shown by the proof that at no time from the date that appellee took possession, until the institution of this action, would the lands have sold for enough to pay the debts, and that frequently and repeatedly, during all this time, appellee advised with and consulted the heirs and creditors about the management of the estate and the heirs acquiesced, fully, in what he was doing.

Counsel for appellants earnestly contend that the testimony, introduced by appellee to prove the agreement above referred to, is incompetent, under the rule that parol testimony is inadmissible to contradict, vary, or control a written agreement. The testimony complained of does not, in any way, violate, vary, attempt to control, or even explain the terms of the written paper; it does not affect the written paper but relates to a different matter entirely. It relates to the course of conduct to be adopted by the executor whereby the debts of the estate could be paid, and, if possible, to leave something for the heirs. The agreement was not a contract in the ordinary sense of the term, but it was an election or decision on the part of the heirs, made known to the executor, about what he should do with the lands, how he should handle them to the best interest of all concerned. They agreed that the debts should be paid by leasing instead of selling the lands. We are of the opinion that the trial court did not err in admitting the testimony.

The question to be determined in this case is whether or not the executor and creditors have been guilty of such laches as to bar the right to subject the lands possessed by the testator at the time of his death to the satisfaction of debts probated against the estate. It is settled law in this state that creditors, executors, and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights in that respect will be barred. *Brogan v. Brogan*, 63 Ark. 406, 39 S. W. 58, 58 Am. St. Rep. 124; *Roth v. Holland*, 56 Ark. 633, 20 S. W. 521, 35 Am. St. Rep. 126; *Killough v. Hinton*, 54 Ark. 65, 14 S. W. 1092, 20 Am. St. Rep. 19; *Brown v. Hanauer*, 48 Ark. 277, 3 S. W. 27; *Graves v. Pinchback*, 47 Ark. 475, 1 S. W. 682; *James v. Gibson*, 73 Ark. 440, 84 S. W. 485; *Black v. Robinson*, 70 Ark. 185, 68 S. W. 499; *Mays v. Rogers*, 37 Ark. 155. The reason for the rule is given in *Mays v. Rogers*, supra, to be that "this charge upon real estate is not a perpetual one which may be enforced by the administrator after any lapse of time. The heirs should not be forever deterred from making

improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate. The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches, or unreasonable delay." In *Roth v. Holland*, supra, it was stated: "But we think it the manifest policy of our laws \* \* \* that a delay for more than seven years is not reasonable, and therefore defeats the right of a creditor or an administrator in his behalf, unless there is something to excuse the delay." In this case the appellee did not make an effort to subject the lands to sale for the payment of debts until the expiration of almost 12 years after he qualified as executor.

The circuit judge sitting as a jury found: "That on or about the 28th day of October, 1890, a few days after the death of the testator, W. M. Mayo, there was a meeting of the heirs at the house of the late W. M. Mayo, at which meeting a conference was had by all of them, except Mrs. L. M. Boyce, who was represented there, in that conference, by her husband W. H. Boyce; that all of the heirs were of lawful age; \* \* \* that all the parties to that conference, as heirs, and as creditors, and as representatives of other creditors, agreed that it was to the best interest of the heirs as well as the creditors of the estate of W. M. Mayo, that the property should not be sold, but that R. D. Mayo should qualify as executor and take charge of the lands and personal property thereof, and that he should cultivate and farm the lands in the hope and belief that, by the farming and cultivation of said lands, the debts might be ultimately paid, and some part or all the lands of the estate saved to the heirs; that in pursuance of the agreement R. D. Mayo, the defendant took charge of the estate as executor and cultivated and farmed the lands in controversy; \* \* \* that frequently and repeatedly from 1890 to the date when this suit was brought, the executor talked to and consulted with the heirs as to the conduct of the affairs of the estate, and no objection or complaint was made known to the executor; that the first notice which the creditors of the estate or the executor had of any objection to the continuance of the first agreement was the institution of this action; that the executor had been managing and operating the lands of the estate under the will and the agreement aforesaid with the heirs and creditors of the estate; that, by reason of this agreement and the continuance thereof, the creditors delayed subjecting the lands to the payment of their debts. The court therefore finds there was reasonable cause for the delay on the part of the executor and creditors in subjecting the lands of the estate to sale to pay debts probated against said estate." The facts found by the trial court are supported by the evidence.

From the undisputed testimony in this case, we are of the opinion that the creditors nor

the executor have been guilty of such laches as to bar the right to subject the lands to sale for the satisfaction of debts probated against the estate of W. M. Mayo.

The judgment is therefore affirmed.

**ST. LOUIS S. W. RY. CO. v. REAGAN.**  
(Supreme Court of Arkansas. July 2, 1906.)  
**DAMAGES—DUTY OF ONE INJURED TO PREVENT DAMAGES.**

Where, by a contract between a railroad and its servant, it was required to transport him to its hospital in case of his being injured in the master's service, he was not entitled to recover for suffering and pain caused by delay in furnishing him transportation after injuries, where he could have reached the hospital by paying his fare with money in his possession.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 120.]

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action by John Reagan against the St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John Reagan was in 1904 a section foreman in charge of Section No. 50 on defendant's road. This section was located at and near Stephens, Ouachita county. On the 8th day of February, 1904, while riding on a hand car in the course of his duties, Reagan was injured by the explosion of a torpedo which had been placed on the track to warn passing trains. The injury was caused by a piece of tin from the torpedo striking the leg of defendant with such force that it penetrated the flesh, and lodged between the two bones of the leg. Reagan went to the local surgeon at Camden who gave him the following certificate: "This is to certify that John Reagan is badly and must go to hospital at Tyler, Texas. [Signed] G. W. Hudson. Local Surgeon." The word "hurt" or "injured" was evidently omitted from this certificate by mistake, but the meaning thereof is plain. Reagan boarded the train with this certificate, but the conductor informed him that he could not receive it in lieu of a pass, and that he must procure a pass or ticket from the proper person or pay fare. Reagan then told the conductor he would go to Stephens, the next station, where he lived, and was allowed to do so. Reagan got off the train at Stephens, and sent a telegram to Davis, the roadmaster asking him to furnish him a pass for transportation to Tyler. By a series of accidents this pass was not received until the 12th of February. After the pass was received Reagan went to the hospital at Tyler, Tex. But there was some delay in performing the operation to remove the piece of tin, and the tin was not taken out of his leg until about 24 hours after his arrival. When the operation was performed the leg had become badly swollen and poisoned by the tin, which was imbedded between the two bones

of his leg. About a pint of clotted blood and pus was removed from the leg. The wound healed slowly, and Reagan was confined at the hospital about four weeks on account of the injury, and had not fully recovered from the effects of the injury at the time of the trial. He brought an action against the defendant company to recover damages caused by delay in furnishing transportation to the hospital at Tyler and by delay in operating after his arrival. The defendant filed an answer and on the trial the evidence showed that a certain amount was deducted by the company from the wages of its employes as a fund to maintain a hospital for injured employes of defendant. This and other facts proved tended to show that there was a contract between the defendant and its employes that if the employe was injured while in the service of the company it would furnish prompt transportation to its hospital and treatment there free of charge.

The court, among other instructions, gave the following instruction to the jury: "You are instructed that if you believe from the evidence that the plaintiff was delayed in receiving transportation, which he had a right to expect from the facts in this case, if such facts are proven, that he is entitled to recover for whatever suffering and pain there may have been caused by reason of the delay in furnishing him transportation, notwithstanding, he may have been able to pay his transportation." And refused to give the following instruction asked by the defendant: "(1) The jury are instructed that if they find from the evidence that the plaintiff was injured while in the service of the defendant company, and was entitled by virtue of an implied contract with defendant to be transported free of charge to its hospital at Tyler, Tex., for treatment, and that defendant failed or neglected to promptly furnish transportation to plaintiff to go to the hospital, and by reason thereof, plaintiff's injury was increased and you further find that the plaintiff had the means by which he could have paid his way and thereby reached the hospital promptly, it was his duty to have done so, and thereby avoided increased injury, and if you find he did have the means and failed or neglected to use it he cannot recover any sum as damages which resulted from the delay of defendant in furnishing him transportation to the hospital." There was a verdict and judgment in favor of plaintiff for the sum of \$2,000, and the defendant appealed.

S. H. West and Gaughan & Sifford, for appellant. Scott & Head, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment for the sum of \$2,000, rendered against the defendant company for failure to furnish the plaintiff prompt transportation to its hospital and prompt treatment after his arrival.

The presiding judge instructed the jury that if there was an agreement by the company in case of injury to furnish the plaintiff transportation to its hospital, and if it failed to do so that plaintiff was entitled to recover whatever suffering and pain there may have been caused to plaintiff by reason of the delay in furnishing him transportation, notwithstanding he may have been able to pay for such transportation. Now, a tickets from Stephens, Ark., where plaintiff lived to Tyler, Tex., where the hospital of defendant was located cost but \$6, and the defendant company offered evidence to show that plaintiff had at all times an ample supply of money to have paid for this transportation had he desired to do so, and that when he arrived at the hospital he had over \$3,000 cash in his possession. Instead of paying his fare and compelling the company to restore the amount paid afterwards, he chose to wait for the pass. This delay, no doubt, acted unfavorably upon his wound, and was the cause of considerable suffering on the part of plaintiff, but as he had it in his power to have avoided this delay and injury by buying a ticket, we think it was his duty to have done so. Suppose the company had never furnished him a ticket, could he with \$3,000 in his pocket have been justified in refusing to spend \$6 for a ticket and in allowing his leg to mortify so that amputation would be necessary, and if he did so could he justly demand of the company compensation for the loss of a leg? It was the duty of plaintiff, when the company failed to carry out its contract to do what he reasonably could to avoid further injury to himself, and we are of the opinion that he cannot recover for pain and suffering caused by the delay under such circumstances, for he had it in his own power to have avoided such injury. *Hall v. Memphis & C. R. Co.* (C. C.) 15 Fed. 57; *Louisville & Nashville R. Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968.

The decision of this court in the case of *Hot Springs Ry. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913, does not conflict with our conclusion here for that was a case of an unlawful ejection of a passenger at a point between stations. In such cases there is an element of tort and the court said that the passenger could recover "for the loss of time and trouble in having to walk back to Hot Springs, and such humiliation as he was made to undergo by being put off," but that he could not recover damages for mental anguish caused by the resulting delay in reaching his sick brother, and the judgment was reversed on account of an improper instruction on that point. But this case has none of the elements of tort for plaintiff was not ejected from the train. He does not complain that the conductor at the time he boarded the train at

Camden refused to carry him beyond Stephens for he had neither pass nor ticket, and did not offer to pay fare. He got off at Stephens and for the first time notified the defendant company that he needed a pass to go to Tyler. He claims only that the defendant was bound under its contract to furnish him transportation to the hospital when thus notified. We may concede that this intention was well taken, but it does not follow that plaintiff can recover for pain and suffering caused by delay in reaching the hospital. It must be remembered that the railway company was under no obligation to enter into a contract of the kind set up by this plaintiff. The law requires railway companies to carry passengers who present themselves at the proper time and place and tender the amount required for transportation of passengers. A breach of a contract of that kind by ejecting a passenger who has paid his fare is a violation of a duty which the company owes to the public for which the passenger ejected may recover his damages in an action for tort. But in this case the law did not require the company to enter into a contract to carry its employees to a hospital when injured. In refusing to perform such a contract the company was guilty of no breach of duty to the public, nor of any tort. The damages must be assessed as in ordinary cases of breach of contract and only those damages can be recovered as are the natural and proximate consequences of the defendant's breach of contract. *Louisville & Nashville R. R. Co. v. Spink*, 104 Ga. 692, 30 L. Ed. 968; (3rd.) *Sutherland on Damages*, § 899.

Then a party has the money with which to purchase a ticket the natural and ordinary damages which would result from a breach of a contract to give him free transportation would be the price of the transportation agreed to be furnished. If plaintiff in this case had the money with which to have purchased a ticket, we see no reason why he should be allowed to recover damages for failing to furnish a ticket beyond the price of a ticket. For if, having the money to buy a ticket, he voluntarily exposed himself to this additional pain and suffering rather than pay the price of a ticket, his suffering caused by the delay is as much due to his own inaction as to that of the defendant, and he ought not to be allowed to hold the defendant liable for pain and suffering that he could have avoided by such a slight expenditure on his part. We are therefore of the opinion that the court erred in refusing to allow evidence that plaintiff had money with which he could have bought a ticket to Tyler. He also, we think, erred not only in giving the instruction to which we have referred, but in refusing to give instruction

No. 1 asked by the defendant, which stated the law substantially as set forth in this opinion.

Judgment reversed, and cause remanded for a new trial.

#### ARK.-MO. ZINC CO. v. PATTERSON.

(Supreme Court of Arkansas. July 2, 1906.)

##### 1. SALES—SUFFICIENCY OF PERFORMANCE—DETERMINATION BY UMPIRE.

A contract for the installation of mining machinery, providing that when tested it must be satisfactory to a certain named person, was valid and binding, though an arbitrary and capricious expression of dissatisfaction would not prevent the seller from recovering for the machinery.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 405, 406.]

##### 2. SAME—EVIDENCE—SUFFICIENCY.

In an action for the price of certain mining machinery sold under a contract providing that it should be installed by the seller, evidence held insufficient to support a finding that the seller substantially performed its contract.

##### 3. SAME—RIGHT TO REFUSE UNSATISFACTORY GOODS—ESTOPPEL.

A contract for the sale of mining machinery provided that it should be installed in a certain manner, and that, when installed, it should be subjected to a test, and that a certain named member of the purchasing corporation should determine whether the machinery, as installed, was satisfactory, and that the purchaser should not be liable if it was not. The person charged with the duty of determining whether the machinery was satisfactory was present at all times while the work of installation was in progress and expressed no dissatisfaction, but after the work was completed refused to accept the machinery. Held, that the failure to make objections while the work was progressing did not estop the buyer from refusing to accept the machinery after the work was completed.

Appeal from Marion Chancery Court; T. H. Humphreys, Chancellor.

Action by G. M. Patterson against the Ark.-Mo. Zinc Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The plaintiff, G. M. Patterson, instituted this suit in the chancery court of Marion county against the defendant, the Ark.-Mo. Zinc Company, a New Jersey corporation doing business in this state, to recover the contract price for the erection of a concentrating and ore-dressing plant at the Climax zinc mine in Marion county owned and operated by the defendant, and to enforce a statutory mechanic's lien therefor. An unpaid balance of \$892.33 is claimed on the original contract price, and the further sum of \$781.36 for extras, making a total of \$1,673.69 alleged to be due and unpaid.

The contract between the parties, whereby the plaintiff undertook to construct the plant, contained the following clauses, viz.: "(1) The second party shall furnish, build, erect, install, complete and place in good running order satisfactory to first party, the said plant, according to the specifications and blue prints hereto annexed, and by refer-

ence thereto herein is made a part hereof, and second party shall furthermore furnish and install all machinery, lumber, hardware and other material, together with all labor necessary to complete the said plant. (2) The same shall be furnished in a good, workmanlike and substantial manner to the satisfaction and under the direction of W. N. Allen, or under such other person as first party shall select for that purpose, to be certified under the hand of the said W. N. Allen or by first party. \* \* \* (6) Should any dispute arise concerning the true construction or meaning of the specifications, the same shall be decided by the said W. N. Allen, or such other person appointed by him or by first party in good standing, and his decision shall be final and conclusive. \* \* \* (8) After completion of the plant and upon due notice by second party to first party or to said W. N. Allen, given personally or by registered letter, at least ten days prior to a day to be therein fixed, the said plant shall be tested by being operated continuously for a period of five days under the control and direction of the said W. N. Allen or any person appointed by first party as hereinbefore provided. The test must show to the satisfaction of the said W. N. Allen or such other person appointed by the first party that the plant as a whole has been built in conformity to this agreement, and that it will crush and properly clean in ten hours or less at least fifty tons of ore from the said mine, or ore of a similar character to that of said mine. (10) First party shall pay to second party as the sealing and delivery of this contract and the bond hereto attached \$500. First party shall pay second party \$2,000 when said plant, including the machinery, lumber, hardware and all parts thereof are delivered on the property of the Ark.-Mo. Zinc Company at said Climax mine. \$599.53 shall be paid when the plant is completed and accepted and turned over to the owners in good condition, and the balance, \$1,000, after the said last payment and acceptance."

The specifications attached to the contract set forth in detail the kind of machinery to be furnished and the manner in which the plant should be constructed, and concluded with the following provisions, viz.: "Contractor to furnish all machinery, lumber, labor and other material necessary to complete said mill. The contractor will be and is bound to give an approved bond in the sum of the total contract price of the mill, to secure the faithful performance of his part of the contract. Contractor to start up mill and run same for a period of five days to demonstrate the correctness of his work. Owners of mill to furnish crusher, feeders and engineer. These specifications and two blue print drawings comprise a complete mill, tried and running, whether every item is specified or whether shown in blue print

details. The said concentrating and ore-dressing plant is to be finished on or before the 15th day of July, 1902, or as early as possible for the contractor to do so, it being understood that the day fixed is a later day than the one estimated upon during preliminary negotiations. It the said plant is not finished at the time mentioned, then the said contractor shall pay as liquidated damages the sum of \$7.50 per day for each day's delay after said day."

The defendant filed its answer denying that the plaintiff had complied with the contract by constructing the plant in accordance with the terms of the contract and specifications, alleging that the plant had not come up to the test provided in the contract; that it was so defective as to be practically of no use, and was not satisfactory to said W. N. Allen or defendant and had been rejected, and that defendant had paid to the plaintiff the sum of \$3,207.20 on said contract price. The answer was made a cross-complaint against the plaintiff and the sureties on his bond, with prayer for recovery of said sum advanced, and also damages on account of the plaintiff's alleged failure to comply with the contract. Alleged defects in the plant are set forth in detail in the answer as follows: "The boiler is improperly and defectively set; the inside walls in the fire box having fallen in, and being in a dangerous condition; that all steam connections are faulty and so arranged that, when it became necessary to close down any one department of the mill, all must be closed; the engine is defective in its connections, and did not work at all satisfactorily, and had a decided pound in the cylinder, and would wear it out in a very short time; the follower catches and hammers at each revolution. The rolls are not set on a solid foundation, and are insecure and dangerous; the crusher is not set on a solid foundation or anchored, and is not true upon its base, and is insecure and dangerous; the screen is hung insecurely and is dangerous; the main line shaft is not properly set, and is unable to stand the strain that operation would cause; the elevator is improperly constructed and permits a constant waste of ore; the ore bin is improperly constructed, and would not sustain the weight it was intended to sustain, and is broken; the hoister house is improperly and insecurely constructed, the vibrations when the hoister is in operation being so great that it renders it difficult for the hoisterman to perform his duties; the steam connections on the hoister are so leaky that it is impossible to operate it on account of escaping steam, without wrapping the joints with cloth, and the building is improperly and defectively constructed; that it will not crush and properly clean in ten hours or less at least 50 tons of ore from appellant's mine, or ore of a similar

character to that of said mine, and that there are many other defects in the construction of said plant; that after a test of said plant by appellee, and said plant being defective and not according to contract, the same was rejected and was not satisfactory to said W. N. Allen or appellant, and although promptly notified of such defects the appellee refused to remedy same, and said plant was closed and tendered to appellee, and appellant still tenders same to them."

The chancellor made the following findings of the facts, viz.: "W. N. Allen, the director of the work, was on the ground about three days out of the week while the work was progressing, according to his own evidence, and more of the time according to the weight of evidence. The machinery was of the kind and quality provided for in the contract. There were some defects in the construction of the building and installation of the machinery, and some changes and modifications in the plans and specifications, yet upon the whole there was a substantial compliance with the contract on the part of the contractor. The changes and modifications of the plans and specifications consisted in roofing the building shingle fashion instead of being batted; a slight change in the location; a decrease in the size of the jigroom of 4 feet and 2 inches in the fifth cell of the jig. Any of these changes could be observed by a casual observer. The defects consisted in the floor lacking sufficient bracing, thickness of the floor, and failure to bat the hoister house. The failure to put a mudsill lengthwise under the support to the orerom; the failure to line the mouth of the elevator and three pipes with iron; the failure to place a fourth girder, box, and fixtures in the 13-foot space to support the main shaft; the failure to exactly plumb the piles in the piling foundation under the jigroom; the failure to place sufficient piling under the west wall of the boiler and engine room, and to set the crusher on a solid foundation, and to sufficiently line the fire box under the boiler. None of these defects were intentional or willful on the part of the contractor, and most of them could be seen and detected during the construction of the plant by a person competent to direct the construction of a mill and receive same. The jig was constructed in the manner provided in the contract, except the fifth cell, which was a little smaller, but the fifth cell neither adds to nor takes from the capacity of the mill. I find from the whole evidence that it was the duty of respondent to furnish water necessary to operate the mills, which it has never done; that both parties are in possession of the mill; that the capacity of a mill is largely due to the number of jigs and water supply; this contract provides for only one jig. The mill was not completed for 30 days after the time provided by the

contract. After the mill was completed respondent expended \$700 or thereabouts trying to get a water supply without insisting or even requesting or demanding that the contractor furnish water; the respondent has never received the mill, and both parties are in possession thereof, contending that the failure of the mill in the attempted tests to properly perform its functions and come up to the required running capacity is due to the neglect and failure of each other."

A decree was rendered in favor of the plaintiff for the amount claimed, after deducting the sum of \$225, which was allowed to the defendant as liquidated damages of \$7.50 per day on account of delay in completion of the plant. The defendant appealed.

Seawel & Seawel, for appellant. G. H. Perry, for appellee.

McCULLOCH, J. (after stating the facts). The chancellor found from the evidence certain defects in the constructed plant, but declared that there had been, on the part of the contractor, who seeks to recover the balance of the contract price, a substantial performance of the contract. He declared the law applicable to the facts found to exist, as follows: "The owner of the property has no right to rescind a contract for the construction of a concentrating plant where the contract provides for partial payments as the work progresses, and large payments are made when the owner has provided for and actually placed a director on the grounds to supervise the work. In such case the owner is estopped from pleading a rescission of the contract, but must stand on the contract, and be satisfied with damages for failure to do the work in a skillful and workmanlike manner; and especially is this the law when said owner pays subcontractors for material used in the construction of the plant after the plant has been completed, as it has done in this case."

We are unable to agree with him either as to findings of facts or as to the declarations of law. It is undoubtedly the law that, in the absence of an agreement to the contrary, a substantial performance is all that is required to authorize a recovery of the contract price less the additional cost of a literal compliance with the contract. But it has been held by this court that (quoting the syllabus of *Hot Springs Ry. Co. v. Maher*, 48 Ark. 522, 3 S. W. 639) "where parties agree that all questions relating to quality, quantity, or manner of construction of work to be done shall be decided by an engineer in charge of the work, and that his decision shall be final and conclusive, his decision cannot be questioned by either party except for fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment."

This decision is followed in the later case of *Ozan Lumber Company v. Haynes*, 68 Ark. 185, 56 S. W. 1068, and is in line with the authorities generally. 30 Am. & Eng. Ency. Law, p. 1237; *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106; *Martinsburg & Potomac Ry. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *C. & S. F. & C. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; *National Contracting Co. v. Commonwealth*, 183 Mass. 89, 66 N. E. 639; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139.

The contract in this case provides that, upon completion of the work, "the test must show to the satisfaction of the said W. N. Allen, or such other person appointed by first party that the plant as a whole has been built in conformity to this agreement, and that it will crush and properly clean in 10 hours or less at least 50 tons of ore from the said mine, or ore of a similar character to that of said mine." This is a valid feature of the contract and is binding upon the parties, but an arbitrary and capricious expression of dissatisfaction will not prevent recovery, and by some courts it is held that such stipulations require only the performance of the work by the contractor in such manner as ought to satisfy the owner. 30 Am. & Eng. Enc. Law, p. 1236; *Williams Co. v. Standard Brass Co. (Mass.)* 53 N. E. 862; *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 South. 983; *Slingerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; *Howard v. Smedley*, 140 Pa. 81, 21 Atl. 253; *Exhaust Ventilator Co. v. C. M. & C. P. R. Co.*, 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; *Duplex Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; *Lloyd on Buildings*, § 22. The law upon the question is, we think, correctly stated by Chief Justice Brickell, speaking for the Supreme Court of Alabama in *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 South. 983, as follows: "There is no reason of public policy which prevents parties to a contract for the performance of work from agreeing that the decision of one or the other, or a third person, as to the sufficiency of the performance shall be conclusive. Having voluntarily assumed the obligations and risks of a contract, these legal rights and liabilities are to be determined solely according to its provisions. Where the decision is left to a third person, the authorities almost universally hold that his action, in the absence of fraud, or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, is conclusive upon the parties. So, where, by the terms of a contract to do a piece of work or perform services, the excellence of which is not a mere matter of taste or fancy, or to furnish a piece of machinery or other

article, the suitability of which involves a question of mechanical fitness to do certain work or accomplish a certain purpose, the one party warrants the work or article to be satisfactory to the other, the weight of authority is, though the cases are not entirely harmonious, that there can be no recovery when the employer or purchaser is, in good faith, dissatisfied. And this is true where there is no express warranty that the work or article shall be satisfactory, but a provision making the payment contingent upon its being satisfactory."

W. N. Allen, the person who, under the terms of the contract was selected to give direction to the work and to whose satisfaction the plant should be constructed, was a stockholder in appellant corporation and manager of the Climax mine, where the plant was to be operated; and, under the view which we take of the evidence, it is unnecessary to decide whether he should be treated as a disinterested referee, or as a party to the contract, or to decide which of the rules of law hereinbefore announced should be applied to his refusal to accept the plant. Upon a careful consideration of the evidence we are forced to the conclusion that it does not establish a substantial performance of the contract on the part of the contractor or that the completed plant met the requirements of the test stipulated in the contract. Nor do we think that the chancellor's special finding of fact as to defects in the plant justify his general conclusion that there was a substantial compliance. He found that "the defects consisted in the floor lacking sufficient bracing, thickness of floor, and failure to bat the holster house; failure to put a mudsill lengthwise under the support to the oreroom; failure to line the mouth of the elevator and three pipes with iron; failure to place a fourth girder, box, and fixtures in the 13-foot space to support the main shaft; the failure to exactly plumb the piles in the foundation under the jig-room; the failure to place sufficient piling under the west wall of the boiler and engine room, and to set the crusher on a solid foundation, and to sufficiently line the fire box under the boiler."

A large number of witnesses introduced by appellant testified that these defects and numerous others, particularly in the foundation of each of the several buildings, rendered the whole plant insecure and worthless. These witnesses, who appear to be men of intelligence and with more or less experience on the subject, testified in detail concerning the defects in the plant and that it wholly failed, on the final test, to perform the desired work. The effect of these defects in the plant is summarized in the following language of one of the witnesses, and is supported by the testimony of all the numerous witnesses introduced by appellant:

"It was impossible to operate the mill continually on account of the choking of the spouts leading from the first roll to the elevator, and on account of the crusher being set so insecurely that the vibrations caused the taps holding the boxes on the crusher to become loose, and the jig was utterly unable to separate the sand from the ore, the ore now in the jack bin having a large per cent. of sand in it; the elevator showed a constant waste of fine ore, due to imperfect construction." Appellee, Patterson, and a number of witnesses introduced by him, testified that the plant was constructed substantially according to contract, but that the final test failed solely because of an insufficient supply of water. While there is a sharp conflict in the evidence, we are of the opinion that the contention of appellant is supported by a decided preponderance. The chancellor found that the plant was never accepted by appellant, and was not approved by Allen upon the final test. His finding on this point is sustained by the evidence.

It is contended, however, in behalf of appellee, that Allen was present during the progress of the work; that, by his failure to exercise his right of disapproval while the work progressed, he is deemed to have approved it; and that appellant is thereby estopped from rejecting the completed plant. This may be a correct statement of the law applicable to some building contracts, but cannot be applied in this case, where the contract stipulates for the right of acceptance or rejection on final test after completion of the plant, which is expressly warranted to perform certain work. *Brownell Imp. Co. v. Critchfield*, 197 Ill. 61, 64 N. E. 332; *Cornish-Curtis-Greene Co. v. Dairy Association*, 82 Minn. 215, 84 N. W. 724; *Beharrell v. Quimby*, 162 Mass. 571, 39 N. E. 407. The contract in this case did not call for an approval or rejection by Allen until the final test should be made, and appellant was not estopped by his failure to disapprove before completion of the plant. Nor did the payment by appellant of bills for material used in construction of the plant operate as a waiver of the right to reject the whole plant. It follows from what we have said that appellee is not entitled to recover anything, and the decree in his favor was erroneous. Appellant is entitled to recover the amounts advanced and paid to appellee on the contract price, with interest from dates of payment, but we find no satisfactory evidence to justify an assessment of damages for the failure of appellee to construct the plant.

The decree is reversed, and the cause remanded, with directions to enter a decree dismissing the plaintiff's complaint for want of equity and in favor of the defendant for recovery of the amounts paid to appellee, with interest from the respective dates of payment.

**COLLIER v. TRICE et al.**

(Supreme Court of Arkansas. June 25, 1906.)

**1. EXECUTORS AND ADMINISTRATORS — CLAIMS AGAINST ESTATE—VERIFICATION.**

Kirby's Dig. § 118, in relation to the presentation of claims against the estates of decedents provides that if a debt be assigned after the debtor's death, affidavit shall be made by the person who held the debt, as well as the assignee. Section 115 provides that before any executor shall pay any debt, the same must be sworn to as required by law. Section 123 provides that every person having a claim against a decedent after it has been allowed by the executor shall file the same, with a copy of the notice served on the executor, in the office of the clerk. *Held*, that where a claim is properly authenticated when exhibited to the executor, and subsequently it is assigned, it is not necessary that the assignee verify the claim.

**2. SAME—PARTIES.**

A note given by a decedent being assignable, it is not necessary that the payee, who assigned the note, shall be made a party to proceedings for its collection from the estate; Kirby's Dig. § 6000, providing that, where the assignment of a thing in action is not authorized by statute, the assignor must be a party to an action thereon.

**3. WITNESSES—COMPETENCY — TRANSACTIONS WITH DECEDENT — WITNESS NOT PARTY TO PROCEEDINGS.**

Schedule to Const. 1874, § 2, providing that in actions against an executor no party shall be allowed to testify against the other as to any transactions with testator, does not disqualify the payee of a note given by decedent in proceedings by the payee's assignee to enforce collection from the estate.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 621.]

Appeal from Circuit Court, Green County; Allen N. Hughes, Judge.

Action by H. S. Trice and others against M. F. Collier, as administrator of H. W. Glasscock, deceased. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Johnson & Huddleston and W. W. Bandy, for appellant. J. D. Block, for appellees.

**BATTLE, J.** On the 16th day of January, 1883, H. W. Glasscock executed to J. W. Crawford his promissory note for the sum of \$800 and 10 per cent. per annum interest thereon from date. The note was due and payable to the order of Crawford 12 months after date, the 16th day of January, 1883. Sundry credits beginning in 1886 and ending in 1889 were indorsed upon the note. On the 25th of January, 1901, Glasscock died, and on the 4th day of March, 1901, M. F. Collier was appointed administrator of his estate. On the 19th of November, 1902, Crawford presented the note, properly authenticated, to the administrator for allowance, who rejected the claim, and waived notice of presentation to the probate court. Thereafter, Crawford, for a valuable consideration, assigned the note to H. S. Trice, J. R. Miller and J. W. Weathersby. No further affidavit of authentication was made by the assignees or either of them. The claim was presented to the probate court and allowed, and the

administrator appealed to the circuit court.

In the circuit court the administrator moved to dismiss the action because the claim was not properly authenticated, which was overruled. He then moved to make Crawford a party plaintiff, which was overruled. He then answered and pleaded the five-year statute of limitation.

In the trial J. W. Crawford was permitted to testify, over the objections of the administrator as to transactions with Glasscock, the deceased. His testimony, if true, proved that the note was executed by the deceased and was given for a valuable consideration, and that the credits indorsed thereon were for amounts actually paid on the days of their respective dates.

Plaintiffs again recovered judgment against the administrator for the balance due on the note; and he appealed.

The first contention of appellant is that appellees should have verified the claim after it was assigned to them. The basis of this contention is section 118 of Kirby's Digest, which is as follows: "If the debt be assigned after the death of the debtor, affidavit shall be made by the person who held the debt at the death of the debtor, as well as the assignee." Does this mean that the affidavit must be made by the assignee when the assignment has been made after the claim has been presented to the administrator? Section 113 of the Digest provides how a claim shall be presented to the administrator or executor. Section 114 provides how it shall be authenticated. Section 115 provides that "before any executor or administrator shall pay or allow any such debt, the same shall be sworn to as aforesaid." Section 118 provides how it shall be authenticated when it has been assigned after the death of the debtor. All these sections as to authentication, manifestly have reference to the time when the claim shall be presented to administrator or executor for allowance, and has no reference to an assignment made after such presentation. After it has been presented to the administrator or executor, without providing for any other authentication, section 123 provides: "It shall be the duty of every person having claims against the estate of any deceased person, after having exhibited his claim to the executor or administrator, as required, and after the same has been approved and allowed by him, to file the same, together with a copy of the notice served on the executor or administrator, in the office of the clerk, and the said clerk shall, at the next term of the court after the filing of such claim, present the same to the court for classification," etc. Section 124 provides: "If any executor or administrator shall refuse to allow any claim or demand against the deceased, after the same may have been exhibited to him in accordance with law, such claimant may present his claim to the court for allowance," etc. And section 126 provides: "No demand against



any estate shall be presented to the court for allowance until after the executor shall have refused to allow and class the same," etc. All these statutes show that the claim must be authenticated in the manner indicated when presented to the executor or administrator, and it necessarily follows that if the authentication answers the statutory requirements, under conditions existing when the claim is exhibited to him, no further or additional authentication afterwards becomes necessary.

Appellant's next contention is that Crawford should have been made a party. This is not true. The note sued on was assignable. It is only when the assignment of a claim or thing in action is not authorized by the statute that the assignor must be made a party. Kirby's Dig. § 6000.

Crawford was a competent witness. He was not rendered incompetent by section 2 of the schedule to the Constitution of 1874. That section provides: "In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, that in actions by or against executors, administrators, or guardians in which the judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate, or ward, unless called to testify thereto, by the opposite party." Under this section parties to actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them are only incompetent to testify. Interest cannot disqualify. Crawford was not a party to this action and was a competent witness. *Bird v. Jones*, 37 Ark. 195; *Bozeman v. Browning*, 31 Ark. 364; *McRae v. Holcomb*, 46 Ark. 306; *Lawrence v. Lacade*, 46 Ark. 378; *Stanley v. Wilkerson*, 63 Ark. 556, 39 S. W. 1043; *Potter v. Bank*, 102 U. S. 163, 26 L. Ed. 111.

Judgment affirmed.

HILL, C. J., not participating.

#### FOSTER et al. v. BEIDLER.

(Supreme Court of Arkansas. June 25, 1906.)

##### 1. TRUSTS—RESULTING TRUSTS—PAROL EVIDENCE—SUFFICIENCY.

To establish a resulting trust by parol, the proof must be full, clear, and convincing.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 134-137.]

##### 2. SAME.

In a suit by an heir of a grantor to establish a parol trust in the property conveyed, the grantee testified that he held the property under deeds which had been executed to him in trust by the grantor, that he paid nothing for the property, and did not know why it was put in his name. After the death of the grantor, the grantee controlled the property as if the same

belonged to him absolutely. *Held* insufficient to establish a parol trust in favor of the heir.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 134-137.]

##### 3. SAME.

In a suit by an heir of a grantor to establish a trust in property conveyed, the heir testified that he had heard from the grantor that the grantee had no interest in the property, and had heard the grantor say to the grantee that if anything happened to the grantor, the grantee would deed the property to the heir, and that the grantee replied that there could be no trouble about that. The deeds purported on their face to convey the property in fee for a valuable consideration. *Held* insufficient to establish a trust in favor of the heir.

##### 4. EVIDENCE—DECLARATION OF GRANTOR—ADMISSIBILITY.

A declaration by a grantor in a deed purporting to convey absolute title for a valuable consideration made subsequent to the execution of the deed, and in the absence of the grantee, that the grantee had no interest therein, was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 840-851.]

##### 5. TRUSTS—RESULTING TRUSTS.

In a suit by an heir of a grantor to establish a trust in the lands, a witness for plaintiff testified that the grantor contracted a debt for property bought in the name of the grantee, who executed the notes evidencing the debt. The creditor brought suit in attachment against the grantee, and obtained title in such proceedings. *Held*, that the creditor was not a trustee of the land in favor of the heir, for equity would not permit the burden of paying for the land to be shifted to the grantee, who was a mere agent of the original grantor.

Appeal from Miller Chancery Court; James D. Shaver, Chancellor.

Suit by Senator Roy Beidler against W. J. Foster and others. From a decree for plaintiff, defendants appeal. Reversed, and complaint dismissed for want of equity.

This suit is by appellee against appellant Foster and others to set aside certain deeds. The complaint alleged that appellee is the only heir of H. M. Beidler and reached his majority on July 31, 1897; "that H. M. Beidler some time before his death was the owner of a large landed estate in, at, and near the city of Texarkana, Ark.; that he became involved in domestic difficulties ending in a separation and divorce from his wife, Amanda J. Beidler; that his business was that of speculator in real estate, and that he was threatened and feared that his former wife would bring an action against him for alimony, and thus tie up his property, and interfere with and prohibit his making sales and conveyances to those desiring to purchase, and to provide against which he allowed a large amount of his said property to go delinquent for the nonpayment of taxes, and allowed the same to be sold to the state of Arkansas for the nonpayment of taxes, and afterwards repurchased it from the state, taking the title in the name of the defendant, J. H. Beidler, who was his brother, and who is to hold it for him; that to facilitate sales by the said J. H. Beidler he afterwards on December 22, 1887, executed

deed to the property or the lands for the nominal consideration of \$7,000, and on April 6, 1888, he executed a deed for certain other property to the said J. H. Beldler for the nominal consideration of \$5,000. Then follows a recital of other alleged facts to show that J. H. Beldler held the lands so conveyed to him in trust for H. M. Beldler. The complaint then alleges that J. H. Beldler conveyed certain portions of the property to two of his children without consideration, and in violation of the alleged trust, and continues in substance as follows: "The said J. H. Beldler purchased large property in Battle Creek, Mich., and executed his notes therefor, and on February 1, 1890, Joseph L. Foster brought suit against him, and caused an attachment to be levied upon the property heretofore referred to; that said Foster obtained judgment for a large sum in said case, and caused all of said property to be sold thereunder, and bought said property; that said sales were confirmed, and deed executed to the said Joseph L. Foster, who has made deed to numerous parcels of said lands, and on October 10, 1894, conveyed the remainder by quitclaim deed to his son, W. J. Foster, who now holds and controls the same; that all said conveyances should be set aside, save conveyances made by X. F. Beldler to innocent purchasers. The prayer was for the setting aside of conveyances and revesting the property in the plaintiff.

Appellant demurred to the complaint which was overruled, and he saved his exceptions. Appellant then filed an answer, which, after certain denials of material allegations is as follows: "That a large property was purchased near Battle Creek, Mich., by the said J. H. Beldler, who executed his notes therefor; that Joseph L. Foster, father of this defendant, now deceased, did bring suit against J. H. Beldler on said notes; attachments were issued and levied against the property described in the complaint, which was in the name of J. H. Beldler; said Foster obtained judgment, and said property was sold by order of the court under the attachment, which was duly sustained; and was also in part sold under execution; and both attachment and execution sales were confirmed by the court, and the sheriff of Miller County, Ark., executed to said J. L. Foster his deeds for said property; that if it be true, as alleged in plaintiff's complaint, that H. M. Beldler was using his property and his brother, J. H. Beldler's name, for the purpose of selling his interest in the real estate to avoid his obligation to his wife for dower and alimony, as admitted in the complaint, it is also true that said Battle Creek, Mich., property was purchased by H. M. Beldler, in the name of J. H. Beldler, for the same purpose, and if in fact said J. H. Beldler was trustee for the Texarkana property, he was clothed by

said H. M. Beldler with the title to the Texarkana property, whereby the said H. M. Beldler was enabled to purchase the Battle Creek, Mich., property in the name of the said J. H. Beldler, and if it be true that the said J. H. Beldler was acting as trustee only, the Battle Creek, Mich., debt was in fact the debt of H. M. Beldler, made in the name of J. H. Beldler, and upon the faith of the property held by the said J. H. Beldler, and this arrangement was made by the said H. M. Beldler with the said J. L. Foster, whereby the Texarkana property in the name of J. H. Beldler was property subject to the debt for the Battle Creek, Mich., property by the said H. M. Beldler, in the name of said J. H. Beldler; that the debt effected by the said H. M. Beldler with the said Joseph L. Foster, was made by the said H. M. Beldler upon the faith of the Texarkana property, and it was intended that any and all of said Texarkana property would respond to the payment of the debt of the Battle Creek, Mich., property, if the same was not paid at maturity. The defendant states that H. M. Beldler and any one claiming under him, cannot in equity now be heard to claim that the Texarkana property was not subject to the payment of said debt. (5) Defendant denies that any of the property sold under attachment or execution to J. L. Foster, should be declared the property of plaintiff; denies that J. L. Foster, or this defendant, W. J. Foster, or his vendees, are not in position to claim title to said property; denies that they hold the same without right; "then follows allegations of payment of taxes and setting up statute of limitations of seven years." There was a written stipulation that all the exhibits were to be considered in evidence, and that appellant had been in possession since the execution of the deeds under the judgment and execution in the case of J. L. Foster v. J. H. Beldler, which were exhibits, and that appellant and those under whom he claimed had paid all taxes since 21st of February, 1890; that all papers in the case of J. L. Foster v. J. H. Beldler, the attachment suit, were in evidence, and that J. L. Foster purchased the land at attachment and execution sales, and credited his judgment in the circuit court with amount of his bid.

The deposition of appellee so far as material, showed that he was the son of H. M. Beldler the deceased, and his only heir; that he had heard from his father, when a small boy, that his uncle had no interest in the property, and heard his father say to his uncle in Battle Creek, Mich., "Now, brother, if anything happens to me, you will, of course, deed all the property to the boy," and my uncle said, "Why, certainly, brother, there can be no trouble about that;" that no one was present; that he had been led to believe that his father's estate had been held from him, but could get no explanation from

his uncle; he was a little over 12 years of age when his father died; cannot give dates of the conversation which he stated occurred between his father and his uncle, but thinks it was only a few months before his father's death. He had been on friendly terms with his uncle all the time. J. H. Beidler testified that he held the property in suit under deeds which had been executed to him in trust by his brother H. M. Beidler. He paid nothing for the property, did not know why it was put in his name. It was understood that he was to make deeds to whomsoever H. M. Beidler directed. He reconveyed the property to H. M. Beidler a few days before the latter's death, except that which he had caused to be deeded to purchasers before his death. He delivered the deeds to his brother before his death, and after his death the deeds and other papers were returned to him. He could not find the deed of the Texarkana property among the papers, says he told the plaintiff that he would do right by him, and did this he says because, being a nonresident he could not administer on the estate, and thought he could take better care of the estate in the shape it was, than to have it administered by strangers. When asked to explain why he and his agent continued in possession of the property conveyed to him by H. M. Beidler, and continued to sell and offer said property for sale after the death of H. M. Beidler, if he knew it did not belong to him; says he did this to meet expenses and outlay; explains his conveyance to his son X. F. Beidler, by claiming it was for money advanced to pay taxes and traveling expenses, but makes no explanation of the conveyance to his daughter, Grace; does not undertake to account for the proceeds of any of his sales, except in the general way of saying they were consumed in paying taxes and expenses. Says his son knew nothing about his having the deeds to any of H. M. Beidler's property until last summer, when J. D. Cook came to Lincoln; denies concealing them to defraud the plaintiff; says plaintiff had been angry with him for years on account of not being satisfied with his explanations about his father's estate. He admits mortgaging the property, long after H. M. Beidler's death, but says he did not do it for the purpose of defrauding any one, says: "At the time I thought it for the best." When asked what became of the money says: "I do not know." When asked when plaintiff was informed and had knowledge of such mortgages, he answers: "I cannot say, I do not know, never from me." Says the property at Texarkana was not conveyed to him until long after the debt was created on the Michigan property. He states that in the purchase of the Michigan property H. M. Beidler made the contract, and was the actual purchaser; that he permitted his name to be used, and supposed Foster understood his position; that he merely lent his name; that all the arrangements were made by H. M. Beidler as

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to the title of the Michigan property and the execution of the notes in the name of J. H. Beidler and for his own (H. M.'s) benefit; that he signed the notes because his brother requested it; that his guardian has supported plaintiff, but he is not familiar with the guardianship, and says he is not unfriendly to plaintiff, but that plaintiff has not been cordial, but unfriendly for many years.

The decree of the chancellor in this case finds that the title to all said land is in the plaintiff, S. R. Beidler, and that J. L. Foster obtained no title by reason of his purchase, or the proceedings in said case against J. H. Beidler, but S. R. Beidler was and is the rightful owner of all of said land, and entitled to the possession thereof in his own right, describes the land, finds that plaintiff commenced this action on May 5, 1899, and within three years after having reached his majority, and decrees possession of the premises to said S. R. Beidler and all cost against W. J. Foster, who prosecutes this appeal.

T. E. Webber, for appellants. J. D. Cook, for appellee.

WOOD, J. (after stating the facts). First. But, if we should concede that the complaint stated a cause of action, still the proof in our opinion was not sufficient to establish a resulting trust. To establish a resulting trust by parol the proof must be "full, clear and convincing." *Camden v. Bennett*, 64 Ark. 156, 41 S. W. 854; *Crow v. Watkins*, 48 Ark. 169, 2 S. W. 659; *Johnson v. Richardson*, 44 Ark. 365; *Crittenden v. Woodruff*, 11 Ark. 82. To sustain appellee's contention we must set aside solemn instruments of writing purporting to convey title absolute which were entered upon record. To sustain his contention we also, in legal effect, must set aside the solemn judgment of a court of record that was obtained against J. H. Beidler as the apparent owner and operated upon his property because it appeared to be in his name, and because he, by various conveyances, and visible acts of occupation and control had held out to the world that he was the absolute owner of the property. A judgment is demanded of a court of equity that will have this effect partly upon the testimony of the very man whose conduct in dealing with the property appellee himself denounces as "basely fraudulent." Appellee must not expect a court of chancery to give credit to the testimony of a witness (not against his interest) who he himself says perpetrated "grievous frauds upon him." No weight should be attached to the testimony of J. H. Beidler in favor of appellee in establishing any independent fact necessary for recovery. For the facts show that if he was a trustee he robbed his dead brother's estate, and perpetrated "gross frauds" upon his own nephew, while he was yet a boy of tender years. The testimony of this witness is utterly unworthy of belief. His conduct

through all those years under his deeds are of infinitely more force than his words at the trial. "Tell me what a man has done under an instrument and I will tell you what it means." Then the only other proof is a statement by appellee himself that "he had heard from his father when a small boy that his uncle had no interest in the property, and heard his father say to his uncle, 'Now, brother, if anything happens to me, you will, of course, deed all of the property to the boy;' and his uncle reply, 'Why certainly, brother, there can be no trouble about that.'" The deeds which purport upon their face to convey the property in fee for a valuable consideration, should not be canceled upon this proof. It does not come up to the standard. *Goerke v. Rodgers*, *McGuigan v. Gaines*, 71 Ark. 614. The testimony that "he had heard from his father when a small boy that his uncle had no interest in the property," as it appears in this record, was not competent to establish the fact that his uncle had no interest in the property. The declaration of the grantor in a deed which purports upon its face to be for a valuable consideration and to convey the absolute title, cannot be used to impair or impeach the title of the grantee in the deed, or those claiming through or under him. It is not shown that this statement was made in the presence of the grantee, under circumstances which required of him to affirm or deny the statement. The testimony of appellee that he heard his father say to his uncle in Michigan: "Now, brother, if anything happens to me, you will, of course, deed all the property to the boy" conceding it to be true, is too indefinite to establish a resulting trust for the property in controversy. Moreover, this alleged conversation between father and uncle is said to have occurred when appellee was only about 12 years of age. After more than a dozen years had passed he testified to his recollection of the conversation. But he gives no minutia, he details no circumstance showing why a conversation between two grown people about a grave business matter should have found a lodgment in his memory to abide for all those years. Such recollections are not impossible, but without any accompanying circumstance calculated to impress such conversation upon the child's mind, it seems improbable if not unnatural, that he should have remembered it. It is not "the way of a child." Such testimony is inherently weak, and not entitled to the probative force necessary to overcome written instruments, and to destroy titles acquired through reliance thereon.

Second. Appellee's witness J. H. Beldler, says that H. M. Beldler himself contracted the debt for the property in Michigan. H. M. bought the property in his brother's name and had his brother to execute the notes therefor evidencing the debt which is the foundation of appellant's right to the property in controversy. If this contention were true, then indeed appellee would be "hoist

on his own petard," for equity looks to the "real thing." According to the contention the property purchased in Michigan was the property of H. M. Beldler, and J. H. Beldler was merely acting as the trustee of his brother and held it as such for him. Then, of course, equity would not permit the burden of paying for it to be shifted on to the shoulders of the trustee and agent. So, while the suit in attachment really progressed against J. H. Beldler, he being the ostensible debtor and owner of the property in Arkansas and Michigan it was in reality the debt of H. M. Beldler, and his property that was subjected to its payment. So, if appellee's contention in this regard were correct, it would furnish the strongest reason of all, in equity, why he could not recover. The decree of the Miller chancery court is, therefore, reversed, and the complaint of appellee dismissed for want of equity.

McCULLOCH, J., concurs in judgment.  
BATTLE, J., not participating.

#### NOTE.

[a] (Mo. 1874) In a suit against heirs to establish a resulting trust as to land, on the basis of parol admissions of the ancestor, the evidence, in order to warrant a recovery, must be so clear and emphatic as to banish every reasonable doubt from the mind of the chancellor as to the existence of the trust. *Kennedy v. Kennedy's Estate*, 57 Mo. 73.

[b] (Mo. 1875) To warrant the destruction of a legal title, by decree of a resulting trust, the proof should be of the most conclusive character. *Sharp v. Berry*, 60 Mo. 575.

[c] (Mo. 1886) Parol evidence to establish a resulting trust must be clear and unequivocal. *Philpot v. Penn*, 91 Mo. 38, 3 S. W. 386.

[d] (Mo. 1886) In a suit to establish a trust in favor of the grantees of B., in land which was located and entered in 1857, in the name of A., under a land warrant running to S., and assigned by S. to A., it appeared that the patent was issued in 1860 in A.'s name; that B. and his grantees knew this, and did not controvert his title until 1883, long after A.'s death, which occurred in 1876. B., who was A.'s brother, testified that he entered the land with a land warrant which he owned; that he entered it in A.'s name, instead of his own, in order to avoid a certain regulation of the land office (but he did not explain how the warrant happened to be assigned to A. instead of to him); and that A. assigned the certificate to him, and he assigned it and made a deed to C., to whom he sold the land at two dollars per acre. C. testified to obtaining the land from B. by a trade for another land warrant. Deeds from B. to C., and from C. to the plaintiff, dated, respectively, in 1857 and 1859, but not recorded until 1876, were produced, but no assignment of A.'s certificate. It was shown that plaintiff had paid the taxes since 1873, except for one year. *Held*, that the evidence was not sufficient to establish a resulting trust. *Philpot v. Penn*, 91 Mo. 38, 3 S. W. 386.

[e] (Mo. 1888) A creditor, on taking a conveyance from his debtor, agreed to reconvey if the debt should be paid, and the debtor having died without payment, conveyed to defendant, who was then the debtor's lessee of the land, for a sum considerably exceeding the amount of the debt, making no mention of his promise to reconvey. Interested witnesses testified that the debtor and defendant stated that the debt-

or had leased the land to defendant on his promise to pay the debt. Defendant's claim of title, though known to complainants, the debtor's heirs, was unquestioned for 18 years. *Held* not sufficient evidence to establish a resulting trust. *Adams v. Burns*, 96 Mo. 361, 10 S. W. 26.

[f] (Mo. 1889) A resulting trust is not sufficiently established where the evidence consists mainly in verbal admissions made by defendant 35 years before suit brought, and before the date of his patent, and where there is evidence of a statement made by the cestui que trust, who died 18 years before the institution of the suit, to the effect that the land belonged to defendant, and where no claim has been asserted by plaintiffs, who claim as heirs of the cestui que trust, for over 18 years. *Burdett v. May*, 100 Mo. 13, 12 S. W. 1056.

[g] (Mo. 1890) On a bill to enforce a resulting trust against the estate of the administrator of plaintiff's ancestor, it appeared that there came to the hands of the administrator 3,000 acres of land, and about \$100,000 in personalty. A small portion of this was distributed to those entitled. Final settlement, 10 years after the grant of letters, showed a balance of \$25,382 due the estate, and was approved by the probate court, but on appeal to the circuit court the balance was adjudged to be \$71,894. The administrator owned a large plantation, but no other property of consequence. During his administration he engaged extensively in business, and suffered heavy losses. He also bought lands to the amount of \$50,000, which constitute a part of the property sought to be affected with the trust. At his death his estate inventoried \$75,000 in notes and accounts, mostly worthless, and a little other property. His debts were \$60,000, consisting in part of notes given in payment for the lands he had purchased, besides the amounts due from him as administrator to plaintiffs. *Held*, the evidence failed to show that the estate sought to be subjected was the product of the trust estate, or to identify any part of it as the trust property, and did not establish a resulting trust. *Phillips v. Overfield*, 100 Mo. 466, 13 S. W. 705.

[h] (Mo. 1893) In an action to establish a resulting trust in certain land by the heirs of one C., the alleged cestui que trust, the evidence for plaintiffs consisted mainly of the casual statements of the alleged trustee and C., testified to years after it was claimed they were made, by witnesses, many of whom were interested. This evidence was contradicted by defendants' witnesses, who were less in number than plaintiffs'. Defendants put in evidence the written contract between them and their grantor, which recited all the terms of the sale, and was witnessed by C. They also introduced their trust deed to the grantor securing deferred payments, as provided for in such contract, and evidence of payment of the same by them., *Held*, that a judgment for defendants was proper. *King v. Isley*, 116 Mo. 155, 22 S. W. 634.

[i] (Mo. 1895) Where a widow invested the proceeds of a policy payable to herself and children jointly, in a mortgage payable to herself alone, and afterwards married, evidence that the mortgage was satisfied by her husband in his name during her lifetime is insufficient to raise a resulting trust in favor of the children against him. *Reed v. Painter*, 129 Mo. 674, 31 S. W. 919.

[j] (Mo. 1895) In the absence of a contract, it cannot be inferred that the purchaser at a tax sale of land bought it as trustee for the former owner merely because the former owner thereafter refunded to the purchaser all he had paid at the sale, and the purchaser then quitclaimed to him part of the property. *Davis v. Scovern*, 130 Mo. 303, 32 S. W. 986.

BOURLAND et ux. v. McKNIGHT & BRO.  
(Supreme Court of Arkansas. June 25, 1900.)

# 1. LANDLORD AND TENANT—RENTING ON SHARES—NATURE OF CONTRACT.

Where a contract between a landowner and another required the latter to work the land and raise the crop, title to remain in the landowner and the other to be entitled to one-half of the proceeds after deducting all debts due by him to the landowner, the relation of landlord and tenant was not created, but it was a mere employment.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 1349.]

# 2. CHATTEL MORTGAGES—PROPERTY SUBJECT TO MORTGAGE.

One who is employed to raise a crop on another's land, the former to be paid one-half of the proceeds of the crop, has a right to mortgage his interest therein.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 55, 59; vol. 32, Cent. Dig. Landlord and Tenant, §§ 1368, 1369.]

# 3. APPEAL—PRESUMPTIONS—FACTS NOT APPEARING OF RECORD.

Where, on appeal, it does not appear from the bill of exceptions that any other instructions were given than those appearing in the bill, it cannot be presumed that other instructions were given, and that they cured defects in those appearing.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3672, 3750, 3754.]

# 4. LANDLORD AND TENANT—RENTING ON SHARES—RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Where a contract between a landowner and another provided that the other should work the land and be entitled to half the proceeds of the crop after paying for supplies furnished by the landowner for the purpose of enabling him to make the crop, in an action for money received, brought against the landowner by a mortgagee of the other's interest, it was a question for the jury whether certain medical supplies and attention and a cow and a calf were within the contract.

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

Action by McKnight & Bro. against S. H. Bourland and wife. From a verdict in favor of plaintiffs, defendants appeal. Reversed and remanded.

S. H. Bourland and his wife, Carrie Bourland, let C. D. Reynolds have land to cultivate during the year 1903. In the early part of that year Reynolds gave a mortgage or deed of trust to McKnight & Bro., merchants, to secure them for supplies to be furnished to him and for a debt which he owed them. During the year the Bourlands also furnished certain supplies to Reynolds, and at the end of the year he turned over the crop to them with directions that after paying what was due them they should pay the remainder of the proceeds of the crop to McKnight & Bro. Afterwards McKnight & Bro. brought this action against the Bourlands to recover \$146.12 as for money had and received for them. The Bourlands filed separate answers, in which they admitted that they had made a contract with Reynolds by

which he had agreed to make a contract on the land of Mrs. Bourland. Mrs. Bourland alleged in her answer that the conditions of this contract were as follows: "She was to furnish the land, team, and tools to work the crop, and feed for the team, for which she was to receive one-half of the crop; the remainder of the crop was to belong to said C. D. Reynolds after he had paid her for any supplies, money, or other necessities that she might furnish him to make and gather said crop. She further alleged that after paying such debts only about \$3 remained due Reynolds, which she was willing to turn over to plaintiffs.

On the trial the court gave the following instruction asked by plaintiffs: "The jury are instructed that the plaintiff had a lien upon the crop made in the year 1903 by C. D. Reynolds upon the place owned by the defendants, S. H. and Carrie Bourland, subject to the lien of said defendants for the rents and supplies furnished by them to make said crop. The jury are instructed that a cow and calf, and medicine and medical attendance furnished by Dr. Bourland to said Reynolds's family do not constitute such supplies to make the crop with as will entitle the defendants to receive pay for the same before the plaintiff's account furnished under their deed of trust, nor will the defendants be permitted to deduct the item of costs paid by Dr. Bourland on the security debt held by him against the said C. D. Reynolds as against the deed of trust held by McKnight & Bro." But the court refused to give the following instruction asked by defendant: "You are instructed that, if you find from the evidence that the defendants let C. D. Reynolds have land to cultivate and raise a crop of cotton and corn upon, and furnished tools, team, and provender necessary to make the crop, and that the said Reynolds was to have a portion of the crop so made for his services, but that the defendants were the owners of the crop, and were to reserve out of the said Reynolds' part of the crop such sums of money as would pay them for the supplies and advances made to the said Reynolds, and that the remainder was to be turned over to the said Reynolds, then, in that event, the said Reynolds had no such interest in said crop that he could mortgage, or sell, until the same had been set apart to him, and your verdict will be for the defendant."

The jury returned a verdict in favor of plaintiffs for the sum of \$61.00, and the defendants appealed.

Hardage & Wilson, for appellants. J. H. Crawford and D. Flanigan, for appellees.

RIDDICK, J. (after stating the facts). The questions in this case relate to a contract made by Mrs. Bourland with Reynolds for the cultivation of land owned by her. The contract was not in writing and the evidence as to the terms of the contract was somewhat

conflicting. The testimony of S. H. Bourland, the husband of Mrs. Bourland, and who made the contract for her, tended to show that, by the terms of the contract, the title to the crop remained in his wife, the landowner, who was to receive one half of the crop for the use of the land, team, and tools, and that from the proceeds of the other half of the crop was to be deducted the sums due Mrs. Bourland for supplies and other necessities furnished by her to Reynolds, and that, after paying such debts, Reynolds was to receive any balance left. The testimony of Reynolds as to the terms of the contract was somewhat different from Bourland's, but the defendants had the right to have their theory of the case submitted to the jury. If this testimony of Bourland was correct, then Reynolds was only an employé and not a tenant, and the title to the crop remained in the landlord. Reynolds, under such a contract, had the right to demand of the landlord only the balance of the proceeds of the crop left after paying the debts due her. If she furnished the tenant a cow and a calf or medicines and services of a physician when needed by him, she would, under the terms of the contract as shown by Bourland's testimony, be entitled to hold the crop for the payment of such debts. *Tinsley v. Craige*, 54 Ark. 348, 15 S. W. 897, 16 S. W. 570; *Hammock v. Creekmore*, 48 Ark. 264, 3 S. W. 180; *Parks v. Webb*, 48 Ark. 293, 3 S. W. 521.

It follows from this that in our opinion the court erred in giving the instruction asked by the plaintiffs, and which is set out in the statement of facts, for that instruction told the jury, as a matter of law, that Mrs. Bourland had no right to hold the proceeds of the crop for the payment of the cow and calf sold by her or for the medical supplies furnished. If the contract provided that the employé was to receive only what was left of the proceeds of one-half of the crop after paying all debts due by him to the landlord, then Mrs. Bourland would have the right to hold the crop for any debt due from Reynolds to her. But if the contract provided that Reynolds was to get one-half of the crop after paying for supplies furnished by Mrs. Bourland to him for the purpose of enabling him to make the crop, it would then be a question of fact whether he needed the cow and the calf or the other supplies furnished to enable him to make a crop, and whether they were furnished for that purpose or not, for, under such a contract, the landlord could deduct only supplies furnished to enable the tenant to make his crop. But as milk is a common and useful article of diet, and as probably the cheapest way for a farmer to obtain it is to own a milch cow, such animals might be a part of the supplies needed by a tenant and his family to enable him to make a crop just as other provisions would be needed, while, on the other hand, if he bought them for speculation only, they would not be

supplies for making a crop. So medical supplies and attention when furnished or paid for by the landlord, might be necessary supplies if needed to enable the tenant to go ahead with his work. But, under the evidence in this case, the questions arising concerning these matters were questions of fact which should have been submitted to the jury under proper instructions. The law relating to cases of this kind was very clearly stated in case of *Tinsley v. Craig*, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570, and in *Hammock v. Creekmore* and *Parks v. Webb*, above cited. We concur in the argument of counsel for appellant that the employé had the right to mortgage his interest in the crop, but if his interest was only what was left after paying all debts due the landlord, the mortgagee can get no more than the employé could get. But, as the mortgage was valid to that extent, the instruction asked by the appellant was wrong and was properly refused.

Counsel for appellees contend that the bill of exceptions does not show that it contains all the instructions given, but there is nothing in it that indicates that other instructions were given, and it would be a violent presumption to suppose that the other instructions could cure the defect of the one given, for it definitely stated that certain claims of the landlord must not be considered by the jury, which instruction, we think, under the evidence here, was erroneous.

For the reasons stated, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

HILL, C. J., not participating.

### MASON v. BOHANNAN.

(Supreme Court of Arkansas. June 25, 1906.)

#### 1. SALES—TITLE—IMPLIED WARRANTY.

In sales of chattels, a warranty of title and against incumbrances on the part of the seller is implied.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 749-751.]

#### 2. EXCHANGE OF PROPERTY—PERSONAL PROPERTY—WARRANTIES—REMEDIES.

For breach of an express warranty against incumbrances on an exchange of personal property, the remedy, in the absence of fraud or concealment of facts, is an action for damages sustained, and not replevin to recover the property given in exchange.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exchange of Property, § 25.]

Appeal from Circuit Court, Madison County; John N. Tillman, Judge.

Replevin by Goldman Mason against George Bohannan to recover possession of a horse, and damages for detention. Judgment for defendant, and plaintiff appeals. Affirmed.

Harris & Ivie, for appellant. S. M. Johnson for appellee.

MCCULLOCH, J. Mason was formerly the owner of the horse in controversy, and exchanged it to Bohannan for a mare, which the latter had received in a trade with one Powell, and upon which Ledbetter held a lien for the services of his jack. In the trade between Bohannan and Powell the latter had agreed to pay the debt to Ledbetter and discharge the lien but failed to do so, and Ledbetter attached the mare in the hands of Mason. It is undisputed that Bohannan informed Mason, at the time of the trade between them, that Ledbetter had held a lien on the mare, and that Powell had agreed to satisfy the same; and it is also undisputed that Bohannan did not know at that time, and so stated to Mason, whether or not Powell had in fact paid the debt. Mason claims, however, that Bohannan warranted the title of the mare against the incumbrance; but Bohannan denies this, and herein lies the point of difference between them. Under this state of case the court instructed the jury in substance that, if it was agreed between the plaintiff and defendant that the latter should not be liable for the incumbrance on the mare, then the plaintiff could not recover; but, unless the jury should find that they made such agreement, the verdict should be for the plaintiff for recovery of the horse which he delivered to defendant in exchange for the mare. This instruction was too favorable to the plaintiff. In sales of chattels the law implies a warranty of title and against incumbrances on the part of the seller. 2 *Mechem on Sales*, §§ 1302, 1304. But for breach of an express warranty against incumbrances, the remedy, in the absence of fraud or concealment of facts, is to sue for the amount of damages sustained by reason of such incumbrances. 2 *Mechem on Sales*, § 1797. However, the verdict was for the defendant upon these instructions and, as there was evidence sufficient to support the verdict, the plaintiff cannot complain.

Judgment affirmed.

HILL, C. J., absent.

### GUNTER v. STATE.

(Supreme Court of Arkansas. June 25, 1906.)

#### 1. BURGLARY—CHARACTER OF BUILDING.

A chicken house is within Kirby's Dig. §§ 1603-1605, making it burglary to enter a house or other building with intent to commit a felony.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 14, 15.]

#### 2. SAME—EVIDENCE—SUFFICIENCY.

Evidence that defendant took chickens from a "coop" by cutting a hole in the wire around it did not sustain a charge of burglary, under Kirby's Dig. §§ 1603-1605, making it burglary to enter any house or building, as a chicken coop is not necessarily a house.

#### 3. SAME—POSSESSION OF STOLEN PROPERTY.

On a prosecution for burglary, when the larceny is proved to have occurred at the time

of the breaking and entry, possession of all or part of the stolen property raises no presumption of law as to guilt, but warrants conviction where it induces in the minds of the jury a belief of guilt beyond a reasonable doubt.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 104-107.]

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Styles T. Rowe, Judge.

Will Gunter was convicted of larceny and burglary, and he appeals. Conviction of larceny affirmed, but conviction of burglary reversed and remanded.

T. S. Osborne, for appellant. Robt. L. Rogers, Atty. Gen., for appellee.

MCCULLOCH, J. The defendant, Will Gunter, was tried and convicted under an indictment containing two counts; one count charging him with the crime of burglary in breaking and entering the chicken house of George Maledon with intent to steal, take, and carry away the personal property of said Maledon, and the other count charging him with the crime of grand larceny in stealing 33 chickens, of the value of more than \$10, the property of said Maledon.

The sufficiency of the indictment was not questioned below, but it is contended here that breaking and entering a "chicken house" does not constitute burglary. The statutes of this state (Kirby's Dig.) defining the crime of burglary are as follows:

"Sec. 1603. Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft, in the night time, with the intent to commit a felony.

"Sec. 1604. The manner of breaking or entering is not material, further than it may show the intent of the offender.

"Sec. 1605. If any person shall, in the night time, willfully and maliciously, and with force, break or enter any house, tenement, boat, or other vessel or building, although not specially named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary."

It will be seen that this definition is sufficiently comprehensive to embrace any kind of house or building—any structure which is of such a character as to fall within the ordinary acceptance of those words and which is capable of sheltering man or property of any kind. 6 Cyc. pp. 191, 192. Under similar statutes in other states chicken houses are held to be within the statutes. *People v. Stickman*, 34 Cal. 242; *Gillock v. People*, 171 Ill. 307, 49 N. E. 712; *Williams v. State*, 105 Ga. 814, 32 S. E. 129, 70 Am. St. Rep. 82; *Willis v. State*, 33 Tex. Cr. R. 168, 25 S. W. 1119.

The indictment sufficiently charges the crime of burglary, but the evidence does not sustain that charge. The prosecuting witness, Maledon, testified that he missed 33 of his chickens and found where they had been taken out of the "coop" the night before

"through a hole cut in the wire around the coop." He was not asked to describe the structure, and did not do so further than to refer to it as a coop. Now, a chicken coop is not necessarily a house, and, as it was incumbent on the state to prove that a house or building was broken and entered, the crime of burglary was not established by this evidence. It is true that Mrs. Maledon was introduced as a witness to prove that she heard noises that night out where the chickens were kept, and the prosecuting attorney, in propounding questions to her, referred to the place as the chicken house; but neither of the witnesses used that term in referring to the place where the chickens were kept.

The only evidence connecting the defendant with the commission of the crime was that Maledon, two or three days after the burglary, found and identified in his possession five of the stolen fowls. The defendant made no attempt to explain his possession of the recently stolen property. Unexplained possession of property recently stolen will warrant a conviction of larceny, and also of burglary where the larceny is proved to have occurred at the time of the breaking and entry of the house. 6 Cyc. pp. 248, 247; *Malachi v. State*, 89 Ala. 134, 8 South. 104; *Robertson v. State*, 40 Fla. 509, 24 South. 474; *Lester v. State*, 106 Ga. 371, 32 S. E. 335; *Wilson v. U. S.*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *State v. Dale*, 141 Mo. 284, 42 S. W. 722, 64 Am. St. Rep. 513. Such evidence raises no presumption of law as to the guilt of the accused, but only warrants an inference of fact of more or less weight, according to the particular circumstances of each case, which the jury may draw therefrom as to his guilt. It makes a question for the jury, and is sufficient to warrant conviction where it induces in the minds of the jury a belief, beyond a reasonable doubt, of the guilt of the accused.

It is urged by counsel that proof of possession of only a part of the property recently stolen is not sufficient to warrant conviction either of larceny or burglary. We find no such distinction, either upon principle or in the adjudged cases. The rule is based upon the broad principle that, where one is found in unexplained possession of the fruits of crime recently committed, guilty participation in the commission of the crime may be inferred therefrom; and the inference is just as reasonable and natural where only part of the property is found in the possession of the accused, as it is where all is found, if it is shown that all the property was taken at the same time. In either case, where the possession is not explained, the inference of guilty participation in the commission of the crime may follow.

The instructions of the court declared the law in accordance with the views herein expressed, and we find no error therein. The judgment of conviction of the crime of larceny is affirmed; but the judgment of conviction



tion for burglary is, on account of the insufficiency of the evidence to sustain the verdict, reversed, and remanded for a new trial.

HILL, C. J., absent.

ST. LOUIS, I. M. & S. RY. CO. v. ANDREWS.  
(Supreme Court of Arkansas. June 25, 1906.)

1. MASTER AND SERVANT—DUTY OF MASTER—SAFE PLACE IN WHICH TO WORK.

A master must exercise care in furnishing a reasonably safe place in which a servant is required to work, and to exercise ordinary care in discovering defects and in repairing them.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 172-174, 179.]

2. SAME—INJURY TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.

An employé, suing for a personal injury, has the burden of showing negligence on the part of the employer in failing to furnish a reasonably safe place in which the employé was required to work, and negligence cannot be inferred merely from the happening of the accident.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 881, 895, 898.]

3. SAME—SUFFICIENCY OF EVIDENCE.

In an action by an employé for injuries received while climbing down a ladder in consequence of the third round from the top pulling off, evidence held insufficient to show that any defect in the ladder was known to the employer, or should have been known in the exercise of reasonable care.

4. SAME.

In an action by an employé for injuries sustained while descending a ladder, the fact that the two bottom steps had been worn off was not sufficient to warrant the inference that the other parts of the ladder were defective, so as to render the employer guilty of negligence in failing to discover the defect.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 243-251.]

Appeal from Circuit Court, Lonoke County; George M. Chapline, Judge.

Action by J. B. Andrews against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

B. S. Johnson, for appellant. J. H. Harrod and Trimble & Robinson, for appellee.

MCGULLOCH, J. The plaintiff, J. B. Andrews, was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company as assistant pump repairer, and sues to recover damages on account of an injury he received in falling from a ladder which he was descending on the side of a water tank. He was instructed by his superior to change the valves in the tank, and in doing so it became necessary to ascend the ladder to the top and go down to the bottom of the tank. After discharging all the water from the tank, he and his helper went into it and changed the valves, and when he started down the ladder on the

outside the third round of the ladder from the top gave way under his handhold and he fell to the ground, a distance of about 36 feet, and was seriously injured.

The plaintiff, on the witness stand, described the occurrence, after receiving instructions to take his helper and change the valves of the tank, as follows: "I went over and got my tool sack and changed my clothes, and we went up on top of the tank; then went down to the bottom and took out the old valve and put in a new one. After we were through, I picked up my tool sack in my left hand, and started down. The third round pulled off, and I fell between 30 and 36 feet. I remember being in the air with a piece of the round in my right hand. Don't remember hitting the ground. The first I remember was when they had me over at the hospital." He introduced no evidence as to the condition of the ladder, at the time of the injury, but rested the case upon his own statement as above quoted. The defendant introduced as a witness R. F. Cook, foreman of the water department, who was the plaintiff's immediate superior, and he testified as to the condition of the ladder. He said that he went up this ladder on the same day and a short time before plaintiff's injury, and found it in good condition, and that he caused the ladder to be removed about two weeks later, and that the timbers were perfectly sound and in good condition except that the third round or step from the top had been pulled off, and also that the two bottom steps were off. He explained that the steps of the ladder were mitered into the supports or side beam, as well as nailed, and that he ascertained from examination of the ladder immediately after plaintiff's injury that where the step which had been pulled off under plaintiff's grasp joined the side beam or support, the lower side of the mitre joint was split out, showing a fresh break. The ladder had been in use about four years. The complaint alleges that the step of the ladder was rotten, dangerous, and unsafe, and that the defendant was guilty of negligence in not keeping the same in safe condition, so as to furnish the plaintiff, its servant, "a safe place in which to work." This allegation was denied, and the case was put to the jury upon this issue and under correct and appropriate instructions.

Does the evidence warrant a finding of negligence on the part of the defendant in failing to furnish its servant a safe place in which to work? The law of the case is plain. It is the duty of the master to exercise care in furnishing a reasonably safe place in which the servant is required to work, and to exercise ordinary care in discovering defects and in repairing them. The burden is upon the injured servant to show negligence on the part of the master in this regard before recovery can be had for

this court, but by the adjudged cases in the courts of other states as far as we can discover, that, in order to make a valid assessment and sale of land for taxes, the land must be described with certainty upon the assessment rolls, and in all subsequent proceedings for the enforcement of payment of the tax. The chief reason for this requirement is that the owner may have information of the charge upon his property. It has sometimes been said that a description that would be sufficient in a conveyance between individuals would generally be sufficient in assessments for taxation. We do not, however, consider that a safe test. The description in tax proceedings must be such as will fully apprise the owner without recourse to the superior knowledge peculiar to him as owner, that the particular tract of his land is sought to be charged with a tax lien. It must be such as will notify the public what lands are to be offered for sale in case the tax be not paid. 1 Cooley on Taxation (3d Ed.) p. 742; Keely v. Sanders, 99 U. S. 441, 25 L. Ed. 327. The lands now within the meandered bounds of the lake have not been officially surveyed and platted, though the lines were run by the county surveyor by extension of the lines of the original public survey, and the tract in question has been popularly known by the description thus afforded. The controlling question in this case, therefore, is whether a description otherwise than by reference to plats of the original public survey or to other recorded plats properly identifying the tracts or lots of land, can be aided by extrinsic evidence of facts which serve to connect the description with the particular tract or lot sought to be charged. The affirmative of this proposition seems to be established by the great weight of authority. Many of the courts have gone further, in support of this view, than we have felt willing to go, but an examination of the following cases will serve to illustrate the established doctrine. *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711; *Textor v. Shipley*, 86 Md. 440, 38 Atl. 932; *French v. Patterson*, 61 Me. 203; *Smith v. Messer*, 17 N. H. 426; *Driggers v. Cassady*, 71 Ala. 529; *People v. Leet*, 23 Cal. 161; *Hopkins v. Young*, 15 R. I. 48, 22 Atl. 928; *State v. Woolbridge*, 42 N. J. Law, 401; *Stewart v. Colter*, 31 Minn. 385, 18 N. W. 98; *Godfrey v. Valentine*, 45 Minn. 502, 48 N. W. 325; *Marsh v. Nelson*, 101 Pa. 51. This court is already committed to the rule that evidence aliunde is admissible to connect the land with the description used in the assessment list and other tax proceedings. In *Loneragan v. Baber*, 59 Ark. 15, 26 S. W. 13, the court said: "It is true that an assessment which does not identify the land is said to be void, but evidence aliunde is admissible to identify." In *Kelly v. Salinger*, 53 Ark. 114, 13 S. W. 596, the

court held that a description in an assessment which designated the land by lot numbers upon an unrecorded private plat was sufficient to identify it.

Applying the established rule that a description in tax proceeding is sufficient which informs the owner and the public, with certainty, what particular tract of land is sought to be charged, how can it reasonably be said that this description is deficient or that it fails to give such information? The land is shown to have been popularly known and designated by this description. That description cannot possibly be applied to any other tract of land. Aside from the popular interpretation of this description it is not reasonably susceptible of any other interpretation than that it was meant to designate a tract of land bounded by extended lines of the public survey. In *Chestnut v. Harris*, 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep. 213, the court upheld a tax sale of land described by the abbreviation "N. E. S. E. Sec. 24, T. 13, R. 7, 40 acres." The court said: "The statutes of this state provide that each tract or lot of real property shall be so described in the assessment thereof for taxation as to identify and distinguish it from any other tracts or parts of tracts; and the same shall be described, if practicable, according to section, or subdivisions thereof, and congressional townships. They recognize the survey of the United States, and the division of lands, according thereto, into townships and ranges, and sections and parts of sections, and that a description according to such survey will be good and sufficient. For this reason it has been held that a description of land for assessment by the abbreviations commonly used to designate government subdivisions would be sufficient. \* \* \* They are not reasonably susceptible of any other interpretation." This court held in *Towell v. Etter*, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53, that a description of an original tract of riparian land, according to the plat of the public survey, included the accretions thereto so that a sale for levee taxes under the original description carried title to the accretion. We are not, however, vexed in the case at bar with the question of double assessment of the land in controversy. If it be found that the description used in the tax proceedings is sufficient to identify the land, the decree in the condemnation suit is conclusive of the fact that the taxes claimed were legally assessed, and had never been paid. The sole question for determination in testing the effect of the sale is that of the sufficiency of the description. We think that the description was, when aided by evidence, that the land has been surveyed, and is popularly known and designated thereby, sufficient to form the basis of a valid assessment and sale for levee taxes. The chancellor was, therefore, in error in holding that the sale

taxes, unsurveyed land lying within the levee district is subject to taxation for levee purposes. [Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Levees, § 23.]

## 2. TAXATION—DESCRIPTION OF LAND—SUFFICIENCY.

In taxation proceedings the description of the land must be such as fully apprises the owner without recourse to the superior knowledge peculiar to him as owner that the particular tract of his land is sought to be charged with a tax lien.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 720.]

## 3. SAME—EXTRINSIC EVIDENCE.

In determining the sufficiency of the description of land in tax proceedings, extrinsic evidence is admissible to connect the land with the description used in the assessment list and other tax proceedings.

## 4. SAME.

Land uncovered by recession of the waters of a meandered lake would, if the lines of the public survey had been extended so as to embrace it, have been a part of a certain section, township, and range. The land was not officially surveyed and platted, but an extension of the lines of the public survey was run by the county surveyor, and the land was popularly known by the description which it would have had, had the survey been officially extended, and under this description it was sold for taxes. *Held*, that the description, as aided by evidence that the land had been unofficially surveyed and was popularly known by the description used, was sufficient.

Appeal from Mississippi Chancery Court, Osceola District; Edward D. Robertson, Chancellor.

Action by H. A. Sugg and others against George Buckner. From a judgment for plaintiffs, defendant appeals. Reversed, with directions to dismiss the complaint.

The plaintiffs, H. A. Sugg and others, are the owners of fractional section 7, township 15 N. range 18 E., in Mississippi county, containing 358 acres, as shown by the original government survey, and borders upon Buford's Lake, a body of water meandered and platted upon said public survey. The land in controversy was formerly within the bed of said lake, which became uncovered many years ago by gradual recession of the waters, and is claimed by the owners of said section 7 by virtue of their riparian rights as owners of the adjoining lands. If the lines of the public survey had been extended so as to embrace this land it would be properly described, according to said survey, as the south half of section 12 in township 15 north, range 12 east. For more than 20 years prior to the commencement of this suit it has been commonly known and designated by that description and in the year 1898 the lines thereof were run and established by the county surveyor. It was regularly assessed for levee taxes of the St. Francis levee district under the description named above (S. ½ of section 12, township 15 N., range 12 E.), and in 1897 was sold for levee taxes under that description by a commissioner of the chancery court under the decree of that court foreclosing the tax lien of the levee

district. The defendant, George Buckner, claims title to said land under said sale, and the plaintiffs brought this suit in equity against the defendant to cancel said claim as a cloud upon their title to said section 7, and the land in controversy joined thereto by reliction. The complaint alleges that the S. ½ of section 12 was sold under a levee decree rendered in 1897 for the levee taxes of 1895 to J. T. Lasley, and by him conveyed to the defendant, George Buckner, and that the assessment for levee taxes and decree based thereon are void, because the land was "unsurveyed land lying within Buford's Lake, and was not subject to levee taxes nor taxation of any kind." The defendant made answer admitting that he claimed title to said land under said decree and sale for levee taxes, and alleging that said decree and sale were in all respects regular and valid, and that the title to said land passed thereunder to the purchaser at said sale. During the progress of the suit all the owners of the other lands fronting on Buford's Lake, as originally meandered, were brought in as parties. Upon final hearing of the cause a decree was rendered declaring said sale for levee taxes to be void and cancelling the defendant's said claim of title thereunder as a cloud upon the titles of the owners of the lands fronting on the lake. The defendant appealed to this court.

Rose & Coleman, for appellant. Driver & Harrison, for appellees.

McCULLOCH, J. (after stating the facts). Appellant contends that the sole question raised by the pleadings is that the land in controversy was not subject to taxation because it "was unsurveyed land lying within Buford's Lake." The complaint sets forth all the facts concerning the location, etc., of the land, and therefore presents for our consideration not only the question just stated, but also the further one now insisted upon by appellees, that the description of the land was so imperfect that the assessment and sale were void.

The first-named question is easily disposed of in favor of the validity of the assessment and sale by reference merely to the fact that the land was private property, even though unsurveyed, and was, under the statutes of the state, subject to state and county taxes as well as levee taxes. The statute provides that "all property whether real or personal, in this state," except certain kinds which are declared to be exempt, shall be subject to taxation. Kirby's Dig. § 6873. The act creating the St. Francis levee district provides that all lands situated within the district shall be subject to levee taxes. Act Feb. 15, 1893, p. 29, § 7. Was the description sufficiently certain and definite to put the owner of the land on notice and authorize a valid assessment and sale? It is well settled not only by the decisions of

ton under this contract with Lesser Cotton Company until he received his bill of lading. Then he was entitled to draw for the money. In this way Lesser Cotton Company was protected, for it could hold the cotton against the world upon such an instrument. It would pay the draft, or a bank would cash it in reliance upon such payment, only when the bill of lading was attached thereto, conveying the title. Until the Garners furnished Lesser Cotton Company with the muniment of title, they were not entitled to receive a cent on the cotton under the contract. This cotton was being prepared to follow a course of affairs when the title would pass to the cotton company. The first step was delivery to the carrier, the next securing a muniment of title, and finally to deliver that muniment either directly to the Lesser Cotton Company or to a bank with draft attached, when in due commercial course it would reach the cotton company. In this case, only the first step had been taken; the delivery to the railroad company. None of the other necessary acts to change the title to Lesser Cotton Company had been performed.

Appellant's counsel say that appellee relied upon "opinions of this court in certain liquor cases in support of his contention." Doubtless reference is made to *State v. Carl & Tobey*, 43 Ark. 353, 51 Am. Rep. 565, and cases following it, where it was held delivery to the carrier completed the contract. *Burton v. Baird*, 44 Ark. 556, is another instance where delivery to the carrier in pursuance of directions from the other party completed the contract. But those cases do not reach to this one. Here the mere delivery to the carrier with shipping directions was not the termination of Garner's conduct to complete his sale. He had to get a bill of lading and attach it to a draft before he was entitled to a cent, and hence his sale was not complete when he delivered the cotton to the carrier. This was not the final act in consummation of his contract. This was Garner's evidence. It was reasonable and consistent with a common business practice, and if given credit the cotton was appellants' at the time of the fire. The case should have gone to the jury.

Judgment reversed, and cause remanded.

#### TEMPLETON & ADAMS v. EQUITABLE MFG. CO.

(Supreme Court of Arkansas. July 2, 1906.)

##### 1. SALES—DELIVERY—PASSING OF TITLE.

The effect of a delivery by a vendor of personal property in proper manner to a common carrier designated by the vendee is to transfer the title and to fix the time and place when the title passes.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 535, 536.]

##### 2. SAME—DELIVERY—SUFFICIENCY.

Where a contract for the sale of jewelry provided that the jewelry was to be delivered by

the vendors "f. o. b. transportation companies, either at the distributing point or at the factory point," a delivery by the vendors at the factory point absolved them from liability for delay of the carrier in delivering the goods to the vendees.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 377-380.]

##### 3. SAME—BILL OF LADING—NECESSITY FOR DELIVERING.

Where goods were consigned directly to the vendees, and the bill of lading was not negotiated, the failure of the vendors to send the vendees such bill was no obstacle to the delivery of the goods, and did not prevent the passing of the title on delivery to the carrier in accordance with the contract of sale.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 535.]

Appeal from Circuit Court, Lonoke County; George M. Chapline, Judge.

Action by the Equitable Manufacturing Company against Templeton & Adams. Judgment for plaintiff, and defendants appeal. Affirmed.

Vaughan & Vaughan, for appellant. Boyd & Kerby, for appellee.

HILL, C. J. The appellee is engaged in the jewelry business, and appellants are merchants at Kerr, in Lonoke county. Their freight station is the town of Lonoke. The appellee's place of business is Iowa City, Iowa, and its factory is at Alliance, Ohio. Appellee sold appellants a lot of jewelry, and a written contract was entered into between them. One clause is as follows: "On your approval of this order please deliver to us at your earliest convenience f. o. b. transportation companies, either at the distributing point or at the factory point, the above assortment of goods on the terms and conditions herein set forth and no other." The "above assortment of goods" began with "1 revolving show case free with the order." The show case was shown to be a material part of the contract and an inducing element. The goods, except the show case, were duly received at Lonoke; but appellants would not take them until the show case came. The uncontradicted evidence is that the show case was promptly delivered to a railroad company at Alliance, Ohio, the factory point. A bill of lading was issued to the appellee, showing the show case was consigned to the appellants at Lonoke. This bill of lading was not sent to appellants. After waiting more than a reasonable time for the show case to reach them after the other goods arrived, the appellants had the jewelry shipped back. Later the show case came and appellants would not receive it. Appellee did not accept the returned goods and say they are held subject to appellants' orders, presumably by the express company, as they were returned by express, charges prepaid. The appellee sued for contract price of the jewelry, \$150, and recovered judgment, and appellants bring the case here.

It is seen from the foregoing statement that the only point in the case is whether the delivery of the show case to the railroad company at Alliance, Ohio, was a delivery to Templeton & Adams. If it was a delivery to them, then appellee had a right to stand on the contract and refuse to accept the goods tendered back in rescission of the contract. If it was not a good delivery, then Templeton & Adams were within their rights in rescinding the contract after waiting a reasonable length of time to receive the show case, a material part of the goods to be furnished under it. If a vendor undertakes to make delivery to a distant place the carrier becomes the agent of the vendor, and the property will not pass until actual delivery. If the goods are to be delivered to a carrier specially designated by the vendee, the carrier becomes the agent of the vendee, and delivery to it is delivery to the vendee. If the contract is silent as to the mode of delivery, then a delivery by the vendor to a common carrier in the usual and ordinary course of business constitutes delivery to the vendee. Where no carrier is specified, and a choice is open to the shipper, the selection of any one in good faith in the due course of business is sufficient. The effect of the delivery in proper manner to the carrier is to transfer the title and to fix the time and place when the title passes. *Mechem on Sales*, §§ 736, 739. This subject has recently been considered by this court in *Gottlieb v. Rinaldo* (Ark.) 93 S. W. 750, and *Garner v. St. L., I. M. & S. Ry.* (Ark.) 96 S. W. 187. This contract specified that the delivery to appellants was to be to a transportation company at appellee's distributing or factory point. The undisputed evidence is that it was delivered at the factory point in the due course of business in apt time to a railroad company, properly consigned to appellants, pursuant to the direction in the contract. Therefore it follows that the delay in actually receiving at Lonoke the show case was the delay of the agent of Templeton & Adams, the railroad company, and consequently offered no cause of rescission against the vendor. Templeton & Adams could have contracted for delivery at Lonoke, and it is probable, judging from their conduct, that they so understood their contract; but it is not so written. Unfortunately for them, they contracted this delivery should be made to them free on board the transportation companies, either at the distributing point or at the factory point; and that was done and the default was the default of the railroad after the title of the show case passed to them.

It is said that appellee did not send appellant the bill of lading, and therefore the title did not pass. The bill of lading should have been sent; but it was not, and Templeton & Adams made no demand for it. It was settled in *Nebraska Meal Mills Co. v. Ry.*, 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 353,

62 Am. St. Rep. 183, that a carrier is justified in delivering to the consignee pursuant to the shipping directions in the bill of lading, even though the bill of lading is in fact attached to a draft sent for collection, if the latter fault is not known to the carrier. Under the bill of lading in this case the carrier would have been justified in delivering to Templeton & Adams without forwarding the bill of lading. In other words, the failure to send the bill of lading to Templeton & Adams put no obstacle to the delivery of the goods to them. While a bill of lading is both a receipt and a contract, and is a muniment of title (*Garner v. Railway*, supra), yet it had no influence in this case, as the goods were not sent to shipper's order, but consigned directly to Templeton & Adams, and the bill of lading was not negotiated. The case turns simply on whether the show case was delivered to Templeton & Adams at Alliance, Ohio, when there delivered to the common carrier. The contract so stipulated, and it is not for the courts to change it.

The judgment is affirmed.

#### WELLS FARGO EXPRESS CO. v. STATE. (Supreme Court of Arkansas. June 18, 1906.)

##### 1. GAME — SHIPMENT — OFFENSES — INTENT — STATUTES.

The Legislature has power to make the receipt of game for shipment by a common carrier an offense, irrespective of knowledge or intent.

##### 2. SAME.

Kirby's Dig. § 3620, provides that it shall be unlawful for any person or corporation to ship or carry beyond the lines of the state any deer, turkey, wild fowl, game fish, or game of any description, and that any express company so receiving the same for shipment shall be guilty of a misdemeanor. *Held* that, where game was received by an express company for transportation beyond the state in packages supposed to contain furs, the fact that the express company had no knowledge that they contained game was no defense to a prosecution under such section.

##### 3. COMMERCE — TRANSPORTATION OF GAME — STATE STATUTES.

Under the act of Congress, known as the "Lacey Act," providing that the game laws of a state may be made equally applicable to game imported into the state as to game killed within the state, Kirby's Dig. § 3620, prohibiting any express company from transporting or receiving any game for transportation beyond the state, was not unconstitutional because it applied equally to game killed without the state and to game killed therein.

Appeal from Circuit Court, Polk County; James S. Steel, Judge.

The Wells Fargo Express Company was convicted of receiving game for shipment out of the state, in violation of Kirby's Dig. § 3620, and it appeals. Affirmed.

Read & McDonough, for appellant. Robert L. Rogers, Atty. Gen., for the State.

HILL, C. J. At Mena, Polk county, Ark., W. H. Graves delivered to the appellant ex-

press company, for shipment to Senter Commission Company at St. Louis, Mo., three packages of furs. A constable with a search warrant opened the packages while in the possession of the express company and found they contained game, a saddle of venison and eight wild turkeys. The circuit court, without a jury, tried the case, and found that the agent and employes of the express company were without knowledge that the packages contained game. The court found the appellant guilty by reason of having received the game for shipment, and the express company appeals.

Two questions are presented by appellant. (1) That the evidence that the agent and employes—the company itself—had no knowledge that the packages contained game should have been held a defense. (2) That the act under which the proceeding was based is unconstitutional.

1. The statute is as follows: "It shall be unlawful for any person or persons or corporation, to ship, export or carry beyond the lines of this state, any deer, turkey, wild fowl, game fish, or game of any description; and any railroad company, express company, corporation or individual, who shall ship, export, or carry, or receive for shipment, or export, or carry beyond the state line of Arkansas, any game, fish, deer, turkey, or game of any kind, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than \$100 nor more than \$500 for each separate offense." Section 3620, Kirby's Dig. That it is competent for the Legislature to make the receipt of game for shipment an offense, irrespective of knowledge or intent cannot be gainsaid. Clark's Crim. Law, p. 84. If a statute makes the offense consist in knowingly or willfully doing or omitting to do an act, then there is nothing left for construction; but when, as in this instance, the statute omits such words, then it is a matter of construction from the subject-matter, and the evil to be remedied whether such words are to be implied or the statute enforced as written. Many statutes which are in the nature of regulations for the protection of health, morals, or other public concerns are considered as making criminal the forbidden act notwithstanding ignorance or mistake of the doer. Clark's Criminal Law, pp. 84, 86. This court has approved this statement of the doctrine "where a statute commands that an act be done or omitted, which in the absence of such statute, might have been done without culpability, ignorance of the fact or state of things contemplated by the statute, will not excuse its violation," and applied it to a sale of liquor to a minor irrespective of ignorance of his minority. *State v. Lancaster*, 36 Ark. 55. Judge Cooley, while Chief Justice of Michigan and speaking for the court, said: "Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them,

the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270. Many instances of such statutes are given in the cases and the textbook cited. Without attempting to formulate any rule on the subject, suffice it to say that the statute in question seems to be exactly of the kind where ignorance does not excuse and where criminal intent is not necessary. Doubtless such statutes work individual cases of hardship, as the one at bar, where the company was imposed upon; but unless the Legislature had made the act itself the crime, there would have been no use in passing the law. The ease with which game and fish could be inclosed in packages to deceive the express agents would render a statute against knowingly receiving game or fish an idle form. Similar reasons were given for holding the offense complete without guilty intent in many of these cases.

2. Is the statute constitutional? It was held so in *Organ v. State*, 56 Ark. 267, 19 S. W. 840, but counsel contend that the only point decided in that case and in *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, was as to the validity of such a statute when acting upon game killed within the state, and that this statute applies equally to game killed without the state or to game killed within the state, and is for that reason unconstitutional. It might be answered that the game in question was not shown to have been killed beyond the borders of the state and the burden was upon the appellant (1 *Bishop Cr. Law*, § 303, par. 3), but meeting the argument as broadly as it is made, and it will be found that the appellant is equally guilty whether the game was killed in Polk county or across the border in the Indian Territory and brought into Mena for shipment. Following the precedent which was sustained in *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, the Congress conferred upon the states in the "Lacey Act" a police power not theretofore possessed of making operative their game laws on game brought into the state. This act was intended to aid the states in the enforcement of their game laws by rendering them equally applicable to game imported into the state as to game killed within the state. It is fully discussed in a recent opinion of Chief Judge Cullen speaking for the Court of Appeals of New York. *People v. Hesterberg*, 76 N. E. 1032. The decision of that eminent court is undoubtedly sound.

The judgment is affirmed.

GRIFFIN et al. v. DUNN et al.  
(Supreme Court of Arkansas. June 18, 1906.)  
1. ADMINISTRATORS—SALES UNDER ORDER OF COURT—PROPERTY SUBJECT—HOMESTEAD.  
The probate court is without jurisdiction to order a sale of the homestead of a decedent.

and a sale under such order by the administrator is void.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1361.]

## 2. LIMITATION OF ACTIONS—ACTION BY HEIRS TO RECOVER—HOMESTEAD.

The statute of limitations does not run against a cause of action in favor of heirs for the recovery of the homestead during occupancy by the widow.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Limitation of Actions, §§ 220-232.]

## 3. HOMESTEAD—ALIENATION BY WIDOW—ABANDONMENT.

An attempt by a widow to alienate the homestead is ineffectual, and operates as an abandonment of the homestead claim.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 281-285.]

## 4. LIMITATION OF ACTIONS—COMMENCEMENT—RECOVERY OF HOMESTEAD BY HEIRS.

In the event of an abandonment of a homestead by a widow through an ineffectual attempt to alienate the same, the right of action of the heirs becomes complete, and the statute of limitations begins to run against them.

## 5. SAME—JUDICIAL SALES.

Under the five-year statute of limitations, providing that all actions against the purchaser, his heirs, or assigns, for the recovery of land sold at judicial sale shall be brought within five years after the date of such sale, and not thereafter, where, subsequent to an unlawful sale of a homestead by an administrator under an order of the probate court, the widow of decedent abandoned the homestead through an attempted alienation of her homestead rights, a cause of action by the heirs against the vendee arose on such abandonment.

## 6. DOWER—ASSERTION BY WIDOW AFTER ABANDONMENT OF HOMESTEAD.

The right of a widow to claim unassigned dower may be asserted after her abandonment of the homestead.

## 7. EXECUTORS AND ADMINISTRATORS—ALLOWANCES TO WIDOW—RIGHTS PRIOR TO ASSIGNMENT OF DOWER—OCCUPATION OF HOMESTEAD.

Under the express provisions of Kirby's Dig. § 2704, a widow is entitled to hold possession of the dwelling house and farm thereto attached until her dower is assigned.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 655-660.]

## 8. DOWER—EQUITABLE TRANSFER.

A conveyance of land by a widow carries with it an equitable transfer to the grantee of her unassigned dower right.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, §§ 209-217.]

## 9. SAME—POSTPONEMENT OF HEIRS' RIGHT OF ENTRY.

A conveyance of land by a widow carrying with it an equitable transfer to the grantee of her unassigned dower right does not postpone the heirs' right of entry.

## 10. EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW—OCCUPATION OF PROPERTY—TRANSFER OF RIGHT.

Under Kirby's Dig. § 2704, authorizing a widow to hold possession of the dwelling house and farm thereto attached until assignment of her dower, the right so given is a personal privilege, and not an estate in the land, which cannot be transferred to another.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 655-660.]

Hill, C. J., dissenting.

Appeal from Johnson Chancery Court; Jeremiah G. Wallace, Chancellor.

Action by Martha A. Dunn and another against Kizzie Griffin and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Cravens & Covington, for appellants. T. B. Pryor, for appellees.

MCCULLOCH, J. R. R. Posey owned and occupied as his homestead a quarter section of land in Johnson county, and died in August, 1876, leaving surviving him his widow, Sarah Posey, and daughter, Martha R. Dunn, who was then an adult married woman. Her coverture continues to the present time. The tract of land was by an order of the probate court set apart to the widow as her homestead, but in June, 1878, the entire tract was sold, subject to the homestead right of the widow, by the administrator of the estate of said decedent, for the purpose of raising funds to pay the debts of the estate, and was purchased by F. R. McKinnon. The sale was ordered and confirmed by the probate court. In November, 1878, McKinnon and Mrs. Posey, the widow, presumably acting under the belief that the sale made by the administrator subject to the homestead right of the widow was valid, and that McKinnon had obtained title to the land subject only to the widow's homestead right, exchanged conveyances whereby McKinnon conveyed to the widow the west half of the tract, and she conveyed to him the east half. Appellants hold the said east half containing 80 acres under mesne conveyance from McKinnon. The widow died in July, 1901, and in September, 1903, appellee Martha R. Dunn, and R. O. Herbert, her grantee of an undivided interest, brought ejectment to recover possession of the land. Appellants, among other defenses, alleged adverse possession held by them and their grantors since the date of the deed from Mrs. Posey to McKinnon in 1878, and pleaded the five-year statute of limitation under the judicial sale made by the administrator. The defendants also pleaded certain equitable defenses unnecessary to enumerate here, and made their answer a cross-complaint, containing a motion that the cause be transferred to the chancery court, which motion was granted. Upon final hearing a decree was rendered in favor of the plaintiffs for the recovery of the land and rents, but allowing the defendant for taxes paid, and also for a portion, by way of subrogation, of the amount of the probated claims against the estate of Posey for the payment of which the land was sold by the administrator. The sale of the homestead by the administrator was void because the court had no jurisdiction to order it. *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. 71; *Stayton v. Halpern*, 60 Ark. 329, 7 S. W. 304; *Nichols v. Shearon*, 49 Ark. 75, 4 S. W. 167; *Bond v. Montgomery*,

56 Ark. 565, 20 S. W. 525. The statute of limitation does not run against a cause of action in favor of the heirs for recovery of the homestead during occupancy by the widow, but an attempt by her to alienate the homestead is ineffectual and operates as an abandonment of the homestead claim. In the event of such abandonment the right of action of the heirs becomes complete and the statute of limitation begins to run against them. *Garibaldi v. Jones*, 48 Ark. 230, 2 S. W. 844; *Killeam v. Carter*, 65 Ark. 68, 44 S. W. 1032; *McAndrew v. Hollingsworth*, 72 Ark. 446, 81 S. W. 610.

In *Kessinger v. Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220, the five-year statute of limitation under a judicial sale was pleaded against adult heirs whose right of action did not accrue until the coming of age of an infant heir, more than 10 years after the date of the sale. The court held that the statute ran from the date of the sale, but did not apply to a cause of action which arose in favor of the adult heirs after the expiration of five years from the date of the sale. The court there said: "It is manifest that the statute was never intended to be applied in such cases, but that its object was to require all parties to bring suits against purchasers at judicial sales, within five years after the date of the sale, for the enforcement of only such rights to recover the land sold as can be enforced in an action brought within that time, and to bar the recovery of such rights in any suit brought thereafter." The cause of action asserted by the plaintiff in the case at bar arose within five years from the date of sale. It arose upon the abandonment of the homestead by the widow in about five months after the sale, and according to the construction of the statute in *Kessinger v. Wilson*, supra, was barred at the expiration of five years from date of the sale. It is said that the statute should be construed to apply only to causes of action for recovery of land which were complete and capable of being asserted when the sale was made, and to no other. The majority of the court are of the opinion that this is not the effect intended to be given to the statute by the framers thereof. There is certainly no reason found, either in principle or from the language of the statute why it should not apply to all causes of action which come into existence, and are complete within the period of five years from the date of the sale, provided that the period of time between the completion of the cause of action and the expiration of five years from date of sale is not too short to allow a reasonable opportunity within which the right may be asserted. A period of time too short for the reasonable assertion of the right would be equivalent to no time at all, and would be the same as if the right did not accrue within the five years. The statute plainly reads that "all actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales shall

be brought within five years after the date of such sale, and not thereafter." While it does not apply to those who do not have a right of action within five years from the date, yet it would circumscribe the comprehensive language of the statute to say that it does not apply to causes of action which arose after the sale but within that period. In addition to the homestead right, the widow had the right to claim dower in the land which was never assigned, and she might have asserted this right after abandonment of the homestead. She also had the right to hold possession of the dwelling house and farm thereto attached until the dower should be assigned. Kirby's Dig. § 2704.

The further question is therefore presented whether or not these two rights, or either of them—that is to say, the widow's unassigned dower right and her right to tarry in the mansion or chief dwelling house until dower should be assigned—postponed until the death of the widow the accrual of the cause of action of the heir to recover possession after the attempted alienation of the premises by the widow which resulted in the abandonment of her homestead right. The conveyance of the land by the widow carried with it an equitable transfer to the grantee of her unassigned dower right (*Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256), but this outstanding right to have dower assigned did not postpone the heir's right of entry (*Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Padgett v. Norman*, 44 Ark. 490; *Barnett v. Meacham*, 62 Ark. 313, 35 S. W. 533). The widow's right to hold the dwelling house and farm attached until dower shall be assigned is a personal privilege, and not an estate in the land which can be transferred to another. She may rent out the farm and receive the rents and profits, but cannot convey it or transfer her rights. If she does she thereby abandons it, and the right of entry of the heir becomes complete, subject only to the right to have dower assigned. *Padgett v. Norman*, supra; *Garibaldi v. Jones*, supra; *Morton's Ex'rs v. Morton's Ex'rs*, 112 Ky. 706, 66 S. W. 641; *Burks' Heirs v. Osborn*, 9 B. Mon. (Ky.) 579; *Norton v. Norton*, 94 Ala. 481, 10 South. 436; *Wallis v. Doe*, 2 Smedes & M. (Miss.) 220. It follows that the right of action of the plaintiff Mrs. Dunn was complete from the date of conveyance executed by the widow to McKinnon and was barred when this action was commenced. The statute contains no exception in favor of married women.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree dismissing the plaintiff's complaint for want of equity.

HILL, C. J., dissents.

HILL, C. J. (dissenting). *Kessinger v. Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220, decided that the five-year statute of limitations in favor of purchasers at



Judicial sales did not apply to causes of action which did not accrue until after five years from the sale, and as to such causes of action this statute had no application, and for the limitation of such actions some other statute should be looked to. The logic of that decision requires some other than the five-year statute to be looked to to find the proper limitation of this action. At the time of sale the action had not accrued, and the case was then exactly like *Kessinger v. Wilson*. The statute in terms runs from the date of sale. If, at the date of sale, the cause of action had not accrued, this particular statute could not apply. Six months after the sale this cause of action accrued by the widow abandoning her homestead right, and the limitation should run from that period, and which statute should apply? One dating from a sale when that sale had taken place six months prior thereto? The beginning point of limitation is the abandonment by the widow, and this decision takes that point and fits it to a statute which names another point, the sale, as a starting point. To find the limitation in such cases find the starting point, count out the time from the date of sale to this starting point, and the remainder is the period of limitation. In this case it is four years and a half. If the widow had abandoned her rights four years and a half after the sale then the limitation would be six months. If too short to give an opportunity to bring the action, then the court says that this statute does not apply, and it will be treated like it did not accrue within the five years. Yet the Legislature intended five years to be the limitation, and in all cases where this statute applied and never contemplated the movable period, long or short, according to each case. The error of such construction is in substituting some other starting point than that named in the statute. The statute fixes the sale as the starting point, but it was ruled in *Kessinger v. Wilson* that in cases where that could not apply to look to some other statute to find the limitation, and that would be the case. Here the court lets in the five-year statute on the happening of a subsequent contingency, and puts it into operation from prior date.

I cannot concur in this construction, and think this strange running of the five-year statute should be avoided by sticking to the text in *Kessinger v. Wilson*, and holding that it did not apply, and look to a statute which does apply from the happening of the contingency which puts it in motion, the seven-year statute.

#### NUNN v. W. T. McKNIGHT & BRO.

(Supreme Court of Arkansas. June 18, 1906.)

#### 1. LIMITATION OF ACTIONS—PARTIAL PAYMENT—CREDITING PROCEEDS OF PROPERTY.

Defendant had a running account with plaintiffs and delivered to them two bales of

cotton to hold for a rise in price and then sell and credit the proceeds on the debt. Some time after the account was closed and defendant's balance of indebtedness ascertained the cotton was sold and defendant credited with the proceeds. On being told of the sale defendant said he was glad the cotton had brought so much, but did not directly authorize the crediting of the proceeds or demand that they be paid to him. *Held*, that the credit of the proceeds of the cotton was a payment on the debt interrupting the running of the statute of limitations.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 637.]

#### 2. ACCOUNT, ACTION ON—NATURE OF ACCOUNT.

Where the whole of a running account is by agreement regarded as due on a certain date, it is proper in an action for the balance of the account to refuse to instruct that each item of the account is a separate contract.

#### 3. LIMITATION OF ACTIONS—ACCOUNT STATED—PART PAYMENT.

The balance due on account stated is one debt, and a payment thereon interrupts the running of the statute of limitations as to all the items included in the statement.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 642-647.]

#### 4. SAME—ACCOUNT, ACTION ON—INSTRUCTIONS.

Where, in an action on an account, plaintiffs admitted that all the items thereof became due more than three years before the commencement of the action and relied on part payment to interrupt the running of the statute of limitations, a requested instruction that plaintiffs, in order to recover, must show that each item became due within three years, was properly refused.

#### 5. TRIAL—INSTRUCTIONS—FOUNDATION IN EVIDENCE.

Requested instructions as to facts of which there is no evidence are properly refused.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

Action by W. T. McKnight & Bro. against T. J. F. Nunn. From a judgment for plaintiffs, defendant appeals. Affirmed.

C. V. Murry, for appellant. Hardage & Wilson, for appellees.

RIDDICK, J. This is an action by W. T. and Alex McKnight against T. J. F. Nunn to recover the sum of \$609.68 alleged to be due on an account for goods and merchandise sold and delivered, and for balance found due on an account stated. The plaintiffs recovered judgment for \$549.68 and, so far as the amount due is concerned, the evidence fully sustains the judgment, but the main defense relied on is the statute of limitations. The action was commenced July 6, 1903, and it is conceded that the account was due more than three years before that date but plaintiffs contend that there was a part payment made on the account within three years before the bringing of the suit. The plaintiffs are merchants, who had for a number of years furnished goods and supplies to the defendant. Their custom was to have a settlement with him at the end of each year and then carry over any balance

which defendant might be unable to pay until the next year. The last settlement was made in early part of 1897 for goods sold previous to that time, and a balance of \$566.77 was stated and by agreement with defendant this balance was placed on the books of plaintiffs as due January 1, 1898. At this time the plaintiffs had in their possession cotton of defendant which had not been sold, but it was understood that, when sold, the defendant should have credit for the proceeds of the cotton on his debt. After this settlement was made the plaintiffs continued to sell the defendant goods and merchandise during the year 1897, with the understanding that this account should become due and be paid along with the balance found due on the 1st of January, 1898. But the defendant did not pay his debt when it became due on the 1st of January, 1898. The cotton in the hands of plaintiffs was afterwards sold, and the defendant was given the following credits therefor on the books of plaintiff, to wit: February 18, 1899, by proceeds of four bales of cotton, \$120.24; August 7, 1900, by proceeds of two bales of cotton, \$81.23. It is this last payment which is relied upon by plaintiffs to prevent the bar of the statute. This cotton, the proceeds of which were credited in August, 1900, was delivered by defendant to plaintiff in 1896. But at the time it was delivered the price of cotton was low, and by consent of defendant it was held to await a rise in price. Afterwards there was a still further decline in the price of cotton and it was not sold until August, 1900. By this delay defendant obtained several cents a pound more for the cotton than he would otherwise have received, and so soon as sold the proceeds were credited on his account. Shortly afterwards defendant was informed by plaintiffs of the disposition of the cotton and expressed himself as pleased that he had obtained such a good price for it.

Counsel for defendant now contends that crediting the proceeds of this cotton on defendant's account was not such a payment as to make a new date from which the statute of limitations began to run, and that the proceeds of the cotton must be treated as paid when the cotton was delivered. As this cotton was delivered before the debt was due, if there had been nothing more than this delivery with request that plaintiffs should hold the cotton and sell when price of cotton was satisfactory and then credit proceeds on debt, there would be much force in the contention of defendant that this would not affect the statute of limitations for the reason that there would then have been no act of defendant recognizing the debt, after its maturity, that we could treat as admitting its existence and impliedly promising to pay the balance due. *Chase v. Carney*, 60 Ark. 491, 31 S. W. 43. But there is something more than that in this case. One of the

plaintiffs testified that when the cotton was sold it was applied to defendant's account and that the defendant was soon afterwards informed of the sale of the cotton. The witness was then asked, "Was it satisfactory to him?" He answered, "Yes, sir; he said he was well satisfied with the price, for it was more than it had been." The other plaintiff testified that after the cotton was sold he told the defendant of the sale the first time he met him in town, and that defendant did not at first remember that he had two bales. Witness was then asked, "What did he say about it?" and replied "He didn't say anything more than that he had forgotten it and was well pleased after he found that he had gotten more for it." This is certainly not very satisfactory testimony, for the witnesses were not asked and do not directly state that defendant assented to the placing of the proceeds of the two bales of cotton to his credit, but we think the jury had the right to draw that conclusion from the testimony of these witnesses, for we infer from his testimony that defendant did not demand the proceeds of the cotton in cash or object to the action of the plaintiffs. That being so the case stands that the defendant, while he had a running account with the plaintiffs, delivered them this cotton with the understanding that it should be held by them for him for a rise in value, and that so soon as a satisfactory price could be obtained it should be sold and the proceeds credited on his debt; that before the debt was barred by the statute the cotton was sold and proceeds credited as a payment on the debt; that the defendant was then notified of the sale of the cotton and assented to the acts of plaintiffs in selling it and placing the proceeds as a credit on his debt. This brings the case within the decision of *Less v. Arndt*, 68 Ark. 399, 59 S. W. 763, and made a new point from which the statute runs. See, also, *Day v. Mayo*, 154 Mass. 472, 28 N. E. 898; *Buffinton v. Chase*, 152 Mass. 534, 25 N. E. 977, 10 L. R. A. 123; *Porter v. Blood*, 5 Pick. (Mass.) 54; *Harris v. Howard's Estate*, 56 Vt. 695; 19 Am. & Eng. Enc. Law, 325-329.

We find no error in giving or refusing instructions. The first instruction asked by defendant was not correct for it contained a statement that each item of the account constituted a separate contract. If that was true the circuit court would have original jurisdiction sold and delivered, for such accounts are usually composed of small items, the value of which, taken separately, is seldom sufficient to give that court jurisdiction. The account sued on in this case, with the exception of the first item for account stated, is composed of items for goods and merchandise furnished defendant on a running account during the year 1897. This whole account, by agreement between the parties, was due the 1st of January, 1898, and it would

be incorrect and misleading to speak of each item of the account as a separate contract. *Hughes v. Johnson*, 38 Ark. 285; *Dunnington v. Kirk*, 57 Ark. 595, 22 S. W. 430; *Ring v. Jamison*, 2 Mo. App. 584. A payment generally on this account would, it seems to me, make a new point for the running of the statute as to the whole account, but it is unnecessary for the court to decide that question for the reason that if the payment made be applied to the first item on the account, and if we concede that it tolled the statute as to that item only, still the balance due on that item would be more than the amount found by the jury; for the first item is that for account stated, and after application of all credits it still amounts with interest to more than the verdict, and supports the judgment even though the remainder of the account be rejected. The balance due on the account stated is one debt. *Patillo v. Allen West Com. Co.*, 131 Fed. 680, 65 C. C. A. 508.

By the second instruction asked by defendant, the court was requested to tell the jury that the plaintiffs must show that "each item of the account sued on became due within three years before the beginning of this suit before they can recover thereon." But that would have been misleading under the facts of this case, for the plaintiffs admitted that all of the items became due more than three years before the commencement of their action and relied on a part payment. This instruction, as asked by defendant, would have compelled a verdict for defendant, even though there had been a part payment, and was properly refused.

The third instruction asked by defendant related to the effect of a verbal promise to pay on the statute of limitations, but as there was no claim that a verbal promise had been made in this case, and no evidence of such a promise, it was unnecessary to give an instruction on that point.

The fourth instruction requested by defendant so far as correct, was covered by the instructions given by the court on its own motion. The evidence clearly shows that the defendant was liable unless the debt was barred by limitation. On that point the evidence was conflicting and was settled by the verdict.

On the whole case, we are of the opinion that the judgment should be affirmed; and it is so ordered.

#### HOSKINS et al. v. FAYETTEVILLE GROCERY CO.

(Supreme Court of Arkansas. June 18, 1906.)

#### 1. EXEMPTIONS—PERSONS ENTITLED—ABSCONDING DEBTOR—WIFE AND CHILD.

The wife or minor child of a debtor, deserting them and leaving the state, can claim his personal property exemptions.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, §§ 21, 22.]

#### 2. FRAUDULENT CONVEYANCES—PROPERTY CONVEYED—EXEMPT PROPERTY.

Creditors cannot complain of the sale of exempt personal property by the debtor or his wife whom he has deserted.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 114-117.]

#### 3. SAME—FRAUD OF VENDEE—EVIDENCE—SUFFICIENCY.

In an action to set aside a conveyance of personalty as to fraud of creditors, the evidence showed that the vendee gave full value in exchange for the property, that he made inquiries, and was informed that there were no debts. The property given by him in exchange was as much subject to execution as the property received. *Held* to fail to show participation by the vendee in the fraud.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 908.]

Appeal from Madison Chancery Court; T. H. Humphreys, Chancellor.

Action by the Fayetteville Grocery Company against William Hoskins and others. From a decree in favor of complainant, defendants appeal. Reversed, and complaint dismissed.

Harris & Ivie, for appellants. S. M. Johnson, for appellee.

McCULLOCH, J. Jas. M. Bailey owned a small stock of merchandise and was indebted to appellee, the Fayetteville Grocery Company, in the sum of \$147.39 for merchandise purchased from the latter. He deserted his family, and left his stock of goods in the possession of his wife and son, and they sold it to appellant Hoskins for the sum of \$375, which is shown to be the fair value thereof. Appellant paid for the goods by the delivery to Mrs. Bailey of two mules, valued at \$100 each, and a lot of cattle of sufficient value to make up the balance of the agreed price of the goods. The grocery company brought this suit in equity to cancel the sale of the merchandise to appellant and to subject the same to the payment of its debt. The chancellor granted the relief prayed for, and the defendants appealed.

We are of the opinion that the chancellor erred in holding that the sale of the goods was fraudulent. There is no proof of express authority on the part of Bailey's wife and son to sell the goods, but Bailey is not complaining, and appellant is not, under the circumstances of this case, in a position to do so. Bailey was a resident of the state, the head of a family, and was entitled to hold as exempt personal property of the value of \$500. The right to claim the exemption was not forfeited because he deserted his family and left the state. His wife or minor children could make the claim of exemptions. *White v. Swann*, 68 Ark. 102, 56 S. W. 635. 82 Am. St. Rep. 282; *Hollis v. State*, 59 Ark. 211, 27 S. W. 73; *Hall v. Roulston*, 70 Ark. 843, 68 S. W. 24. The proof shows conclusively that all the personal property of Bailey, the debtor, including the merchandise sold to appellant, did not exceed in value the sum

of \$500, and was therefore exempt from execution. His creditors were in no position to complain of a sale of it, made either by the debtor himself or by his wife. *Bogan v. Cleveland*, 52 Ark. 101, 12 S. W. 159, 20 Am. St. Rep. 158; *Sims v. Phillips*, 54 Ark. 193, 15 S. W. 461. The evidence, moreover, entirely fails to show participation by appellant Hoskins in any fraudulent design to hinder the collection of Bailey's debts. He paid full value for the merchandise, or rather gave property of equal value in exchange for it, and did so in ignorance of the fact that Bailey was indebted to the grocery company. He made inquiry as to any indebtedness of Bailey, and was told that he owed no one. The property (mules and cattle) which he gave in exchange was as much subject to execution and within reach of Bailey's creditors as the merchandise was before the sale to Hoskins, so the creditors were not injured or in any way hindered in the collection of debts by the exchange.

Upon any view of the evidence, the decree was erroneous, and must be reversed, and the cause remanded, with directions to enter a decree dismissing the complaint for want of equity. It is so ordered.

#### BUNCH GRAIN CO. v. LAW.

(Supreme Court of Arkansas. June 18, 1906.)

##### TRIAL—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

A purchaser of cotton seed assigned the contract to L. under an agreement whereby L. was to pay his assignor a certain sum per ton, and subsequently L. assigned the contract under a similar arrangement to P. In an action against L. by his assignor, there was no evidence that L.'s assignor had released him. *Held*, that an instruction that if plaintiff, after the contract had been assigned to L., referred him to P. as a probable purchaser and agreed to the transfer, L. was released from his obligations to plaintiff, was erroneous.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 596.]

Appeal from Circuit Court, Ashley County; Zachariah T. Wood, Judge.

Action by the Bunch Grain Company against John C. Law. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Morris M. Cohn (G. W. Norman, of counsel), for appellant. Robert E. Craig, for appellee.

BATTLE, J. "The T. H. Bunch Grain Company, of Little Rock, Ark., in due course of business, on the 13th day of September, 1901, after correspondence with the Portland Oil Mill, at Portland, Ark., received from it through its business manager—shown to be such on its stationery—its letter agreeing to deliver to said grain company, during the season, at the rate of a car a day, 500 tons of cotton seed hulls, manufactured

by it, at and for the sum of \$2.50 per ton, f. o. b. cars at Portland.

"After this contract had been made, the date not being given, it was assigned by the grain company to one John C. Law, for \$750, \$100 of which was cash, and, to use the language of the assignment, Law was 'to pay \$1.50 per ton in addition to paying the Portland Oil Mill \$2.50 per ton, the contract with the mill for the hulls. The said John C. Law is to settle with the Bunch Grain Company as often as he settles with the Portland Oil Mill, and is to pay the said \$1.50 per ton on each ton of hulls delivered on said contract, until he has paid the said T. H. Bunch Grain Company \$750, the full consideration of said contract.'

"Thereafter, on October 4, 1901, Law assigned said contract to one Ike T. Pryor of Kansas City in the state of Missouri, for a cash consideration of \$350, in addition to \$850, to be paid to Bunch Grain Company, and the \$2.50 per ton to the Portland Oil Mill."

Law having failed to pay the \$650 to the grain company, it brought an action against him in the Ashley circuit court for the same. Law answered, and admitted the execution of the contract as set out in the complaint, and that the same was assigned to him as therein stated, for which, upon the delivery of the hulls by the Portland Oil Mill, and as delivered by said mill, and paid for by him, he was to pay the plaintiff the said sum of \$750, upon which he paid \$100, leaving the balance due had said seed been delivered as contracted, the sum of \$650, but he avers that said mill never delivered him any of said hulls under said contract.

He further averred "that, with the consent and by the advice of plaintiff, he, on the 4th day of October, 1901, for a valuable consideration, transferred the contract to Ike T. Pryor, whom he made a defendant, and made his answer a cross-complaint against him, and averred that Pryor, by reason of his assignment of the contract, assumed the execution of the contract and all of Law's liability to plaintiff for the \$650, which he is informed, and believes that Pryor failed to pay to plaintiff."

He asked that "the judgment herein be rendered against Pryor, or, if it be found, upon the hearing of the evidence, that plaintiff did not agree to accept Pryor for said indebtedness, that he (Law) may have judgment against Pryor for said sum and interest."

He afterwards amended his answer by alleging that the Portland Oil Mill never made the contract sued on.

"He afterwards filed an amended cross-complaint, which did not materially vary from the other, except that there was no claim therein that the mill had refused to deliver the hulls, he therein alleging 'that the said Ike T. Pryor neglected and refused

to pay, and still refuses to pay the said sum of \$650, either to the Bunch Grain Company' or to him to his damage in said sum of \$650, and interest."

The cross-action instituted by the cross-complaint, upon change of venue, was transferred at Pryor's instance, to the Drew circuit court. After there had been two mistrials in the cross-action, Law compromised with Pryor, and receiving \$450 from him released him from the contract sued on.

A jury trial was had in the main action, which resulted in a verdict for Law.

There was no evidence to prove that the Bunch Grain Company released Law from his contract with it. The cross-complaint and amended cross-complaint were read as evidence to the jury and evidence showing the compromise with, and release of, Pryor in the cross-action, was also adduced.

And the court instructed the jury, in part, over the objections of the plaintiff, as follows:

"(5) If you believe from the evidence in this case that the T. H. Bunch Grain Company, after said contract had been assigned to Law, referred Law to Ike T. Pryor as a probable purchaser, and agreed with Law that if he would transfer said contract to Pryor, and Pryor assumed the amount due plaintiff, and that Law, in pursuance of said agreement, transferred said contract to Pryor, and Pryor agreed to pay him by Law, then Law is absolved from any obligation to plaintiff, and your verdict will be for defendant."

This instruction is clearly wrong and prejudicial.

Reverse, and remand for a new trial.

### STONE v. DRAKE.

(Supreme Court of Arkansas. June 18, 1906.)

#### 1. GARNISHMENT—DEBTS SUBJECT.

A debt due from a foreign railroad corporation, which, however, has a line and an agent in this state, for labor performed in another state, may be subjected to garnishment here.

#### 2. SAME—EXEMPTIONS.

Where a debt due from a foreign corporation having an office and an agent in this state, for labor performed in another state is garnished in this state, the exemption laws of this state, and not of the foreign state, apply.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 2.]

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action by M. A. Stone against Walter Drake, in which the Texas & Pacific Railway Company was summoned as garnishee. From a judgment discharging the garnishee, plaintiff appeals. Reversed.

On the 13th day of July, 1901, the appellant, a citizen of Arkansas, commenced this action, by filing before W. H. Rankin, a justice of the peace of Big Rock township, Pulaski county,

Ark., an account and bill of particulars, in the sum of \$90.15, caused summons to issue for defendant Walter Drake, which was returned on the 24th day of July, 1901, served, and on said 24th day of July, 1901, appellant recovered a judgment, by default, against said defendant in the sum of \$90.15 and costs of the action, which judgment has never been satisfied. On the 7th day of March, 1904, appellant caused a duly certified transcript of the proceedings had before W. H. Rankin, J. P., to be filed before W. J. Smither, a justice of the peace for Garland township, Miller county, Ark., and caused a judicial garnishment to issue against the appellee, Texas & Pacific Railway Company, which writ of garnishment was returned duly served on the 22d day of March, 1904. The appellee, as garnishee, on the 20th day of June, 1904, filed before W. J. Smither, J. P., its answer, admitting an indebtedness to the defendant, Drake, in the sum of \$95.50, but stated that said sum of money was due for wages earned in the state of Texas, and that by the laws of that state, same was exempt from garnishment or attachment, and that therefore the garnishee should not be held liable. The appellant demurred orally to paragraph 8 of appellee's said answer, which paragraph is as follows: "That said indebtedness of \$95.50, due by the garnishee, the Texas & Pacific Railway Company, to the defendant, Walter Drake, is for current wages earned by said defendant while in the employ of said garnishee in the state of Texas, and under the Constitution and law of said state of Texas, exempt from garnishment and attachment; and, therefore, this garnishee ought not to be compelled to pay said sum into this court, or to be liable herein, as garnishee to the extent of such indebtedness," which demurrer the justice sustained, and defendant failing to appear and claim said wages as exempt, said justice rendered judgment for appellant in the sum of \$95.15. On the 18th day of July, 1904, the appellee, Texas & Pacific Railway Company, filed its affidavit and bond and appealed the case to the circuit court where appellant again demurred to paragraph 8 of appellee's answer and same was by said court overruled, and judgment rendered for appellee, the garnishment dissolved, and the garnishee discharged, and appellant prosecutes this appeal.

Pratt P. Bacon, for appellant. Glass, Estes & King and W. F. Kirby, for appellee.

WOOD, J. (after stating the facts). The question presented by overruling the demurrer to the third paragraph of appellee's answer is: "Can appellant, a citizen of Arkansas, garnish the Texas & Pacific Railway Co., a foreign corporation of the state of Texas that has a track and runs trains in Miller county, Ark., and has an agent there, for a debt due one of its employes for labor performed in the state of Texas, the employé be-

ing a citizen and resident of the state of Texas and such wages by the laws of said state not being subject to garnishment?"

First. In *Kansas City, Pittsburg & Gulf Ry. Co. v. Parker*, 69 Ark. 401, 63 S. W. 993, 86 Am. St. Rep. 205, we said: "The situs of a debt for purposes of garnishment, is not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the law of that state permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the state." True, the debt due by the railway company in that case was for labor performed in this state. But, in our opinion, that makes no difference. While, as we said in *Railway v. Parker*, supra, there is great contrariety of judicial opinion upon the question, yet, the doctrine there announced is sound, and supported by abundant authority. In addition to the authorities there cited see *Rood on Garnishments*, § 245, and authorities cited in note. In *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84, Judge Mitchell, speaking for the court, said: "While by fiction of law, a debt, like other personal property, is for most purposes, as, for example, transmission and succession deemed attached to the person of the owner, so as to have its situs at his domicile, yet this fiction yields to laws for attaching the property of nonresidents, because such laws necessarily assume that the property has a situs distinct from the owner's domicile. For such purpose a debt has situs wherever the debtor or his property can be found. Wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided, of course, the laws of the forum authorize it." Under our statute, *Drake*, the original defendant, a non-resident, could have maintained an action against the appellant for his wages in this state by giving bond. Section 959, Kirby's Dig. Mr. Wharton, in his excellent work on *Conflict of Laws*, cites the following cases as

supporting the doctrine that a debt due from a foreign corporation to a nonresident who is only constructively served with process, is subject to garnishment in a state in which such corporation does business, although the debt is not payable in that state and did not arise out of business transacted therein. *Mooney v. Buford & G. Mfg. Co.*, 72 Fed. 32, 18 C. C. A. 421; *Nat. Fire Ins. Co. v. Ming* (Ariz.) 60 Pac. 720; *Lancashire Ins. Co. v. Corbetta*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; *Missouri Pac. R. Co. v. Flannigan*, 47 Ill. App. 322; *German Bank v. American Fire Ins. Co.*, 83 Iowa, 491, 32 Am. St. Rep. 316, 30 N. W. 53; *Pittsburg, C. & St. L. R. Co. v. Bartels*, 108 Ky. 216, 56 S. W. 152; *Howland v. Chicago, R. I. & P. R. Co.*, 184 Mo. 474, 86 S. W. 29; *Nat. Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663; *Fithian v. New York & E. R. Co.*, 81 Pa. 114; *Datz v. Chambers*, 3 Pa. Dist. R. 353; *Neufelder v. German Amer. Ins. Co.*, 6 Wash. 336, 22 L. R. A. 287, 36 Am. St. Rep. 163, 33 Pac. 370. We have examined these cases and they support the doctrine we have announced. See, also, to the same effect, *Chicago, Rock Island & Pac. Ry. Co. v. Sturn*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144.

Second. It is a well-established rule that exemption laws are not a part of the contract. They pertain to the remedy, and are subject to the law of the forum. Wharton on *Conflict of Laws*, § 791a, and numerous authorities cited in note, among them *C. R. I. & P. R. Co. v. Sturn*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, 12 Am. & Eng. Enc. L. p. 793, note; 18 Cyc. 1376. The amount due from appellant to Drake for wages was not exempt from garnishment under our laws. Appellee had obtained judgment against Drake. Section 3695, Kirby's Dig.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to sustain the demurrer to the third paragraph of appellant's answer, and for further proceedings not inconsistent herewith.

## CUMBERLAND R. CO. v. PINE MOUNTAIN R. CO.

## PINE MOUNTAIN R. CO. v. CUMBERLAND R. CO.

(Court of Appeals of Kentucky. Dec. 14, 1905.)

## 1. RAILROADS—RIGHT OF WAY—LOCATION—FILING MAP—STATUTES.

Where a railroad company had full notice of a prior survey at the time it attempted to make a similar survey over the same route, it was immaterial to the priority of the company making the first survey that it did not first file for record a map of its location, as required by Ky. St. 1903, § 767.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 127-129.]

## 2. SAME—CONFLICTING LOCATIONS.

Where a railroad company has actually located its right of way and is in good faith following up its location by buying land or instituting condemnation proceedings with reasonable diligence, another company cannot go to a point on the route which is neither the beginning nor the ending of its proposed line and locate a right of way on the same line.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 127-129.]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Actions by the Cumberland Railroad Company against the Pine Mountain Railroad Company and by the Pine Mountain Railroad Company against the Cumberland Railroad Company, each to enjoin the other from disturbing a staked right of way location. From an unfavorable decree, both parties appeal. Motion to discharge injunction in favor of Pine Mountain Railroad Company sustained, and motion to discharge a similar injunction in favor of Cumberland Railroad Company overruled.

Jas. D. Black and D. B. Logan, for Cumberland R. Co. A. L. Stone, B. D. Warfield, and O. W. Metcalfe, for Pine Mountain R. Co.

**HOBSON, C. J.** The Cumberland Railroad Company was organized June 30, 1902, under article 5 of chapter 32 of the Kentucky Statutes of 1903. By its original articles it was authorized to construct and operate a railroad from Artemus, in Knox county, Ky., up the valley of Big Brush creek, a distance of about 10 miles. This road it had about completed on September 15, 1905, when it amended its articles of incorporation by providing for an extension of its railroad to the city of Jellico. As soon as this amendment was made it put its chief engineer, with a lot of men, in the field to locate the right of way for the extension. They began at the end of the then nearly completed original line about September 25th, and by the 9th of October had completed the location of the right of way along Brush creek to Brush Creek Gap and up Greasy creek to Greasy Creek Gap; the right of way so located being marked by stakes in a regular and systematic way. They then continued on until the 19th day of October, when the entire right of way was laid out of

the proposed extension. The Pine Mountain Railroad Company executed its articles of incorporation on October 1, 1905, and on October 13th it put a corps of engineers in the field to locate its right of way, which began on the Louisville & Nashville Railroad near Williamsburg; thence up Cumberland river to the mouth of Poplar creek; thence up Poplar creek and down Greasy creek to a point on the Cumberland Division of the Louisville & Nashville Railroad a few miles north of Pineville. But these engineers did not begin at either end of the proposed route. They went in the first place, on October 13th, about 2 o'clock to Greasy Gap, and surveyed from that point onward in the direction in which the Cumberland Railroad Company's engineers were locating its right of way. One crew would be ahead one day and the other the next day, and in this way they raced on as far as the lines ran together; each company aiming to secure priority over the other. At some points the lines were practically identical, and they often crossed each other. The Pine Mountain Company as it went along day by day filed in the county clerk's office its maps of the route as located, and when it had finished its route filed a map of the entire route. That company also, by action of its board of directors, adopted the route so selected. The Cumberland Company filed its map also, but after the map of the Pine Mountain Company had been filed. There was no express action of the directors of the Cumberland Company approving the location of the route as made by its engineers, but as they went along it took deeds for the right of way from such persons as were willing to sell and instituted proceedings to condemn the lands of those with whom it could make no contract. The Pine Mountain Company took like deeds and instituted like proceedings. Finally these suits were brought by each of the two companies to enjoin the other from disturbing it. The circuit court, on the hearing of the case, sustained the injunction of the Pine Mountain Company for a part of the right of way, and sustained the claim of the Cumberland Company to another part of the right of way. Both parties, being dissatisfied with the order of the circuit court, have entered motions to dissolve the injunctions granted by him, and the two cases have been heard together. On the oral argument Judges O'REAR and NUNN sat with me, and on the consideration of the case Judges PAYNTER and SETTLE also sat; Judge BARKER, declining to sit in the case. In the spring of 1905 the Louisville & Nashville Railroad Company had the land examined to learn if it was a practicable route for a railway; but we attach no importance to this, as no location was then made and the Pine Mountain Company was not then incorporated. Our conclusions are as follows:

The purpose of requiring a map to be filed under section 767, Ky. St. 1903, is to give notice of the location of the right of way. The

map, when properly lodged for record, is constructive notice, just as a deed properly lodged for record; but, if a person has actual notice of the location of the right of way, the fact that the map was not filed cannot be relied on by him. When the engineers of the Pine Mountain Railroad Company went to Greasy Gap and began their work the right of way of the Cumberland Railroad Company had been located through this territory four days before. The stakes were on the ground, the tents of the surveying party were to be seen, and the Pine Mountain Company had full notice of the situation when it undertook to begin its survey at this point in the middle of its proposed line. We therefore conclude that the fact that the map of the Cumberland Railroad Company was not filed is not material, and that it is also immaterial that the Pine Mountain Company first filed its map. When a company has actually located its right of way, and is in good faith following up its location by buying the land or instituting proceedings to condemn it with reasonable diligence, another company cannot go to a point on the route which is neither the beginning nor the ending of its proposed line and run a race with

the company which has begun at the beginning of its route and is going on in an orderly way to its other terminus. The railroad company is authorized to take land under eminent domain and when it has in good faith entered for this purpose, located its right of way, and is proceeding to perfect its right, the law prefers him who thus first enters in good faith, and it cannot be permitted that another company with notice of his rights shall make another survey right behind him and destroy his priority which he has thus gained. While it is true that on some days the Pine Mountain Company's engineers were ahead of the Cumberland Company's engineers, they got thus ahead by beginning in the middle of the line and then running a race with the other people. The statute does not contemplate this. It contemplates a location in good faith and in the usual course of business.

Under all the circumstances we conclude that the Cumberland Company has the better right. The motion to discharge the injunction granted to it is overruled. The motion to discharge the injunction granted in favor of the Pine Mountain Railroad Company is sustained, and that injunction is dissolved.



## In re TWENTY-FIRST ST.

## KANSAS CITY v. HYDE.

(Supreme Court of Missouri, Division No. 1.  
May 30, 1906.)

## 1. EMINENT DOMAIN—EXTENSION OF STREET—EVIDENCE—ADMISSIBILITY.

In a proceeding under an ordinance to condemn land for the extension of a street terminating at the boundary of an owner's land, evidence of a contemporaneous ordinance for the widening of another street, so that the street as extended and the street as widened will meet and form a thoroughfare, is admissible.

## 2. SAME—JUDGMENT.

Where, in a proceeding under an ordinance to condemn land for the extension of a street terminating at the boundary of an owner's land, it appeared that, unless another street was widened as contemplated by a contemporaneous ordinance, the street as extended would be a cul-de-sac in the owner's land, the court should withhold its final judgment until judgments are reached in both proceedings; each proceeding depending for its success on the other.

## 3. SAME—EVIDENCE—ADMISSIBILITY.

Where the extending of a street is but a part of a general scheme, the court should know what the scheme is, in order to appreciate the value of the particular extension.

## 4. SAME.

Where the extending of a street is but a part of a general scheme, the scheme may be shown by contemporaneous ordinances or by the best evidence of which the fact is susceptible.

## 5. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—EFFECT OF FRAUD.

A person injuriously affected by an ordinance may show that its passage was obtained by fraud or other unlawful means or for an unlawful purpose, and the fraud which will invalidate an ordinance is shown by proof of fraud, defined to be the willful doing of an unlawful act.

## 6. SAME—ESTABLISHMENT OF STREETS—AUTHORITY.

A city council has authority to establish streets for the purpose of public highways, and, when established, it has authority within certain bounds to allow railway tracks to be laid therein; but it has no authority to establish a street for the use of a private individual.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 718, 1461.]

## 7. EMINENT DOMAIN—EXTENSION OF STREET—EVIDENCE—ADMISSIBILITY.

In a proceeding to condemn land for the extension of a street terminating at the boundary of an owner's land, evidence that the proceeding is for the use of an individual, and not for the purpose of establishing a street for public use, is admissible.

## 8. SAME—BENEFITS—ASSESSMENT.

In a proceeding to condemn land for the extension of a street terminating at the boundary of an owner's land, it appeared that the street, if extended, would form a cul-de-sac in the owner's land, and that on the widening of another street as proposed the street as extended and the other street as widened would meet. The proposed extension of the street gave to the owner of the land no connection that he did not have, and it cut him off from his connection with the right of way of a railway. *Held*, that the owner would not be benefited by the extension of the street sufficient to warrant the assessment of benefits in proceedings to condemn his land therefore.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 378-398.]

## 9. EMINENT DOMAIN—PLEADINGS—SUFFICIENCY.

Where a city charter, prescribing the procedure in proceedings to condemn land, does not require formal pleadings, the filing by an owner, whose land is sought to be condemned for a street, of a motion averring that the ordinance providing for the street is invalid, because it provides for a taking of his property for a private use, sufficiently raises the issue as to whether the proceeding is to condemn his property for a private use.

## 10. SAME—QUESTION FOR COURT.

Where, in a proceeding to condemn land for a street, the owner of the land sought to be taken avers that the land is sought to be taken for a private use, the court must hear evidence on the issue, and, if satisfied that the proceeding is one to condemn property for the use of an individual, it must dismiss the proceeding.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

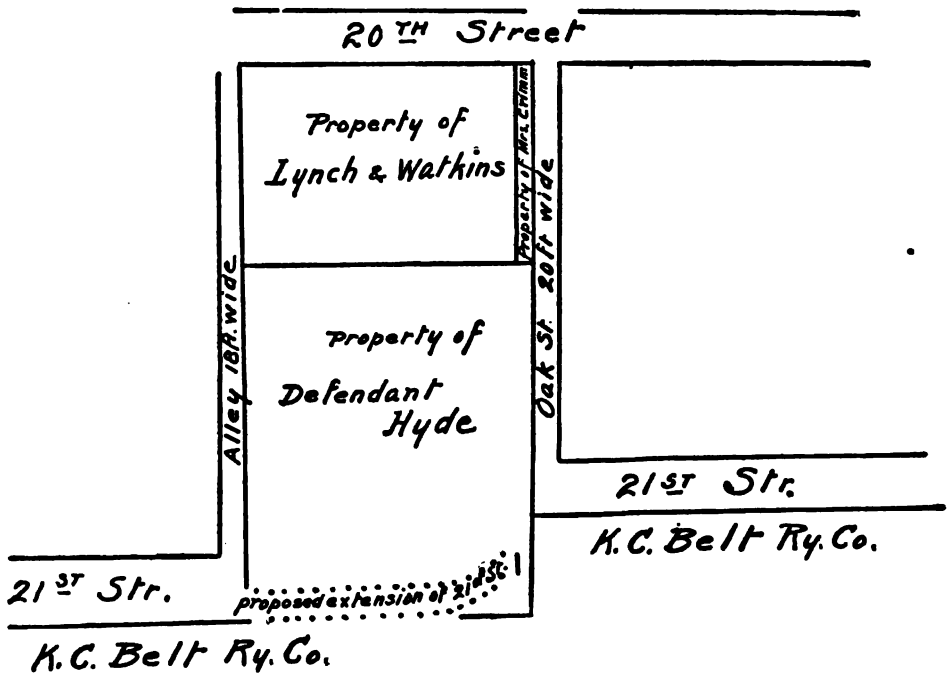
Proceedings by the city of Kansas City to condemn land for the extension of a street. From a judgment awarding damages and condemning the land, Louis K. Hyde appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore, for appellant. Edwin C. Meserve, for respondent.

**VALLIANT, J.** In re Twenty-First street. This is a proceeding under an ordinance of the city to extend Twenty-First street into certain property of the defendant, Hyde, and for that purpose to assess his damages for the property to be taken or damaged, and to assess the benefits over a district prescribed by the ordinance, in which district is included remaining property of defendant. The jury assessed the defendant's damages at \$5,000 and his benefits at \$2,577.10, and from the judgment of condemnation that followed on those assessments the defendant has appealed.

Defendant Hyde owns a tract of land nearly square in shape, containing about 60,000 square feet, bounded on the east by Oak street 20 feet wide, west by an alley 18 feet wide, and on the south by the right of way of the Kansas City Belt Railway. Twenty-First street, 60 feet wide, coming from the west, terminates on the west line of defendant's property; its south line being nearly coincident with the south line of defendant's property. The diagram on the following page gives a general idea of the location.

Twenty-First street, as will appear from the diagram, does not extend across defendant's property, but it ends on the west against defendant's west line, and begins again going east at defendant's east line, and not then on a line with its own west end but considerably north of it. The ordinance in question does not aim to unite the two disconnected ends of Twenty-First street, nor to carry the street entirely through defendant's property, but to terminate it in defendant's property at a point 10 feet west of his east line; nor does the ordinance aim to carry the street to its full width even



as far as it purposes to go, but to the width only of 30 feet. Another feature of the route marked out by the ordinance is that after going 68 feet along the south line of defendant's land it changes course to the northeast to the terminus named and that too at an angle which, even if the course were extended to defendant's east line, would not connect it with that end of Twenty-First street.

Appellant contends that it appears on the face of the ordinance, when applied to the physical facts, above stated, that the public has no interest in this proceeding; that the extension of Twenty-First street as proposed would simply create a cul-de-sac in defendant's property which would be of use to no one, and that we think is correct. But to meet that objection the city undertook to prove that there was another fact to be considered which would show that this extension was for a public use and would serve the public, namely, that there was pending at the same time and in the same court another proceeding the purpose of which was to widen Oak street and bring it down to connect with this extension of Twenty-First street and to the right of way of the Kansas City Belt Railway Company. But, on the objection of defendant, the testimony offered by the city on that point was excluded. The idea advanced was that this case would have to stand or fall by its own

strength and could not be helped out by another proceeding, the result of which was only problematical. We have now under consideration the appeal of this same defendant in the Oak Street Case (96 S. W. 206), both cases having been submitted for our judgment at the same time, and in that case, to meet the objection of the defendant that the widening and extending of Oak street would only carry it to an unprofitable end, the city offered to prove that it was, at the same time, moving to extend Twenty-First street so as to connect it with the widened and extended Oak street, but on like objection by the defendant that evidence was excluded. In spite of the ruling of the court, however, the evidence in its full force got to the jury and must have had its effect, because the jury could not, with reason, have assessed any benefits in this case if there was no purpose shown to connect the two streets. The court erred in excluding that evidence. Assuming that it was to the public interest that these two streets should be connected in the manner that they would be if both of those ordinances were carried into effect, and that the common counsel so determined, yet, since proceedings to widen or extend both streets cannot be embraced in one suit, it would be impossible to carry the scheme into effect if each proceeding had to rest alone on its own facts without taking into account the purpose of the other. If each

proceeding depends for its success on a condition that does not already exist, but that can be brought about only by a successful prosecution of the other, and if neither can proceed until the other is finished, then the one defeats the other and both must fail. That cannot be the law. The danger suggested in the possible failure of the other proceeding can be avoided without any difficulty by the court in its control of its judgment; it can withhold its final judgment, or its ruling on a motion for a new trial, or otherwise suspend final action, until judgments are reached in both cases. Nothing that it is necessary for the court to know in order to reach a correct conclusion in a given case can be said to be irrelevant or immaterial.

If the opening or extending of a particular proposed street is but a part of a general scheme, the court should know what the scheme is in order to appreciate the value of the particular street in question. That scheme may be shown by contemporaneous ordinances if it has been put into that record form, or it may be shown by the best evidence of which the fact is susceptible, if it has not been made a matter of record. Whilst the passing of an ordinance to establish, widen, or extend a street is the exercise by the city of a delegated governmental power, legislative in its character and, therefore, not subject to judicial direction (*Albright v. Fisher*, 164 Mo. 56, 64 S. W. 106; *State ex rel. v. Gates*, 190 Mo. 540, 89 S. W. 881) yet after the ordinance has become an accomplished fact, if attempt is made to apply it to the injury of the property rights of a citizen, he may, if he can, show that its passage was obtained by fraud or other unlawful means or for an unlawful purpose. In *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743, this court, per Black, J., said: "The rule of law is well established that the courts will not inquire into the motives of the Legislature in enacting a law, even where fraud and corruption is alleged. *Cooley on Const. Lim.* (5th Ed.) 225. But the rule is somewhat relaxed as to municipal bodies. Speaking of such bodies it is said: 'We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of persons injured thereby.' 1 *Dill. Munc. Corp.* (4th Ed.) § 311." That doctrine has been iterated by this court in other cases. *Knapp Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102; *State ex rel. v. Gates*, supra.

At the trial of this case the defendant offered to prove that one of the men who owned the property adjoining his on the north was, at the time of the passage of these ordinances, the speaker of the lower house of the common council to whose property a switch could not be run from the Kansas City Belt Railway unless the streets were extended and widened as in these ordinances was proposed, that he, through his

partner, had approached defendant with a proposition that if he, defendant, would sell him a right of way to the Belt Railway the ordinances would not be passed, but defendant declined and the ordinances were passed; that the purpose of the ordinances was not to widen or extend the streets for use as public highways, but solely for the purpose of affording the speaker of the lower house and his business partner access, by means of a switch track, to the Belt Railway, and that, when widened and extended, as proposed in these ordinances, and turned over to the railway to be covered with switch tracks the public would be practically excluded from the use of those streets. The court on objection of the plaintiff rejected the evidence and exception was saved. The rejection of that evidence raises the serious question in this case. If it is a fact that the purpose of the council in passing the ordinances was that these streets, when widened and extended as proposed, were to be given over to railway switch tracks, then the common council was proceeding to condemn private property for a purpose for which it had no right to condemn. When we say that the validity of a city ordinance may be attacked on the ground of fraud in its procurement, we do not necessarily mean that actual bribery or corruption must be shown, but it is sufficient if the fraud charged is of that character that has been defined to be the willful doing of an unlawful act. The common council has authority to establish, extend, and widen streets for the purpose of public highways, and, when established, extended, or widened, it has authority, within certain bounds, to allow railway tracks to be laid in the streets and trains to pass over them. But those streets are established for public use and the cost of establishing them is charged as a special tax on the benefit district affected. The common council has no authority to establish a street or a system of streets at the expense of the property owners in the district for the use of a private individual or number of individuals. And if the council should undertake to use the power, that has been intrusted to it for the public benefit, to serve private interests, it is an abuse of the power, a violation of the trust, a willful doing of an unlawful act, a legal fraud. It has been decided by this court that an ordinance of the city of St. Louis, essaying to grant a railroad company the right to lay its tracks in a street that was so narrow that when the tracks were laid and trains operated on them, the street was practically unsafe for a public highway, was illegal and of no effect. *Lockwood v. Wabash Ry.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547. As was held in the case of *Glasgow v. St. Louis*, above mentioned, the city has the power to vacate a street when it deems it no longer of public use, and, in the absence of fraud, it

is no ground for holding the vacating ordinance illegal because the effect is to give the use of the ground to an adjoining manufacturing concern, or even if it was done for that purpose. The controlling idea in that case is that if, without fraud, the city authorities are well satisfied that the street is of no use to the public and could be advantageously used by the adjoining manufacturing concern the ordinance vacating it is not illegal.

But in the case at bar the common council come saying: "We need this ground for a public highway; we are going to condemn it for the use of the public, and we are going to make those who own property lying within a certain district pay for it. We are going to make this defendant, whose property to the value of \$5,000 we will take, pay, as for the benefit it will do him, more than half the sum we give him." Surely, if for nothing more than showing the questionable extent of his benefits, the defendant ought to be allowed to show the purpose to which the proposed streets are to be put, if that purpose is already a part of the general scheme. If, along with these two ordinances, the common council had passed an ordinance authorizing the Belt Railway Company to so occupy the proposed streets, when completed with switch tracks, as to give certain individuals switch connection for their property with the Belt Railway that would be a fact that would necessarily influence the jury in the assessment of the benefits which the defendant would be required to pay, and it might be an important fact for the court to know, when the time should come to pass on the question of the validity of the ordinance, and if such was the purpose the common council would have been more candid to have so avowed it, but if such was in fact the purpose, though not so avowed, it is just as important for the court to know it, and the defendant has the right to prove it. What is called Oak street is now only 20 feet wide, it terminates in that part of Twenty-First street that lies east of the defendant's property, it stands at such an angle to the Belt Railway as seems to make it impracticable to run a switch track into it. The property of the firm, in whose interest alone, as the defendant contends, this proceeding is being prosecuted, lies adjoining, on the north, defendant's property, and is separated from Oak street by a strip 10 feet wide belonging to Mrs. Crimm. The scheme as shown by the ordinance in the Oak street property is to take Mrs. Crimm's 10-foot strip and a strip of like width off the east side of defendant's property, thus making Oak street 30 feet wide and giving the firm mentioned a front for the full length of its property on that street, then the sharp angle, that would otherwise hinder the laying of a track from the Belt line into Oak street, is reduced by the turn of the course of the proposed extension of Twenty-First street to the northeast.

If the purpose is, as defendant offered to prove that it was, to shape these streets for the convenient introduction of the switch track mentioned, the plan proposed would facilitate that purpose. Then if we contemplate what Oak street would be, 30 feet in width and a railroad track through it, the question would arise as to whether that street was any longer susceptible of being used as a public highway. In the case of *Lockwood v. Railway*, above mentioned, the street was 40 feet wide, from building line to building line, and 24 feet from curb to curb, and this court held that the railroad tracks amounted to a practical exclusion of the public from the street, and that the ordinance was therefore void.

If there was now no scheme to turn these streets over to the use of the Belt Railway Company, if they were now already extended, widened, and established as proposed, and if the common council was now proposing to grant the Belt Railway Company the right to lay its tracks through Oak street, if we should adhere to what we said in the *Lockwood Case*, we would have to hold that the city council could not so drive the public off that highway. And it does not alter the case that there are other lots along the line that might be rendered more available for business purposes if they were afforded connection by switch tracks with the Belt road. The common council can no more create a street for the especial benefit of a given number of people than it can for that of one individual. If it is to be a street, it must be a highway for the public, and no use of it can be granted inconsistent with the use of the general public. And whilst it is competent, as we have seen in the *Glasgow Case*, above mentioned, to vacate a street which is no longer of any use to the public, yet it is not competent to create a street in the name of the public for the purpose of vacating it in the interest of whom it may concern. In *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 82 Am. St. Rep. 179, the city council had passed two ordinances, one to widen Archer avenue, the other granting a railroad company the right to lay its tracks in the street when it should be so widened. the court said: "It is, to our minds, clear that both ordinances before us in this case are but parts of a single and entire scheme. They were adopted on the same day and the latter expressly refers to, and is by its terms dependent upon, the adoption and enforcement of the former, and it requires that the entire cost and expense of enforcing both ordinances, and all damages which may be adjudged against the city by reason of these being adopted and enforced, shall be paid by the railroad companies." In that case the city council was entirely candid in the expression of its purpose, and was careful not to impose the burden of cost, expense, and damage on the persons whose property was to be taken, or on those owning other

property in the vicinity. The court went on to say: "Moreover, the attempt to widen Archer avenue for the limited distance and in the peculiar manner described in the first ordinance is manifestly to meet a local want in that respect, and the second ordinance expressly shows that that local want is space for laying down additional railroad tracks, and nothing else." Then, after showing how completely the street, when widened, would be occupied by railroad tracks, the court, continuing, said: "Hemmed in by the wall on one side and by the buildings or inclosures on private property on the other, no rational being would, at the risk of the inevitable dangers from passing cars, use this part of the street as a common highway, unless under stress of most extraordinary circumstances. It is not material that the public are not, by the words of the ordinance, forbidden to use this part of the street—the effect of the grant is inevitably an exclusion of all but these railroads from its use, and the law deals with results and not with mere forms in such matters.

\* \* \* It is so familiar that we need not stop to demonstrate it, that cities, villages, and towns are only empowered to lay out, open, and improve streets for such public use as that persons and property within the municipality may be legitimately assessed or taxed for payment thereof, and that persons and property within a municipality cannot be legitimately assessed or taxed for the right of way or the making or improving of a road for a railroad company alone. \* \* \* We do not deny that the city has power to widen streets, generally, and that, when it has undertaken to do so, the motives that may have actuated those in authority are not the subject of judicial investigation; but the purpose for which a thing is done is very different from the motives which may have actuated those by whom it is done, and is, in the present instance, a legitimate subject of judicial investigation, for the right to exercise the power of eminent domain is, in all cases, limited by the purpose for which it shall be exercised—as thus, private property may be condemned for public use, but it may be shown the use, in fact, is not public but private. \* \* \* A railroad company, under authority to condemn property for its right of way, cannot condemn property for a street of a city, and \* \* \* a city cannot under authority to condemn property for streets, condemn property for a railroad track, for the principle must be the same."

The facts of the case at bar illustrate forcibly the necessity for the admission of evidence of kind offered by the defendant. To the city council the state has delegated the power to condemn land for a public use, it has no power to condemn for a private use. "Public" in that connection means everybody. If the use is not for everybody, it is a private use. If to an individual, or to

any number of individuals, is given the right to use the property in such manner as will practically exclude the general public, it is a giving of the property to private use, and a destruction of its public service character. Now, suppose an influential individual, to whom a slice of his neighbor's property would be very convenient, should ask the city council to condemn that property for his use, and the council should pass an ordinance, as requested, declaring that it condemned the property for the use of the individual, of course the ordinance would be void on its face. But suppose the council, intending the condemnation to be really for the sole benefit of the individual, in order to give it validity, should say in the ordinance that the property was to be condemned for a public street, would such a false recital in the ordinance be conclusive, would it put the man whose property was to be taken, and the people in the district who were to be taxed to pay for it, beyond the protection of the constitutional guarantee that their property should not be taken for private use? Could the city council, by a false recital in the ordinance, give it a validity which it would not have if it recited the truth? And when the city comes to ask the aid of the court to carry the ordinance into effect, is it possible that the court must be a mere tool to do the will of the council, with no power to inquire into the truth of the matter? What protection has a citizen for his constitutional rights, if the courts cannot look through a sham and see the truth, and how can the courts learn the truth if they must take the recitals in the ordinance as conclusive, and reject all evidence to show their untruth? What a reproach it would be to our system of jurisprudence and how humiliating would be the attitude of our courts if they were so powerless! But our law is not so lame, and our courts are not so impotent. The courts in such case will hear the evidence and find the facts. If the truth lies only in an unwritten agreement or understanding, it can be proven only by oral testimony and that being the best evidence of which the fact is susceptible the court must receive it and weigh it. Defendant, in such case, is not driven to a suit in equity to reform the ordinance or assail its integrity. This is a summary proceeding, no pleadings are prescribed by the charter or by statute, and the party has a right to demand that the court hear the evidence and find whether or not the purpose of the proceeding is to condemn his property for a public use or for the use of an individual or individuals. If, as the defendant offered to prove, the real purpose for which these ordinances were passed was to make a way for a switch track or switch tracks to property of an individual or of any number of individuals, then it was a purpose for which the city council had no authority to condemn property, and the passage of the ordinances

was an abuse of its power, and the court should adjudge the ordinances void. But, even if switch tracks are not intended and will not be laid in the streets, still on what possible theory can it be said that this defendant will be benefited by the opening of this street through his land? It gives him no connection that he has not already, and it cuts him off from his connection with the right of way of the Belt Railway. The only change in his situation, besides that of depriving him of a large slice of his property, will be to put him at the mercy of the city council if he should ever want a switch track into his premises connecting with the Belt Railway.

It is said, in behalf of respondent, that no pleadings were filed alleging that this was a proceeding to condemn private property for a private use, and that therefore there is no such question in the case. Under the provisions of the city charter prescribing the procedure in such case, formal pleadings are not required. Nevertheless the defendant in this case did file what is called a motion averring that the ordinance was invalid for several reasons, specified among which was that it was a proceeding to take his property, not for a public, but for a private use, and prayed that the suit for those reasons be dismissed, which motion the court overruled without hearing evidence, and defendant excepted. It is true, as contended by respondent, that the jury was not empaneled to try any questions except those relating to the damages and benefits, and therefore, except as bearing on those questions, the jury had nothing to do with determining whether this was a proceeding in good faith to condemn property for a public street; but that was a question addressed to the court, on which the court ought to have heard the evidence offered, and, if satisfied that it was a proceeding to condemn the property of the defendant for the use of one individual or individuals, it ought to have rendered judgment for defendant, dismissing the proceeding. The court could have tried that issue before impaneling the jury, or during the jury trial, or afterwards as it might see fit to do, since there is no particular procedure prescribed in the charter or elsewhere.

For the reasons above given the judgment is reversed, and the cause remanded to the circuit court to be proceeded with according to the law as herein above expressed. All concur.

In re OAK ST.

KANSAS CITY v. HYDE.

(Supreme Court of Missouri, Division No. 1. May 30, 1906.)

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Proceedings by the city of Kansas City to condemn land for a street. From a judgment of condemnation, Louis K. Hyde appeals. Reversed and remanded.

Lathrop, Moore, Fox & Moore, for appellant. Edwin C. Meservey and John H. Thacher, for respondent.

VALLIANT, J. In re Oak street. This is a twin case with that between the same parties (In re Twenty-First Street [just decided and not yet officially reported] 96 S. W. 201), and the facts of this case are sufficiently stated in the opinion in that case. For the reasons given in the opinion in that case, the judgment in this case is reversed, and the cause remanded to the circuit court to be proceeded with according to the law as expressed in that opinion. All concur.

SITES v. KNOTT et al.

(Supreme Court of Missouri. June 1, 1906.)

1. RAILROADS—INJURIES TO PEDESTRIAN ON TRACK—NEGLIGENCE.

The negligence of a pedestrian crossing a railroad track does not preclude a recovery for injuries received by being struck by an engine, where the employes operating the engine could have seen the pedestrian in a position of peril in time to have avoided injury by the exercise of ordinary care.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1096-1099.]

2. SAME.

An engineer, seeing a pedestrian approaching a recognized railway crossing, has the right to presume that he will stop before reaching a point of peril patent before him, in the absence of evidence showing that the pedestrian is unmindful of the approaching danger or in such a condition as not to appreciate it, and until the engineer has good reason to believe that the pedestrian will not stop before reaching a point of peril, he is not required to use proper means to prevent injuring him.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1014-1016.]

3. SAME—QUESTION FOR JURY.

In an action against a railroad for injuries at a crossing, evidence considered, and held insufficient to authorize the submission of the issue of the negligence of the employes in charge of the engine, based on their failure to stop the engine in time to have avoided the injury, after the discovery of the pedestrian's peril.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1165.]

4. SAME—EXISTENCE OF RAILWAY CROSSING—CROSSINGS BY CUSTOM.

In an action against a railroad for injuring a pedestrian, evidence held not to show any regularly used open street crossing at the point where the pedestrian was struck, so that the liability of the railroad would depend on the question as to whether the public had been accustomed to cross the tracks at that point and the railroad had recognized the right so to do.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 955.]

5. SAME—OBLIGATION OF RAILWAY EMPLOYEES.

Where, at the place a pedestrian was killed by being struck by a train, people for a consid

erable length of time had been accustomed to daily cross the tracks at that point, and the railroad had recognized the right to do so, the railroad owed it to the public to give suitable warning of an approaching train, while if there was no open public street across the tracks, and the railroad had not recognized the right of the public to cross the track, and did not by its conduct indicate its recognition of such right, the railroad was not required to give a warning.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 957, 994.]

6. SAME.

Where the point where a pedestrian was killed in consequence of being struck by cars pushed together, was a crossing for the public, and the right of the public to use the crossing had been recognized by the railroad company, and it was customary to place cars on the tracks, so as to leave an opening for the public to cross, the pedestrian was justified in acting on the implied invitation to cross, and it was the duty of the railroad company to give a reasonable warning before pushing the cars together and closing the opening.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 956, 993.]

In Banc. Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Laura A. Sites against Stuart R. Knott and others, receivers of the Kansas City Suburban Belt Railroad Company. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This cause is here upon appeal by the defendants from a judgment of the circuit court of Jackson county, Mo. This is an action brought by the widow of William R. Sites to recover the statutory penalty on account of the death of her husband, who was killed on September 6, 1901, at about 4 o'clock in the afternoon, by being crushed between the drawheads of two freight cars in the yards of the Chicago & Alton Railroad Company, located in what is called East Bottoms, in Kansas City, Mo. Deceased was a mail carrier, and had been on the same route for two months prior to his death, crossing, at or near the point where he met his death, three times a day. That portion of the Alton yards in question lies between Gillis street on the west and Lydia avenue on the east, a distance of a little over a quarter of a mile. Throughout this distance the yards are not intersected by cross-streets on account of the high bluff, ranging from 20 to 50 feet in height on the south, which begins just west of the gasworks at Gillis street and extends east nearly to Lydia avenue. Between this bluff and the south side of the tracks are four small houses. The one farthest west belongs to Mrs. Rodes; just across the tracks to the north is the Zenith Mill. Between the Rodes house and this mill is the point of the accident. East of this mill lies the property of the Bolen Coal Company. Within this space and north of the tracks there are also some other business houses, offices and the residences of three or four other families. Between 10 and 150 feet east of the Rodes cottage, in the gulch or draw in the bluff, is located a spring, which is frequently used by

people in the neighborhood. At the point of the accident, between the Rodes cottage and the Zenith Mill, the Alton's tracks are arranged as follows, beginning on the south: First. The "mud track" (used for storing cars). Second. The Kansas City Suburban Belt receiving track. These two tracks are connected by a switch at the west end of the Rodes cottage. Third and fourth. Alton main tracks (kept free to permit passage of trains). Fifth. The Kansas City Suburban Belt delivering tracks. Sixth. Zenith Mill track. (Tracks 5 and 6 are connected at the point marked "X" on the plat.) The location of these tracks is fully shown on the plat. The west end of these yards in question, near Gillis street, is the connection of the Chicago & Alton and the Suburban Belt; that is, the point where deliveries of cars are made to and from one road to the other. The Alton sets all cars which it has destined for the Belt on track 2, and the Belt Company places its cars for the Alton on track 5. Each road gets the cars thus set to it at certain intervals, suiting its own time and convenience.

The negligence complained of in this action is embraced in the following part of the petition filed by the plaintiff, which is as follows: "That defendants are and at all times herein referred to are and have been engaged in the business of running, conducting, managing, and operating all of the railroad property, locomotives, cars, trains, and rolling stock of the said railroad heretofore and now commonly known as the railroad of the Kansas City Suburban Belt Railroad Company; and that part of the said business of the defendants is and was during all of said period to transfer cars of various railroad companies from one track to another and from one locality to another in Kansas City, Mo., on tracks owned or controlled by them, or other persons or corporations, and on and from those certain railroad tracks extending in an easterly and westerly direction across Troost avenue south of the Zenith Mill, near First street, in said city, which said Troost avenue is a public street in said city, which said place is a populous and thickly settled locality in the vicinity of which are many dwellings, mills, and factories, and that at or near the intersection of the west line of Troost avenue with said tracks a great number of people are and were, at the time herein referred to and for a long time prior thereto, accustomed to and did daily cross the said tracks, of all of which facts defendants, through their servants and agents in charge of their said railroad, engines, and cars, had notice; that at all times herein referred to the said William R. Sites, while engaged in the service of the United States government in carrying and delivering mail to the residents and persons engaged in business at or near the intersection of said railroad tracks with the west line of Troost avenue in said city, was accustomed to and did, as one of the public, daily cross the said railroad tracks

at and near the west line of the said Troost avenue, and where the public were accustomed to and did cross as aforesaid, and on or about the 6th day of September, 1901, he did, while so engaged in his said business and while in the exercise of ordinary care, attempt to cross said tracks at or near the intersection thereof with the west line of Troost avenue, and in so doing did attempt to pass between certain stationary freight cars which were then on one of said tracks but separated so as to allow foot passengers to pass between them; that other persons at the same time and immediately prior to the said attempt of said William R. Sites, with the knowledge of defendants through their servants and agents, had been and were passing between said cars, and the defendants' servants and agents, while in charge of and running and managing a certain locomotive engine then being managed and operated by the defendants through their said servants and agents, negligently and carelessly ran the said locomotive engine against the said cars standing west of the point at which said William R. Sites attempted to cross said track and drove them suddenly upon the said William R. Sites, and caught and crushed him between said cars as he was attempting to cross said track as aforesaid, and thereby mangled and injured him, which said injuries thereafter and during the same day caused his death, and without ringing any bell, or blowing any whistle, or giving any warning of the approach of the said cars or locomotive engine, and when they, the said servants and agents of defendants, whilst running, conducting, and managing the said engine and cars, saw said William R. Sites in a place of danger, or when, by the exercise of ordinary care, they could have seen him in such place of danger in time, by the exercise of ordinary care, to have avoided injuring him; that by reason of the premises, plaintiff has been damaged in the sum of five thousand dollars (\$5,000)." The answer consists of a general denial and a plea of contributory negligence.

There was no testimony introduced on the part of the defendants. The testimony of the various witnesses introduced on behalf of the plaintiff was substantially as follows:

J. P. Smiley, on direct examination, testified as follows: "I have charge of the elevator department of the Zenith Mills at the foot of Troost avenue and First street and have been working for this company about four years. At the time of this accident I was sitting in the door on the east side of the elevator, facing east. I did not see the accident; it happened to my right. I went to him right after it happened. He was lying about 30 or 35 feet from where I was sitting. If I had been looking south, I could have seen the accident. My attention was called to him by a little girl screaming. I crawled under one car, and had to cross one car after I crawled under; crossed one

track and saw him lying on the ground after I crawled under the car. He was lying very near opposite the gate to Mrs. Rodes' house; might have been a little bit east of the gate. There was an opening between the cars. I passed through it three times that day, once in the morning about 7 o'clock and then in going to and from Mrs. Rodes' at noon. This accident occurred about half past 3 in the afternoon. There was a solid string of cars from Gillis street to this opening. This opening was about two feet in width. East of this opening was a vacancy of a half or two-thirds of a car's length, then cars standing close together down to the end of the switch. This was on the receiving track. East of this opening of two feet was an empty car. There was a track south of the receiving track called 'mud track.' The switch stand connecting mud track and receiving track is a little this side of the Rodes house. West of her house the cars cannot be crowded up to the switch stand. There were five tracks there altogether. Sites was injured practically at the connection of the mud track and the receiving track. I tried to get through at this place that morning but there was not room to go through sideways. The cars on mud track had been there at least two weeks; those on the receiving track were pushed in and taken out nearly every day; some days they would not be, but as a rule they took them out once a day. These cars on the receiving track were in the same condition the evening before at 6 o'clock when I went home as they were at the time of the accident. The Chicago & Alton track next to the mill on the north side, the fifth track, was full of cars from Gillis street to the mill. The cars on mud track extended east from where Sites was injured across Troost avenue, or what would be Troost avenue if it was cut through. There is a big bluff there and two paths leading up to it. At the foot of this bluff is a ravine and a spring. The first nine months I worked at this mill I lived up in this part of town and went down the air line tracks; but since that I have lived on Forest avenue, and when it isn't real muddy I go down this hollow and home that way, crossing the tracks at what would be Troost avenue, somewhere near where the accident occurred and near the Rodes house. The place where the deceased was injured has been used continually as a passageway, passing there all day long, men, women, and children, morning and evening; I have seen as many as 15 or 20 men just as a line going up that path. This spring is used by the whole neighborhood and the school children. The entrance to this hollow is about 25 or 30 yards east of Mrs. Rodes' house. Families on the north side of the tracks west of the mill, and some due north of the mill, four cottages across the street from the mill, in going for water come to the west side of the mill and cross between the elevator and the Rodes house,



where Sites was injured; coming from the other way they come around the corner of the mill between the mill and coalyard and cross the track a little east of where he was injured. Sites had delivered mail at Mrs. Rodes' and was making his next route to the mill office. I have seen people drive teams across at this place, taking feed over there. They would come in at the east end of the mill for a load of wheat, get on the scales, and have to drive across the track to Mrs. Rodes' house to get a vacancy to get out. It was solid track from the elevator to the Rodes house; there would probably be room for one more track in front of her door. People have been crossing and recrossing at this place ever since I have been there. I would estimate that not less than 50 people cross there every day. It is used as a general crossing for all persons in the neighborhood. It is the only way to get across from between Lydia to Gillis street. The deceased could not have gotten across unless he crawled under the cars or went over the top or without going through this opening back to Gillis or down to Lydia. He made this trip over this route three times a day, crossing at about the same place each day. I saw him that day; he came down Gillis street and if he had mail for any one on the south side of the track would come down next to the track, between the tracks and the gas house fence. He nearly always had mail for the Rodes house and sometimes he would have mail for the next door east; then he would have to come back west before he could cross the tracks. The Chicago & Alton road had ties piled between the track and gas house fence. I have seen them piled 12 and 14 feet high; 4 or 5 piles. On the day of this accident I would judge the ties were 8 feet high. This fence is about 12 or 14 feet high. There is not room for a man to walk between the fence and ties. He could walk between the rail and the ties. These ties were west of the Rodes house. I did not hear a bell or a whistle prior to the accident; was in a position to hear it if a bell had been rung or a whistle blown. These cars on the receiving track extended to Gillis street. With these obstructions, the fence and ties and the way the cars were that day, a person passing from the gate at the Rodes house to the cars and looking west could not have seen the switch engine on the Suburban Belt switch until it run upon the cars. As it comes on Gillis street it makes a short curve to get on the receiving track. It could not have been seen if there were no ties there."

Upon cross-examination he testified: "This track spoken of as the receiving track of the Suburban Belt is the track the Chicago & Alton sets cars onto they intend the Suburban Belt engine to take away. Occasionally the Belt Line leave cars there themselves. As a general rule the Belt Line engine would come in once a day and take all cars set on that

track. The next day there might be some cars put at the west end toward Gillis, and then a break, and another batch of cars and another break, and another batch. I have seen the Chicago & Alton set them in there a dozen or fifteen at a time all coupled together. They generally push them up to Gillis street as far as they dare and fill them in there off and on all day to fill the track. The engine would come again at different times, and fill in one, two, three, or four at a time. Sometimes they would couple them all up, and sometimes they would not. If they had as many as four or five they were already coupled. If they brought in one car they would throw it on the track, right in and up to the train. Sometimes they would couple them and sometimes they would not. On this particular day there were a number of cars west towards Gillis street and then a 2-foot opening. There was a boy in this car which stood separated from the others about two feet; after that car was another space of two-thirds of a car's length, east of the mud track; then the cars were pretty near solid down to the end. I could not state what time the previous day these cars were set in there; some were there the evening before. The switch engine did not have a regular hour to come in there. I have known them to come in at 9 in the morning, at 11, and 3 or later in the evening. The track next to the elevator, which is the Chicago & Alton receiving track, was filled with cars from Gillis street to the mill switch, marked "X" on the plat, or what would be Troost avenue, which would be about 150 feet from where I was sitting. In going to where the deceased was lying I had to crawl under the cars on the track next to the elevator. If he had succeeded in getting across the track and wanted to go into the mill from the Rodes house he would either have to crawl under the cars on the elevator track or have gone east to the point of the switch. The entrance to the gulch or draw is over 100 feet east of the Rodes house. There are two paths, one on each side of the spring branch. People coming down the gulch to the railroad track, if they want to get to the mill, cross the track at what would be Troost avenue, a hundred or so feet east of Mrs. Rodes' house; for instance, coming down the gulch going to the mill, when I come to this mud track I have got to go west or crawl under or over the tops of the cars, if there are cars there. If there are no cars they go diagonally across, but cannot go straight, have to bear west and north. Walking across the track at that point is all right if there are no cars there. The tracks alone there from the point east of the east end of the mill down to the west end of the mill are on practically level ground. People going up the gulch or going across from the gulch to the north, so far as walking is concerned, can cross at one point as well as another if the cars are

not there; they cross all the way from the mouth of the gulch to the west end of the elevator, a distance of something over 100 feet; no regular path or anything of that kind; cross where it is handiest for them. The opening was changed according to the number of cars and the way they were placed. There was no path after you leave the end of mud track except right up the side of the tracks. On this day I do not know how many cars there were west of this opening, where Mr. Sites attempted to go through, and Gillis street. The switch engine was standing right in Gillis street when we picked him up; not directly in it; had not gotten clear across the street; part of the engine was standing in the street; that was the only engine there. These cars were uncoupled when I reached the place of the accident. There was rust on the rails showing the cars had been moved about 18 inches or 2 feet. You could stand north of Mrs. Rodes' house and just south of the Suburban Belt track and look down and see the switch engine after it got off the switch onto the receiving track."

Mrs. Mary Stanley testified substantially as follows: "I live at Third and Forest avenue, and have been living there 14 years. On the day that Sites was injured and about five or seven minutes before the accident I passed through this opening in the cars. Had to go through sideways. I weigh 208 pounds. I was on the opposite side of the track going around the cars at the elevator when Mrs. Rodes' little girl came and told me that the mail man was killed. In crossing the track this little girl was behind me. Mr. Sites was on the track as I was coming. In coming from my home, I came straight down one of these paths; down the hill, the way we always come. Everybody passes that way. I crossed the track in front of Mrs. Rodes' house; could not cross before I reached that point on account of the cars on mud track. When I found the track was full of cars I kept on going until I found an opening. I have been going to the mill for the last 14 years. I have crossed it going on 14 years. That is the usual way people go to the mill and back. Every workman living in our direction goes that way. As to the people that live north of the track and go to school, I don't know, except when I go myself. I don't notice them. The deceased was on the pathway just about opposite the gas house fence coming from Gillis street and going east when I saw him, along the south side of the track; the side the Rodes house is on. I did not see him go to the Rodes house. I always like to pay particular attention to where I am going for fear an engine is coming along, because it is a dangerous place to cross. Both engines were on the other tracks when I went through. Before I went in I noticed to see if the engine was there. There was no engine on the track at the time. They were on the track the mail man was on. One was on the regular Belt

Line track, to the best of my opinion, coming down at the head of the crossing. I do not know whether this engine hit the cars or not. All I know is that no engine was there when the mail man came. No engine was attached to the cars, nor at the time he could get to Mrs. Rodes' house, because he came straight on down. He had no other way to come to her house." On cross-examination she testified: "In going to the mill I come down the gulch and cross mud track at the first place I find an opening through the cars. If there is an opening at the foot of the gulch I cross right there diagonally to the mill, in case no engine is in sight of me. I would watch for the engine. I made the remark to the girl that day that I thought I might get hurt, those cars being so close together. Before I went in I said to the little girl, 'Birdie, go out and see if you see an engine on the other side,' and she said, 'No, there is none.' I knew it was a dangerous place on account of being a narrow opening. I stood there again and looked up the track by the next car to see if the engine was coming down to catch onto these cars. When I come down the gulch and find cars on mud track I go until I find a safe opening. Sometimes I find that east of the Rodes house and sometimes right at the mouth of the gulch; but very seldom there is any opening over these tracks across there. There are cars there most of the time. There is no regular place where there is an opening through the cars; sometimes one place and sometimes another. I have found one up and down on those tracks. This day I had to go as far west as Mrs. Rodes' house before I found an opening. When I got over to the mill track there was another string of cars and I went around the end of these cars because I saw an engine at the head of them. There was no opening in that string of cars. Just what tracks the two engines were on, I don't pretend to tell the court, but I know I could see them. They were in the neighborhood of the gas house. They are switching cars on the tracks there every hour and every minute. There was no engine attached to the cars when I went through this opening; I looked straight up the track and there was nothing to prevent me seeing if the engine was at the head of the cars. When I stood at the gate of Mrs. Rodes and looked straight up the track, there was nothing to prevent me seeing the engine at the head of the cars. I can see the engine when there are no cars in front of me to prevent my seeing it. I went up a few steps to examine if there was an engine, and there was none. I could see down to the end of that string of cars and there was no engine." On redirect examination this witness stated that she had to walk a few steps towards the Rodes house to see the end of this string of cars; that she did not look anywhere else for an engine and that she couldn't have seen anywhere else.

Edward Wright testified: "I live on Independence avenue and work at the Zenith

Mills; have been working there a little over a year. In going to the mill I go down Gillis street to First and up First to the mill. On the day of this accident I was loading cars at the mill. First noticed this opening at noon when I went to dinner at Mrs. Rodes. Going to dinner I went under the cars on the track next to the mill and crossed the place where Sites was injured; I returned the same way, heard a little girl hullo. This attracted my attention to the accident. The place this accident occurred or about that place is used for a crossing generally by people going back and forth. Quite a number of working people go to work backwards and forwards morning and evening; more at that time than any other time. The mill hands use that spring in the summer when the ice man don't come around. They cross the tracks and go through the cut by Mrs. Swinney's house. The school children cross at the place where Sites was injured, or a little below that. When mud track is full of cars, the only crossing is in front of Mrs. Rodes' house, unless they crawl under or go over the cars. At the time of this accident the tracks were full of cars, on account of harvest time. When you come down the gulch and mud track is full of cars they cross in front of the Rodes house, by passing the receiving track. I cannot say it is the regular crossing place. It is usually used. When mud track is full of cars they cross almost in front of Mrs. Rodes' house." On cross-examination he testified: "People cross at the mill and east of the mill wherever they find an opening in the cars; no regular crossing. In going to dinner that day, I had to crawl under the first string of cars, then went down and found this opening and crossed over almost in front of Mrs. Rodes' house. I do not remember how I got through the day before. Sometimes the opening is at one point and sometimes at another. Sometimes you have to go zigzag. The openings are not made straight. There is no special place where the railroad always keeps an opening through the cars standing on the receiving track. They come as a result of the way the cars happen to be set in. One pull of cars would be set in and go pretty near the west end of the Belt receiving track, then another car will come that will leave an opening. Another pull be set in that will leave another opening. That is the way they are formed. There is no special place kept open between the cars in front of Mrs. Rodes' house."

Charlie Burns testified substantially as follows: "I am 14 years old and live at Second and Tracy street; have lived there about two years. On the day of this accident I was sweeping wheat out of the car east of where the accident occurred. The car I was in was standing by itself east of this train of cars. I passed this opening. It was about four feet wide. Mud track was full of cars. There were no cars east of the one I was in. There was a string of cars east of me, but

not on the same track. The string of cars west of me bumped against the car I was in. There was no whistle blown or bell rung before the bump. I was where I could have heard it. When the bump came, I heard Mr. Sites say, 'Oh, my God!' I jumped out of the car and ran to where he was lying. The switching crew had gotten to him before I reached there. The head switchman of the Chicago & Alton was taking his name. I had been there about three hours before the accident. The cars west of me and those on mud track were there all that time. When I came down from the west end of the string of cars there was no switch engine around there. The Chicago & Alton switch engine was there three hours before but not on this track. There is a path coming down from the spring and goes over the crossing; right across Forest avenue. It goes right across the track there from the spring. People on the northwest side of the mill come up by Rodes' and around there to that gulch. A good many do that. Some cross on the west part of the mill and some at the east part, where Forest avenue runs through. People north and west of the mill cross in front of the Rodes house. Almost all the people on the north of the track use that spring. They have to cross the track to get to it. I see one or two people come off the hill and go down to the mill and other places across the track. There are four houses on the north side of the track. On the south side there are three houses on the hill and four along the side of the hill." On cross-examination he testified: "I was sweeping wheat out of the cars for my chickens. There were seven or eight cars ahead of the car I was in, then this space and then the car I was in. These cars did not run west as far as Gillis street. It is pretty near 500 feet from the point where Sites was injured to Gillis street. These cars would take up about 300 feet. I was down to Gillis street and remember that the cars did not run down there. I came down Gillis street and down the track. People coming down the draw would cross over mud track if they could get through the cars and walk over to the opening east of the mill. Lots of them do that that are going to the north. If they find the track full they had to go west until they found an opening. There was no regular place for an opening between the cars."

J. D. Wilkinson testified: "On the day of the accident I was working at the Zenith Mills; had been working there something over a year before the accident. People living on the north and south sides of the track are accustomed to cross the track along about where Sites was injured, in front of the Rodes house. Mud track is generally filled with cars. At that season of the year it is generally filled. People have been crossing in front of the Rodes house ever since I have been there. I see children crossing at about that place.

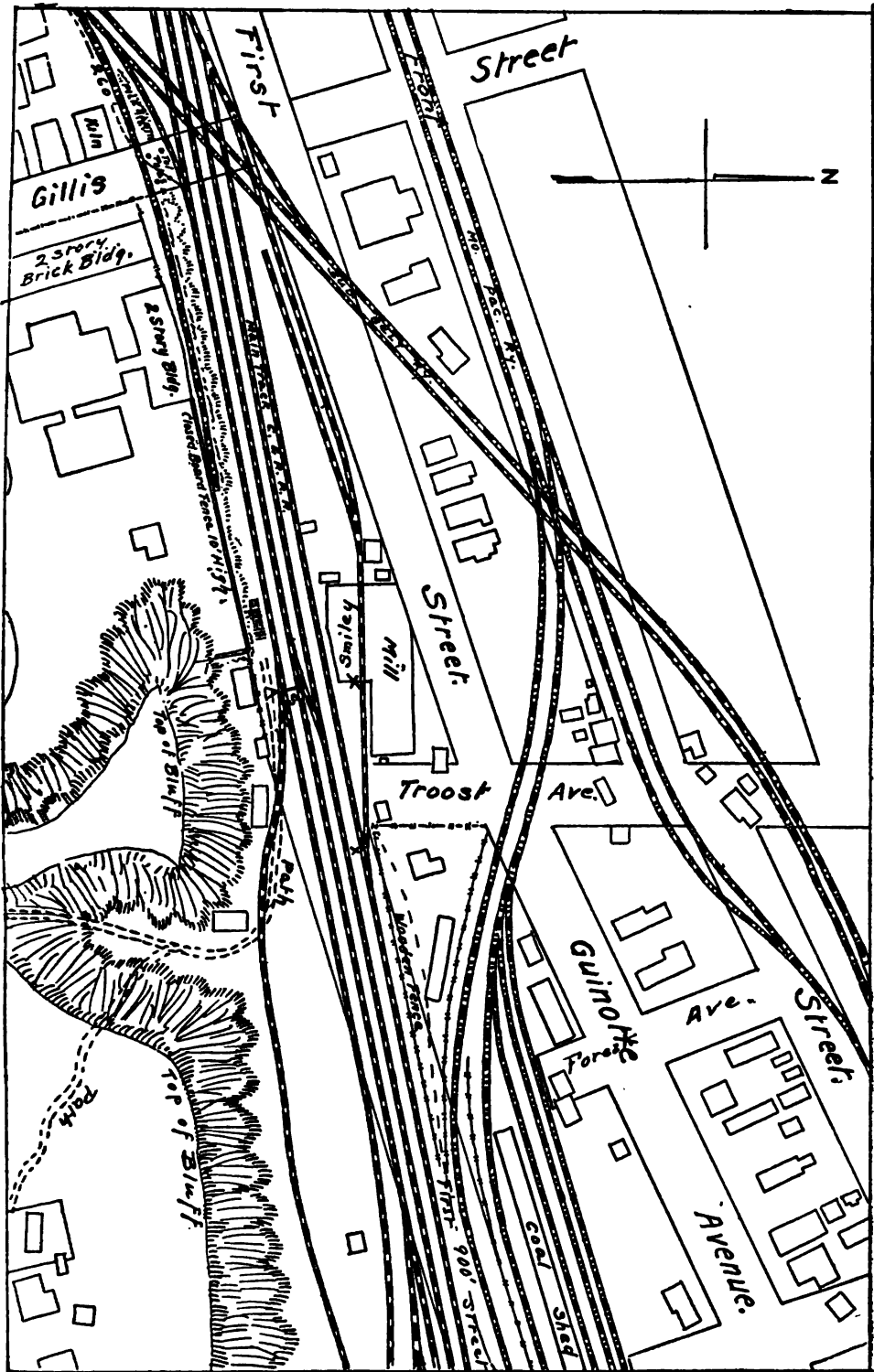
Don't know whether they are going to school or not. A little girl told me about the accident. Troost avenue, if cut through, would cross the tracks at the east end of the mill near Mrs. Rodes' house. Sites was lying right in front of this house; I usually crossed where Sites was injured." On cross-examination he testified: "In crossing the tracks I crossed at different places, according to where I found an opening. Do not always find the opening at the same place. If I had to go too far to find an opening, I would climb over the cars. People cross at different points between Gillis and Lydia avenue. Most of us cross in front of the Rodes house. I have seen them cross the tracks diagonally from the hollow to the east end of the mill. The Rodes house is probably a half a block from the entrance of the draw."

Mrs. Harriet Burns testified substantially as follows: "I live in the bottom close to the Zenith Mills. I have lived in that neighborhood 16 years. In the last four or five years I have noticed the people crossing the tracks, and would say they are all accustomed to crossing there by Mrs. Rodes' house; not just exactly at one place, but somewhere right close there. I had to use water from this spring for quite a while; also sent the children after water. We usually crossed back and forth at this place where Mr. Sites was injured. Mud track runs within 10 feet of my front gate. It is usually filled with cars they are not using. They usually left a passageway when the track was filled with cars. I don't think they left it at Mrs. Rodes' house. The passageway was generally left right in front of my gate. The passageway is just a little east of the Rodes house; about straight across the end of mud track." On cross-examination she testified: "I live about 200 yards east of Mrs. Rodes' house, nearer the road. People pass back and forth over the track there. We live under the hill, and there is no passageway without coming there. They pass through the cars and over the tracks at the mouth of the gulch. Go diagonally over to the east end of the mill. Coming down the gulch going to the coal yard, they have to go to the east to cross the tracks. Some pass over the track west of the mill; but it is not a public crossing. This gulch comes down across the track at the east end of the mill. Most of the crossing is at that place. The reason of that is there is an open space with a path winding around in between these houses. The gulch is about 100 feet from the Rodes house."

G. S. Peppard testified substantially as follows: "I am a postman, and have been in the service 28 years. When Mr. Sites was put on duty he was given the west limits of my route, which extended to Gillis street. I traveled this route twice a

day or 21 years. Sites traveled it three times a day. He was assigned to this route the 1st of July, 1901. In making my route I had to cross from north of the Zenith Mills over to Mrs. Rodes' house and deliver her mail, then crossed back to the Zenith Mills and made my delivery. I generally crossed in front of Mrs. Rodes' house, possibly a little close to the west end of the mill; generally an opening in front of her house or a little to the west. The track in front of her house from the opening in front of her to Gillis street was generally full of cars. Mud track was generally full of cars also. People generally crossed the track in front of Mrs. Rodes' house—anywhere along there. People going over to get water would generally cross the tracks in front of Mrs. Rodes' house. I crossed wherever I could. I have gone under the cars, gone over them, and gone around them. There was more often an opening there than any other place. People crossed at this place ever since I carried mail there. Persons living diagonally, that is below Mrs. Rodes' house or above, or anything of that kind, they might go in a different way, but persons calling on Mrs. Rodes or her family or boarders, anything of that kind, generally crossed in front of her house. This was the best opening always." On cross-examination he testified: "Delivering mail there I noticed people crossing the tracks at different points between Gillis and Lydia avenue. Speaking generally, the people crossing these yards had to go according to where they could find an opening through the various strings of cars. This opening varied according to the way the cars happened to be placed in there. It was not always at the same place because it was a switch track. People living west of the mill would cross west of the mill, and those living east of the mill would cross east of the mill. The public generally that crossed at Mrs. Rodes' house were people going to her house, boarders, some of the family, or myself. As a general proposition, I had more mail for the Rodes house than any others on that side. After delivering mail to her house and other families living on the south side of the tracks, I would go down to Swinney's and then cross over to the mill, crossing east of Mrs. Rodes' if I could find an opening. It was the shortest, quickest, and handiest for me to cross in front of her house; generally crossed where I could find an opening. Years ago there was a spring between the Rodes house and the gas house. At that time people crossed west of her house going to that spring."

The plat hereto referred to is here inserted. The Chicago & Alton tracks appearing in white, the Kansas City Suburban Belt tracks in yellow, and the Missouri Pacific tracks in red.



The railroad tracks referred to in the opinion are represented thus:

- Chicago & Alton. (white)
- Kansas City Suburban Belt. (yellow)
- Missouri Pacific. (red)

At the close of the evidence on the part of the plaintiff defendants requested the court to instruct the jury to return a verdict for the defendants. This instruction, which was in the nature of a demurrer to the evidence, was, by the court, denied, to which action of the court defendants duly preserved their objections and exceptions. The court then proceeded to instruct the jury (which instructions will be given attention during the course of the opinion), and the cause was submitted to the jury, and they returned a verdict finding the issues for the plaintiff, and assessing her damages at the sum of \$5,000. After unsuccessful motions for new trial and in arrest of judgment defendants in due time and proper form prosecuted their appeal to this court, and the record is now before us for consideration.

Samuel W. Moore and Cyrus Crane, for appellants. A. N. Adams and Scarritt, Griffith & Jones, for respondent.

FOX, J. (after stating the facts). The record in this cause presents but two legal propositions for consideration: (1) It is earnestly insisted that the trial court committed error in submitting this cause to the jury upon what is commonly called the humanitarian doctrine. (2) It is contended that the facts developed upon the trial were insufficient to warrant the court in submitting the cause to the jury upon any theory. The instruction of the court, which undertakes to cover the entire case, and upon which appellants predicate their complaints of error, was as follows: "The jury are instructed that if you believe from the evidence that Wm. R. Sites was injured and killed on or about the 6th day of September, 1901, and that at that time and for a long time prior thereto the plaintiff, Laura A. Sites, was and had been the wife of said Wm. R. Sites, and that on or about the 6th day of September, 1900, the defendants, Knott and Swinney, were appointed by the United States Circuit Court of the Western Division of the Western District of Missouri receivers of all the property and effects of the Kansas City Suburban Belt Railway Company, and that thereupon the defendants took possession and control of said property and continuously thereafter, and on said 6th day of September, 1901, managed, controlled, and operated the said railroad, and the cars and engines thereon through their servants and agents, and that defendants' said servants and agents were on the said 6th day of September, 1901, engaged in the operation, control, and management of a certain switch engine on the tracks of the said Suburban Belt Railway Company at or about the intersection of said tracks with Gillis street in Kansas City, and that on said day there were at and near the intersection of Troost avenue and First avenue, in Kansas City, Mo., a number of railroad tracks, extending in an easterly and westerly

direction, along which there were stationed and standing a large number of cars attached together and extending from about Gillis street eastward to a point at or near the intersection of said tracks with said Troost avenue, and that the place last aforesaid said cars were separated, and that on said date, and for long time prior thereto, the locality on both sides of said tracks at the place last aforesaid was a populous neighborhood, and that on said date, and for a long time prior thereto, persons, and the public in general, having occasion so to do, were accustomed to, and did, continuously cross and recross said tracks at the place last aforesaid, and about the point where said cars were left separated as aforesaid, and that defendants, through their servants and agents, knew thereof, and that on or about the date last aforesaid, the said William R. Sites was lawfully pursuing his business of distributing mail as a United States postman, and that he, while in the exercise of that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances, and while attempting to cross said tracks near their intersection with Troost avenue, and where said cars were left separated as aforesaid, was run against, crushed, and killed by the said cars so standing on one of said tracks being with force and violence propelled against him, and that said cars were propelled against him by the said switch engine then being operated and controlled by the servants and agents of defendants in charge thereof, and that said servants and agents of defendants in charge of said switch engine negligently propelled the same against said cars with force and violence without giving a signal or warning of the approach of said engine or cars, and thereby caused the said injuries to said Sites from which he died, or if the said servants and agents of defendants in charge of said switch engine caused or permitted the same to be propelled against said cars, and the said cars against said Sites, and internally injured him after they saw, or by the exercise of ordinary care might have seen, said Sites approaching and attempting to cross said tracks on which said cars were standing, and in a situation of peril from said cars, and after the said servants and agents in charge of same, said switch engine, might, by the exercise of ordinary care, have stopped said engine and avoided such injury, then your verdict should be for the plaintiff in the sum of five thousand (\$5,000) dollars." It will be observed that this instruction embraced two theories upon which this cause was submitted to the jury: First, that the place where plaintiff's husband was killed was a regular and recognized crossing of the railroad tracks for the use of the public, and at the time he was killed there was an opening for the purpose of allowing persons to pass over said tracks at said crossing, and

that the agents and servants of defendants, operating the engine and cars on said tracks, negligently and carelessly caused said opening to be closed up, without giving any signal or warning of the approach of the engine, thereby causing the injuries to and death of plaintiff's husband; second, that "if the said servants and agents of defendants in charge of said switch engine caused or permitted the same to be propelled against said cars, and the said cars against said Sites, and internally injured him, after they saw, or by the exercise of ordinary care might have seen, said Sites approaching and attempting to cross said tracks on which said cars were standing, and in a situation of peril from said cars, and after the said servants and agents in charge of same, said switch engine, might, by the exercise of ordinary care, have stopped said engine and avoided such injury, then your verdict should be for the plaintiff in the sum of five thousand (\$5,000) dollars."

1. We have indicated in the statement of this cause substantially the testimony as applicable to the vital questions presented in the record, and have carefully read in detail all of the testimony elicited upon the trial of this case, and we are unable to discover such a state of facts surrounding this accident as authorized the court to submit the cause to the jury upon what is known as the humanitarian doctrine. This doctrine is now well settled in this state and proceeds upon the theory that the party injured was, in the first instance, guilty of some negligence by placing himself in a position of peril, but that such negligence would not prevent a recovery if the agents and servants operating the engine and cars could have seen him in such position of peril in time to have avoided the injury by the exercise of ordinary care on their part. The testimony in this case is by no means clear and satisfactory as to the approach of this engine to Gillis street preparatory to coupling to the string of cars which were standing on the track upon which plaintiff's husband was killed. However, for the purpose of treating of this part of the instruction, which submitted to the jury the question of the negligence of the defendants in failing to stop the engine in time to have avoided such injury after having seen the deceased, or by the exercise of reasonable care could have seen him, in a position of peril, it may be conceded that this engine was coming from a southwesterly direction through a deep cut which hid the view of the place where plaintiff's husband was undertaking to cross the track, until it had almost reached the west side of Gillis street. The facts developed upon the trial of this case indicate that it was the purpose of plaintiff's husband, who was a postman and had mail for delivery at the Zenith Mills, to go from the Rodes cottage across the track, where he was injured, to the Zenith Mills. The testimony further shows that there was a pile of ties south of the track on which de-

ceased was injured, and an open space between this pile of ties and the track of about five feet, and the only opportunity that the defendants' employes on the engine could have of seeing the deceased would be as he passed north of the pile of ties along this 5-foot space. Let the presumption be indulged that the engineer saw the deceased as he walked along in this 5-foot space in which the testimony indicates that he might have been enabled to see him, must not the presumption also be equally indulged that the deceased saw the approaching engine? The facts in this case show that the deceased was in no perilous position until he undertook to go through the small opening between the cars on that track. We are of the opinion that it is logical that if the engineer saw the deceased approaching this open space where he intended to cross going to the Zenith Mills, that it must be presumed that the deceased also saw the engine, and that if this was a regular and recognized crossing, both by the public and the defendants, as contended for by the respondent, with the presumption that the deceased saw the approach of the engine, in view of the fact that the engine was about to couple upon the string of cars on the track which the deceased was seeking to cross, the engineer had the right to presume that the deceased would take no steps that would bring him into danger of the cars in the closing of the opening.

The law upon this branch of this instruction may thus be briefly stated: If the place where the deceased was killed was a regular and recognized crossing of the track at that point by the public and the defendants, and the engineer saw the deceased approaching the crossing, he had the right to presume that the deceased had due regard for his own safety and would stop before he reached the point of peril patent before him. The physical facts show that the crossing of the tracks, as indicated on the plat filed in the statement of this case, was at all times attended with peril and danger to the pedestrian; in other words, the situation confronted those who desired to cross these tracks with danger and peril. Therefore, if it be conceded that the engineer could have seen the deceased, it must also be conceded that the deceased could have seen at least the engine which the engineer was operating, and indulging the presumption that he did see the engine and was approaching a crossing of the track for pedestrians, it is manifest that the engineer had the right to indulge the presumption that the deceased would not undertake to pass through the small opening left between the cars upon the track upon which he was injured. This branch of the instruction must not be confounded with the other theory upon which this cause was submitted to the jury, that is, of the failure to give a warning or signal of the closing of the opening between these cars at a crossing for pedestrians. For upon this prop-

osition it is not a question as to whether or not it was the duty of the engineer to give a signal or warning; that is involved in another separate and distinct proposition. The simple question here confronting us is whether or not the facts as developed justified that part of the instruction which authorized a recovery upon the alleged negligence of defendants in failing to stop its engine in time to have avoided the injury. The failure to ring a bell or to give any warning has no application to the question now under discussion. The rule as above indicated, applicable to the facts in this case, is fully supported by the uniform expression of this court in an unbroken line of decisions announcing the rule in cases embracing a similar state of facts. There is, however, a clear and well-preserved distinction applicable to infants to whom contributory negligence cannot be applied and to other persons where the facts upon the trial of the cause show that the party approaching the crossing is obviously unmindful of the approach of the train or is in some way hampered or impeded so that he cannot stop and let it pass. The facts in this case do not place the deceased as falling within the line of cases preserving this distinction. He was a man of ordinary intelligence; no complaint of his eyesight or hearing, and was simply approaching what respondent contends was a regular crossing, and the engineer had a right to indulge the presumption that the deceased would stop before undertaking to cross through the small open space between the cars on the track. An infant incapable of appreciating danger, is in a perilous position within the contemplation of the rule announced, when seen by the operators of the train approaching a crossing, but such is not the case with an adult. This distinction was drawn in the case of *Frick v. Railway Co.*, 75 Mo. 595. It was said by the court in that case that "the defendant contends that the first and second instructions given at the request of the plaintiff, and the first and second instructions given by the court of its own motion, are erroneous, in that they fail to tell the jury that the defendant was liable only in case its servants failed to exercise ordinary care to prevent the injury, after they became aware of the danger to which the plaintiff was exposed. This would undoubtedly be a proper qualification of the instructions referred to, if this were the case of an adult who had been guilty of contributory negligence." Where persons are upon the railroad track in plain view of those operating the engine, apparently unmindful of the approach of such engine, or where there is something in the conduct of the person approaching the crossing and about to cross the track at a point where the train men are required to keep a lookout, showing that he does not realize the danger or is in such condition as not to appreciate

it, then the humanitarian doctrine is applicable and in full force. *Kelny v. Railway Co.*, 101 Mo. 87, 13 S. W. 806, 8 L. R. A. 783; *Bunyan v. Railway*, 127 Mo. 13, 29 S. W. 842; *Chamberlain v. Mo. Pac. Ry. Co.*, 133 Mo. 587, 33 S. W. 437, 34 S. W. 842; *Holden v. Railway Co.*, 177 Mo. 458, 76 S. W. 973; *Morgan v. Railway Co.*, 159 Mo. 262, 60 S. W. 195; *Klockenbrink v. Railway Co.*, 172 Mo. 678, 72 S. W. 900. In *Bunyan v. Railway Co.*, 127 Mo. 13, 29 S. W. 842, the testimony showed that the gripman discovered that deceased was staggering and did not know what he was doing when at least five or six feet from the track. It is clear that a party in that condition approaching a track was in a perilous and dangerous condition before going onto the track, and no presumption could be indulged by reason of such conduct that the deceased would stop and avoid the danger, and the court very clearly announces the rule under that state of facts, that "It was the duty under these circumstances to have at once taken precaution to prevent the collision. He should not have deferred action until the deceased had placed himself in a dangerous position, when it was manifest to him that he was heedlessly staggering into it." On the other hand, it has been uniformly held by this court, in the absence of any testimony showing the condition of the party approaching the railroad crossing, that he is unmindful of the approaching danger or that he is in such a condition as not to appreciate it, those in charge of the train have the right to presume, in the first place, that such person will keep out of danger and not until they have good reason to believe he will do so, are they required to use all proper means at their command to prevent injuring him. *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909; *Guyer v. Railway Co.*, 174 Mo. 344, 73 S. W. 584; *Van Bach v. Railway Co.*, 171 Mo. 338, 71 S. W. 858; *Thompson v. Railway Co.*, 93 Mo. App. 548, 67 S. W. 693; *Davies v. Railway Co.*, 159 Mo. 1, 59 S. W. 982; *Reno v. Railway Co. (Mo. Sup.)* 79 S. W. 464; *McGauley v. Transit Co. (Mo. Sup.)* 79 S. W. 461; *Evans v. Wabash*, 178 Mo. 508, 77 S. W. 515; *Roefeldt v. Railway Co. (Mo. Sup.)* 79 S. W. 706.

The rule is nowhere more clearly or tersely stated than in *Guyer v. Railway Co.*, 174 Mo. 344, 73 S. W. 584. *Valliant, J.*, in speaking for the court, thus stated the law: "The theory of the plaintiff is that the man running the engine saw, or ought to have seen, her husband as he was thus approaching the tracks. Suppose the engineer saw him; what did he have a right to presume? It was daylight, the engine coming was in plain view to the man or the roller as he was to the engineer. There was nothing to suggest to the engineer that the other was oblivious to the situation, or that he had failed to use his eyes and see what every one else there



saw. Any reasonable man in the engineer's position would presume that the man on the roller would stop before crossing and let the engine pass." The testimony of nearly all the witnesses in this cause indicates that the space between the cars through which the deceased was attempting to pass, was only about two feet. Under the facts developed in this case, his position was not a dangerous or perilous one until he stepped upon the track, and there is an entire absence of any testimony that after he did so that defendants' employes could have in any way averted the injury. We have carefully considered all of the testimony as applicable to the proposition now under discussion, and the conclusion is inevitable, as was ruled in the cases of *Guyer v. Railway Co.* and *Van Bach v. Railway Co.*, *supra*, that even though it be conceded that the engineer saw the deceased approaching dangerously near the crossing, yet he had a right to presume that Mr. Sites, who was injured and killed, had used his eyes and would act as a reasonably prudent man under the circumstances and for his own preservation. On the theory that the engineer saw the deceased and that the deceased saw the engine, the presumption logically follows that the deceased would stop before undertaking to cross the track through this narrow passageway between the cars. That this is what a careful and prudent person would have done under the circumstances is emphasized by the conduct and actions of plaintiff's own witness, Mrs. Stanley, who crossed at the same place only a few minutes before Mr. Sites was killed. She stopped and would not undertake to go through that narrow passageway until she had made an investigation as to whether an engine was preparing to couple upon the string of cars located upon said track. The testimony in this cause did not warrant the submission of the case to the jury upon the theory of the humanitarian doctrine, and the submission of it to the jury upon that theory constitutes reversible error.

2. This brings us to the consideration of the second and only remaining proposition involved in this proceeding; that is, was there sufficient testimony to authorize the submission of this cause to the jury upon the charge of negligence of the defendants in failing to give any signal or warning of the approach of the engine, by which the space or opening between the cars on the railroad track through which the deceased was attempting to pass, was closed. At the very inception of the consideration of this proposition it is manifest that the testimony on the part of the plaintiff is by no means clear or satisfactory. The crucial question upon this branch of the case is the nature and character of the crossing where plaintiff's husband was killed. We think it is clear that the testimony in this case fails to show any regularly used open public street crossing of the tracks at the point where plaintiff's

husband was killed, hence the question is narrowed down as to whether it was such a crossing as is indicated by the allegations in the petition of plaintiff, that is, at a point where "a great number of people are, and were at the times herein referred to and for a long time prior thereto, accustomed to and did daily cross the said tracks, of all of which facts defendants, through their servants and agents in charge of their said railroad, engines, and cars, had notice; that at all the times herein referred to the said William R. Sites, while engaged in the service of the United States government in carrying and delivering mail to the residents and persons engaged in business at or near the intersection of said railroad tracks with the west line of Troost avenue in said city, was accustomed to and did, as one of the public, daily cross the said railroad tracks at and near the west line of the said Troost avenue and where the public were accustomed to and did cross as aforesaid." The testimony of the witnesses on the part of the plaintiff, as is substantially indicated in the statement of this cause, upon their examination in chief, tends to show that the point, where the deceased was killed, had been used for a number of years as a place for crossing the tracks by the public in that community and people having business in that neighborhood; but it will be observed upon cross-examination that nearly all of them state that there was no regular place of crossing these tracks in the yards; that people crossed at various places between Gillis street and Lydia avenue, wherever they could find an opening; in other words, that the place of crossing these tracks largely depended upon the convenience of the particular person and where an opening could be found through the cars, and, in fact, the record discloses that there were instances, if no such opening was found, persons would at times crawl under or climb over the bumpers on the cars. While the point at which the deceased was killed may not have been an open public street, yet it does not follow that defendant owed no duty to the public in crossing its tracks at that point. If, at the place where deceased was killed, the people for any considerable length of time, as is indicated by the allegations in the petition, had been accustomed to and did daily cross the railroad tracks at that point, and the defendant permitted them to cross, and recognized their right to do so, and in recognition of this custom and right on the part of the public to cross the tracks at that point, were in the habit of leaving openings for the public to pass over its tracks at that point, under such circumstances defendants owed it to the public and those who were in the habit of passing through such openings to give some reasonable or suitable warning of its intention to close this opening, and it constitutes negligence if it failed or neglected so to do. On the other hand, if these railroad tracks were in the yards of the railroad com-

pany, across which there were no open public streets, and the defendants did not recognize the right of the public to cross the railroad track at the point where deceased was killed, and did not, by its conduct or actions in respect to the management and control of such tracks, indicate its recognition of such right, and the openings between these cars were merely chance or accidental openings, then persons who sought to pass through such openings would not be warranted in treating such openings as an implied invitation to use such openings for a crossing, and the defendants would not be required, under such circumstances, to give a warning or signal of the closing up of any such accidental or chance opening, and would not be liable for injuries sustained by others in undertaking to use such openings as a passageway over the tracks by reason of the failure to give such signal or warning.

If the point where plaintiff's husband was killed was a crossing for the public as herein indicated, and the public had, for any considerable time, been using same, and the right of the public to so use such crossing was recognized by the defendants, and that it was the customary and usual method of placing cars on said tracks so as to leave an opening for the public to cross, and plaintiff's husband came to said crossing and found such opening, then he was justified in acting upon this implied invitation to cross, and it was unquestionably the duty of the defendant to give some suitable or reasonable warning before closing such opening. On the other hand, it must not be overlooked that the opening must be of such a nature and character as to indicate to a reasonably prudent man that the defendants intended that the public should use such opening as a crossing. The case of *Gurley v. Railway Co.* was three times before this court; first in 93 Mo. 445, 6 S. W. 218; second in 104 Mo. 211, 16 S. W. 11, and third in 122 Mo. 141, 26 S. W. 953. The rules of law as announced in that case have not been departed from by this court, and we know of no case where the law as applicable to the proposition now in hand is more clearly or correctly stated. In that case plaintiff sought a recovery for injuries received while crossing through a passageway between the cars of the railway company at the town of Pleasant Hill. The testimony in that case clearly indicated the point of crossing, and it was shown by the agent of the defendant that it constructed a sidewalk between its rails to conform to the walk coming down from the hotel to its depot, and that he kept a space open between the cars for the public travel. In fact the great weight of the evidence showed that more citizens of Pleasant Hill used this crossing than any other crossing in the city, and it had been used for a period of 20 years. There was testimony in that case showing that the defendant had been in the habit of leaving an open space for the passage of the public at

this particular point crossing the tracks. This cause was reversed and remanded by this court in 93 Mo. and 6 S. W., with the same result in 104 Mo. and 16 S. W., and the judgment for \$6,000 was affirmed in 122 Mo. and 26 S. W. Gantt, J., speaking for this court in 104 Mo. and 16 S. W., in that case, in discussing the rules of law applicable to the leaving of a space or opening between the cars at a point where the public had been in the habit of crossing, said: "Now, it may be conceded that if when plaintiff came there the cars were opened as if to invite the public to cross, and it was the custom of the defendant when it had finished its switching to leave an opening between the cars at this crossing for the public, then unquestionably it would be the duty of defendant to give some suitable or reasonable warning before closing the same, for the protection of those who used the crossing, and plaintiff might well have supposed it would be safe to cross if he was not otherwise advised that the defendant was about to close this gap or opening, and acting upon this invitation he would be protected." During the course of the opinion in that case this court announced in no uncertain or ambiguous terms what should have been told the jury as a guide in reaching their conclusions. It was said: "We hold that it should have distinctly said to the jury that if the company was in the habit of making these openings for the public to pass over its track at this point, and when plaintiff came to this crossing these cars were so separated as to induce plaintiff and the public to believe the company intended they should use it for a crossing and he did so believe, then plaintiff was justified in acting upon this implied invitation, and defendant owed it to him, under such circumstances, to give some reasonable or suitable warning of its intention to close this opening, and it would be liable to plaintiff if it neglected so to do. On the other hand, the court should have said to the jury that, if the company had placed its cars in such close proximity that it was dangerous or hazardous for anyone to attempt to pass between them, and it would appear to a reasonably prudent man that the company did not intend the public should use said opening as a crossing, then the implied invitation to pass was revoked, and plaintiff was not justified in risking himself between the cars at said crossing. This was a question for the jury, under the evidence and proper instructions." It was further stated, during the course of the opinion in that case, that "common prudence and care required of plaintiff to look and ascertain whether he could safely pass through that train, and common prudence dictated that he should not recklessly expose himself to the danger of being crushed between those cars. Their very position was a warning to a man of ordinary prudence to stay out. The plaintiff's conduct savors of reckless rashness."

Now, while it must be conceded that the law was properly and correctly declared in *Gurley v. Railway*, and also from the disclosures of the record, had Mr. Sites exercised the same care and prudence that Mrs. Stanley, a witness for the plaintiff, did, before undertaking to enter the narrow passageway between the cars, that this accident would have been avoided, it by no means necessarily follows that the instruction given by the court, at the request of the plaintiff, upon this branch of the case was erroneous. Upon plaintiff's theory of this case it declared the law correctly, and if the defendants desired the questions more sharply presented, and the facts in this case were sufficiently similar to those in the *Gurley Case* to warrant the court in declaring the law as indicated in that case, it was clearly the duty of the defendants to request such declarations as would properly submit the questions to the jury. If the plaintiff's husband was killed through the negligence of the defendants in failing to give a proper signal or warning of the closing up of the opening between the cars at the point where death resulted, then she is entitled to recover. But on the other hand, no essential fact should be ignored, and if the death of the husband of plaintiff resulted from his own negligence, there should be no recovery. The affirmance of this judgment in favor of plaintiff can only be justified after a submission of the cause to the jury upon instructions which are applicable to the essential facts necessary to a recovery.

We have indicated our views upon the legal propositions presented by the record before us, and to the end that the parties may be fully heard upon the facts of this case, and the law declared covering every feature of the case, to which the testimony upon a new trial may be applicable, the judgment should be reversed, and cause remanded; and it is so ordered. All concur, except GRAVES, J., not sitting.

#### CITY OF JOPLIN v. JACOBS.

(Kansas City Court of Appeals. Missouri.  
June 18, 1903.)

#### INTOXICATING LIQUORS—MUNICIPAL REGULATION—PUBLIC MORALS.

A city has no power either under the authority to suppress tippling houses, or under the general law regulating dramshops, to adopt an ordinance making it unlawful for a keeper of a dramshop, defined by Rev. St. 1899, § 2990, as a person permitted by law to sell intoxicating liquors, to allow women to enter the dramshop and obtain liquor.

[Ed. Note.—For cases in point, see vol. 29. Cent. Dig. Intoxicating Liquors, §§ 7-13.]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Louis Jacobs was charged with violating an ordinance of the city of Joplin. From a judgment sustaining a demurrer to the complaint, the city appeals. Affirmed.

Geo. J. Grayston, for appellant. F. M. Cummings, for respondent.

ELLISON, J. The defendant is a licensed dramshop keeper in the city of Joplin. He was charged with violating an ordinance of such city "in relation to wineroms," by having connected with, or as a part of his dramshop, a "winerom" where female persons were allowed to enter for the purpose of being supplied with intoxicating liquor, and where they were so supplied. There was a demurrer to the complaint and it was sustained by the circuit court. The city appealed.

Much of the argument in this case has been directed to an ascertainment of the meaning of the words "tippling house," as distinguished from that of "dramshop." The cause of such contention is that the charter of cities of the third class, to which Joplin belongs, empowers such cities to suppress tippling houses and, while providing for licensing of dramshops, does not grant authority to suppress them. The city's theory is that a dramshop and a tippling house are one and the same thing, and that authority to suppress a tippling house embraces authority to prevent a sale of liquor to women by a dramshop keeper. In some jurisdictions there is a distinction made between a dramshop and a tippling house; in others, no distinction is recognized. Both are places where intoxicating liquors may be purchased at retail. To tipple, is to drink intoxicating liquors, and to take a dram is the same thing. Whether there is, in reality, any substantial difference between a dramshop and a tippling shop, we need not inquire, for the reason that in a legislative sense, there is a recognized difference and distinction made between them in this state. Our Legislature has designated a licensed place for the sale of intoxicating liquors as a dramshop, and to be a dramshop, as known to the law, it must be licensed. Section 2990, Rev. St. 1899. The charter of cities of the third class does not authorize the suppression of the dramshop, known as such by the general law. The defendant, as already stated, is a licensed dramshop keeper and so long as he does not violate the general law, or any valid ordinance, his dramshop cannot be suppressed by the city. On the other hand, there is no provision for licensing a tippling house in cities of the third class, and such house is therefore an unlicensed place, and power to suppress it is expressly granted.

The defendant is charged, as a dramshop keeper, with the violation of an ordinance which forbids the keeping of a room where intoxicating liquors are sold to women who may enter such room. It is evident from the face of the ordinance that it is not intended merely as a regulation of a dramshop, of a character like those which

provide that there shall not be side doors, or closed doors, or window shades, or screens. Nor was it intended merely to prevent separate rooms for women, or women and men. So it is likewise clear that it was not intended to merely regulate the dramshop as to any particular class of women to whom liquor must not be sold, for it prohibits a sale to any of the female sex. It was clearly intended to prohibit the sale of intoxicating liquor to female persons; for it makes it unlawful for the dramshop keeper to allow any such person to come into his dramshop to obtain liquor. It is an absolute prohibition against the sale of intoxicating liquor to women.

The question is: Is such an ordinance authorized by the general state law as to dramshops? It is easily answered, "No." The general state law has a large variety of provisions made in the regulation of dramshops. Thus, the keeper of such shop cannot sell to minors, nor to habitual drunkards, nor to Indians or intoxicated persons, nor to students. Nor can he keep musical instruments. Nor can he allow sparring, boxing, billiards, pool, cards, or dice. Nor can he employ females in such shop. But nowhere is it said that he cannot sell to a woman merely because she is a woman. But, notwithstanding the ordinance is not authorized by the general state law, if authorized by the charter for the city, it is valid. Ample authority on such an ordinance is found in the charter of some cities, as for instance, Kansas City. Section 14, art. 3, p. 32, Charter of Kansas City. But no such authority appears in the statutory charter of cities of the third class. A dramshop keeper's license, authorized by the charter in such cities, is obtained under the general law, and the dramshop keeper, during the life of his license (it not being revoked) would exercise whatever substantive right he has under the general law. *State ex rel. v. McCammon*, 111 Mo. App. 626, 86 S. W. 510; subject, of course, to reasonable municipal regulation, not inconsistent with the general law.

The ordinance in question is like one ordained by the city of Denver in Colorado, which was upheld by the Supreme Court of that state and, on appeal, by the Supreme Court of the United States. *Cronin v. Adams*, 192 U. S. 108, 24 Sup. Ct. 219, 48 L. Ed. 365. The dramshop keeper in that case claimed that the ordinance, in prohibiting the sale of liquor to women, took from him a right guaranteed by both the state and federal Constitutions. But in that case the power was exercised by the state of Colorado. The Legislature of that state granted to the city of Denver exclusive power to prohibit the sale of intoxicating liquors, while, as we have seen, the Legislature of this state has not exercised such power itself, nor has it delegated the

power to cities of the third class. There is no doubt of the power of the state to annex to the license of a dramshop keeper a condition that he shall not sell to females. For there is no right to sell liquors; it is a privilege only, and it may be granted on conditions to be determined by the Legislature, or it may be withheld altogether. But so long as the Legislature neglects to prohibit the sale of liquor to women and neglects to authorize a municipality to do so, the latter's ordinance to that effect is invalid. Municipal corporations can only exercise such powers as are expressly granted by their charters, or those necessarily incident to, or implied in the powers expressly granted. *Nevada v. Eddy*, 123 Mo. 557, 558, 27 S. W. 471. If there be any ambiguity or reasonable doubt as to the grant of a power, it is resolved against the municipality. *State v. Butler*, 178 Mo. 311, 312, 77 S. W. 560; *City of Corvallis v. Carlille*, 10 Or. 140, 141, 45 Am. Rep. 134; 1 Dillon on Mun. Corp. p. 145.

Our conclusion is that the trial court properly interpreted the law, and the judgment will be affirmed. All concur.

#### INKS v. BRAKEBILL et al.

(Kansas City Court of Appeals. Missouri. June 18, 1906.)

##### 1. APPEAL—DISMISSAL—IMPERFECT ABSTRACT.

The fact that an abstract of the record filed on appeal under appellate court rule No. 15 (67 S. W. vi) is imperfect is no ground for dismissing the appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2618, 3126.]

##### 2. SAME—JURISDICTION OF LOWER COURT.

An appeal will be dismissed from the Court of Appeals where it appears that the action originated in a justice court, but there is no record showing that the circuit court ever obtained jurisdiction by an appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3124.]

Appeal from Circuit Court, Hickory County; Argus Cox, Judge.

Action by George W. Inks against John Brakebill and others. From a judgment in favor of defendants, plaintiff appeals. Dismissed.

J. W. Montgomery, Hazen Green, and W. L. Pitts, for appellant. Rechow & Pufahl and F. M. Wilson, for respondents.

**BROADDUS, P. J.** It appears from the record that this suit was instituted before a justice of the peace, but there is nothing to show that it was there tried except incidentally, or how it afterwards got to the circuit court. The respondents make the point that appellant has not complied with rule 15 of this court (67 S. W. vi), in that they have failed to file an abstract of the case.

Appellant has filed printed matter containing 14 pages, on the cover of which are the

following words: "Statement of Case," "Abstract of Record," "Assignment of Errors," and "Brief of Appellant." The contents are under the following heads: "Statement of Case," "Abstract of Record Proper," "Bill of Exceptions." The "Statement of the Case" refers to the evidence. The abstract contains the bill of items, the foundation of the suit and amended statement filed with the justice. There is no showing of a trial before the justice; no judgment; and no appeal. Then follows trial in the circuit court, judgment in favor of defendant, and filing of plaintiff's motion for a new trial. Then follows what plaintiff terms a "Bill of Exceptions" containing his motion for a new hearing, the order of the court giving him time to file his bill of exceptions, the filing of his affidavit for an appeal, the granting of the appeal, and the order for filing the bill of exceptions. Then follows his points and authorities. In addition, plaintiff has brought up a transcript of the bill of exceptions. This bill contains the record proper and the proceedings of the trial. The different orders of the court referred to are set out in full, but are not attested separately by the clerk. But at the end of the record made by the bill the clerk certifies, "That the above and foregoing is a true and complete transcript of the record and proceedings in the cause therein named," etc. The said certificate of the clerk is a sufficient authorization of the matters contained in the record proper, which are set out in the bill, but the usual and proper manner is for the clerk to make out a transcript of such record separate from the bill of exceptions, as the purpose of the latter is to make the proceedings of the trial a part of the record, which they would not be otherwise. We suppose plaintiff intended that the paper be filed containing his statement and what he calls a "Bill of Exceptions," and printed on the back thereof a statement and abstract, as the abstract required by the rule. But, treating it as such, it is very imperfect, as it falls to state matters material to the case. But under the ruling in *State ex rel. v. Smith*, 172 Mo. 446, 72 S. W. 692, which practically destroys rule 15 as to abstract, an imperfect abstract is not a ground for dismissing an appeal.

But the case will have to be dismissed because there is no record of any kind showing that the circuit court ever obtained jurisdiction of the case by appeal. All concur.

#### PHELPS v. MANICKO et al.

(Kansas City Court of Appeals. Missouri.  
June 18, 1906.)

#### 1. CHAMPERTY AND MAINTENANCE—CONTRACT TO CONDUCT LITIGATION.

Where plaintiff, who was not an attorney, agreed to take up W.'s cause of action against defendant, employ lawyers, get up evidence at his own expense, and conduct the litigation to

a termination, the contract was void for maintenance.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Champerty and Maintenance, § 4.]

#### 2. CONTRACTS—ILLEGALITY OF CONSIDERATION — AGREEMENT VOID FOR MAINTENANCE — BILLS AND NOTES.

Defendant, after liberally watering his stock of whisky, traded his saloon to W. for a farm, after which plaintiff, who had no connection with the trade, agreed with W. to secure a rescission for \$1,000, but before doing anything plaintiff contracted with defendant to refrain from taking up W.'s cause for \$625, for \$325 of which he accepted defendant's note sued on. *Held*, that, plaintiff's agreement with W., being void for maintenance, the surrender thereof was no consideration for the execution of defendant's note.

Appeal from Circuit Court, Osage County; R. S. Ryors, Judge.

Action by James L. Phelps against W. C. Manicke and others. From a judgment for plaintiff, defendants appeal. Reversed.

W. S. Pope, W. L. Vaughan, and W. L. Pinneil, for appellants. J. W. Voshell and Monroe & Zevely, for respondent.

ELLISON, J. Defendant gave to plaintiff his promissory note for \$325, and upon refusal to pay it, plaintiff brought the present action and recovered judgment in the trial court.

It is rather a remarkable case. It appears that defendant owned a saloon in the town of Belle, Maries county, and one Jake Weller owned a farm in that county. They made a trade or exchange of the saloon for the farm. It seems preparatory to the trade defendant liberally mixed water with his stock of whisky and for that, and other reasons, Weller, as the lawyers say, wanted to rescind; but he himself expressed his desire rather more forcefully on the witness stand, by testifying that being drunk when he made the exchange he wanted to "rue back on the trade." It became known in the town of Belle that Weller was dissatisfied with his bargain, and wanted it undone. He spoke of his desire to this plaintiff, who, though not a lawyer, readily entered into an arrangement whereby, for \$1,000 remuneration, he would establish the status quo between the parties; or, as he more intelligibly explained to Weller, he would put him back on his farm, and defendant back in his saloon. It appears that this arrangement to "break up the trade" came to defendant's ears, and he became alarmed for the safety of his profit in having traded water for land. It does not appear clearly just how plaintiff and defendant came together, nor is it clear that plaintiff took part in having the story of his engagement with Weller to interfere with plaintiff's affairs, come to the knowledge of the latter. At any rate plaintiff was not at all averse to the story reaching defendant, and, apparently, he did not sympathize with defendant's alarm, for he added thereto somewhat by suggesting that he purposed

having him "pulled" by the federal court for adulterating whisky in violation of the revenue law. Defendant now became nervously solicitous as to plaintiff's getting into the affair and began making offers of money to him to stay out. He first offered \$28 and pasture for some horses, which plaintiff rejected as "no inducement at all." Defendant then sent for him and offered him \$250, which he rejected, and they separated. Again they met, and defendant offered him \$625. He took this offer under advisement and considering that staying with Weller involved "the employment of lawyers" and that he would have to "get up the evidence to break it up," he concluded he "would not make any more out of it (Weller's offer) than he (defendant) offered me, so I went back and told him I would take him up at that." But defendant did not have the ready money, and plaintiff must have it. So it was finally arranged that defendant would pay \$300 in cash and give his note (the one in suit) with a surety, for \$325. As just stated, defendant did not have any cash, and as he states, having before his eyes a violated revenue law and a federal court for which and before which, he was to be "pulled," he gave another party \$100 for assisting him in borrowing the \$300 paid down to plaintiff. This short history of how and why plaintiff abandoned Weller and took up with the other side is taken from plaintiff's own testimony except where otherwise indicated. Plaintiff denies, however, that he made the suggestive and persuasive intimations about the revenue law and the federal court. And as we intend to lay our hand on the plaintiff, or rather, take the trial court's hand off of the defendant, we will pass that by and only consider the case as made by the evidence in plaintiff's behalf.

The idea urged by plaintiff in support of the judgment is that there was a valid legal consideration supporting the note in his giving up his bargain to serve Weller for \$1,000. It is, however, a matter for serious consideration whether in the conduct of plaintiff and defendant in bringing about the abandonment of Weller (if the proposed service was legal) was not of sufficient turpitude to condemn the plaintiff. If the law catches two in an evil transaction, it will frequently punish both, but it never lends the assistance of the courts to one of these to enforce the other's promise. Not that the law favors the promisee more, or the promisor less, but it is so utterly indifferent between the two as to refuse to move its machinery at the request of either. But we pass by that suggestion to take up one made by defendant's counsel upon which we base our judgment. Plaintiff was an outside party wholly without interest in the matters out of which a legal controversy might arise between Weller and defendant, and according to his own statement he was to take up Weller's cause,

employ lawyers, and get up evidence at his own expense. His engagement, the abandonment of which he relies upon for consideration to support the note, was clearly and plainly what the law calls maintenance, and was therefore unlawful. *Duke v. Harper*, 66 Mo. 51, 37 Am. Rep. 314; *Gilbert v. Holmes*, 64 Ill. 548; *McGoon v. Ankeny*, 11 Ill. 558, 560. We considered such question in a recent case in this court, pronouncing acts of maintenance to be unlawful in this state. *Breeden v. Insurance Co.*, 110 Mo. App. 312, 85 S. W. 930. The abandonment of an unlawful enterprise though it would have been profitable, is not a valid consideration. It is against public policy to permit one to demand a price for abstaining from an unlawful project or an evil deed. In such case there can be no consideration, for the wrongdoer has not lost anything which he had any right to gain. The demurrer offered by defendant's counsel should have been sustained.

The judgment will therefore be reversed. The other judges concur.

#### WARNER v. MODERN WOODMEN OF AMERICA.

(Kansas City Court of Appeals. Missouri. June 18, 1906.)

##### 1. INSURANCE—MUTUAL BENEFIT INSURANCE—SUSPENSION OF MEMBERS—REINSTATEMENT.

Under the by-laws of a mutual benefit association stipulating that a member in suspension for more than 60 days and less than 6 months on account of non-payment of assessments may, if in good health, be reinstated on furnishing a certificate of good health from his camp physician after medical examination by him made, approved by the head physician and on payment of the arrearages, a suspended member cannot be considered as reinstated until he has submitted a truthful health certificate for approval to the head physician, and when a suspended member has in good faith complied with the condition of the by-laws the society cannot refuse him as a member.

##### 2. SAME.

A by-law of a mutual benefit society provided that a suspended member may, if in good health, be reinstated on furnishing a certificate of good health from his camp physician after medical examination by him made, approved by the head physician, and on payment of all arrearages. A camp physician and a suspended member, also a physician, were together for about three hours. Two days thereafter the suspended member requested the camp physician to issue a health certificate, stating that he had forgotten to mention the matter to him the day they were together. The camp physician issued a health certificate which was mailed on the day it was written. On the day after, the suspended member became sick, and on the following day his father mailed a money order for the amount of the arrearages, which reached the clerk the following day. The member died the day after. *Held* insufficient to show that the suspended member had been reinstated.

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by Willis Warner against the Mod-

ern Woodmen of America. From a judgment for defendant, plaintiff appeals. Affirmed.

F. W. Reed and Shannon & Shannon, for appellant. Benj. D. Smith, Thomas & Hackney, and Barbour & McDavid, for respondent.

BROADDUS, P. J. The cause of action set forth in the petition is to enforce the payment of a benefit certificate issued by the defendant to Dr. J. A. Warner, who died at about 12 o'clock m., February 16, 1904, at Reeds, Mo., his place of residence. The certificate was issued in April, 1901, for \$1,000, payable on the death of the insured to his two daughters, the plaintiff being their assignee. The deceased failed to pay his assessment in November, 1903, and thereby admittedly became suspended in accordance with the by-laws of the association, from and after December 1, 1903. He was a member of the local camp of the defendant's order at Sarcoxie, Mo., and was subject to be reinstated by complying with section 52 of defendant's by-laws. The question for our consideration is: Was he restored as a member of the association prior to the time of his sickness and death? Dr. Roper, who resided at Sarcoxie and was camp physician of Strawberry Camp at Sarcoxie, on February 9, 1904, went to the town of Reeds for the purpose of visiting a sick patient with deceased. They were together on that day for about three hours; at 2 o'clock, the end of the time, Dr. Roper returned to Sarcoxie. On or about February 11th, Dr. Roper received from the deceased a letter asking for a health certificate, and stating that he had forgotten to mention the matter to him when they were together previously. He at once wrote the following certificate: "Sarcoxie, Missouri, Feb. 11, 1904. This is to certify that I have this day examined Dr. J. A. Warner, a member of Strawberry Camp at Sarcoxie, Missouri, and find him in good and perfect health, and recommend his reinstatement in our Order. W. H. Roper, M. D., Med. Ex. for Strawberry Camp No. ———." Dr. Roper mailed this certificate on the day it was written to Dr. Warner at Reeds, but it appears that it did not reach him until late on Saturday, February 13th. On the evening of the next day, Dr. Warner was unwell, and went to bed and from that time until his death he kept his room. On the next day, the 14th of February, plaintiff, the father of the deceased, bought a money order of the amount of \$3.50 and mailed it to the clerk of the camp at Sarcoxie, which reached said clerk on the morning of February, the 15th. On the morning of the last-named day Dr. Wise of Carthage was called in professionally to see deceased. He went to see him again about noon of the next day, but when he arrived, Dr. Warner was dead. There is nothing to show that on the day Dr. Warner received the certificate of good health he was in other than good health.

It was shown upon the part of plaintiff that from the time deceased kept to his room he was not confined generally to his bed, but was up part of the time, talked to his friends, and prescribed for his patients up to within 15 minutes of his death.

Section 52 of the by-laws is as follows, omitting certain parts: "A beneficial member in suspension for more than sixty days and less than six months, on account of nonpayment of assessments, fines, or dues, if in good health \* \* \* may be reinstated upon furnishing a certificate of good health from his camp physician \* \* \* upon form prescribed by the executive council, after medical examination by him made, duly approved by the head physician, and upon payment of all arrearages of every kind. \* \* \*" Under this section, the deceased was entitled to stand as reinstated if in good health upon doing certain things, viz., by furnishing a certificate of the medical examiner of his camp as to his good health, after medical examination by him made, duly approved by the head physician of the order, and the payment of all arrearages to the association. Do the facts show that deceased complied with the by-law in question? As it was a part of the contract of insurance, its provisions should have been substantially complied with. It is an admitted fact that the medical examiner made no examination of the deceased, and did not know his condition of health at the time he made the certificate. It is, however, urged that the medical doctor waived such examination. In support of this view, we are cited to a number of cases, some of which we will notice. In *Cauveren v. Ancient Order of Pyramids*, 98 Mo. App. 433, 72 S. W. 141: "Deceased after his default in his dues made payment of such arrears to the local scribe who promised to send him a blank 'health slip' to be filled out and returned to him, which he failed to do. This practice appeared in other cases without objection by the company. Held, a waiver of requirement of such certificate at the time of paying the arrearages." That was a case where the health certificate was required to be made out by the member himself, and as it was a practice of the association to waive such certificates the court very properly held that it amounted to a waiver. In *Boward v. Bankers' Union*, 94 Mo. App. 442, 68 S. W. 869, the suspended member had only to pay his arrearages if in good health to be reinstated. No certificate of good health was required. It was therefore a question of fact for the jury to determine whether at the time he paid his arrearages he was in good health. In *Andre v. Modern Woodmen*, 102 Mo. App. 877, 76 S. W. 710, it was shown that the association was not in the habit of exacting prompt payment by members of their dues. It was held as applied to that case a waiver. And the holding is similar in *Cline v. Sovereign Camp, Woodmen of the World* (Mo. App.)

86 S. W. 501; McMahon v. Maccabees, 151 Mo. 522, 52 S. W. 384.

But there was no evidence in this case of waiver except as to the prompt payment of dues, which has nothing to do with the issue, as there was no delay in that respect after the certificate of health was made unless the failure of the medical examiner to examine deceased was such a waiver; and we find no evidence that such was his custom. It seems to us that this was a matter that the medical examiner could not waive. He was not an agent of the association with authority to manage its business affairs in any way whatever. He was simply a person designated by the laws of the order, which were a part of the contract, to examine and make certificates of health, and he could only perform his duty in that respect in the mode provided by the by-laws, even as to the form of his certificates. Besides, although he was the medical examiner of the association, he was not its agent in making the health certificate; he was, on the contrary, the agent of the deceased in that particular respect. If in good health, it was the duty of the deceased to have had himself examined by the medical examiner and a truthful certificate of the condition of his health made by such examiner for the approval of the head physician of the order. Every requirement of the by-law, that was necessary in order that he be reinstated as a member, was a duty resting on him and not upon the order, save and except that of the approval by the head physician of his health certificate. First, it was his duty to obtain from the medical examiner an examination and a certificate; second, to pay his arrearages, upon which he stood reinstated when the head physician should have approved of such certificate. The latter condition perhaps might be waived by the association accepting a member as reinstated, as for instance, receiving his dues and allowing him to participate in the business of the local camp as other members. And it may be said that a suspended member, such as the deceased was, would in law be considered as reinstated if he should pay all arrearages and procure the required health certificate of the medical examiner, without the approval of the head physician, if the latter should arbitrarily and without just cause withhold his approval. But we think it is clear that a suspended member should not be considered as reinstated until he has submitted a truthful health certificate for approval to the head physician. This provision in the by-law is not without meaning, as it was evidently intended to protect the order against such cases as the one we are now considering, a case of collusion between the suspended member and the medical examiner.

We do not wish to be understood as holding that had the said examiner made an examination of the deceased when he did and found him in good health and so certified,

and deceased had paid up his dues, that his subsequent sickness, if it was such, would have been a justifiable cause for a refusal of the head physician to withhold his approval. When a suspended member has in good faith complied with every condition of the by-law providing for his reinstatement, the society cannot refuse him as a member, notwithstanding his subsequent sickness. In this case, deceased failed in two of the most important particulars while in good health, viz., obtaining a proper certificate of health and payment of all dues. It is no answer to say that there was evidence of good health at the time the certificate was made, and that at the time his dues were paid he was apparently suffering from a mere cold, when in fact he was afflicted with the sickness that resulted in his death in so short a time afterwards. Dr. Wise, who was available as a witness, was called upon to attend deceased the day before his death, and who came a second time to see him, but arrived too late to see him alive, perhaps might have thrown some light upon the nature of his affliction. But he was not called.

It may be said that the deceased, although a doctor himself, did not anticipate his coming sickness, but we are impressed with the conviction that at the time the plaintiff, the father of deceased, procured the money order to pay the arrearages due the association, grave apprehensions existed in his mind as to his son's condition, which accounts for his haste in making the payment, for it was at this time Dr. Wise was sent for. Whatever may be said as to the condition of Dr. Warner at the time he procured said certificate from Dr. Roper, there can be no question but what the former at the time the arrearages were sent to the local camp knew he was then suffering from a serious disease, which resulted the next day in his death. The facts show beyond all reasonable dispute that deceased was not in good health at all times during which the attempt was made to reinstate him as a member of the association. Under such a state of facts it is unnecessary to refer to precedents in order to sustain the action of the trial court in directing a verdict for the defendant. Its duty was evident. And it exercised that inherent power which is lodged in all courts to prevent the consummation of an injustice through the instrumentality of a jury.

Affirmed. All concur.

#### FOSTER v. BYRD.

(Kansas City Court of Appeals. Missouri.  
June 18, 1906.)

#### 1. DEEDS — MISTAKE — DESCRIPTION — EVIDENCE.

In an action for breach of covenants of seisin and warranty, evidence held to sustain a finding against defendant's contention that there was a mutual mistake in the description in the deed for failure to exclude a strip of land previously sold to a railroad company.



## 2. SAME — DESCRIPTION — EXTENT OF LAND CONVEYED—REPRESENTATIONS.

Where by a warranty deed defendant covenanted to give plaintiff an indefeasible seisin of an entire quarter section of land, which he was unable to do because of his prior conveyance of a strip containing more than three acres to a railroad company for a right of way, the recital in the description that the tract contained 160 acres more or less, constituted a mere representation of the grantor's opinion, and not a covenant to convey that quantity of land, nor an agreement restricting the extent of the grant to such represented quantity.

## 3. COVENANTS—TRUST DEEDS—SECURITY FOR PRICE—EFFECT.

Defendant executed a warranty deed purporting to convey to plaintiff an entire quarter section of land, when in fact he did not own a portion thereof, which he had previously conveyed to a railroad company for a right of way. The deed was deposited in escrow, after which plaintiff executed a deed of trust to secure the unpaid portion of the price, which excepted such right of way from its description, when the deed was duly delivered. *Held*, that there was no inconsistency between the deed and the deed of trust, and hence there was a breach of the grantor's covenant of seisin immediately on delivery of the deed.

Appeal from Circuit Court, Linn County; Jno. P. Butler, Judge.

Action by Henry E. Foster against Arthur S. Byrd. From a judgment for plaintiff, defendant appeals. Affirmed.

C. C. Bigger, for appellant. A. W. Mullins, O. F. Libby, and H. J. Libby, for respondent.

JOHNSON, J. This is an action to recover damages for the breach of covenants of seisin and warranty contained in a warranty deed executed and delivered by defendant to plaintiff, wherein the grantor undertook to convey an entire quarter section of land in Linn county. A jury was waived and the court found the issues in favor of plaintiff and entered judgment accordingly. Defendant appealed.

It appears that the quarter section of land described in the warranty deed contains about 164 acres. Defendant at one time owned the whole tract, but, in 1888, deeded to a railroad company a strip 50 feet wide along the west boundary line for a railroad right of way. This strip contained more than three acres and its conveyance left defendant in the ownership and possession of a fraction more than 160 acres. Plaintiff, then a citizen of Illinois, came to Linn county, in January, 1902, to buy a farm and accompanied by a real estate agent visited defendant's farm and entered into negotiations with him for its purchase. Defendant fixed the price at which he would sell at \$8,800. Plaintiff examined the land, and, observing the railroad, states that he asked defendant if "it cut the field" and was told that it did not; he then inquired if defendant owned the full quarter, and the latter replied that he did. This conversation is denied by defendant, who testified, "I said nothing to Mr. Foster in regard to the strip deeded to the railroad. I sold him the quarter section of land with-

out saying anything to him about that strip; he has a quarter section inside the fences; I sold him what land I had there, nothing was excepted in the contract or deed." Plaintiff further said, but in this was contradicted by defendant, that the price was computed by the defendant at \$55 per acre. On the next day, January 17th, plaintiff informed defendant he would buy the place and the parties met in a lawyer's office in Laclede and entered into a written contract, which expressed the following agreement. Defendant agreed to execute a warranty deed conveying to plaintiff land described as "all the southeast quarter of section No. 30," etc., in consideration of the payment of \$8,800 on these terms: \$500 cash was to be paid on the signing of the contract, and the execution of the warranty deed by defendant; \$3,500 to be paid in cash on March 10th; and plaintiff was to execute and deliver his promissory note to defendant for the remainder of the purchase money—\$4,800, and secure its payment by a deed of trust on the land. The contract and warranty deed were to be deposited in a bank in Laclede, the latter to be delivered to plaintiff by the banker on the payment of the \$3,500 in cash and the delivery by plaintiff of his note for \$4,800 and the trust deed securing it. At the time of the signing of this contract defendant and his wife executed and acknowledged a warranty deed in which, for the expressed consideration of \$8,800, they conveyed to plaintiff the land as described in the contract; i. e., the entire quarter section without excepting the part thereof previously deeded by them to the railroad company. Both plaintiff and defendant could read and write. The former states the contract and deed were read aloud by the attorney who prepared them before they were signed, but defendant says he executed the papers without reading them or hearing them read. The contract and deed were then deposited, as agreed, with the banker and plaintiff immediately returned to his home in Illinois. Shortly thereafter he received from the attorney at Laclede an abstract of title to the property and a note and trust deed duly prepared, so the attorney stated in the accompanying letter, in accordance with the provisions of the contract respecting the deferred payment of \$4,800. The trust deed, however, in the description excepted the strip of land previously conveyed. Plaintiff noticed this, but said nothing about it to defendant or the Laclede attorney, and, at the appointed time, paid \$3,500 in cash to the banker, delivered his note for \$4,800, and the trust deed duly executed, and received the warranty deed in return. He then brought this suit to recover the value of the three acres contained in the portion of the quarter section conveyed to the railroad company. In his answer, defendant alleges "that at the time said warranty deed and deed of

trust were so written, executed, and delivered, it was well known to plaintiff the defendant did not own said strip of land and was not, and did not sell or attempt to sell the same to plaintiff, and that plaintiff was not buying the same, and that said strip of land was included in said warranty deed through and by the mutual mistake of the plaintiff and defendant and the scrivener who prepared said deed." The answer concludes with a prayer that the deed be reformed to express the actual agreement of the parties under which the sale was made. The reply is a general denial. No declarations of law were asked by either party.

In this state of the case the judgment of the trial court will be accepted as a finding against defendant on the issue raised in the answer, that the inclusion of the right of way in the description of the land conveyed in the warranty deed was the result of a mutual mistake. The evidence introduced by plaintiff strongly negatives the conclusion that such mistake occurred. He, being a stranger to the land, asked defendant if he owned the entire quarter, and received an affirmative answer. If his testimony is to be believed the written contract of sale and warranty deed expressed the actual agreement made. We are not satisfied that the preponderance of the evidence is against the finding of the learned trial judge on this issue, and therefore the finding will not be disturbed. *Taylor v. Cayce*, 97 Mo. 242, 10 S. W. 832; *Rawlins v. Rawlins*, 102 Mo. 563, 15 S. W. 78; *Bank v. Murray*, 88 Mo. 191; *Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914; *Dunivan v. Dunivan*, 157 Mo. 157, 57 S. W. 711. In the warranty deed defendant covenanted to give plaintiff the indefeasible seisin of the entire quarter section. The recital in the description that the tract contained 160 acres, more or less, was a mere representation of the opinion of the grantor, and not his covenant to convey that quantity of land, nor an agreement between him and the grantee to restrict the extent of the grant to such represented quantity. *Corrough v. Hamill* (Mo. App.) 84 S. W. 96; *Hobeln v. Frick*, 69 Mo. App. 263; *Wood v. Murphy*, 47 Mo. App. 539. But defendant assumes that the delivery of the warranty deed in escrow was not a delivery thereof to plaintiff, and that plaintiff did not become vested with any title to the land before the actual delivery of the deed to him and argues that as this delivery was concurrent with that of the deed of trust from plaintiff to defendant, both deeds should be construed as one instrument. We may stand with defendant on this ground and yet find ourselves unable to agree with his conclusion that the description in the deed of trust of the tract conveyed serves to control or modify the extent of the conveyance from defendant to plaintiff. The land described in the trust deed is included within the description ap-

pearing in the warranty deed, and the mere fact that it does not embrace all of the land conveyed by defendant does not bring the two deeds in conflict nor, of itself, even suggest a mistake or inconsistency. Certainly a vendor in conveying a tract of land and accepting from his vendee a trust deed conveying a part only of the tract to secure unpaid purchase money does not raise any question relative to the extent of the grant. That is controlled by the covenants of the warranty deed. There being no inconsistency between the terms of the two deeds, there is nothing to harmonize and the principle followed in the cases of *Geer v. Redman*, 92 Mo. 375, 4 S. W. 745, and *Land Company v. Campbell*, 65 Mo. App. 109, has no application. The possession of the three acres in question was not and cannot be delivered by defendant to plaintiff; the covenants of seisin were broken by defendant at the time of the delivery of the warranty deed and a cause of action then accrued to plaintiff for the recovery of the damage sustained. *Adkinson v. Tomlinson*, 121 Mo. 487, 26 S. W. 573; *Murphy v. Price*, 48 Mo. 247; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142; *Pacare v. Chouteau*, 13 Mo. 527. The judgment is affirmed. All concur.

CLEM v. QUINCY, O. & K. C. R. CO.  
(Kansas City Court of Appeals. Missouri.  
June 18, 1906.)

1. RAILROADS — KILLING STOCK — ACTIONS — PETITION — SUFFICIENCY.

A petition in an action against a railway company for killing stock, which alleges that the company failed to maintain lawful fences and cattle guards, as required by law; that by reason thereof plaintiff's animals, without his fault, went on the railroad track through the defective fences and cattle guards, at a point where the company was by law required to erect and maintain the same, is good after verdict, for it charges the company with a breach of duty imposed by Rev. St. 1899, § 1105, to erect and maintain fences and cattle guards of the standard fixed by section 3294.

2. SAME — INSTRUCTIONS — SUBMISSION OF MATTERS OF LAW.

An instruction in an action against a railway company for killing animals, submitting to the jury the question whether the railroad company maintained lawful fences and cattle guards, was erroneous because it permitted the jury to determine the law as well as the fact involved in the issue.

3. APPEAL — HARMLESS ERROR — ERRONEOUS INSTRUCTIONS.

Where, in an action against a railway company for killing animals, the evidence showed the failure of the company to maintain fences and cattle guards, as required by Rev. St. 1899, § 1105, and the issue was whether the animals entered the track through a gap in the fence, or from an adjoining field to a wagon road and thence on the right of way over a cattle guard, the error in submitting to the jury the question whether the railroad maintained lawful fences and cattle guards, was harmless, because, whether the animals entered the right of way through the open gap in the fence or over the cattle guard the railroad was liable.

Appeal from Circuit Court, Sullivan County; Jno. P. Butler, Judge.

Action by W. A. Clem against the Quincy, Omaha & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. G. Trimble and Wilson & Clapp, for appellant. Wattenbarger & Bingham and R. El. Ash, for respondent.

JOHNSON, J. In the first count of the petition plaintiff seeks to recover double damages under the provisions of section 1105, Rev. St. 1899, for the killing of two horses by defendant. He had judgment on this count in the sum of \$470, double the amount of the verdict returned, and defendant appealed. In addition plaintiff had judgment on the causes of action pleaded in the remaining two counts of the petition, but defendant does not claim that error was committed in the trial of either of them, and our inquiry will be confined to the cause pleaded in the first count.

First, it is insisted by defendant that no cause of action is pleaded. The allegations criticised are as follows: "Plaintiff further states that on said 28th day of November, 1903, defendant failed, neglected, and refused to keep and maintain lawful fences along the sides of its railroad track and to construct and maintain cattle guards, as required by law, where said road passes through, over, and across, the farm and cultivated fields of plaintiff. That by reason of defendant's failure and neglect to keep and maintain proper and lawful fences along the sides of its said track and to construct and maintain cattle guards as provided by law inclosing its railroad on plaintiff's farm, the horses aforesaid, owned by plaintiff and by him kept on said farm, without the fault or procurement of plaintiff went upon defendant's railroad, and upon the track thereof through, and over, said defective fences and cattle guards where said railroad passes through plaintiff's farm, in Sullivan county, Mo., at a point where defendant was by law required to erect and maintain good and lawful fences along the sides of its said railroad and to construct and maintain cattle guards, and not at the crossing of any public highway or other road and not within the limits of any incorporated town or city." No attack was made on this pleading by demurrer or motion, but defendant answered to the merits. At the trial defendant made the general objection that this count of the petition fails to state a cause of action, but did not state the ground of the objection. In the motion in arrest, the objection was renewed. It is supported here by the argument that the pleader should have stated in what manner the fences and cattle guards were defective and that the omission of such averment is not supplied by the statement that defendant "failed, etc., to

keep and maintain lawful fences, \* \* \* and to construct and maintain cattle guards as required by law," since such statement embraces nothing more than a mere legal conclusion. We have noted the fact that the attention of the trial court was not called to this supposed defect until after verdict. In this state of the case the defect, if one exists, will be deemed to have been cured by verdict. The rule is well settled that "after verdict the petition should not be most strictly construed against the pleader, but should be construed liberally with a view to substantial justice." Saxton v. Railroad, 98 Mo. App. 494, 72 S. W. 717; Munchow v. Munchow, 96 Mo. App. 553, 70 S. W. 386; Vivian v. Robertson, 176 Mo. 219, 75 S. W. 644. It cannot be denied that defendant was notified by the averments under consideration to meet the charge of a breach of the duty imposed on it by the provisions of Rev. St. 1899, § 1105, to erect and maintain on the land in question fences and cattle guards of the standard fixed by law, Rev. St. 1899, § 3294, King v. Railway, 79 Mo. 328; and this being true, a fair and liberal construction of the petition necessitates the inference that the existence of the essential fact was sufficiently alleged to support a verdict.

The court at the request of plaintiff gave the following instruction: "The court instructs the jury that if they find and believe from the evidence that plaintiff was on the 28th day of November, 1903, the owner of the farm described in his petition and that defendant company on said day owned and operated a railroad through, over, and across said farm and the inclosed and cultivated fields thereof in Ducan township, Sullivan county, Mo., and that plaintiff was on said date the owner of the two horses mentioned in said petition, and that said horses were kept in the inclosed fields of plaintiff, through, over, and across which defendant's railroad passes, and that said railroad was not inclosed by lawful fences on both sides thereof, and that by reason of such failure to keep and maintain good and lawful fences and cattle guards along its said right of way, plaintiff's said horses escaped from the pasture or the inclosed and cultivated fields as aforesaid, and came upon defendant's railroad, without the fault or procurement of defendant, in Ducan township, Sullivan county, Mo., by reason of the failure and neglect of defendant company to keep and maintain good and lawful fences and cattle guards along the sides of its said railroad at the place where said horses came upon the said railroad as required by law; if you find said horses did come thereon, and that said horses were struck and killed by defendant's engine and cars while being run and operated by defendant's agents, servants and employes by reason thereof, then your verdict will be for plaintiff on the first count of his petition for such sum as you may believe said horses

were reasonably worth, not to exceed the sum of \$250." In thus submitting to the jury the question of whether or not defendant maintained lawful fences and cattle guards along its right of way without defining the term, the court permitted the jury to determine the law as well as the fact involved in that issue. This was error. The only function the jury has is to decide issues of fact and it is error to submit to that body questions of law or mixed questions of law and fact. *Fugate v. Carter*, 6 Mo. 267; *Hickey v. Ryan*, 15 Mo. 63; *Turner v. Railroad*, 76 Mo. 261; *Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 809; *Estes v. Fry*, 22 Mo. App. 80; *Boot & Shoe Co. v. Bain*, 46 Mo. App. 581.

But plaintiff contends the error should be regarded as harmless for the reason that the uncontradicted evidence shows that the fences and cattle guards maintained by defendant along its right of way through the field where plaintiff kept his stock were not lawful fences and cattle guards and therefore the court would have been justified in withdrawing that fact from the issues submitted to the jury. The fact that the animals were killed by one of defendant's trains at a place on the road where it runs through plaintiff's farm is conceded. Plaintiff and his witnesses testified that for some 12 months before the occurrence a gap several yards wide existed in the right of way fences, that permitted the passage of stock in the adjoining fields of plaintiff to and across defendant's right of way. At another place, the fences were partially down, and stock could cross over at that place. A public wagon road bisected plaintiff's farm, and crossed the railroad at a right angle, and it was shown that the cattle guards maintained by defendant at this crossing were so out of repair that they were insufficient to turn stock. All these facts are in effect conceded by defendant, and the only controverted fact on this branch of the case is whether the animals entered the right of way through the open gap in the fence or passed from the adjoining field of plaintiff to the wagon road through a gate, traveled on this road to the railroad and then entered the right of way over the cattle guard. The facts adduced by plaintiff strongly tend to show that the right of way was reached through the opening in the fence, while defendant attempted to show that it was entered by way of the public road and cattle guard. In either case, we do not perceive how defendant may expect to escape liability under the conceded facts. The statute, Rev. St. 1899, § 1105, imposed on it the duty to maintain cattle guards "sufficient to prevent horses, etc., from getting on the railroad." This duty, according to all the evidence, it did not perform. Conceding that the animals may have reached the wagon road through the carelessness of plaintiff or his servant in leaving open or unfastened the gate in the fence that separated his field from the wagon road, such fact would not affect the liability of defendant

for damages sustained in consequence of the animals reaching its track by way of the defective cattle guards.

It follows that the error in the instruction could not have been prejudicial, and the judgment accordingly is affirmed. All concur.

### YOUNG v. RUHWEDEL.

(Kansas City Court of Appeals. Missouri.  
June 18, 1906.)

#### 1. PRINCIPAL AND AGENT—SALE OF LAND—CONTRACT BY AGENT—NECESSITY OF WRITTEN AUTHORITY.

Rev. St. 1899, § 3418, provides that no contract for the sale of lands made by an agent shall be binding on the principal, unless the agent is authorized in writing to make such contract. *Held* that where the employment of a broker by a landowner was not evidenced by a writing signed by the landowner, a written contract of sale made by the broker with a purchaser was unenforceable against the landowner.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 254, 380; vol. 23, Cent. Dig. Frauds, Statute of, § 255.]

#### 2. BROKERS—COMMISSIONS—NECESSITY OF WRITTEN EMPLOYMENT.

A broker who has found a purchaser pursuant to an oral contract of employment is entitled to recover commissions of the landowner; the statute not being applicable to the contract of employment.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 44.]

#### 3. SAME—EMPLOYMENT—RELATION TO PRINCIPAL.

Where a landowner agreed to sell his land on certain terms if plaintiff could find a buyer within a specified time, and plaintiff was to receive as his commission all that he could obtain for the land over a certain price, the agreement created an agency, and not an option to buy.

#### 4. CONTRACTS—CONSIDERATION—MUTUAL PROMISES.

A contract between plaintiff and a landowner whereby the landowner agreed to sell land to any buyer found by plaintiff, on specified terms, plaintiff to have as a commission all that he could obtain for the land above a specified sum, was not without consideration moving to the landowner, plaintiff's agreement to perform the service being sufficient.

#### 5. BROKERS—RIGHT TO COMPENSATION—DEFENSES.

A husband who employed a broker to find a purchaser for the homestead could not on performance by the broker escape liability for failure to perform because of the fact that the wife refused to sign the deed.

#### 6. SAME—PERFORMANCE BY BROKER—SUFFICIENCY—PRODUCTION OF PURCHASER.

Rev. St. 1899, § 3418, provides that no contract for the sale of lands made by an agent shall be binding on the principal unless the agent is authorized in writing to make the contract. *Held*, that where a landowner orally employed a broker to find a purchaser, and the broker made a written contract with the purchaser, the production thereof to the landowner was equivalent to the production of the purchaser, since if the owner had chosen to ratify the contract, it would have been binding.

#### 7. SAME—PURCHASER'S ABILITY TO PERFORM—BURDEN OF PROOF.

In an action by a broker to recover on a contract, whereby he was employed to find a purchaser for defendant's land, the burden is on plaintiff to show that the purchaser was not

only willing to buy on the terms proposed, but able to perform.

**8. SAME—BREACH BY PRINCIPAL—MEASURE OF DAMAGES.**

Where a broker employed to sell land was to receive as his compensation anything that he could obtain for the land above a specified sum, in an action against the landowner for failure to perform the contract with a purchaser produced by plaintiff, the measure of damages was the amount of the commission earned and lost.

**9. SAME—COMPENSATION — CONTRACT — CONSTRUCTION.**

Where a landowner employed a broker to sell the land on an understanding that he should have as his commission anything that could be obtained over a specified price, the broker was entitled to his commission out of the first payment made by the purchaser.

**10. SAME—PERFORMANCE BY BROKER—SUFFICIENCY—PURCHASER'S ABILITY TO PERFORM.**

A landowner employed plaintiff to find a purchaser on terms whereby a certain cash payment was to be made and a mortgage given, and on production of a purchaser plaintiff offered to pay the whole of the purchase money if the landowner was not satisfied as to the purchaser's ability to meet deferred payments when they fell due. *Held*, that such offer did not remove an objection as to the ability of the purchaser to perform the contract, as it amounted to a proposal to vary the terms of the sale.

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by John B. Young against Conrad Ruhwedel. From an order to sustain a motion for a new trial and in arrest of judgment, plaintiff appeals. Affirmed.

P. H. Cullen, J. W. Delventhal, and E. Rosenberger & Son, for appellant. C. E. Peers and Geo. Robertson, for respondent.

JOHNSON, J. Plaintiff, a real estate agent, sues to recover commissions which he claims to have earned under a verbal contract of employment. The jury returned a verdict in his favor in the sum of \$1,100, but the trial court sustained the motions for a new trial and in arrest of judgment filed by defendant, and plaintiff appealed.

At the time the contract was made, defendant, the head of a family, owned and occupied a farm of 237 acres in Warren county. Plaintiff testified that on November 6, 1903, accompanied by a Mr. Foristell, he went to defendant's home for the purpose of obtaining employment as agent to sell the farm. Defendant was willing to sell and valued the place at \$5,900. Plaintiff inquired, "Will you give me a commission for selling your place?" Defendant answered, "No, you will have to make your commission out of the buyer, but, if you get a buyer for me for \$5,900, you can have all over that amount, \$5,900, that you may get, for your commission." Terms of sale were then discussed. We quote from plaintiff's testimony: "I said, 'On what terms will you sell it?' He said, 'I am not particular, but I will leave \$3,000 or \$3,500 on the place.' I said, 'How much do you want paid down to bind the bargain?'

He said, "I am not particular; \$250, \$300, or \$400, so it is safe." I said, 'If I furnish you with a buyer, will you furnish a good deed and furnish an abstract and deliver it?' And he said he would. \* \* \* In regard to possession being delivered to the purchaser, Mr. Ruhwedel said that he would have to have time to have his sale and get away, and that he would like to stay until the 1st of March, 1904. \* \* \* I was to have 30 days within which to find a purchaser. \* \* \* The deferred payments were to bear 5 per cent. compound interest to be secured by a deed of trust on the land for the deferred payments to run two years. These matters were all discussed between Mr. Ruhwedel and myself, the details gone over again and again; \$3,000 or \$3,500 was to be secured by deed of trust and the purchaser was to pay \$250, \$300, or \$400, to bind the bargain of sale, and the balance was to be paid on or before the 1st day of March, without interest."

Defendant's version of the agreement made is stated by him in this language: "I agreed with Mr. Young to take \$5,900. Mr. Young asked me if I would pay him a commission if he sold my farm, and I told him I would not give him any commission, that I wanted \$5,900 clear, and if he could make any commission out of the buyer, he could do it that way; that it was satisfactory to me for him to sell for any price he saw fit so I got \$5,900, and he would have the balance for his commission. I agreed to carry \$3,000 or \$3,500 on the place for two years at 5 per cent. interest. I agreed that the person purchasing the farm might pay \$500 on any interest pay day. I agreed to give possession on the 1st of March. Mr. Young was to sell the place within 30 days, or have no right to sell it at all. He asked me if I had an abstract of title, and I told him I had, and I told him I had a good title to the place. Nothing was said about a payment being made. I thought I was to be paid for the place when I delivered the deed. Nothing was said about making the deed at that time, but I expected to be paid for the land when I gave the possession." After the agreement was made plaintiff returned to Warrenton, his home, and at once communicated by telephone with a firm of real estate dealers in Mexico, Mo., the fact that he was authorized to sell defendant's farm. The next day the Mexico agents brought with them to Warrenton a Mr. Snyder of Wauke, Iowa, who was looking for a farm. Plaintiff went with the party and assisted by defendant and his family showed Snyder the land and improvements. No sale was made at the farm, but after the return of plaintiff and Snyder to Warrenton a sale was agreed on at the price of \$7,000, and a written contract was drawn and signed by Snyder and by plaintiff as the agent of defend-

ant. This contract provided that the sale was made "upon the following terms: \$1,500 in hand paid, the receipt of which is hereby acknowledged; \$2,000 to be paid on or before March 1, 1904; the balance of the purchase price, \$3,500, to be secured by a deed of trust on the real estate hereby conveyed, payable on or before two years from date thereof, with interest at the rate of 5 per cent. from March 1, 1904, interest payable annually. The party of the second part [Snyder] reserves the right to pay the amount of \$500 or more any interest pay day. The party of the first part [defendant] agrees to make a good and sufficient warranty deed with abstract of title within 30 days from this date. The party of the second part is to have 30 days to examine the abstract of title and in case of error in abstract the party of the first part is to have 30 days to correct said abstract and, if the first party fails to show good merchantable title, then this sale shall be null and void, and the party of the first part is to refund the money paid on this contract. The party of the first part hereby agrees to deposit the deed in escrow properly signed in the Citizens' Bank of Warrenton within 30 days from this date. The party of the first part agrees to give peaceable possession on or before March 1, 1904, at the completion of this contract." At the execution of this contract Snyder gave plaintiff his check for \$1,500, drawn on a bank in Wauke, Iowa, to make the first payment. It was shown that he had funds on deposit in that bank sufficient to cover the amount of the check. Plaintiff accepted it, and gave Snyder a receipt for it as so much cash. Plaintiff notified defendant through Foristell of the sale, and, being informed that defendant would not execute a deed, drove to the farm, read the contract of sale to defendant, and urged him to complete the transaction. This is plaintiff's account of what transpired: "The only reply that he made was, he says, 'I cannot help it, I have to back out.' Mr. Ruhwedel said, 'The trade is all right, the terms are all right, and I am satisfied and ready to sign it at any time, and I wish I could make a deed to Mr. Snyder and settle it, but my wife will not sign it.' That is the only reason he gave me for not signing the deed—that his wife would not sign it. He repeated that to me half a dozen times in the presence of Mr. Foristell. On that occasion I offered him \$400 in money, laid \$400 on the table in the presence of his wife and daughter and Mr. Foristell, and told him that I had collected \$1,500, and, 'Here is \$400 or here is a check for the balance that is due you; you can take your choice; I cannot afford to lose this trade.' He said that he was very sorry, that he knew it would hurt my business, but his wife would not sign the deed, and he could not sign

it. I told him in his wife's presence if he didn't pay me I would bring suit against him. \* \* \* His wife spoke up and said 'Mr. Ruhwedel, maybe I had better sign it if it makes trouble; if it makes trouble I had better sign it.' And he says, 'No, you will not sign it, I have had lawsuits before.' \* \* \* I told Mr. Ruhwedel that if he objected to the terms of payment on the contract, if he didn't think Mr. Snyder was good, or if he didn't want to leave a loan on the place as he had agreed to, that I would pay him all the money in cash, advancing it to Mr. Snyder. He said he would rather have a mortgage than the money and he again repeated that the terms and the price suited him and that I had done all that I agreed to do and it was too bad that he couldn't make the deed. At that time I was possessed of sufficient money to have paid the purchase price to Mr. Ruhwedel if he had demanded it." Defendant admitted: "Everything that Mr. Young explained to me was all right so far as I understood it and the way he read it to me. I told him on that occasion that he had gone ahead and done all he had agreed to do and that I was sorry I couldn't carry out the contract, but on account of my wife refusing to sign the deed I couldn't do it. I don't know whether I told him that I knew my backing out would hurt his business or not. I took my place off of the market and it has not been for sale since. \* \* \* The only reason I gave Mr. Young for not signing the deed and the only objection that I made for not carrying out the terms of the sale was that my wife would not sign the deed."

In sustaining the motions for a new trial and in arrest the court assigned the following reasons: "First. Because the court erred in refusing to sustain defendant's demurrer offered at the close of plaintiff's evidence in chief for the reasons: (1) Because there is no evidence that defendant appointed plaintiff his agent or that any contract of agency was understandingly entered into between the parties; they were dealing with each other at arm's length; (2) because the verbal agreement between them was in the nature of a roving option to buy rather than of agency, and there was no consideration to support the agreement; (3) because plaintiff did not bind himself to do anything, hence the alleged contract was not mutually binding; (4) because the alleged agreement is within the statute of frauds. Second. Because the court erred in giving plaintiff's instructions Nos. 2 and 3 for the reasons above given. Third. Because the court erred in giving plaintiff's instruction No. 8, for the reason that the court peremptorily instructed the jury, in case they found for plaintiff, to assess his damages at \$1,100, said sum being grossly excessive under the evidence so far as actual damages go. Fourth. Because the greater weight of the

evidence is that plaintiff's purchaser was financially unable to perform the conditions of the alleged contract of sale on his part, hence the verdict of the jury is against the greater weight of the evidence, and is for that reason set aside. Fifth. Because the suit was prematurely brought, and defendant's motion in arrest of judgment is seen and heard by the court and sustained.

First, we will consider the questions involved in the conclusion of the learned trial judge, that the demurrer to the evidence of plaintiff should have been sustained: As the employment of plaintiff by defendant to act as the agent of the latter in the sale of the farm was not evidenced by a written contract signed by defendant, the written contract made by plaintiff with the purchaser, Snyder, falls within the statute of frauds, so far as defendant is concerned, and therefore could not have been enforced by Snyder against defendant. Since the enactment of the provision in section 3418, Rev. St. 1899, that "no contract for the sale of lands made by an agent shall be binding upon the principal unless such agent is authorized in writing to make such contract," it has been held repeatedly that in the absence of written authority to sell, signed by the principal, the fact of the existence of the relation of principal and agent does not of itself confer authority on the latter to bind his correlate with respect to the subject-matter of the employment. *Johnson v. Fecht*, 185 Mo. 335, 83 S. W. 1077; *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. 830; *Roth v. Goerger*, 118 Mo. 556, 24 S. W. 176; *Fox v. Courtney*, 111 Mo. 147, 20 S. W. 20; *Greening v. Steele*, 122 Mo. 287, 26 S. W. 971. But we are not dealing here with an action founded on the written contract of sale made by the agent with the purchaser. The cause asserted springs from the agreement of defendant to employ plaintiff as his agent to sell land, and the procurement by the agent from the purchaser of a written contract was but an incident of the employment—an act in the performance thereof, and the importance of that contract in its bearing on the rights of the parties does not arise from the fact that it could not be enforced by the purchaser against the principal, but, as we shall show, depends on the construction of its terms and the result of a comparison of them with the terms of sale authorized by the principal in the agency agreement. In other words, our consideration of that contract will be confined to the inquiry, did the agent in procuring and offering it to his principal in legal effect produce a purchaser willing and able to buy the land on the terms authorized by defendant in his instructions to plaintiff? If this question should be answered in the affirmative, and should it appear that the verbal agreement made by plaintiff and defendant evidenced their mutual intention to establish the relation between them of prin-

cipal and agent, then the refusal of defendant to consummate the sale constituted a breach of the contract of employment and created a cause of action in favor of plaintiff; for a contract providing for the employment of an agent to sell land, to be valid and binding on the owner, is not required to be in writing, but may rest entirely in parol. It is not to be regarded as a "contract for the sale of lands," but as an agreement enlisting the services of another to aid the owner in effecting a sale. Section 3418 of the Revised Statutes of 1899 has no application to such contracts. The St. Louis Court of Appeals in the case of *Gerhart v. Peck*, 42 Mo. App. 644, observed: "This section of the statute can, by no sort of construction, be made to apply to contracts of employment between real estate brokers and their principals. The statute only prohibits such agents from binding their principals in contracts of sale to third persons when they are not so expressly authorized in writing by their principals," and this we regard as a correct enunciation of the rule. *Gwinnup v. Sibert*, 106 Mo. App. 709, 80 S. W. 589. We do not agree with the view that the verbal agreement between the parties was not a contract of employment, but "was in the nature of a roving option to buy rather than of agency," nor can it be true under any interpretation of the evidence that "the parties were dealing at arm's length with each other and did not understandingly enter into a contract of agency." There is no dispute between the parties regarding the facts relating to this phase of the case. Plaintiff was to have 30 days in which to find a buyer on the terms stated, and was to receive as his commission all that he could obtain for the land above the sum of \$5,900. There was neither suggestion nor thought that plaintiff himself was to buy the land. His services were engaged for a specific purpose, and the amount of his compensation was made to depend on the success of his efforts to find a buyer who would be willing to pay more than the amount demanded by defendant as his share of the proceeds of a sale. The terms of the agreement were definite and free from ambiguity, and must be construed as constituting a contract for the employment of an agent. The parties were not dealing at arm's length. It is true plaintiff sought the employment, but equally is it true that defendant engaged his services, and thereupon the parties ceased to deal as strangers and entered into a relation of trust and confidence. The contract was supported by a sufficient consideration; the agreement of plaintiff to perform the services required by its terms. Our conclusion on this branch of the case is that the existence of the agency must be assumed under the admitted facts, and it remains to be ascertained whether or not plaintiff produced a purchaser willing and able to buy the land on the terms au-

thorized by defendant, and thereby earned a commission under the contract of employment.

Before disposing of the questions presented by this feature of the case, we will determine another point made in the argument of defendant. It is urged that as the farm was the homestead of defendant and his wife, and, therefore, their joint estate, the contract of employment must be held void because the wife was not a party to it. Recently, in the case of *Curry v. Whitmore*, 110 Mo. App. 204, 84 S. W. 1131, where the sale made by the agent employed by the husband alone was defeated by the refusal of the wife to sign the deed, we answered the argument that the husband could not sell the homestead without his wife's consent by saying, "Neither can a husband sell any other lands and make perfect title without his wife's consent. But neither of these conditions will relieve him of liability on his contract for the sale of such lands. That is a matter he should think of and provide against at the time he enters into his obligation." If plaintiff produced a purchaser possessing the requisite qualifications, defendant offered no legal excuse for his failure to consummate the sale in the fact of his wife's refusal to sign the deed. *McCray & Son v. Pfost* (decided at this term), 94 S. W. 998. It is contended that in bringing to defendant the written contract of sale plaintiff did not produce a purchaser, since he had no valid authority on behalf of his principal, and the only thing he was authorized to do was to find a buyer who would buy the place on the terms stated and introduce him to defendant. Notwithstanding, plaintiff had no legal authority to bind his principal in a contract of sale, the contract he made with Snyder was not absolutely void, as erroneously assumed by defendant. It was valid and binding on the purchaser at the election of defendant. It cannot be denied that, had defendant chosen to ratify it, the purchaser could have been held in damages for his failure or refusal to carry out its terms. The production of the contract was legally equivalent to the production of the purchaser himself. *McCray & Son v. Pfost*, supra; *Huggins v. Hearne*, 74 Mo. App. 86; *Rice v. Ruhlman*, 68 Mo. App. 503; *Hayden v. Grillo*, 35 Mo. App. 647; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683; *Chibley v. Leathe*, 60 Mo. App. 15. Defendant admitted that the contract embodied the terms of sale authorized by him. The willingness of the purchaser to perform its conditions is conceded, but the burden is on plaintiff to show that the purchaser not only was willing to buy on the terms imposed, but was able to perform the conditions of his contract. We are asked by defendant to declare as a matter of law that plaintiff failed completely to meet this burden. It appears that when he sustained the motions for a new trial and in arrest the learned trial judge

entertained the view that the facts put in evidence by plaintiff tend to show Snyder was able to comply with the conditions of the contract, but that the greater weight of the evidence is against plaintiff on that issue. This is our own opinion of the evidence, and it necessitates the holding that the issue is one of fact for the triers of fact, and not of law for the court. The suit was not prematurely brought. Plaintiff had the right under his contract of employment to provide, as he did, for the payment of his commission out of the first payment made by the purchaser. He had the money or its equivalent in hand and defendant's wrongful refusal to carry out the contract compelled him to restore to the purchaser the commission he had earned. His cause of action became complete on defendant's repudiation of the sale, and the bringing of this suit followed that act. *Nichols v. Whitacre*, 112 Mo. App. 692, 87 S. W. 594; *Gwinnup v. Sibert*, supra. It follows from what we have said that no error was committed in the refusal to give a demurrer to the evidence.

Plaintiff's instruction No. 8 was properly given. The measure of his damages is the amount of the commission he earned and lost through defendant's wrong. The parties in the contract of employment adopted the rule to be applied in fixing the compensation of plaintiff for his services to be performed thereunder and this rule should control. The fourth ground assigned by the court in its order granting a new trial must be sustained. The facts in evidence relative to the ability of the purchaser to perform his contract justify the conclusion reached by the learned trial judge that the verdict was against the weight of the evidence. Not only was it within his judicial discretion to grant a new trial on that ground, but he would have failed in the proper discharge of his duty had he refused to sustain the motion believing, as he did, that an injustice had been done. *Lawson v. Mills*, 130 Mo. 170, 31 S. W. 1051; *Bank v. Armstrong*, 92 Mo. 265, 4 S. W. 720. Counsel for plaintiff argue that the court abused its discretion, because of the undisputed fact that plaintiff, a man of means, offered to pay the whole of the purchase money if defendant was not satisfied on the point of Snyder's ability to meet the deferred payments when they fell due. Defendant did not wish to have the whole of the purchase money paid, but preferred as an investment to carry a loan of \$3,000 or \$3,500 secured by deed of trust on the land. Being the owner of the property, he had the right to fix the terms of sale, and this he did in the contract of employment. Plaintiff's offer, therefore, was in effect a proposal to vary the terms of sale authorized by defendant in a substantial particular. He did not offer to advance the payment of \$2,000 Snyder was required to make by March 1st, and look to Snyder for reimbursement, which, if accepted, would have en-



abled Snyder to meet all of his obligations in the manner provided. For the reason stated, if for no other, the offer must be rejected as valueless, since it did not in any way add to the ability of Snyder to perform the contract of sale in all its terms.

We do not find it necessary to comment further on the instructions given and refused, as the views expressed will furnish a sufficient guide in a retrial of the cause.

The judgment is affirmed. All concur.

## BARRIE v. ST. LOUIS TRANSIT CO.

(St. Louis Court of Appeals. Missouri.  
June 5, 1906.)

### 1. STREET RAILROADS—COLLISION WITH VEHICLE—DISCOVERED PERIL—EVIDENCE—QUESTIONS FOR JURY.

In an action against a street railroad company for injuries caused by a collision between a car and a milk wagon, evidence held sufficient to require submission to the jury of the question whether the motorman had an opportunity to prevent the accident after having discovered plaintiff's danger.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 251.]

### 2. APPEAL—SECOND APPEAL—LAW OF THE CASE.

Where, on a second appeal, the evidence is substantially the same as that involved in the first appeal, a previous ruling as to the sufficiency of the evidence to require submission to the jury will be treated as res adjudicata.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and error, §§ 4370-4379.]

### 3. APPEAL—INSTRUCTIONS—HARMLESS ERROR.

In an action for personal injuries, an instruction that the burden was upon plaintiff to prove by the evidence that defendant was guilty of negligence, while objectionable because failing to state that plaintiff must prove this by a preponderance of the evidence, nevertheless was not cause for reversal, where various other instructions on the same subject required proof by a preponderance of the evidence, and a view of the fact that defendant submitted no evidence whatever.

### 4. TRIAL—MULTIPLICITY OF INSTRUCTIONS.

Where, in an action for personal injuries in which the issues were few and simple, the court gave 11 instructions presenting every possible phase of the defendant's theory of the case, a refusal to give a twelfth instruction was sustainable on the ground that further instructions would tend rather to confuse than enlighten the jury.

### 5. STREET RAILROADS—OPERATION—CARE REQUIRED OF MOTORMAN.

The duty of a motorman to check the speed of his car to avert a collision with a vehicle on the track is not limited to the time when the vehicle is on the track or in actual danger of collision if the car goes forward, but it is the motorman's duty to exercise ordinary care by checking the car as soon as he sees, or by the exercise of due care may see, a person in a vehicle approaching the track with the apparent intention of crossing.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 192.]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by David Barrie against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff was the driver of a milk wagon and while driving across defendant's street car tracks on Jefferson avenue, in the city of St. Louis, near Geyer avenue, the rear wheel of his wagon was struck by a south-bound car, whereby the wagon was overturned and he was injured. Hence this suit. The case was here before and is reported. *Barrie v. Transit Co.*, 102 Mo. App. 87, 76 S. W. 706. The facts developed upon the part of the plaintiff in the trial court are to the effect that the plaintiff, with a horse and covered wagon laden with milk cans, was on his route delivering milk on the day of the injury. It was in the day time, and he drove out of an alley near Geyer on Jefferson avenue, and across the defendant's street car tracks, of which there are two, one for the north-bound, and one for the south-bound cars on Jefferson avenue; his purpose being to supply a milk customer on the west side of said avenue. When he drove out of the alley and onto the street, he was sitting in his covered wagon on the seat usually occupied by the driver, and before driving upon the track he listened for a car and looked from under the cover of his wagon both north and south for some distance, about 100 feet, to ascertain if there was a car approaching in near proximity, and, not seeing a car, proceeded, without stopping his horse, to cross the track. It is in evidence that, had he desired to do so, he might have seen the car for at least three blocks. The space between the curb at the alley where he looked and listened for a car and the east rail of the car track was about 10 or 12 feet, and his horse was just about stepping upon the car track at the time he peered out from under the covering, looking for a car. He desired to go to the southwest. He was driving slowly or in a walk in that direction, and crossed the tracks at an angle of about 45 degrees. The street was rough at that point, the track rails extending above the level of the street, and by so crossing, he could more successfully convey the milk without jostling the lids off of the cans. While his wagon was still partially on, but in the act of leaving, the west track, he heard a noise behind him, and, looking around, he saw the car within 10 feet of his wagon. He whipped up his horse in an endeavor to escape, but the car struck the rear wheel of his wagon between the hub and the felloe, whereby the wagon was overturned and his leg was broken and other painful injuries inflicted upon him. He heard no gong sounded and did not observe the motorman making any effort to stop the car at the instant he looked around. Mr. Tobias, for plaintiff, testified that he was a passenger sitting on the front seat of the car which collided with the wagon. The car was going at an ordinary rate of speed, when, within 8 or 10 feet of the plaintiff's wagon, the motorman checked the speed. The body of the milk wagon was then on the

track in front of the car and in the act of leaving the same. Just at that time he said, in speaking of the car: "It slowed up to go slower, but kept on going." After it had collided with the wagon, the car then went backwards. Witness Hartman testified for plaintiff that he saw the accident; that when the car was about 18 feet from the plaintiff's wagon the motorman commenced to put on the brake and slow down the car; that the wagon was then in the act of crossing the track, but, when the car was within 6 or 8 feet of the wagon, he turned on the power in full force and collided with the rear wheel before it became clear of the car in its southward course. His testimony on this question is as follows: "Q. In what manner did the motorman begin to stop the car when he began to turn on the brake? Now, state to the jury as near as you can, just what the motorman did. A. He started to turn on the brake when he was about 16 or 18 feet from the wagon. Q. You have told us that. Just explain to the jury or tell the jury what efforts did he make before he struck the wagon until he started to stop? A. He didn't attempt to stop it at all until he got within that distance. Q. State what effort he made as near as you can—the manner in which he applied that brake. A. He slacked it down slow when it was about that distance, then all of a sudden he turned it at full force. Q. Where was he when he turned it at full force? A. Within 6 or 8 feet of the wagon. Q. Then when he got near the wagon he turned it at full force? A. Yes, sir." The defendant introduced no evidence.

The court refused a peremptory instruction to find the issues for the defendant. The court submitted the case on behalf of the plaintiff in a proper instruction upon the assumption that the plaintiff was negligent in failing to exercise due care to discover the approach of the car prior to going upon the track, and instructed, in effect, that the defendant was liable to him only in the event it had a last clear chance to avert the injury by the use of the appliances at hand, and neglected to do so after his position of danger became apparent to, or by the exercise of ordinary care could have been discovered by, the motorman, and that defendant's negligence was the sole and proximate cause of the injury without that of plaintiff directly and proximately contributing thereto. Among other instructions, the court gave the following at the instance of the plaintiff: "The court instructs the jury that the burden of showing that plaintiff was guilty of negligence contributing to his injuries is upon the defendant company to establish by a preponderance of the evidence. But you are also instructed that the burden is upon the plaintiff to prove by the evidence that the defendant was guilty of negligence which was the proximate cause of the injuries complained of." The answer of the defendant,

besides a general denial, contained a plea of contributory negligence on the part of the plaintiff and all phases of the case on the theory of plaintiff's contributory negligence were properly submitted to the jury in numerous instructions given at the instance of the defendant, as well as the doctrine that if the injury resulted from the concurring negligence of both parties, plaintiff could not recover. In all, the court gave 11 instructions on behalf of the defendant, presenting every phase of the case from its standpoint, among which instructions given on behalf of defendant, was the following: "Plaintiff alleges as his cause of action that while he was driving across Jefferson avenue, in the city of St. Louis, Mo., from the east to the west side thereof, at a point near the intersection of Geyer avenue, a car belonging to the defendant, then and there in charge of defendant's agents, approached at a high rate of speed from the north, moving in a southerly direction without sounding a gong or in any way signalling its approach, and that plaintiff was not aware of the approach of said car until it was near upon him; and that after plaintiff's dangerous position became known to the defendant's said agents, or by the exercise of ordinary care, ought to have become known to them, they made no effort to stop the car or check its speed, and failed to sound the gong, whereby his wagon was struck and he was injured. The answer of defendant denies each and all of these allegations, and also avers that plaintiff's alleged injuries, if any, were caused by his own carelessness and negligence contributing thereto, by the plaintiff, without looking or listening for an approaching car going onto defendant's track in such close proximity to an approaching car that the same came into collision with him, when the plaintiff might, before going onto said track, by looking, have seen, and by listening, have heard said approaching car in time to have remained off said track until said car passed him, and thereby have avoided a collision with said car. The jury are instructed that the burden is on the plaintiff throughout the whole case to show to the satisfaction of the jury, by the greater weight of the evidence, that the acts of negligence which he alleges, or some one of them, are the efficient and proximate cause of the injuries which he received, and that without such negligence on the part of defendant's agents he would not have been injured, and unless the plaintiff has so proved to the satisfaction of the jury by the greater weight of the evidence, that the acts of negligence, or some one of them which he claims the defendant's agents were guilty of, was the cause of his alleged injuries, the verdict should be for the defendant." The court refused the following instruction: "The jury are instructed that, while the duty of watching for persons and vehicles on or near the tracks devolves upon those in charge of the car, nevertheless, they

have the right to assume that persons on the street will be prudent and keep a reasonable lookout for the approach of cars, and if the motorman in charge of the car at the time of plaintiff's alleged injuries saw the plaintiff driving on the street near the track, he had a right to assume that he would be on the lookout for a car, and that he would not drive on or so near the track as to expose himself to the danger of a collision, and the defendant's motorman had a right to move his car forward upon such assumption, until it became apparent, or by the exercise of ordinary care ought to have become apparent, to him that plaintiff did not know of the approach of the car, or that he intended to drive immediately in front thereof. And in this connection the jury are further instructed that by the allegation in the petition, that defendant's agents in charge of said car were aware of plaintiff's dangerous position, is meant that the plaintiff was in a position of peril a sufficient length of time to enable the said motorman in charge of the running of the car, by the exercise of ordinary care and by the use of such instrumentalities as he had on hand for that purpose to enable him to stop the car and avoid the collision. In other words, until the plaintiff was upon the track, or in actual danger of collision with the car by going forward, the motorman was not obliged to bring the car to a stop."

After a verdict and judgment for the plaintiff, defendant appeals, assigning as error: First, that the court should have given its peremptory instruction to find the issues for the defendant; second, the giving of plaintiff's second instruction, *supra*; and third, the refusal of its instruction copied in the statement. The assignments will be noticed in the opinion.

Boyle, Priest & Lehman, for appellant.  
Marion C. Early, for respondent.

NORTONI, J. (after stating the facts).

1. The first point urged for a reversal of the judgment is that the court erred in its refusal to peremptorily direct a verdict for the defendant. It is true that the plaintiff's evidence showed that he could, by exercising more care than he did, have seen the approaching car for two or three blocks, and possibly have heard the same for nearly one block at the time he peered from under his wagon cover and looked and listened therefor. Yet by looking for 100 feet in either direction and neither seeing nor hearing its approach, he evidently satisfied himself that no car was then in near proximity and that it would be safe for him to proceed to cross the tracks. But it is entirely unnecessary for the court, on this record, to pass upon the question as to whether ordinary prudence and care would require him to survey the car tracks for a distance beyond the 100 feet in either direction viewed by him before driving thereon, or to listen more at-

tentively for an approaching car, inasmuch as the case was submitted to the jury upon the theory that plaintiff was first negligent in failing to exercise ordinary care in that behalf, and it was only for the last breach of duty on the part of the defendant, the negligence of the plaintiff after he became in his situation of peril being in no wise proximate to nor concurring in his injury, that the defendant could be held to respond therefor. There is ample evidence in the record to sustain a recovery on this theory of the case. It is palpable that the motorman, by exercising ordinary care in the discharge of his duty in the premises, could have seen the plaintiff on or about to go upon the tracks in time to have averted the injury by the proper employment of the appliances therefor at hand. The motorman could have seen the plaintiff in the act of driving toward and across the track at all times after he drove out of the alley and toward the tracks. At the time plaintiff looked for a car, his horse was within two feet of the car tracks, so it is said in the evidence, and the fair inference is that the car was more than 100 feet distant at the time, or the plaintiff could have seen it. Plaintiff then being in the act of driving upon the track and in a position of danger from the approaching car under the control of the motorman, it became imperative on the motorman, in discharging that duty owing from his master to the plaintiff, to employ the appliances at hand, in the exercise of ordinary care, to the end that the car should be under such control as to avert the threatened collision; for under the law of this state, it was his duty not only to exercise ordinary care to avert the injury after discovering the plaintiff in peril, but it was his duty as well to exercise ordinary care to discover the plaintiff when approaching the track with the apparent intention to drive upon and across the same. The evidence tended to prove that the motorman was negligent with respect to this duty, and moreover, the evidence (that of Hartman) is to the effect that the motorman did actually discover plaintiff's position of peril in time, no doubt, to have prevented a collision. Hartman said, and the same inference arises from the testimony of Tobias, that when the car was about 18 feet from plaintiff, the motorman "slowed it (the car) down slow when it was about that distance; then of a sudden he turned it at full force. \* \* \* Q. Where was he when he turned it at full force? A. Within 6 or 8 feet of the wagon." From this, the only legitimate inference that can possibly arise is that the motorman had the car under control and when, within 6 or 8 feet of the wagon, thinking that the plaintiff would be able to get out of the way, negligently turned on the power, propelling the car forward, just in time to strike the rear portion of the rear wheel, thereby causing the wagon to over-

turn and the plaintiff's resultant injuries. Here is abundant evidence authorizing the submission of the case to the jury under the last clear chance doctrine, as announced by the Supreme and appellate courts of the state, and the court was justified in refusing the peremptory instruction. *Guenther v. Railway*, 95 Mo. 286, 8 S. W. 371; s. c. 108 Mo. 18, 18 S. W. 846; *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195; *Moore v. St. Louis Transit Co.* (Mo. Sup.) 92 S. W. 390; *Klockenbrink v. Railway Co.*, 172 Mo. 678, 72 S. W. 900; *Klockenbrink v. Railway Co.*, 81 Mo. App. 351; *Cooney v. Railway Co.*, 80 Mo. App. 226; *Moore v. Transit Co.*, 95 Mo. App. 728, 75 S. W. 699; *Barrie v. Transit Co.*, 102 Mo. App. 87, 76 S. W. 706.

2. We have thus noticed the evidence to demonstrate the correct action of the trial court in refusing the peremptory instruction on its merits. But aside from this, it may be said that this question is no longer open for review in this case. The identical question on the identical facts in all material respects, between the identical parties in this same case was presented on a prior appeal, wherein it was adjudged that the evidence was sufficient to remove the case beyond the province of the court as a question of law and within the province of the jury as a question of fact. See *Barrie v. Transit Co.*, 102 Mo. App. 87, 76 S. W. 706. If the facts, as developed in the former trial, as appears from the report of the case, and those in the record now before us, are to be differentiated at all, it is in favor of the plaintiff here, and, under these circumstances, the rule is well established that, on a second appeal, as in this case, where the evidence is substantially the same, without material variance from that before the court in the prior adjudication, the previous ruling will be considered as conclusive for the purpose of the case and the question treated thereafter as *res adjudicata*, unless it appears that the court overlooked a controlling statute or decision and therefore erred in its opinion as to the legal effect of the facts on which the judgment of the court was pronounced. *Baker v. Railway Co.*, 147 Mo. 140-152, 48 S. W. 838; *Hesse Ptg. Co. v. Protective Ass'n*, 81 Mo. App. 467.

3. The court instructed the jury, at the instance of the plaintiff: "The court instructs the jury that the burden of showing that the plaintiff was guilty of negligence contributing to his injuries is upon the defendant company to establish by a preponderance of the evidence. But you are also instructed that the burden is upon the plaintiff to prove by the evidence that the defendant was guilty of negligence which was the proximate cause of the injuries complained of." The defendant complains that the giving of this instruction was error in this, that, while the first clause thereof, which informs the jury that it devolved

upon the defendant to establish plaintiff's contributory negligence by a preponderance of the evidence, is proper enough, the second clause, which informs the jury as to the measure of proof required on behalf of the plaintiff, is error in omitting to employ the word "preponderance" in connection with the word "evidence." It is argued that while the defendant was required to establish plaintiff's negligence by a preponderance of the evidence, the instruction was especially unfair to it in this case, inasmuch as it placed no witness upon the stand in defense, and that the instruction was calculated to mislead the jury in believing that any amount of evidence, whether a preponderance or not, was sufficient to establish negligence against the defendant, whereas the greater burden of proof was devolved upon it to establish the negligence against the plaintiff. The instruction is subject to criticism, but in this case, where the defendant placed no witnesses on the stand and rested its rights entirely upon the evidence as adduced by plaintiff's witnesses, we are unable to appreciate the force of defendant's argument, for there was no conflict in the proof and plaintiff's case was uncontradicted. All the evidence in the record tended to prove that the motorman was negligent, and no one, not even the motorman himself, was placed on the stand to controvert it for defendant, and under these circumstances, when coupled with the fact that the jury were properly instructed on the question on the part of the defendant, and were further instructed at the instance of the plaintiff that all of the instructions of the court must be read together and taken as their guide, the jury were certainly not misled as to the fact that the burden was on the plaintiff to establish his case by the greater weight or preponderance of the evidence. It will be observed that the portion of the instruction complained of, which omits the word "preponderance" does inform the jury that the "burden" is on the plaintiff, and this, when considered by the jury in connection with that given on the same subject for defendant, and together with the instruction to the effect that it was the duty of the jury to take all the instructions and read them together as their guide in the case, is quite sufficient to persuade us that the jury were not likely to be misled thereby. In the first instruction given on behalf of the defendant, the jury were told as follows: "The jury are instructed that the burden is on the plaintiff throughout the whole case to show to the satisfaction of the jury, by the greater weight of the evidence, that the acts of negligence which he alleges, or some one of them, are the efficient and proximate cause of the injuries which he received, and that without such negligence on the part of defendant's agents he would not have been

injured, and unless the plaintiff has so proved to the satisfaction of the jury by the greater weight of the evidence, that the acts of negligence, or some one of them, which he complains the defendant's agents were guilty of, was the cause of his alleged injuries, the verdict should be for the defendant." Here, in most positive terms, the jury were repeatedly told that unless the plaintiff proved his allegation by a greater weight of the evidence, he could not recover, and further, the jury were instructed (plaintiff's instruction No. 4): "The instructions of the court are all to be taken and read together, and the law therein laid down, applied by the jury to the facts of the case," etc. Ever since the Supreme Court, in *Owens v. Railway Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39, adopted the views of Judge Black, expressed in his dissenting opinion in *Sullivan v. Railway Co.*, 88 Mo. 169-188, overruling the *Sullivan Case*, the rule has been uniformly adhered to in this state that the error in one instruction will not constitute reversible error if the question is properly covered in other instructions so that, when taking the instructions together as a whole, they present the issues fairly and are not calculated to mislead and are not misleading to the jury. Under the authority of these cases, we are persuaded that the error in the instruction complained of, in view of the others given, was not such as to mislead the jury or affect the substantial rights of the defendant. *Henry v. Railway Co.*, 118 Mo. 526, 21 S. W. 214; *Hughes v. C. & A. Ry. Co.*, 127 Mo. 447, 30 S. W. 127; *Burdoin v. Trenton*, 118 Mo. 358, 22 S. W. 728; *Owens v. Railway Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; *Meade v. Railway Co.*, 68 Mo. App. 92; *Ephland v. Railway Co.*, 57 Mo. App. 147; *Shaw v. Dairy Co.*, 56 Mo. App. 521; *Nelson Distilling Co. v. Creath*, 45 Mo. App. 169.

4. The court gave, at the instance of defendant, 11 instructions, covering in all seven pages of printed abstract. In this case where the issues were few and simple and refused one instruction, No. 12, set out in the statement supra. Error is assigned because of its refusal. In those given, the court had submitted every possible phase of defendant's theory of the case and covered all matters incidental thereto, and was therefore amply justified in refusing the twelfth instruction requested, if on no other ground than that a multiplicity of instructions would tend rather to confuse than enlighten the jury on the issues and law of the case. *Renshaw v. Firemen's Ins. Co.*, 33 Mo. App. 394; *McAllister v. Barnes*, 35 Mo. App. 668; *Crawshaw v. Sumner*, 56 Mo. 517. By reference to that instruction, however, it will be noted that after telling the jury a number of things, it concludes: "Or, in other words, until the plaintiff was upon the track or in actual danger of a

collision with the car by going forward, the motorman was not obliged to bring the car to a stop." This is not the law. The motorman's duty to exercise ordinary care to avoid injuring the plaintiff was not deferred until the plaintiff was "upon the track or in actual danger of a collision with the car by going forward," but, on the contrary, it became the motorman's duty to exercise ordinary care to avoid a collision by using the appliances at hand as soon as he saw, or by the exercise of due care could have seen, the plaintiff approaching the track apparently intending to pass before the car and thus become imperilled. *Moore v. Transit Co.* (Mo. Sup.) 92 S. W. 890, and cases supra. The instruction told the jury that the motorman was under no obligation to act until the plaintiff was upon the track or in actual danger of a collision by going forward. If the duty to exercise ordinary care to save human life, is thus deferred by the law until actual danger of collision by going forward, then the principle which requires the exercise of ordinary care for the protection of those going toward the track with the apparent intention of walking on or across the same, is of no force. In our opinion, the court very properly refused this instruction for the reasons given.

Finding no reversible error in the record, the judgment will be affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

## RUDD v. AMERICAN GUARANTEE FUND MUT. FIRE INS. CO.

(St. Louis Court of Appeals. Missouri.  
June 5, 1906.)

### 1. INSURANCE—PROVISIONS OF POLICY—WAIVER—AUTHORITY OF LOCAL AGENT.

Local agents of insurance companies vested with authority to make contracts to insure and to countersign and deliver policies and receive premiums, have power to waive stipulations in the policy, although it contains a restriction declaring that its provisions can only be waived by an agreement in writing signed by the president or secretary.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 948-965.]

### 2. SAME—IRON-SAFE CLAUSE—WAIVER.

Where an agent of a fire insurance company issues a policy with knowledge that the insured has no iron safe, and that owing to the nature of his business it is impossible for him to remove his books from the insured building when he is absent therefrom, a provision of the policy making it void unless the books are kept in an iron safe, or removed from the building when insured is absent therefrom, is waived.

### 3. SAME—EFFECT OF ADJUSTMENT OF LOSS.

The adjustment of a loss under a fire policy waives a forfeiture for previous violation of conditions of the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1078-1082.]

### 4. SAME—ACTION ON POLICY—INSTRUCTIONS.

Where, in an action on a fire policy in which it was claimed that an agent of the in-

sured had adjusted the loss and agreed to pay it, its agent testified that at the time he agreed on a settlement he did not know that the iron-safe clause of the policy had not been complied with, and that the books of insured had been lost, it was error to instruct that the agent's agreement to settle estopped the company from asserting a forfeiture for noncompliance with the iron-safe clause, without requiring a finding that at the time the agreement was made the adjuster had knowledge of the destruction of the books.

**5. SAME—FORFEITURE—WAIVER BY ADJUSTMENT—AGREEMENT AS TO ADJUSTMENT.**

Where, after a loss under a fire policy, insured agreed with an adjuster sent by the company that any action taken in investigating the cause of the fire, and the amount of loss or damage should not waive or invalidate any rights of either of the parties this agreement did not prevent a final adjustment and promise by the adjuster to pay the loss from operating as an estoppel preventing the company from enforcing a forfeiture for previous noncompliance with a provision of the policy.

**6. TRIAL—INSTRUCTIONS—IGNORING DEFENSE—ACTION ON INSURANCE POLICY.**

Where, in an action on a fire policy, the insured defended on the ground of forfeiture for failure to comply with the iron-safe clause, an instruction that if the company issued the policy and while it was in force, and without the fault of the plaintiff, part of the property was destroyed, and proper proofs of loss made or waived, the jury should find for plaintiff, improperly disregarded the defense, and was erroneous.

Appeal from Circuit Court, Dent County; Leigh B. Woodside, Judge.

Action by W. E. Rudd against the American Guarantee Fund Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

A. E. McGlashen and Barclay & Fauntleroy, for appellant. Cope & Elmer, for respondent.

**GOODE, J.** This is an action on a fire insurance policy issued by the defendant company October 18, 1903, to run for one year and covering a stock of drugs and merchandise contained in a store in the town of Anutt, in Dent county, Mo. The stock was entirely destroyed by fire July 25, 1904, the store building having been ignited by some unknown cause. It was agreed at the trial that the loss to plaintiff on the property covered by the policy was greater than \$500, the maximum indemnity to be paid in case of loss by fire. The action was instituted to recover that sum. A few days after the fire the company sent plaintiff blank proofs of loss which he filled out, signed, and returned to the company. No point is made that the proofs furnished fell short of complying with the requirements of the policy. In defense a violation of the "inventory and iron-safe clause" of the policy was pleaded. This stipulation required the assured to take a complete inventory of stock at least once in each calendar year, and unless such inventory had been taken taken within 12 months prior to the date of the policy, to take one in detail within 30 days. It also required him to keep a set of books clearly setting forth

a complete record of the business transacted for cash and on credit, including purchases, sales, and shipments, from the date of the inventory, and during the continuance of the policy, and to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the building containing the insured stock was not open for business; or failing this, to keep such books and inventory in some place not exposed to a fire which might destroy the building. It was further provided that if the assured failed to produce such books and inventory for the inspection of the company on demand, the policy should become void, and there could be no recovery on it. The defendant alleged that plaintiff failed to make an inventory in compliance with the clauses we have digested; that he did not keep a set of books showing purchases and shipments during the term the insurance contract was in force, or keep such books and inventory locked in an iron safe, or other place not exposed to fire, and did not produce such books on demand of defendant, though the fire occurred when the building where plaintiff kept his store was not open for business; that is, did not occur during business hours; that whatever inventories or books plaintiff kept were destroyed by the fire and plaintiff was unable to produce any books or inventories from failure to preserve the same in a fireproof iron safe or other place not exposed to fire. Therefore, it is alleged the policy became null and void, and defendant tendered into court and offered to return to plaintiff, the premium paid for the insurance.

A reply was filed denying each allegation of the answer and averring in avoidance of defendant's plea in bar, that John M. Stephens is defendant's agent at Salem; that plaintiff made application to said Stephens for insurance on the property covered by the policy, and, at the time of applying for it, informed Stephens that the drug store and said business would be conducted in connection with plaintiff's practice as a physician; that he did not employ a clerk nor keep the store open regularly for business; that Stephens was also informed at the time of such application that plaintiff did not have an iron safe and this fact was well known to said agent from a personal inspection of the risk; that Stephens told plaintiff it was not necessary to have an iron safe; that plaintiff's profession called him away from the store at all times of the day and night and said calls for his professional services were so urgent that plaintiff was compelled to leave without having time to put his books in a place of safety; that plaintiff did keep a set of books showing the sales made by him, and invoices of all goods he purchased, and said agent knew the kind and character of books kept and where they were expected to be kept, and assented to the keeping of them in such manner, and waived the keeping of them in an iron safe; that with this

understanding, plaintiff paid the agent the premium, and it was accepted by the company, and the policy issued; by which act defendant, through its agent, waived all right to claim any benefit from said conditions set forth in the answer; that plaintiff can produce, and has offered to produce to defendant's adjuster, and now offers to produce the bills of invoice of all purchases made by him, and make full proofs of loss, but the same were not demanded by said adjuster; that defendant's adjuster agreed to pay the loss to plaintiff by reason of said fire, at the expiration of the time fixed for payment of losses by the policy, said adjuster having agreed to pay plaintiff's loss in full after having made an investigation concerning the origin of the fire; that by agreeing to pay said loss in full, there became an accord and satisfaction of damage and loss on part of plaintiff, and defendant waived any forfeiture of the policy it might have asserted, and is now estopped from asserting a forfeiture.

The policy contained the clauses alleged in the answer, and it was proved the fire occurred at night when the store was not open for business; that plaintiff told Stephens, the agent to whom he made application for insurance, that plaintiff kept no clerk, and the store would be closed at irregular hours; that there was no iron safe in it; that whenever plaintiff knew he was to be away for any length of time he would leave his books at the store of Mr. Porter in the same town. When negotiating for the insurance, plaintiff objected to the iron-safe clause in the policy, explaining to the agent that it would be impossible, on account of his professional practice to secure his books from fire in the manner required by that clause. Both he and Stephens swore the latter consented to accept his application for the policy on the understanding that keeping the books in an iron safe or some place where they would be safe from fire which might consume plaintiff's store building, would not be obligatory on plaintiff. A written application for the insurance was signed in plaintiff's name by his brother-in-law, who, according to plaintiff's testimony, had authority to act for him. This application was dated October 13, 1903, and contained certain statements and warranties; among others, that plaintiff would comply with the inventory and iron-safe requirement. One clause of the policy was the following: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added hereto, and no officer, agent or other representative of this company, except the president or secretary, shall have power to waive any provision, or any condition of this policy, except such as by the terms of this policy, may be the subject of agreement indorsed hereon, or added hereto,

and as to such provisions and conditions, no officer, agent or representative, shall have such power, or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto. Nor, shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached and signed by the general agents."

Some six weeks after the fire a special agent or adjuster visited Anutt for the purpose of investigating the loss. The testimony for plaintiff is that after he had looked into the matter this adjuster said he was satisfied the loss was an honest one and greater than the amount of indemnity provided; that plaintiff's claim would not be contested by the company, but he would be paid in a few days; that the money would be paid to the Salem Bank, and plaintiff must deposit his policy there, and a receipt for the \$500 to be paid him. The adjuster denied making such a statement, and swore he had no power to adjust losses except subject to the company's approval. At the time of his visit he procured plaintiff's signature to the following document: "It is hereby mutually agreed and stipulated by and between W. E. Rudd, party of the first part and the Mercantile Town Mutual Insurance Company, and American Guaranty Fund Mutual Fire Insurance Company, party of the second part, that any action taken by the party of the second part in investigating the cause of the fire, or investigating and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on the 25th day of July, 1904, shall not waive or invalidate any of the conditions of the policy of the party of the second part, held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement. The intent of this agreement is to preserve the rights of all the parties hereto, and provide for an investigation of the fire and the determination of the amount of the loss or damage, in order that the party of the first part may not be delayed unnecessarily in his business, and in order that the amount of his claim may be ascertained and determined without regard to the liability of the party of the second part." Defendant objected to all the testimony regarding conversations between plaintiff and Stephens, the local agent of defendant at Salem, tending to show an agreement by Stephens made anterior to the issuance of the policy, that the inventory and iron-safe clause should not be obligatory; also, to testimony of statements by the adjuster that the loss would be settled, and to instructions recognizing such statements and acts of Stephens as a waiver of compliance by plaintiff with the inventory and iron-safe clause, and a waiver by the adjuster of any

forfeiture for noncompliance even if Stephens had not waived the clause in making the contract. These objections were overruled and exceptions saved. The verdict and judgment were for plaintiff, and defendant appealed.

1. There was evidence for the jury on the issue of waiver by Stephens, defendant's local agent, of the inventory and iron-safe clause. Indeed, the evidence was conclusive in favor of a waiver, if plaintiff and Stephens are to be believed. The former acted in good faith about the requirement, notifying Stephens when he applied for insurance that it would be impossible for him to conform to it because his practice as a physician called him away from the store, and as he had no clerk he would be forced to close the building frequently during business hours, instead of keeping it open continually. The clause in question required the books of account and the inventory to be kept in an iron safe or other place secure from fire, whenever the building, in which the merchandise was contained, was closed; a requirement incompatible with the professional engagements of plaintiff. He and Stephens discussed the matter, and the latter informed him in effect, that the company would waive the stipulation, and he need not comply with it. This case must be determined according to the latest decisions of the Supreme Court, which are in conflict with some decisions of the two appellate courts and, perhaps, with earlier decisions of the Supreme Court. Local agents of insurance companies vested with authority to make contracts to insure property, countersign, issue, and deliver policies and receive premiums, stand in the place of the companies in dealing with applicants for policies, and may waive stipulations which purport to be essential to the validity of the contract. *Parsons v. Insurance Co.*, 132 Mo. 583, 592, 31 S. W. 117, 34 S. W. 476; *Rissler v. Insurance Co.*, 150 Mo. 366, 374, 51 S. W. 755; *Carr v. Insurance Co.*, 100 Mo. App. 602, 75 S. W. 180; *Springfield etc., Co. v. Ins. Co.*, 151 Mo. 90, 98, 52 S. W. 238, 74 Am. St. Rep. 521; *Weed v. Insurance Co.*, 116 N. Y. 117, 22 N. E. 229; 1 *Joyce, Insurance*, § 439. According to these authorities, and we are bound by them, this rule prevails over a restriction in the policy prescribing a particular mode in which its terms may be waived or designating particular persons who alone have power to waive a term. Probably the rule has grown out of the repugnance of equity to forfeitures and its unwillingness to permit the forfeiture of an insurance policy to be accomplished by the fraud of the company. No point is made that the authority of Mr. Stephens was too narrow to make this rule applicable to the facts of the present case.

The position of the company is that, as the oral assent by Stephens to plaintiff's keeping his books and inventory in the storeroom and exposed to destruction by a fire which would

destroy the merchandise was given during the negotiation for insurance and anterior to the delivery of the policy, it was superseded by this document, which, when delivered, became the sole evidence of the contract. In other words, the rule is invoked that oral evidence is not admissible to contradict or vary the terms of a written instrument or ingraft a stipulation on it. The position that the court erred in receiving testimony regarding the oral agreement, and in treating it as evidence of a waiver by the company of the iron-safe clause, is untenable under the decisions in this state, and in many other jurisdictions. Stephens, as the full representative of the company, had power to waive the stipulation in question and did waive it by accepting the premium, and permitting the policy to stand without objection when he knew the stipulation was not being, and would not be, observed. *Riley v. Insurance Co.* (Mo. App.) 92 S. W. 1147. The law imputes the power to him. In such instances the waiver contains the elements of estoppel; and this is emphatically true in the present case, wherein the defense that plaintiff did not comply with the iron-safe clause is unconscionable, in view of the fact that the policy was issued to him, and his premium accepted after he had declared that it was impossible for him to observe the clause, and he would take the insurance only if compliance was excused. A waiver or estoppel has been allowed against an insurance company, because of the conduct of its local agent, when the facts before the court were exactly like those in the case at bar, and when the facts, though different, were so analogous as to render the point calling for decision, the same in principle as the one involved here. Identical cases wherein the issue was whether the acts of the local agents at the time the applications for insurance were presented, waived the necessity for compliance with the iron-safe clause, are: *Parsons v. Insurance Co.*; *Rissler v. Insurance Co.*, supra; *Bush v. Insurance Co.*, 85 Mo. App. 155; *Hanna v. Insurance Co.*, 109 Mo. App. 152, 82 S. W. 1115. Analogous cases are *Springfield, etc., Co. v. Insurance Co.*, supra; *Thompson v. Insurance Co.*, 169 Mo. 12, 68 S. W. 889; *Ross-Langford v. Insurance Co.*, 97 Mo. App. 79, 71 S. W. 720; *Ormsby v. Insurance Co.*, 98 Mo. App. 371, 72 S. W. 139; *Hackett v. Phila. Underwriters*, 79 Mo. App. 16. The last-cited cases, and many others which might be collected, hold, in effect, that, if the agent who writes the policy is aware when he does so of some condition which one of its terms makes essential does not exist, and notifies the insured that such condition is immaterial or will not be required, compliance with the term is waived. We hold that the court committed no error in refusing to instruct for a verdict for the company because plaintiff failed to preserve his books and inventory safe from the fire,



and in instructing that if he communicated to Stephens facts regarding his inability to comply with such clause and Stephens consented to waive compliance, the failure to comply was not a defense, nor in refusing counterinstructions requested by defendant. If this conclusion is opposed to the judgments in *Crigler v. Insurance Co.*, 49 Mo. App. 11, and *Gillum v. Insurance Co.*, 106 Mo. App. 673, 80 S. W. 283, the first of those decisions may be treated as overruled by, and the latter as opposed to, the later decisions of our Supreme Court.

2. The court instructed that if the special agent who visited the locality in the middle of September after the loss, was defendant's adjuster, and as such and on behalf of defendant, met plaintiff, and they agreed on the amount of the loss, and the agent in behalf of defendant, agreed to pay plaintiff the full amount of the policy, the jury should find for plaintiff, if they further found the agent had authority from the company to adjust and settle the loss. In another instruction the jury were told what authority was necessary to constitute an agent of an insurance company an adjuster. The definition given is not challenged. The same instruction advised the jury that if defendant's special agent had the authority necessary to constitute him an adjuster, and authority to agree on a settlement of the loss, either as adjuster or special agent, and did agree with plaintiff on a settlement, then the company was estopped to assert a forfeiture of the policy on the grounds set up in the answer; that is, for nonobservance of the iron-safe clause. The facts in proof warranted a finding that the special agent who visited plaintiff, came as an adjuster and was empowered to settle with plaintiff. When the agent visited plaintiff he asked about the books and inventory, and was told they had been consumed. There was abundant testimony that after he knew this fact, the agent said he was convinced the loss was honest and greater than the indemnity named in the policy; and that plaintiff would be paid without contest; that the agent told plaintiff to deposit his policy and a receipt with the Salem bank saying the check to pay the loss would be forwarded to the bank. Whether the iron-safe clause is intended simply to aid in ascertaining the amount of the damages done by a fire, or to diminish the risk of loss by preventing, in some measure, the collection of exaggerated indemnities, it is obvious that when a company is satisfied both that a fire was of honest origin, and that the damage was greater than the amount of the indemnity, all purposes which can be served by the preservation of account books and an inventory are achieved without those data. According to the testimony for plaintiff, there was a complete adjustment of the loss in question, and everything was done looking toward settling it, except mak-

ing the payment. Plaintiff testified that he and the agent agreed on a settlement. This testimony is corroborated by Stephens and other witnesses. The adjustment of a loss waives a forfeiture for a previous violation of the policy. *McCollum v. Insurance Co.*, 61 Mo. App. 352; *Ramsey v. Association*, 71 Mo. App. 383, 13 Am. & Eng. Ency. Law (2d Ed.) p. 326; 4 *Joyce, Insurance*, 3385; *Levy v. Insurance Co.*, 10 W. Va. 560, 27 Am. Rep. 598; *Egan v. Insurance Co.*, 10 W. Va. 583; *Ill., etc., Co. v. Archdeacon*, 82 Ill. 236, 25 Am. Rep. 313; *Farmers', etc., Co. v. Gargett*, 42 Mich. 289, 3 N. W. 954; *Smith v. Insurance Co.*, 62 N. Y. 85; *Wagner v. Insurance Co.*, 143 Pa. 338, 22 Atl. 885. The adjuster testified that if he said he would pay the loss or agreed on a settlement, it was before he knew the books had been consumed. An essential element of a waiver is, of course, knowledge of the fact to be waived. Therefore, this testimony of the agent presented an issue of fact, and the court erred in instructing that the agent's agreement to settle estopped the company from asserting a forfeiture for noncompliance with the iron-safe clause, without requiring a finding that, at the time the agreement was made, the agent had knowledge of the destruction of the books.

3. It is insisted that what the special agent did could be no waiver because he took a written agreement from plaintiff that an investigation into the cause of the fire, and the amount of the loss should not waive any right of either party. Testimony for the plaintiff goes to show that instrument was produced, and plaintiff's signature obtained after there had been an agreement to settle the loss. We have recognized the right of an insurance company to protect itself by such an instrument, and likely defendant is protected against any waiver or estoppel which might be asserted from an inquiry into the cause and the extent of the loss. *Keet-Rountree Co. v. Insurance Co.*, 100 Mo. App. 504, 74 S. W. 469. But there is nothing in the terms of the so-called nonwaiver agreement to protect the company against the consequences of an adjustment or settlement. The document provided merely that any action taken by the insurance company in investigating and ascertaining the cause of the fire, and the amount of damage done, should not create a waiver or invalidate any of the conditions of the policy. It is not clear that an investigation of those matters would waive a forfeiture had no nonwaiver writing been taken. But according to the testimony for plaintiff, the special agent did more. He agreed to settle the loss, stated the mode in which the settlement would be made and declared, after he knew the books had been destroyed, that the indemnity would be paid without contest. The rule is that such conduct waived any previous ground of forfeiture, and the nonwaiver in-

strument neither prevents, nor undertakes to prevent the operation of the rule.

4. It is said that the instructions permitted a recovery on an alleged accord, which was first set up as a cause of action in the reply. When a waiver is relied on, we prefer to see it stated in the petition. But it is not true that the action is on an accord or new agreement made between the adjuster and plaintiff after the fire, instead of on the original contract. In insurance litigation waiver of conditions may be proved under an averment of performance. This rule enabled plaintiff to give evidence under his petition, going to show the iron-safe clause was waived by Stephens when the policy was written, or, if it was not, that a forfeiture for noncompliance with it was waived by a settlement. The policy itself provided for an adjustment of the loss, and the act of the special agent in adjusting it was but carrying out the original contract, and constituted no new promise on which plaintiff sued. This was adjudged in *Gerhart Realty Co. v. Insurance Co.*, 86 Mo. App. 598.

5. The court instructed that if the jury found the company issued the policy sued on, and while it was in force, and without fault of plaintiff, part of the property was destroyed, and plaintiff made proofs of loss on blanks furnished by the company, or if such proofs were waived by the company, the jury should find the issues for plaintiff and assess his damages at the value of the goods so burned, not exceeding \$500. That instruction omitted any mention of the defense in the case, and authorized a verdict for plaintiff on a finding of facts, none of which was contested. It was erroneous.

The judgment is reversed, and the cause remanded. All concur.

#### KURZ v. KURZ.

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

**HUSBAND AND WIFE—SEPARATE SUPPORT AND MAINTENANCE—GROUNDS—EVIDENCE—SUFFICIENCY.**

In an action by a wife for support and maintenance for herself and children, evidence considered, and held sufficient to have justified the wife in separating from the husband.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by Mary Kurz against John Kurz to compel defendant to furnish plaintiff and her children support and maintenance. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Tapley & Fitzgerald, for appellant. Pearson & Pearson, for respondent.

GOODE, J. These parties are husband and wife, and this action is to compel the defendant to furnish support and maintenance for plaintiff and her two minor children. The

parties are both Germans by birth, were married in St. Louis in 1875, lived there some 10 years, and then moved to Ralls county, where they have lived 20 years. Plaintiff is 53 years old, and defendant 66. The separation occurred September 2, 1903, on which day plaintiff left her home in Ralls county and went to live with her married daughter. Defendant has furnished her nothing to live on since. Seven children were born of this marriage, four sons and three daughters, and all but two of the children are of full age. The minors are two girls of 10 and 12 years, respectively. The couple have prospered in life, for the evidence shows defendant has a farm of 835 acres in Ralls county, well improved and stocked with cattle and horses, and supplied with farming implements, and that he has some \$14,000 to \$16,000 of money loaned. He testified that he was worth \$7,000 when he married, but his wife testified that he was not worth over \$2,000 at that time. It is evident that he has accumulated much property since his marriage, and evident, too, that he and his wife have been a hard-working couple. She carried on the usual housework on a farm, sold eggs, butter, and chickens to get money for her personal expenses, and in every way contributed her portion of the industry required to succeed.

The petition alleges that plaintiff left defendant because his treatment rendered her condition intolerable. He is said to have subjected her to indignities, called her vile names, to have been morose and crabbed, never to have exhibited any affection, and by persevering continually in such conduct to have driven her from home. The testimony of the witnesses is that defendant was of a morose, taciturn, and gloomy nature; but there was some conflict regarding the manner in which he treated his wife. If she and her children are to be believed, this treatment was of a brutal character in every respect, except that he never offered her personal violence. He was extremely crabbed, insulting, called her opprobrious names, was harsh to the children, on one occasion kicked a daughter until she had a violent nervous attack in consequence, and generally demeaned himself in a way that was unbearable. His good qualities were industry and providing well for the family. Plaintiff was afflicted with a cancer on her head. As an instance of the alleged harsh language defendant would use to her, it is proved he said to her, regarding her disease, that she was so full of devils that one had burst in her head and wanted to get out; that she had a devil in her head. The children all sympathized with the mother in her domestic trouble, and their testimony strongly corroborated hers in regard to the intolerable harshness of defendant's conduct. Suffice to say that if the testimony for the plaintiff is true—and in our opinion it greatly prepon-

derates over that for the defendant—she was fully justified in leaving home and separating from her husband. She was in extreme misery from the cancer, and was entitled to kindness, if not affection; but defendant's conduct appears to have been unsympathetic and callous to the last degree. The court awarded plaintiff \$50 for the support of herself and the minor children during their minority, and \$30 for her own support after that time, as small an award as could be expected in view of the substance of the parties, which had been accumulated in part by plaintiff's labor.

It is contended on behalf of defendant that he and his wife got along well until he went to Europe in 1900, leasing out the farm during his absence to the two oldest sons, John and Adolph. It is said that when he returned these sons wished to retain the farm and deprive defendant of his rights as owner; to subordinate him in the household and practically drive him from home. It is said, further, that the mother took the part of the sons, and the disagreement between them and the father was the cause of the separation. It is certain that the father fell out with his boys and gave them notice to leave the farm, which they did. But there is little or no testimony, aside from his own, to show this was the cause of his wife's leaving him. It is further said that plaintiff testified herself she had left because she wanted to go elsewhere to have her head treated. That she wanted treatment for the cancer is true; but the record by no means yields the conviction that she left the defendant and refused afterwards to live with him for that reason. No question of importance is raised on this appeal, except as to the sufficiency of the evidence to justify the judgment of the court.

We think the judgment is well supported by testimony and is moderate. Therefore it is affirmed. All concur.

#### BADER v. STROTHER.

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

#### APPEAL—REVIEW—EVIDENCE.

Where, in an action by plaintiff for an alleged balance due, the verdict was rendered for him on conflicting evidence, it will not be set aside, in the absence of a preponderance of the evidence in favor of the theory that he had been fully paid.

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by John W. Bader, administrator, etc., against J. D. Strother. Judgment for plaintiff and defendant appeals. Affirmed.

Chas. G. Sheppard, for appellant. S. J. Corbett and Brewer & Collins, for respondent.

GOODE, J. John W. Bader, the plaintiff, administrator of the estate of J. W.

Canady, deceased. In that capacity he instituted the present action against defendant for an accounting and judgment for whatever balance might be found due on a certain contract between plaintiff and defendant for the sale of timber. This timber stood on a quarter section of land in Pemiscot county, which had belonged to Canady, the deceased. Canady had made a sale of the fee to the land in his lifetime, but had reserved a right to take off the timber. Pursuant to this reservation, after his death, Bader, as administrator, made a contract with Strother by which the timber on the land was sold to the latter at the following prices: Oak, ash, and cottonwood timber, \$2 per 1000 feet; and gum timber, \$1 per 1000 feet. The contract was in writing and provided that Strother could make an estimate every 30 days of the timber cut and stacked during the previous month and pay for it. These estimates were not to be conclusive. There was a clause in the contract stating that, after all the timber had been cut, there should be a final settlement according to the actual measurements of the timber, and if it appeared in this settlement that Strother had either overpaid or underpaid in the monthly settlements, the error should be rectified. The petition charges that Strother refused to make an estimate every 30 days, as required by the agreement, or to pay plaintiff monthly; that, according to the best information plaintiff had been able to obtain, the quantity of timber cut by defendant exceeded 500,000 feet of oak, ash, and cottonwood, and 200,000 feet of gum—that is to say, was over 700,000 feet in all. It was averred that on or about March 5, 1903, defendant had paid \$77.40, and on or about April 6, 1903, \$140.62, which amounts represented the total payments for timber made by Strother. The answer avers that estimates and payments were made each 30 days. It further pleads two payments, one of \$150 on October 30, 1903, and another of \$133.50 on November 15, 1903. These payments are stated to have been the final payments, and to have fully compensated plaintiff for all the timber cut. The answer further avers that, after the contract had been executed, defendant, at plaintiff's request, gave the latter an itemized statement of all the timber cut and the money for the same.

It is contended that the weight of the evidence shows plaintiff had been paid in full, and therefore the judgment ought to be reversed. The evidence on the question of payments is very contradictory. The parties practically agree that something more than 700,000 feet of timber was taken from the land by defendant and that it was worth over \$700. The judgment of the court was in favor of plaintiff for \$435.56. Plaintiff testified that two monthly payments were made, and that afterwards he never could get Strother to make estimates or payments. The credits he acknowledges in his petition

were two, but their dates, in the spring of 1903, varied from two checks he had given plaintiff in October and November of that year. Defendant asserted the two checks represented additional payments; whereas, plaintiff said he had been misled by the statement defendant furnished, and hence had affixed erroneous dates to the payments acknowledged in his petition; that the two checks were the only payments received. There is some confusion about the payments. Defendant contends there were six monthly payments in all. As to the itemized statement furnished by defendant after the timber had been cleared off, he swore plaintiff admitted it was correct, and plaintiff's attorney testified positively that plaintiff made no such statement, but, on the contrary, denied its correctness. Nearly all the evidence in the case was given by witnesses on the stand, and there was a marked discrepancy in their statements. We find no such preponderance of the evidence in favor of the theory that plaintiff had been fully paid as would justify us in setting aside the finding of the court below.

The judgment is affirmed. All concur.

#### WILSON et al. v. PARKE et al.

(St. Louis Court of Appeals, Missouri. May 22, 1906. Rehearing Denied June 5, 1906.)

#### 1. FRAUDULENT CONVEYANCES—PURCHASERS FROM FRAUDULENT GRANTEE—RIGHTS AS TO CREDITORS OF ORIGINAL GRANTOR.

A conveyance will not be held fraudulent as to the grantee on the mere fact that his grantor acquired the property conveyed through a fraudulent conveyance.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 608.]

#### 2. SAME—REMEDIES OF CREDITOR—BURDEN OF PROOF.

A purchase of property for a valuable consideration is presumed to be bona fide until the contrary is shown by direct evidence, or by the proof of facts from which fraud may be reasonably inferred.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 819.]

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by N. U. Wilson and others against H. B. Parke and others, in which William Hewitt and another intervene. From a judgment in favor of plaintiffs, interveners appeal. Reversed.

R. H. Davis and W. Cloud, for appellants. C. V. Buckley and H. S. Miller, for respondents.

BLAND, P. J. In December, 1901, H. B. Parke, under the trade-name of the Wentworth Lead & Zinc Mining Company, acquired a mining lease by assignment, on a parcel of land, in the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , section 1, township 26, range 29, in Lawrence county, Mo., upon which he erected a reduction plant and

placed mining machinery, etc., for the operation of the mine. On August 16, 1902, the Wentworth Lead & Zinc Mining Company, H. B. Parke and wife, by their deed of trust, duly acknowledged, conveyed the leased premises and machinery and tools thereon situated to W. R. Scheldrup, trustee, to secure the payment of the promissory note of said Parke, of even date therewith, for the sum of \$2,500, to the Pierce City National Bank, the beneficiary named in the deed of trust; deed recorded September 8, 1902. On September 30, 1903, the Wentworth Lead & Zinc Mining Company, Parke and wife, executed a second deed of trust on the same property, subject to the prior one, to A. L. White, trustee, to secure the payment of several sums of money due from Parke to N. U. Wilson and the other plaintiffs, aggregating \$2,691.21; deed recorded September 12, 1903. The trustees in these two deeds of trust were given power to advertise and sell the property conveyed in case of default of payment of the sums secured thereby, and provided that in the event of the death, or the refusal of either of the trustees to act, the acting sheriff of Lawrence county should be authorized to advertise and sell. Default was made in the payment of the bank's note and deed of trust, and by direction of the managing officer of the bank, trustee Scheldrup duly advertised the property for sale under the deed of trust, and on the 14th day of December, 1903, sold the same in accordance with the terms of said deed. The bank became the purchaser of the entire property at the sale, for the sum of \$2,000. On the following day the trustee made and acknowledged a deed, as such, conveying the property to the bank; deed recorded September 30, 1903. On December 20, 1903, the bank by its deed, duly executed and acknowledged, conveyed the property to John S. Cooke, of the county of Passiac, in the state of New Jersey, as trustee. This deed was recorded March 16, 1904. On April 22, 1904, John S. Cooke, trustee, by his deed, duly executed and acknowledged, conveyed the property to the Jovis Zinc Mining Company, a New Jersey corporation. This deed was recorded April 26, 1904. On April 22, 1904, the Jovis Zinc Mining Company, at the county of Passiac, in the state of New Jersey, made and acknowledged its deed of trust conveying the property to R. H. Davis, trustee, to secure the payment of \$2,000 to William Hewitt, the beneficiary named in said deed of trust. This deed was also recorded. Default was made in the payment of the \$2,000 secured by said deed of trust, and by direction of Hewitt, Davis, as trustee, advertised the property for sale under the terms of said deed.

The petition alleged, in substance, that the deed from the bank to Cooke, the one from Cooke to the Jovis Zinc Mining Company, and the deed of trust from the min-

ing company to Davis, trustee, for the benefit of Hewitt, were all made and entered into for the purpose of defrauding the plaintiffs; that in truth and in fact, Parke furnished the money to make the purchase from the bank, and procured the deed made to Cooke, his brother-in-law, for the purpose of concealing the real title to the property; that the deed from Cooke to the Jovis Mining Company was made for the same purpose, and the deed from it to Davis, as trustee, for a like purpose, and all with the fraudulent intent to defeat the lien of the plaintiffs upon said property. The petition alleged that Parke is the real owner of the property and asked that plaintiffs' deed of trust be declared a first lien upon said property, and that it be foreclosed and the property sold to satisfy the debts due the plaintiffs. The petition further alleged that White, the trustee named in the deed of trust made for the plaintiffs' benefit, refused to act as such, and that defendant Connor, the acting sheriff of Lawrence county, also refused to sell under said deed. Pending the suit a supplemental petition was filed, praying for an order to enjoin Davis and Hewitt from selling the property under the Davis and Hewitt deeds of trust. A temporary injunction was granted, which was made perpetual on the final hearing. Defendants Davis and Hewitt filed their joint answer, denying the allegations of the petition and alleging the bona fides of the Hewitt deed of trust and of the other deeds charged by plaintiffs' petition to have been fraudulently executed. The suit was commenced in the Lawrence circuit court, but was removed by change of venue to the Greene circuit court, where it was tried, resulting in a finding by the court in favor of the plaintiffs, and a judgment awarding the relief prayed for in the petition. Davis and Hewitt appealed.

The only connection Davis, who resides in Lawrence county, Mo., is shown to have had with any of the transactions set forth herein is that he, without his knowledge, was named as trustee in the deed of trust given to secure Hewitt, and when requested by Hewitt to act as trustee, consented and at Hewitt's request advertised the property for sale. It appears from the evidence that Parke and wife were residents of the state of New Jersey; that the leased property did not prove to be a paying mine while in the hands of Parke, and he became involved in debt in the operation of the mine. A. L. White was president of the Pierce City National Bank, in 1901, 1902, and 1903, and was on intimate terms with Parke, and on account of his friendship for him and his wife used his influence to postpone the foreclosure of the bank's deed of trust as long as he could, and succeeded at one time in having a sale called off which had been advertised to take place. It was at White's suggestion that Parke and wife executed the second deed of trust to

secure Parke's indebtedness to the several plaintiffs and by agreement of parties he was named as trustee, and made the depository of the deed. Wilson, who had been superintendent of the mine while it was in the possession of Parke, was the active creditor among the plaintiffs. Wilson testified that he went to Pierce City on Sunday evening, December 13, 1903, to see White, president of the bank, about the sale that was to take place under the bank's deed of trust at Mt. Vernon on the following day; that White was not at Pierce City, and did not arrive until 11 o'clock that night, when he met him at the depot, and White invited him to come around to the bank the next morning at 9 o'clock; that he did so and White showed him two telegrams, one from Parke and one from Parke's wife, who were both in New Jersey at the time; that Parke's telegram read: "Hold the sale for a week. I will take up the proposition, and pay you your money." The one from Mrs. Parke was an appeal to White to try to protect their interest, and not let them lose everything. The witness continued as follows: "I did all of the business for the company while I was there. I worked there for two years. Mr. White and I had talked this matter over. In fact, the property had been advertised once before for sale, and before the day of sale Mr. Parke raised \$500 and paid on that mortgage. It was originally for \$2,500. He raised \$500, and paid on the mortgage and stopped that sale; and we had often, Mr. White and I, had often talked about the matter, and thought that him, or some of his friends, or her friends, their brother-in-law, would come in and rescue the property and not let it sell. When I saw these telegrams that morning I says: 'That settles it, Mr. White, they are going to take this up. We have talked several times, and I don't think I had better interfere. Let them take it up,' and I didn't go to Mt. Vernon. Q. What did he tell you, if anything, in reference to what the bank would do? A. Well, I urged action, so I would know what to do. The board was called together that morning, which I presume they are every Monday morning, or maybe every other morning, and had a meeting. I was inside the directors' room, and also in behind the railing of the teller, Mr. Coppock, and we were all in there together and were talking over this matter. He says, 'They have decided to give Mr. Parke—to sell the property and bid it in for just their claim, and give Mr. Parke a week to take it up in.' I says, 'That is all right, but if he don't take it up, I am ready to take it up; I am ready and anxious, and if he don't take it up, I want to take it up, because that makes my trust deed good.' Q. Did you leave then, or was there anything further? A. I stayed around there until the train went west, about 9:30. There was a gentleman with me who was going to take an interest in the property with me, if we had to bid it in. We went down and looked

over the mine, at Mr. White's suggestion. Q. State to the court if you would have bid that property in at that time, except for what Mr. White told you? A. Certainly. I went there for that purpose." White refused to advertise and sell under the second deed of trust, or to surrender the deed to Wilson, whereupon Wilson requested the sheriff (Connor) to act as trustee. Connor at first consented to advertise and sell under the deed of trust, but when he was put in possession of the facts growing out of the sale under the bank's deed of trust, he refused to act further. Wilson then procured the keys to the mining plant from the watchman in charge, and took possession, and held possession from two to three weeks, when he was forcibly ejected. He then brought suit for forcible entry and detainer, but on the trial the verdict of the jury was against him.

The following letters were offered in evidence:

"December 23, 1903.

"Mr. N. U. Wilson, Joplin, Missouri—Dear Sir: Your favor of yesterday's date has been received. From the way things look this bank will have no trouble in disposing of the mining plant bought in by sale 14th instant. There is an option on this property that expires 26th instant. Price of plan is what it cost the bank. Now, if the parties do not take up their option and pay cash for the property on or before the 26th instant, and your crowd want it on the same terms, will see that you can get it. But you will have to notify bank Saturday, 26th, that night, or the Monday following, 28th, by eight a. m. Bank claims will not exceed \$2,200, which includes royalty claims. Answer. Yours truly, A. L. White."

"Pierce City, Mo., Dec. 25, 1903.

"Mr. N. U. Wilson, Joplin, Mo.—Dear Mr. Wilson: Your letter 24th received. You certainly misunderstood my letter. However there is no explaining matters as the plant is sold and money paid for them. Time of option to Mr. Parke was extended and yesterday acceptance was wired here. Have every reason to believe that one of Mr. Parke's friends, a Mr. Cooke, furnished the money and deed will be made out in his name. Had that end not taken up our offer to redeem, your crowd would have had a chance to take up the property. There has been no desire on part of the bank to keep the property. In fact, they have acted just as I told you they would do. So don't you or any of your friends think to the contrary. All the bank ever wanted was to get the money coming to them. Am home and not well. Write me if you want any further information. Yours truly, White."

"Pierce City, Mo., 12/15/03.

"Dear Sir: Sale was made of plant yesterday by trustee and bought in by bank.

No other bids. If Mr. Parke or his friends on his behalf want property, Bank will make deed for same upon its claim being paid. A. L. White."

And also the following letter from Parke to White: "I deposited to-day with the National Park Bank \$2,190.06, as per your favor of the 18th, and hold their receipt therefor, of which they are to advise you by wire. Kindly have it made in name of John S. Cooke, trustee, and mail him at Patterson, New Jersey. I am very thankful for the result, and desire to extend thanks for the opportunity."

J. E. Coppock, cashier of the Pierce City National Bank, testified that the bank had corresponded all the time with Parke until it conveyed the property to Cooke, and on December 18, 1903, he wired Parke that the amount due the bank was \$2,190.06, and wrote him the same day giving the details, and informing him that the amount could be deposited with the National Park Bank to the credit of the Pierce City National Bank, on or before the 28th of December; that White, president of the bank, wanted to postpone the sale but was overruled by the board of directors, who ordered the sale to proceed as advertised, and Wilson was advised to that effect on the morning of the day the sale took place.

In respect to the condition of the mine, Parke gave Hewitt the following written statement to induce him to aid the Jovis Zinc Mining Company: "Wm. Hewitt, Esq.: The financial condition of the Jovis Zinc Mining Co., for whose benefit your loaning two thousand dollars, taking as security for loan, a mortgage on the plant owned by the said company at Wentworth, Mo., is as follows: A purchase money mortgage of twenty-two hundred (\$2,200) dollars. The mortgage to you two thousand (\$2,000) dollars, and a floating debt of about three hundred dollars (\$300). The capital stock of the company is \$50,000, of which \$43,300 will be issued. Yours, H. B. Parke. March 23, '04." The evidence of Hewitt and Cooke, the latter being president of the Jovis Zinc Mining Company, shows that Hewitt indorsed and agreed to take up four notes of \$500 each for the mining company, and that said company executed the deed of trust to him as security and Hewitt took up and paid off the said four notes.

W. C. Van Blarcon testified that he was a traveling salesman and knew the mining property; that he and Cooke bought it from the Pierce City National Bank, Cooke taking the deed as trustee; that they paid \$2,200 for it and afterwards sold it to the Jovis Zinc Mining Company and took a purchase mortgage for \$2,200. The balance of the purchase price, witness stated, was paid in the stock of the mining company; that Parke was the manager of the company, at a salary of \$1,500 per annum, but owned no stock in the company and was not in the

least interested in the purchase made by himself and Cooke; that the purchase money was furnished by himself and Cooke, each furnishing \$1,100, and the purchase was made for their sole benefit; that Cooke was a retired locomotive builder and an officer in the Patterson National Bank of Patterson, N. J.

A. L. White testified that he notified all the plaintiffs of the sale to take place under the bank's mortgage; that there was no understanding between the bank and Parke that the bank would sell the property, bid it in and give Parke the option to redeem it, but after the sale he wired Parke that he or any of his friends could have the property at what it had cost the bank, but that the offer was limited to December 24th. Witness further testified: "I have written a good many letters as an individual, but appertaining to the bank, claiming that the bank is in no way responsible, for I did it to settle the claim of the bank, and also to give my friend, Mr. Wilson, a chance to get out of his trouble, and all communication of that kind are signed by me as an individual. Furthermore, at two different times the mining plant got into financial trouble, and through my efforts the workmen were paid for their labor." Witness also testified that after the Jovis Mining Company acquired the property, Parke took charge of it, as superintendent, and operated it for a time, and though from \$1,000 to \$1,100 was furnished him from the East to operate the mine he was not able with this sum and the proceeds of the mine to meet expenses, and returned to the East leaving a number of claims for labor and supplies unpaid.

The plaintiffs' evidence shows that Parke is wholly insolvent. The most favorable deduction which can be drawn from the evidence is that Wilson was misled by the promises and representations of White, president of the Pierce City National Bank, and by him induced to refrain from attending the foreclosure sale under the bank's deed of trust, relying on White's promise, that if Parke did not redeem the property, the plaintiffs should have the privilege of buying it from the bank at its cost to the bank. If this deduction be drawn, then the transfer of the property by the bank to Cooke, if made with the intent to cut out plaintiffs' lien, was fraudulent as to plaintiffs. While we do not think the evidence warrants this deduction, but are of the opinion that Wilson, after seeing Parke's telegram to White, relied more upon his belief that Parke would redeem the property than on any promise made to him by White to protect the plaintiffs' lien, yet, for the purposes of this case, we may concede all that plaintiffs' claim, in respect to the alleged fraudulent conveyance from the bank to Cooke, and that Cooke held the property in

trust for Parke. How about the conveyance from Cooke to the Jovis Zinc Mining Company? There is not a scrap of evidence in the record connecting it in the remotest degree with the fraud of the Pierce City Bank, Parke and Cooke. Parke, according to the evidence, is not a stockholder in the corporation, nor is there a ray of evidence showing or tending to show that the corporation did not purchase the property from Cooke, in good faith, and for a valuable consideration. A court may, from proven facts and circumstances, find a conveyance was made to defraud the creditors of the grantor generally, or a particular creditor, or set of creditors, but a court cannot find a conveyance to be fraudulent as to the grantee on the mere fact that his grantor acquired the property conveyed through a fraudulent conveyance. A purchase of property for a valuable consideration is presumed to be bona fide until the contrary is shown by direct evidence, or by the proof of facts and circumstances from which fraud may be reasonably and logically inferred. This discussion applies with greater emphasis to the Hewitt deed of trust, which, according to all the evidence, was given for a valid consideration, and in perfect good faith. From the fact that the deed from Cooke to the Jovis Zinc Mining Company, and the deed of trust from the latter to Hewitt are dated on the same day, the inference is that the Jovis Zinc Mining Company borrowed the \$2,000 of Hewitt for the purpose of enabling the company to pay Cooke for the property, and it is certain that this money did not go to the Pierce City National Bank, for it had been paid for the property by Cooke or Parke at a prior date (December 20, 1903), and there is not a ray of testimony to connect either the Jovis Zinc Mining Company or Hewitt with transactions between the Pierce City Bank and Parke or Cooke, except they derived title through them by mesne conveyance of the property, untinctured by fraud, so far as the evidence shows.

The judgment of the circuit court is therefore reversed, and judgment will be entered here dissolving the injunction and dismissing plaintiffs' suit at their cost. All concur.

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#### HACKETT et al. v. VAN FRANK.

(St. Louis Court of Appeals. Missouri. May 22, 1906. Rehearing Denied June 5, 1906.)

##### 1. PARTIES—PLEADING—AMENDMENT.

Where suit on a cause of action in favor of a corporation was commenced in the names of the owners of all the corporate stock, an amendment substituting the corporation as party plaintiff should have been allowed, and was not objectionable as changing the cause of action, within Rev. St. 1899, § 657.

[Ed. Note.—For cases in point, see vol. 87, Cent. Dig. Parties, § 162.]

## 2. APPEAL—DISCRETION OF TRIAL COURT—AMENDMENTS.

By mistake of the attorneys for the plaintiff, suit on a cause of action in favor of a corporation was commenced in the names of the holders of all the corporate stock, and immediately after plaintiff's attorneys discovered the mistake, a motion to amend by substituting the corporation as party plaintiff was made after due notice. If the action had been abated and a new action commenced, the cause of action would have been barred by limitation. *Held* that, while the trial court generally has discretion as to the allowance of amendments, nevertheless under the circumstances it was proper for the appellate court to reverse a judgment refusing to permit the amendment and remand the case, with directions to allow it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3824.]

Appeal from Circuit Court, Ste. Genevieve County; Chas. A. Killian, Judge.

Action by James L. Hackett and others against Philip R. Van Frank. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions to allow amendment of the petition.

R. H. Whitelaw, for appellants.

GOODE, J. This suit was brought in the Cape Girardeau court of common pleas to the May term, 1900. On application of defendant, the venue was changed to the circuit court of Madison county, and from that court the cause was transferred by agreement of the parties to the circuit court of Ste. Genevieve county, whence this appeal comes. The action is to recover for liquors alleged to have been sold and delivered to defendant at different dates between June 23, 1899, and November 18th of that year. The case has been tried three times, and was once before appealed to this court, which reversed the judgment then in contest. *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013. By reading the opinion given on the appeal it will be seen that the defense was that the liquors were not purchased by defendant, but by his son-in-law without authority from him. The petition is in the ordinary form for merchandise sold and delivered, and originally ran in the name of Wm. M. Collins, Jas. L. Hackett, and Graeme McGowan, who are alleged to have been partners under the style of Wm. M. Collins & Co. and doing business in Louisville, Ky. This allegation never was put in issue by a verified answer. The firm originally was composed of Collins & Hackett, McGowan never having had any interest in it. He was its bookkeeper. Collins died in 1895, five years before this action was begun, but his death was not suggested until two years after the institution of the action, which, from the date of the suggestion, proceeded in the name of Hackett & McGowan. The firm of Wm. M. Collins & Co. was engaged in the liquor business prior to September, 1891, and for several years thereafter. In September of said year Collins, Hackett, McGowan and two men named

Brown, incorporated the Greenbrier Distillery Company for the purpose of manufacturing liquors, and both the firm and the distillery company conducted business until November, 1894. By that time all the stock in the company had been acquired by Collins, Hackett, and McGowan, and it was determined to merge the business of the partnership with that of the Greenbrier Distillery Company. In pursuance of this purpose the parties interested entered into a written agreement and filed amended articles of incorporation. The distillery company's business had been chiefly the manufacture of liquors; whereas, the firm's business had been the sale of liquors at wholesale. Hence, the firm of Wm. M. Collins & Co. was well known to the trade, and it was deemed wise to retain the firm name in selling to retail dealers. For this reason, in the articles consolidating the business of the partnership and that of the corporation, the following clauses were inserted: "It is hereby agreed that the Greenbrier Distillery Company may continue to sell goods in the name of Wm. M. Collins & Co. and use that firm name as it deems best, and that the parties to this agreement shall be responsible for any and all obligations so incurred in the name of Wm. M. Collins & Co. as partners, in the proportions, as between themselves, of their respective interests in the corporation as amended. It is further agreed that said Greenbrier Distillery Company shall collect and receive all the assets and complete and carry out all of the contracts and perform all of the obligations and satisfy all the liabilities of the existing firm of Wm. M. Collins & Co."

Pursuant to those clauses the Greenbrier Distillery Company, after the merger and even after the death of Collins, continued to take out a wholesale liquor dealer's license and sell liquors in the name of Wm. M. Collins & Co., and when the goods in controversy in this suit were sold, the sale and billing were in the name of Wm. M. Collins & Co., and under that name they were shipped to Van Frank at Cape Girardeau. When this sale occurred nobody owned any stock in the distillery company except the plaintiffs Hackett and McGowan, who, in May, 1898, had acquired the stock previously held by Collins, and remained the sole owners of all the stock in that corporation until August 27, 1900; that is, during the period of the sales of the liquors in controversy. After the case was returned by this court for another trial, the deposition of McGowan was taken, and therein the facts we have related were developed. They had been unknown previously to the attorneys for plaintiffs, who inadvertently instituted the action in the names, as the attorneys supposed, of the members of the old firm. When the business of the firm and that of the corporation were merged, it was provided in the articles of consolidation, as will



be seen in the quoted clauses, that the Greenbrier Distillery Company should receive all the assets, assume all the obligations, and carry out all the contracts of the firm of Wm. M. Collins & Co. The facts having been ascertained, plaintiffs' attorneys gave notice that they would ask leave to amend their petition so as to make the suit stand in the name of the Greenbrier Distillery Company instead of the names of James M. Hackett and Graeme McGowan. Previous to the presentation of this motion, but after service of notice that it would be presented, defendant filed an amended answer, in which, among other things, it was averred that the merchandise mentioned in the petition was the property of and in the possession of the Greenbrier Distillery Company when sold; was sold by said company; that plaintiffs had no right to or interest in the merchandise, and no right or claim to the cause of action stated in the petition, the Greenbrier Distillery Company being the real party in interest. At the hearing of the motion plaintiffs introduced the original petition, defendant's amended answer, and the deposition of McGowan, thus showing the facts we have recited. The court overruled the motion to amend and plaintiffs excepted. The case was then called for trial and both parties announcing ready, a jury was impaneled. After the jury was sworn, but before any evidence was heard, the court, at defendant's request, instructed that under the pleadings plaintiffs were not the real parties in interest, were not suing in a representative capacity, or as trustees of an express trust, and a verdict should be returned for defendant. An exception was saved to this instruction, and a verdict having been returned by the jury in accordance with it, followed by final judgment, the present appeal was taken after appropriate preliminary motions.

The firm of Wm. M. Collins & Co. had no existence when the merchandise in controversy was sold, as the death of Collins in 1895, had dissolved it, even if it continued to be a legal entity subsequent to the absorption of its obligations and assets by the distillery company. There is no proof of the organization of a new firm, after Collins' death, by Hackett and McGowan. But the old name was still used by the corporation as a trade designation or style, in order to retain, unimpaired, the good will enjoyed by the firm. After the death of Collins was suggested, the present action stood in the names of Hackett & McGowan. The indebtedness owing for the merchandise was an asset of the Greenbrier Distillery Company, and the action ought to have been in its corporate name. But when the goods were sold and also when this action was begun, Hackett & McGowan owned the entire capital stock of the corporation and, in effect, owned this asset. A man named Thies acquired on August 27, 1900, one share of the com-

pany's stock. This was after the institution of the present case. The question for decision is whether or not, with these facts conceded, the court should have permitted plaintiffs to amend their petition by substituting the name of the company for their own names. Though amendments should be liberally allowed in furtherance of justice, the right to amend is limited by a proviso that there shall not be a substitution of an entirely different cause of action for the one originally pleaded. Rev. St. 1899, § 637; *Heman v. Glann*, 129 Mo. 325, 31 S. W. 580. Technically regarded, it might be said that a cause of action in favor of a corporation is entirely distinct from one in favor of two persons who are the only shareholders, even though the subject-matter of the demand is the same. If the question is to be tested by whether the same evidence will support both demands, the propriety of an amendment substituting a corporation as plaintiff instead of its shareholders, might be dubious, because the evidence which would prove a demand due to the shareholders would not prove one due to the corporation. It is difficult to discern the reason of this test, in view of the spirit of the Code; which allows amendments in order to let in evidence otherwise inadmissible, or to conform to evidence already received. Though there may be difficulty in reconciling the amendment requested in the present case with some rules which have been laid down regarding the right to amend, for instance, the one just noticed, the conclusion to be drawn from the precedents is that the amendment was permissible.

In the case of *Lilly v. Tobbeih*, 103 Mo. 447, 15 S. W. 618, 23 Am. St. Rep. 887, which was an action to establish a will, the original plaintiff was an unincorporated society, a church association. A demurrer was sustained to the petition on the ground that the unincorporated society had no legal power to sue, and thereupon an amended petition was filed in which were added as plaintiffs certain members of the society by their individual names, with the allegation that they were trustees of the church, and also other members who were not trustees. A demurrer was sustained to the joining of the unincorporated association as a plaintiff in the amended petition, but overruled as to the new individual plaintiffs introduced by the amendment. It was contended on appeal that the circuit court erred in allowing competent individual plaintiffs to be substituted for the incompetent association; but this assignment of error was overruled. In *Ward et al. v. Pine*, 50 Mo. 38, a suit was commenced in the name of the St. Clair Coal Mining Company, alleged to be a corporation organized under the laws of Illinois. The plaintiffs were permitted to file a second petition in their names, alleging that they were copartners under the style of the St.

Clair Coal Mining Company. The objection raised to this alteration was, that the substitution of the names of the individual plaintiffs for that of the corporation, was a change of the cause of action. The Supreme Court upheld the amendment, saying it did not amount to the substitution of a new party, but was only a "designation of the individuals who were in reality the parties suing as a corporation when it was only a copartnership." The ruling in *State ex rel. Longdon v. Shelby*, 75 Mo. 482, was that the petition declaring on an administrator's bond in the name of Longdon might be amended by substituting the words "State upon the relation and to the use of John Longdon, Plaintiff," for the words "John Longdon, Plaintiff." It will be perceived that this amendment changed the plaintiff; the new plaintiff being the state of Missouri, whereas the original one was Longdon. In *Tayon v. Ladew*, 33 Mo. 205, it was ruled that an amendment of the petition at the trial by striking out the name of one plaintiff and substituting another, was within the discretion of the court. When the suit was brought one of the parties named as plaintiff was a daughter who claimed an interest in the land in controversy as heir of her mother, who was supposed to be deceased. Afterwards, the mother was ascertained to be alive, and her name was substituted for her daughter's. This ruling was approved. In *Winkelmaier v. Weaver*, 28 Mo. 358, it having been objected at the trial that the interpleader who claimed the property in controversy had been a beneficiary in a deed of trust, whereas the legal title was in his trustee, it was held that the trial court should have allowed the trustee to be substituted as interpleader. In *House v. Duncan*, 50 Mo. 453, it was held that it was permissible in the circuit court to amend a complaint in a cause appealed from a justice of the peace so as to bring in a new party plaintiff. The opinion disapproved an intimation to the contrary in *Kraft's Adm'r's v. Hurtz*, 11 Mo. 109. In *Gunther Bros. v. Aylor*, 92 Mo. App. 161, the statement filed in the justice's court where the case originated, omitted to name as plaintiffs two of the parties interested in the demand. In the circuit court an amended complaint was permitted to be filed, joining those parties as plaintiffs. This ruling was approved by the appellate court.

In *Burk v. Andis*, 98 Ind. 59, it was ruled that an amendment substituting new plaintiffs was proper, the court saying the change produced no delay, and put the defendant to no disadvantage. In *Lake Erie, etc., R. R. v. Town of Boswell*, 36 N. E. 1103, 137 Ind. 336, an action by a town to enjoin the obstruction of a street, the substitution of the town itself as plaintiff instead of its trustees, was approved. Where an action was brought in the names of certain individuals who were designated as "commissioners of highways of the

ing out the names of the plaintiffs and also the title of the office, and permitting the suit to progress in the name of the "town of Waynesville," was approved. *Yocum v. Waynesville*, 89 Ill. 220. In *Courtney v. Sheehy*, 38 Mo. App. 290, which is cited as opposed to the right to amend in the present case, the action was brought before a justice of the peace in the name of a husband when the claim belonged to the wife. At the close of the evidence on the trial in the circuit court, whence the case had been appealed, it was moved that the wife be made a party plaintiff. The question for decision was whether the statute permitting statements filed before a justice to be amended in the circuit court, authorized the wife to be united as a plaintiff with her husband; and it was ruled in the negative, as the result would be to substitute a new suit, different from the one originally instituted before the justice. The same question arose in *Clements v. Greenwell*, 40 Mo. App. 589, and in *Thleman v. Goodnight*, 17 Mo. App. 429. The statute construed in the three cases was the one dealing with the right of amendment on appeals from justices of the peace. In *School District v. Wallace*, 75 Mo. App. 317, the court said the change of party plaintiff was a change of the cause of action, and therefore inadmissible, citing *Clements v. Greenwell* and *Courtney v. Sheehy*, *supra*. The facts before the court did not call for that ruling, because it was held there had been no change of parties plaintiff; and, further, that if there had been, the objection was waived by the defendant. These cases from outside jurisdictions permit such an amendment: *Reynolds v. Smathers*, 87 N. C. 24; *Walhour v. Spangler*, 31 Pa. 523. These cases deny the right: *Liebmann v. McGraw*, 3 Wash. St. 520, 28 Pac. 1107; *Wilson v. Kiesel*, 9 Utah, 397, 35 Pac. 488; *Dubbers v. Goux*, 51 Cal. 153.

This case is to be distinguished from those in which one corporation was sued, and there were attempts to substitute as defendants other corporations which had not been sued or brought into court by service of process. In such instances the amendments contended for were held to be improper. *Hajak v. Benev. Society*, 66 Mo. App. 588; *Jordan v. Railroad*, 105 Mo. App. 446, 79 S. W. 1155. So where the original petition stated a cause of action against individuals as partners, and the amended petition was against a corporation, it was held the court could have no jurisdiction over the corporation until it was brought into court by process or voluntarily appeared, even though the style of the alleged partnership was the same as that of the corporation, and the stockholders in the latter were alleged to compose the partnership. *Thompson v. Allen*, 86 Mo. 85. The facts before us show the defendant will not be prejudiced by making the case stand in the name of the Greenbrier Distillery Company, nor will the form or substance of the cause of action be altered. We see no reason why

the amendment is not legitimate under the decision in *Ward v. Pine*, supra, wherein an amendment, which was the exact converse of the one now requested, was approved; that is to say, the substitution as plaintiffs of the members of the partnership in lieu of the corporation.

Generally speaking the trial court has discretion about permitting amendments; but in the present case, timely application was made as soon as the mistake in the parties plaintiff was discovered, due notice of an intention to ask leave to amend was given to the defendant before court convened, and, as the demand will be outlawed by limitation if this suit is abated, we deem it proper to reverse the judgment and remand the cause, with directions to the trial court to permit the Greenbrier Distilling Company to be made plaintiff, and the litigation to be continued in its name. All concur.

**STATE ex rel. GALBRAITH et al. v. McCUTCHAN et al.**

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

**1. COURTS — JURISDICTION OF APPEAL — PROCEEDINGS TO OPEN HIGHWAY.**

If, on appeal from proceedings to open a highway, the contest concerns the right to take private property for the road, the title to real estate is so far involved that the jurisdiction of the appeal is in the Supreme Court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 657.]

**2. MANDAMUS—HIGHWAYS—PROCEEDINGS TO OPEN—DUTY OF COUNTY COURT.**

A county court ordered the road commissioner to survey a road, and on report by the commissioner found that the road was of great public utility, and appointed freeholders to determine the damages to a person who refused to relinquish a right of way for the road. Upon the award of damages this landowner appealed successively to the circuit and appellate courts, which latter court affirmed the judgment of the circuit court as to the amount of damages, leaving it discretionary with the county court as to whether the expense of opening the road should be paid from the county funds. *Held*, that it was not obligatory upon the county court to open the road even if the petitioners therefor paid the cost, so that the discretion of the county court in refusing to open the road would not be controlled by mandamus.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 201, 134.]

Appeal from Circuit Court, Lewis County; Chas. N. Stewart, Judge.

Mandamus proceedings by the state, on relation of H. J. Galbraith and others, against John S. McCutchan and others. From a judgment sustaining a demurrer to the alternative writ, relators appeal. Affirmed.

Richard T. McNally, for appellants. Marchand & Rouse, for respondents.

**GOODE, J.** An alternative writ of mandamus was issued at the suit of the relators against the respondents as justices of the

county court of Lewis county, commanding respondents to make and enter of record in due form an order that a certain public road be opened and established upon the relators' first paying to the treasurer of Lewis county the ascertained damages to William H. Prentice and the proper costs, or show cause against the command of the alternative writ at the September term, 1905, of the circuit court of said county. A demurrer was sustained to the alternative writ, and, relators having refused to plead further, final judgment was entered in favor of the respondents, from which judgment this appeal was prosecuted.

The alternative writ describes the course of the public road which relators desired opened, states facts showing the county court of Lewis county had acquired jurisdiction of a proceeding to open said road, and at its August term, 1901, found that the probable expense of locating the road through the lands of William H. Prentice would be \$75, whereupon the relators deposited \$75 with the treasurer of Lewis county to the use of Prentice, who was the only individual through whose lands the proposed road would run who refused to relinquish the right of way for it; that, on said deposit being made, the county court ordered the road commissioner of said county to survey and mark out said road, perform the other duties required of him by law, and make a report at the next term of the county court; that the commissioner reported at the November term, 1901, of said court, showing the location and survey of the road, the lands through which it would run, that the right of way had been given by all landowners except Prentice, who refused either to convey the right of way through his farm or agree on the amount of damages he would sustain from opening the road; that, at the same term, the county court found Prentice had refused to accept the amount deposited by relators (petitioners in the original proceeding to open the road), and said county court further found that said proposed road was of great public utility, and appointed three freeholders to view Prentice's premises and assess his damages, which having been done, the commissioner reported to the February term, 1902, of the county court a description of the tracts of land to be affected by the road and the damages assessed in favor of each one who had not relinquished the right of way; that said commissioner assessed Prentice's damages at \$275; that Prentice filed an exception to said report at the same term of court, whereupon the cause was continued to the May term, 1902, and Prentice's exception was tried before a jury of freeholders and his damages assessed at the sum of \$500, whereupon it was ordered that the proposed road be opened and established upon the payment by petitioners

(relators in this proceeding) of said damages and costs; that thereafter Prentice took an appeal from said judgment of the county court assessing his damages, to the circuit court, wherein there was a trial anew of his damages at the September term, 1902, of the court, before a jury, and a verdict was returned assessing his damages at the sum of \$300; that thereupon it was ordered and adjudged by said circuit court that Prentice have and recover of Lewis county the sum of \$300, together with his costs expended in his trial in the county court, and that Lewis county recover of Prentice its costs expended at the trial in the circuit court, and that execution issue therefor; that Prentice appealed from said judgment to the St. Louis Court of Appeals, and at the October term, 1904, of the last-named court, said judgment of the circuit court was in all things affirmed, except that it was modified so as to leave it to the discretion of the county court of Lewis county whether the damages and costs of opening the said road would be paid out of the county funds; that thereafter at the May term, 1905, the relators appeared before the county court, of which the respondents were judges, and applied to said county court for an order that said road be opened at the expense of Lewis county, which application was denied; that thereupon relators offered to pay all the damages and accrued costs in the cause, but the county court announced that, under the opinion of the St. Louis Court of Appeals, it was the duty of said county court to order the road opened at the expense of Lewis county or dismiss the cause, and they had no discretion to order the road opened upon payment of damages by relators; that the county court arbitrarily ordered all proceedings in the cause dismissed; that the offer of relators to pay the damages and costs does not appear on the record of the county court, for the reason that one of its judges ordered the clerk not to make an entry of the offer, wherefore affidavits were filed with the petition for the alternative writ of mandamus to supply said omission from the record. The alternative writ further alleges that the opinion of the St. Louis Court of Appeals did not take away from the county court its power to order the road opened if the relators would pay the damages and costs; that the discretion vested in said county court to determine whether or not said road was of sufficient public utility to warrant its establishment had already been exercised and expressed by that court in its order that it would direct said road to be opened upon payment of damages and costs by the petitioners (relators); that such finding and judgment of the county court rendered its duty to order said road opened upon payment of damages and costs by relators a ministerial duty; that relators are

now ready and willing to pay all damages and costs as a condition precedent to the opening and establishment of said road. Wherefore the alternative writ ordered the county court to enter an order of record for the opening and establishment of said road or show cause to the contrary.

No suggestion again: the jurisdiction of this court has been made in the present case, nor was any made in the case out of which it grew. *Galbraith v. Prentice*, 109 Mo. App. 498, 84 S. W. 997. Nevertheless, on reflection we are inclined to doubt our jurisdiction in the former case. The Supreme Court hears appeals in proceedings to open roads through private lands. *Bennett v. Hall*, 184 Mo. 407, 88 S. W. 439. The two courts of appeals have heard such cases, too. *Aldridge v. Spears*, 40 Mo. App. 527; *In re Gardner*, 41 Mo. App. 489. But if the contest on the appeal is over the right to take private property for a road, our opinion is that the title to real estate is so far involved that the jurisdiction is in the Supreme Court. In *Galbraith v. Prentice*, supra, the only matter in controversy in the circuit court was the amount of damages that ought to be awarded to Prentice; and though, of course, his land would be subjected by the condemnation to an easement for the highway, it did not occur to us that probably this circumstance affected our jurisdiction. The present proceeding is of a collateral character and the judges of the county court are the respondents. That court misconceived the opinion delivered in *Galbraith v. Prentice* when it ruled that our decision left no alternative but to order the road opened at the expense of the county or dismiss the entire proceeding. No statement in the least suggesting such a thought can be found in the opinion, which recognized the third contingency, namely, the opening of the road at the expense of the petitioners. But if the county court had power to dismiss the proceeding, it matters not that it did so for an erroneous reason. The error cannot be corrected by mandamus. Mandamus would not lie if there is a right of appeal from the dismissal obtained in favor of the relators, who were the petitioners in the proceeding to open the road. It has been decided by the Supreme Court that petitioners for the opening of a highway cannot appeal from an order refusing to open it. *Aldridge v. Spears*, 101 Mo. 400, 14 S. W. 118. Yet we find a later case in which an appeal by petitioners from a judgment of a circuit court, whither a road case had gone on appeal from a county court, was entertained by the Supreme Court though the appeal was taken from a judgment dismissing the petition. *Bennett v. Hall*, supra.

Waiving this point, we turn to the inquiry of whether or not the county court was bound to have the road opened after the rendition of the judgment of the circuit court and its modification and affirmance by this court. In *Bell v. County Court*, 61 Mo. App. 173, it

was determined that mandamus would not lie to compel a county court to order the opening of a proposed public road, though the petitioners were willing to pay all damages incident to the opening, for the reason that it is incumbent on a county court to determine whether a road is of sufficient public utility to justify, not only opening it, but maintaining it at the expense of the county; and, as the offer of the petitioners was only to pay the damages caused by the opening, the county court was not bound to open the road, but might dismiss the petition if, in its judgment, the burden of maintenance was greater than the county ought to assume. That case and *Strahan v. County Court*, 65 Mo. 644, treat the action of a county court in determining whether or not a proposed highway will be of sufficient public utility to justify opening and maintaining it at public expense as a question involving judicial discretion and not to be controlled by the writ of mandamus. But it is contended for the relators that in ordering the road commissioner to view, survey, and mark out the road, and in appointing a board of freeholders to assess damages, the county court determined, in effect, that the road was of sufficient public utility to justify its maintenance at the county's expense; whereby this matter became adjudicated and could not subsequently be changed. The averment of the alternative writ is not that the county court found the road was of sufficient public utility to justify either its opening or maintenance at the expense of the county, but that the county court made a finding that it would be of great public utility. That court never contemplated opening the road at public expense, but always at the expense of the petitioners. Its express finding regarding the public utility of the road excludes the theory of a constructive finding by having the route marked and the damages to property assessed. Now what the court expressly found embraced neither the conclusion that the road ought to be opened or ought to be maintained at public expense. In *Aldridge v. Spears*, 40 Mo. App. 527, 530, it was held that, in determining this question of the public utility of a road, the county court does not act in a judicial capacity, nor does its decision constitute *res adjudicata*. This conclusion was reached on the ground that, if one petition for a road is dismissed on a finding that the proposed road lacks utility to justify opening it and maintaining it at public expense, the county court may immediately entertain a new petition and decide to the contrary. The ruling was apparently indorsed by the Supreme Court, to which the cause was certified. *Aldridge v. Spears*, 101 Mo. 400, 405, 14 S. W. 118. It is difficult to reconcile this doctrine with the rulings in the *Bell* and *Strahan* Cases, unless the discretion spoken of in the latter cases is a ministerial and not a judicial one. Be it either, other tribunals ought not to determine how it shall be exer-

cised. The *Aldridge* Case also holds in emphatic language that no appeal lies from the refusal of a county court to open a road, and puts the decision on the ground that the whole matter is within the county court's discretionary control and not to be interfered with by other tribunals.

The relief the relators seek in the present proceeding is to compel the county court to open the road along the lines marked out by the county road commissioner or have that officer do it. In the light of the adjudications cited, we deem it improper to control the county court's action in that regard by mandamus. Relators say that tribunal had no power to dismiss the proceeding at a term subsequent to the one at which it had entered an order for the opening of the road on the payment of *Prentice's* damages by the petitioners. This point need not now be determined.

The judgment is affirmed. All concur.

#### STEWART v. HUTCHINSON.

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

##### 1. GAMING—SPECULATIVE TRANSACTIONS—OPTIONS—STATUTES.

Rev. St. 1899, §§ 2337-2342, prohibiting option dealing, and declaring that all contracts relating thereto shall be gambling contracts and void, make obligations arising out of option transactions void in the hands of one who was a party to the transactions, though he acted in ignorance of the fact that a delivery of the commodity purchased was not intended.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 39.]

##### 2. SAME—NOTE FOR GAMING CONSIDERATION.

A note to secure a balance found to be due the payee therein from the maker on a settlement of joint speculations on the rise and fall of the future market value of a commodity is void under Rev. St. 1899, §§ 2337-2342, prohibiting option dealing, and making contracts relating thereto void.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 39.]

##### 3. SAME—INDEPENDENT CONSIDERATION.

A bank in good faith advanced money to plaintiff and defendant, who used the same in joint speculations on the rise and fall of the future market value of a commodity. Plaintiff assumed the debt to the bank, and defendant gave his note to plaintiff for his share of the indebtedness. *Held*, that the note was not vitiated by the illegality of the gambling transaction, but was supported by an independent valuable consideration.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, §§ 39, 47, 48.]

Appeal from Circuit Court, Lawrence County; F. C. Johnson, Judge.

Action by P. W. Stewart against F. W. Hutchinson. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

McNatt & McNatt, for appellant.

GOODE, J. Action on a promissory note for \$2,200, dated April 5, 1902, executed by

defendant and payable to the order of plaintiff, drawing interest at the rate of 8 per cent. from date. In his answer the defendant admitted the execution of the note, but pleaded in defense that the consideration for it was an indebtedness contracted in gambling deals in which he and plaintiff were jointly interested. The gambling deals were alleged to be speculations on the rise and fall of the future market values of wheat, the parties not contemplating the delivery of the wheat they pretended to purchase, but only to gamble on its future price. It is averred that the note was given by defendant for that proportion of the joint loss sustained in the ventures, which plaintiff had borne in excess of the amount of loss borne by defendant. This special defense was put in issue by a general reply. Plaintiff introduced the note in evidence and rested. Thereupon defendant introduced plaintiff's deposition as an admission against interest. The deposition and other testimony would support the conclusion that plaintiff and defendant had been engaged in bucket-shop transactions with which the note in suit was connected. Indeed, we have no doubt that their dealings were of a gambling character, consisting of marginal speculations on the market prices of wheat, without the sellers intending to deliver the wheat or the buyers to receive it. The buyers were the two parties to this action and a man named Wilson, who was connected with the deals in some manner. But, though the evidence to prove the business of the parties was of a gambling nature is satisfactory, the plaintiff swore he understood the wheat was to be delivered whenever the buyers wanted it. He did not swear he was trading in the expectation of deliveries being wanted or made. The dealings in which the parties were interested began in January, 1902, and ceased by April. They had borrowed money to use from the Bank of Aurora. Their ventures entailed a heavy loss, and when over the parties owed the bank \$6,400; for which, at different times during the period of the dealing, they had given six or seven promissory notes signed by both of them. The bank advanced the money principally on the credit of plaintiff, who was considered good, and deposited collateral obligations for security. The cashier of the bank demanded payment of the notes early in April, and at that time a settlement occurred between the parties which led to the execution of the note in suit. The indebtedness to the bank was discharged principally by the plaintiff. Defendant sold some securities he owned and with the money thus raised, paid \$400 on what he and plaintiff owed, and plaintiff gave his individual note and collateral for the balance of \$6,000. Defendant's part of the indebtedness was \$3,200, and as he only paid \$400, plaintiff assumed \$2,800 of defendant's part. This was done pursuant to an arrangement made the day the bank was

settled with, and was participated in by Davis, the cashier. That is to say, at the request of the parties Davis made whatever computations were necessary. It was agreed at the time that plaintiff should assume, and discharge the balance owing the bank, and that defendant should give him negotiable promissory notes for the amount assumed by plaintiff over and above the latter's half of the indebtedness. Thereupon, as we have stated, the partnership notes were canceled and surrendered, plaintiff assuming the full debt to the bank, and defendant executing and delivering to plaintiff 12 promissory notes for \$50 each and the note in suit for \$2,200, or notes amounting in all to \$2,800. Defendant paid the 12 small notes, but refused to pay the large one. He testified that when the settlement occurred he and Stewart jointly owed the bank, and that he (defendant) did not then dispute his part of the indebtedness. It is to be borne in mind that defendant paid \$400 to the bank, plaintiff gave his individual note for the remaining \$6,000, the bank surrendered the joint notes of plaintiff and defendant and the latter executed to the former the note in suit and the 12 small notes at the same time and as parts of one transaction. The only conflict is in regard to the extent of the settlement between plaintiff and defendant. Most of the testimony goes to show the settlement embraced nothing more than an arrangement regarding the indebtedness to the bank and was made at the request of, and to satisfy, that institution. But it is contended by defendant and conceded by plaintiff, that some testimony went to show the settlement of the parties litigant was really an adjustment between themselves of their losses in speculations, and that in the course of the settlement the indebtedness to the bank was adjusted. As plaintiff concedes there was such testimony we will assume there was, though we find little or no trace of it in the record before us. The court directed a verdict for defendant, and plaintiff appealed.

Plaintiff's testimony that he was innocent of any knowledge that the transactions in which he and defendant were engaged were of a wagering character, and not to be followed by deliveries of wheat, is said to have raised an issue of fact for the jury which the court erred in ignoring. Though admissions made by plaintiff on the stand regarding his knowledge of the nature of the transactions, went far to refute the notion that he believed the purchases of wheat to be genuine and not marginal dealings, we may concede, for argument's sake, that an inference fairly might be drawn in favor of his innocence, and yet it does not follow that the note in suit was valid, and he entitled to a judgment on it. If he was an innocent party, he was the only innocent one connected with the transactions. His partners and the sellers of the wheat had no thought of deliveries, and intended to settle

the profits and losses of the deals on differences. In construing the act of March 9, 1889 (Rev. St. 1899, §§ 2337-2342, inclusive), the Supreme Court has held that obligations arising out of option transactions, are void in the hands of a person who is a party to such transactions, even though he acted in ignorance of the fact that a delivery of the commodity purchased was not intended. In other words, that the purpose of one of the parties to a trade not to deliver or receive the property, invalidates an agreement arising out of the business. This was the interpretation given to the statutes by the decisions in *Connor v. Black*, 119 Mo. 126, 24 S. W. 184, s. c. 132 Mo. 150, 33 S. W. 783; *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 527, 61 S. W. 617. Those decisions changed not only the rule which prevailed before the enactment of the statutes in question, but the interpretation put on those statutes in *Mulford v. Caesar*, 53 Mo. App. 263, and *Schreiner, etc., Co. v. Orr*, 55 Mo. App. 406. As the law now stands, the note in suit is void if a consideration for it must be found in the wheat speculations of plaintiff and defendant; for whatever expectation the plaintiff may have had about the delivery of the wheat, it is certain that his partners did not intend to receive or the sellers to deliver it.

We have referred to the conceded conflict in the evidence regarding the scope of the settlement which occurred when the note in suit was given. This question is important, because, if the purpose of the note was to secure a balance found to be due plaintiff from defendant on a settlement of their joint speculations, it is tainted by an illegal consideration and void. *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Schreiner, etc., Co. v. Orr*, 55 Mo. App. 406; *Armstrong v. Bank*, 133 U. S. 433, 467, 10 Sup. Ct. 450, 33 L. Ed. 747 et seq.; *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595. Therefore an issue of the fact is presented as to whether the note was given pursuant to a general settlement between the parties and for a balance which the settlement showed defendant owed plaintiff, or whether it was given in consideration of plaintiff's assuming the entire indebtedness to the bank, taking up the joint notes and executing his individual note in lieu of them. If the latter hypothesis is true, the present note stands on an independent footing, and is a new contract not vitiated by the illegality of the partnership ventures. In such a contingency the plaintiff did not advance for defendant, money to settle losses incurred in wagering transactions; nor did defendant execute his note to plaintiff to make the latter whole for money he was out of pocket in consequence of deals in excess of what defendant

had disbursed. The money was lent by the bank, as it supposed, for lawful purposes, and the debt the parties owed the bank was altogether valid. If one attends exclusively to the rules of decision laid down in the books for cases like this one, the law appears to be clear. But, if the facts in the cases in which recoveries have been allowed on obligations in some way connected with prohibited affairs, are compared with the facts in other cases in which recoveries have been denied, some conflict is discernible. In truth, the application of the rules has been inconsistent. Perhaps, a true expression of the spirit of the law on the subject may be given by saying that the intimacy with which the agreement sued on is bound up with the prior irregular business, is decisive of whether or not the agreement will be enforced.

The important inquiry is this: Is the obligation sought to be enforced a new and independent contract? In practice this inquiry always leads to the ultimate question of whether the obligation is supported by a detached and independent consideration—a new consideration unconnected with the prohibited deals. The question of consideration is decisive, for the reason that the obligation challenged as void always represents a new agreement made by the parties. But every agreement is not a contract. To be valid, as a contract, an agreement must have a consideration. Now, in all the cases we have examined no question was raised that the obligation in suit was not the result of a new agreement. That was conceded, and whether or not the agreement was an enforceable contract, was to be determined by ascertaining if a consideration for it existed which was independent of prior forbidden transactions. If the present note was given to plaintiff on account of a balance coming to him on a settlement of the partnership affairs, the consideration for it was, of course, those affairs which were unlawful. In other words, it does not represent a new and distinct contract, but is intermingled with the original undertaking. The partnership between plaintiff and defendant contemplated from the first a possible profit or loss, which should be adjusted, and borne equally by them. Hence, if the note was executed pursuant to an adjustment of their affairs, it was, in effect, a continuation of the original scheme, and invalid because the scheme was illegal. But plaintiff was under no duty to defendant to assume payment of the latter's portion of the indebtedness owed by the partnership to the bank, and if plaintiff consented to the assumption on defendant's promise to make him whole, and the note in suit was given as evidence of the promise, the arrangement was an entirely new agreement, which amounted to a valid contract because supported by a perfectly legal consideration, namely; plaintiff's as-

sumption of defendant's debt. No more luminous exposition of the law of the subject can be found than the two opinions in *Armstrong v. Toler*, 11 Wheat. (U. S.) 258, 6 L. Ed. 468. The opinions are those of Judge Washington delivered on the circuit and of Chief Justice Marshall, speaking for the Supreme Court of the United States, on the appeal. We confidently refer to them as supporting our conclusion in the present case. In it the various decisions to that date were reviewed and their determinations stated. As no change has occurred in the law since, it is sufficient to cite the reader to that authority for an elucidation of the subject. In commenting on the case Judge Story said: "The recent authorities since this case was decided, have not entirely cleared the subject of all difficulty. The distinction between the cases in which a recovery can be had, and the cases in which a recovery cannot be had, of money connected with the illegal transactions, which seems now best supported, is this: That, wherever the party seeking to recover, is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original contract or transaction, there he is not entitled to recover any advances made by him, connected with that contract. But when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, but the title of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, there he is entitled to recover. Mr. Evans, in his edition of Pothier on Obligations, vol. 2, App'x No. 1, pp. 1-19, has examined this whole subject with great diligence and ability. His conclusion is that money advanced to pay the debt of another, due upon an illegal transaction, may be recovered by the party lending it, from the party for whom it is advanced, if the lender was not a party to the original transaction, or it was not a part of the original scheme; although, at the time of the advance, he knew of the illegality." 2 Story, Agency (2d Ed.) pp. 425, 426, note. A case in its facts precisely like the one at bar, provided the settlement merely embraced the indebtedness to the bank, is *Falkney v. Reynolds*, 4 Burrow, 2069, in which Lord Mansfield permitted the plaintiff to recover. Other apposite authorities are *Farmer v. Russell*, 1 B. & P. 296; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473; *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132; *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732; *Armstrong v. Bank*, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747; *Hoffman v. McMullen*, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410, 417. Perhaps, cases may be found which would warrant a recovery by plaintiff even if the note was given for a balance due on

a settlement of the losses of their joint ventures. If there are such adjudications we will not follow them; for we consider the rule to be otherwise in this and most jurisdictions. It is plain to us that the law did not preclude these parties from entering into a binding arrangement for the settlement of what they owed the bank, an innocent lender, merely because they had borrowed the money for gambling purposes.

On another trial of the case the jury should be instructed in accordance with the views expressed in this opinion. The judgment is reversed, and the cause remanded. All concur.

#### CITY OF ELSBERRY v. BLACK.

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

#### MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—VALIDITY.

Rev. St. 1899, § 5989, requires the letting of a contract for the construction of a street improvement to the lowest bidder. Section 5992 provides that, where no bids are received to construct sidewalks, the city may construct them. A city, desiring to construct a sidewalk, obtained no bids for the work and the street commissioner and street committee were directed to construct the walk in accordance with the specifications. The street commissioner and street committee entered into a verbal contract with a firm of paving contractors to lay the walk. No account was kept of the separate amounts expended for labor and material. *Held*, that the contract was unauthorized, and a special assessment against property for the improvement could not be approved, though the owners were not prejudiced by the letting of the contract.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 854.]

Appeal from Circuit Court, Lincoln County; Houston Johnston, Judge.

Action by the city of Elsberry against Robert E. Black. From a judgment for plaintiff, defendant appeals. Reversed.

Norton and Avery & Young, for appellant. Dudley & Palmer, for respondent.

GOODE, J. This is an action on a special tax bill issued by the common council of the city of Elsberry in favor of that city for the construction of a granitoid sidewalk laid in front of a lot owned by appellant. There was much controversy regarding the proceedings preliminary to the letting of the work and also as to whether the job when completed was a substantial compliance with the plans and specifications. A finding of facts was made by the trial court at the request of both parties by which we shall abide, and therefore will say, regarding the facts only, that the court found the preliminary proceedings were regular and that the sidewalk laid pursuant to them conformed to the specifications.

The point of difficulty in respondent's cause is the mode in which the contract for laying the walk was let. There was a proper advertisement for bids for the work, looking



to letting the contract to the lowest bidder in accordance with the statute. Rev. St. 1899, § 5989. But no bids were received, and thereupon, as the trial court found, the city council ordered the street commissioner and the street and alley committee to proceed with the construction of the walk in accordance with the specifications on file with the city clerk, and that said committee and commissioner keep an accurate account of the cost, including all labor and material, the same to be charged as a special tax against the abutting property. This proceeding was according to the statutes; for it is provided that when a city of the fourth class shall advertise for bids for the construction of a new sidewalk of any kind and shall receive no bids, the city may proceed to construct or reconstruct such sidewalk at its own expense, and shall keep an accurate account of the amount expended for labor and material, including the grading and filling opposite each lot or piece of ground, and present the same to the board of aldermen for assessment; further that each lot abutting on the sidewalk shall be liable for the cost thereof as reported by the officer or committee having charge of the matter. Rev. St. 1899, § 5992. Now the street commissioner and the street and alley committee of Elsberry, instead of constructing the sidewalk as the council had ordered them to do, entered into a verbal contract with a firm of paving contractors by the name of Craft & Son, to lay the walk for 13 cents a square foot, said price to cover the entire cost of labor and material. No account was kept by the city or any one else of the separate amounts expended for labor and material. The testimony went to show that the price paid for the work yielded a profit to the contractors. We know of no authority for constructing sidewalks by cities of the fourth class in the manner narrated. If the work is to be done by an independent contractor, it must be pursuant to a contract entered into after competitive bidding. If no bids are received, the only method of laying the walk provided by the statutes is for the city to do the work at its own expense, keeping an account of the items of cost. For the amount of these items a special tax bill may be issued against the abutting property. The law seems to contemplate that when the work is not let to a contractor on competitive bidding, only the actual cost incurred in laying the walk can be assessed against the property, and that this cost shall represent the itemized expense incurred by the city authorities in doing the work. In other words, a contract by which a private person may do the work, perchance at a profit which is not limited by competition, is unauthorized. We wish to make our decision no broader than the facts require and do not say what would be the legal result if the different items of the work had been let in separate contracts. No separate account of the items was

kept, but both the letting and the assessment were for one sum.

It is argued that respondent was not prejudiced in any way by the city letting the work to competent contractors, and possibly this is true. But we have no power to approve a method of creating special assessments against property for public improvements which is a radical departure from the method prescribed by the Legislature for letting the work.

The judgment is reversed. All concur.

**CITY OF ELSBERRY v. BLACK et al.**  
(St. Louis Court of Appeals. Missouri. June 5, 1906.)

Appeal from Circuit Court, Lincoln County; Houston Johnston, Judge.

Action by the city of Elsberry against R. E. Black and another. From a judgment for plaintiff, defendants appeal. Reversed.

GOODE, J. This case is identical with *City of Elsberry v. Robert E. Black* (Mo. App.) 96 S. W. 256; and for the reasons given in the opinion in that case the judgment in this one will be reversed. All concur.

**CITY OF SPRINGFIELD ex rel. GILSONITE CONST. CO. v. SCHMOOK et al.**

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—TIME THE ESSENCE OF.

When the particular ordinance directing a public improvement in a city provides for its completion within a certain time, and the prescribed time is exceeded, tax bills issued for such improvement cannot be collected.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 894, 1063, 1066.]

2. SAME—BREACH OF CONTRACT—FAILURE TO COMPLETE WORK—QUESTION OF FACT.

Where, in an action to enforce the lien of tax bills issued to pay for street paving in front of defendant's lot, it was alleged that the contractor failed to complete the work within the time specified, the question whether the excuse assigned for not completing the work sooner—i. e., that the weather was unsuitable therefor—was a valid one raised an issue of fact for the court to determine.

3. SAME—STREET IMPROVEMENTS—CONTRACTS—CONSTRUCTION—TIME FOR COMPLETION.

Where a general ordinance relating to public improvements in a city required work to be performed within the agreed time, the contractor under a street paving contract with the city was bound to finish the work within the specified time and was not entitled to a reasonable time thereafter.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 894.]

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by the city of Springfield, on the

relation of the Gilsonite Construction Company, against Henry B. Schmook and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Barbour & McDavid and M. C. Early, for appellant. W. D. Tatlow and E. D. Merritt, for respondents.

GOODE, J. This is an action to enforce the lien of three tax bills issued to pay for paving the street in front of a lot in the city of Springfield. Those of the defendants in whom the title to the lot is vested are the heirs or devisees of John Schmook, deceased, who was the owner of the lot when the proceedings in question occurred. The other defendants are interested as trustees or beneficiaries in deeds of trust. The property lies on the west side of Boonville street, a thoroughfare along which double street car tracks run. The improvement for which the tax bills were issued is an asphalt pavement, and was laid by the Gilsonite Roofing & Paving Company, which assigned the tax bills to the Gilsonite Construction Company, to whose use the present action was brought. The judgment of the court below was in favor of the defendants. Several defenses were interposed, but the only one we find it necessary to consider is that the work was not completed within the time required by the contract between the city and the original contractor, the Gilsonite Roofing & Paving Company. The proceedings for the improvement of the street were started by two resolutions passed by the council of the city of Springfield, June 9, 1898. Under the ordinances of the city and the franchises by which the street railway company (the Springfield Traction Company) used the street, it was incumbent on it to pave that portion of the street occupied by its rails and two feet outside. One of the original resolutions declared it was necessary to improve the street by paving with asphalt that portion of the roadway on either side of the street car tracks and two feet from them, and the other resolution declared it was necessary to pave with the same material the center of the street occupied by the car tracks and two feet beyond the outer rails, and ordered the traction company to lay that paving. The other work was to be let by the city to a contractor to be done in conformity to specifications on file in the office of the city engineer. Bids for the work were advertised for by the city, and that of the Gilsonite Company was accepted by an ordinance approved July 20, 1898. This ordinance said nothing about the time in which the work should be begun or finished; but the city entered into a contract with the Gilsonite Roofing & Paving Company, dated July 25, 1898, which contained a provision that the said company, as contractor, should complete the work according to specifications in 90 days from the time the contract took effect. We

quote that clause of the contract: "Now, therefore, the said party of the first part hereby agrees with the said city of Springfield to do and complete said work according to specifications, without negligence causing or tending to cause damage to private property for which the city might be held liable, furnishing all materials therefor at his own cost and expense, within ninety days from the time this contract goes into force and effect, according to such directions as the city engineer and street committee of the city of Springfield may from time to time give in superintending the construction of said work, and in accordance with the plans and specifications of said work prepared by the city engineer for the letting of a contract for said work, and to the satisfaction and acceptance of the city engineer of the city of Springfield, and said specifications are attached hereto and made a part of this contract: Provided, if the contractor is delayed by injunction or legal proceedings, or by any unavoidable cause, the time of completion shall be extended by the council covering said delay." At the time the contract was executed, a general ordinance of the city of Springfield was in force which provided that every person who should bid for the job of constructing a public improvement should enter into a written contract within 10 days, and complete the improvement according to the plans, specifications, and ordinances within the time agreed on, without negligence tending to cause damage to private property. On September 13, 1898, the council directed the mayor to notify both the Springfield Traction Company and the Gilsonite Company to begin the improvement. Shortly afterwards the paving company started the work. The traction company refused to comply with the city's resolution directing it to put in asphalt paving between the tracks and two feet on either side, and in consequence litigation arose between it and the city. On account of the action of the traction company the mayor pro tem. of the city served a written notice on the Gilsonite Roofing & Paving Company, October 17, 1898, directing it to cease work under its contract until the traction company could be compelled to proceed with the improvement it was bound to make, or until further notice from the city of Springfield. The testimony tends to show that on receipt of this notice from the mayor the paving company ceased work, and shortly thereafter the weather became unsuitable for laying asphalt paving. The dispute between the city and the traction company resulted in allowing the latter to pave that portion of the street it had to pave with brick, instead of asphalt. On January 19, 1899, the mayor of the city notified the paving company to go on with its work; the controversy with the traction company having been settled. There is testimony that early in the spring, and as

soon as the weather permitted, the Gilsonite Company went ahead with the improvement and completed it as quickly as possible. It was finished early in July, 1899. The contract called for its completion within 90 days from July 25, 1898, unless the Gilsonite Company was delayed by injunctions, legal proceedings, or some other unavoidable cause, in which case the term for completion should be extended by the council to cover the unavoidable delay. An attempt was made to prove that the acting mayor was authorized to serve notice on the Gilsonite Roofing & Paving Company to cease work until the dispute with the traction company was settled, but no such authority was in fact shown. In the court below no declarations of law were asked, or any findings of fact. At the conclusion of the evidence the court rendered a judgment in favor of the defendants; and on the facts the question for decision is, did it conclusively appear that the work was completed in due time so that the tax bills were valid? or was the court justified in holding completion was so long delayed that the contract was not complied with by the paving company and, therefore, the tax bills were void?

When the particular ordinance which orders an improvement provides that it must be completed within a certain time, and the prescribed time is exceeded, tax bills cannot be collected. *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163. The law seems to be the same way when the particular ordinance is silent regarding the time for completion, but there is a general ordinance relating to public improvements in force, requiring the work to be performed within the agreed time. *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926; *Springfield v. Davis*, 80 Mo. App. 574; *Heman v. Gilliam*, 171 Mo., loc. cit. 267, 71 S. W. 163. The present contract was not rendered indefinite as to the time limit for finishing the work by prescribing a per diem forfeiture for failure to finish in the time stipulated, as was the contract in *Heman v. Gilliam*. The *Davis Case*, just cited, dealt with the same general ordinance of the city of Springfield with which we must deal in the present case, and the contract under which the work was done limited the time of completion to 60 days. Applying the general ordinance to the contract, this court held that the intention of the city and of the contractor was to provide a definite and specified time for the completion of the work, to wit, 60 days. In the case in hand the contract did not require the work to be done, at all events, within a certain time—that is, 90 days—but allowed some indulgence to the contractor in case it was delayed by injunction suits or other unavoidable causes, by stipulating that in such a contingency the council should extend the time for the completion of the work. If we apply the *Davis Case*, we must hold that this contract, read in connection with the gen-

eral ordinance, made time of the essence of the agreement and required the work to be done within 90 days, barring certain named contingencies. Now, that the contracting company was prevented or interfered with by injunction suits is not contended, for no suits were brought against it. The contention is that it was hindered from prosecuting the work by a notification served on it by the city, which desired the paving company to await the settlement of the dispute with the traction company before going further with the work. So far as the record discloses, the service of this notice by the acting mayor of the city was without authority from the governing body of the city; that is, the council. But, if we grant that the notice was a good excuse for pausing in the work, the fact confronts us that in January the paving company was notified to resume the work, as the difficulty with the traction company had been adjusted. The paving company was, therefore, at perfect liberty to go on with the improvement after January, and, as only a week or so was required for its completion, it looks like the job might have been finished before July.

The excuse assigned for not doing it sooner was that the weather was unsuitable throughout the winter and spring. But this excuse certainly raised an issue of fact for the court to determine. We are unable to say the evidence positively shows the weather stood in the way of performance of the work so that it could not be finished sooner, and, therefore, that it was finished in a reasonable time. What is a reasonable time for the doing of an act of performing a contract is ordinarily a question of fact. *Burks v. Stam*, 65 Mo. App. 455. We can think of no instance in which the question would be more properly one of fact, to be found by the trier of the fact, than when it arises on a dispute about weather, and whether the state of the weather for several weeks was such as to interfere with the prosecution of a given kind of work. However, we do not agree with counsel for the plaintiff that the true construction of the contract, read in connection with the general ordinance, was to require the work to be done within a reasonable time. Our view of the contract is that it had to be finished in 90 days, unless finishing it in that time was prevented by injunction suits or other unavoidable causes. In any view of the matter it was for the court to decide whether the contractor was unavoidably prevented from finishing the job in 90 days, and surely it was for the court to say whether some unavoidable cause arose which hindered its completion earlier than July. The work extended seven or eight months over the stipulated time, during which interval the street, presumably, was torn up and in bad condition for travel. We detect in the record no facts compelling the conclusion that the paving could not have been finished much earlier than it was. As the

parties raised no legal question on this branch of the case by declarations of law, it is presented to us as a question of fact.

Justice might be promoted by conforming the law of special assessments to that governing contracts for the erection of buildings. When a contractor for street improvements is guilty of no fraud or willful violation of his agreement, he ought to be allowed a recovery on a quantum meruit against the property benefited, subject to penalties for delay, and a right in the property owners to counterclaim for damages on that account, or for any other shortcoming which injures him. But in the present state of the law we think the judgment of the court below must be affirmed. It is so ordered. All concur.

### ELLIS v. ELLIS et al.

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

#### EXECUTORS AND ADMINISTRATORS—WIDOW'S STATUTORY ALLOWANCE—WAIVER—ACCEPTANCE OF WILL.

The acceptance by a widow of a bequest given to her by her husband's will, with a provision that it shall be in lieu of dower, does not destroy her right to the allowance given her by Rev. St. 1899, § 107, providing that in addition to other allowances the widow shall be entitled to select and receive personal property of the value of \$400.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 696.]

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by Catherine V. Ellis against John Ellis and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ball & Sparrow, for appellants. Leslie Edwards and E. J. Major, for respondent.

GOODE, J. This case involves the construction of the following will:

"I, William S. Ellis, of the county of Pike and state of Missouri, being of sound mind, do make and publish this my last will and testament, revoking all others.

"I give, devise and bequeath all of my property, real and personal in manner following, to wit:

"1st. I desire and direct that all my just debts be paid, including necessary expenses that may be incurred after my death.

"2d. I give and bequeath unto my beloved wife, C. V. Ellis, all my household goods on hand at my death.

"3d. I give and bequeath unto my said wife one-half of all my personal property, except the above named household goods in lieu of dower.

"4th. I give and devise unto my said wife my home farm, consisting of two hundred and nineteen (219) acres, so long as she remains my widow; in the event of her death or her marriage, I direct that my real estate shall go two-thirds ( $\frac{2}{3}$ ) absolutely to my be-

loved son, John T. Ellis, and one-third ( $\frac{1}{3}$ ) absolutely to my beloved grandson, William A. Ellis.

"5th. I give and bequeath unto my said son, John T. Ellis, one-third ( $\frac{1}{3}$ ) of all my personal property other than household goods above disposed of.

"6th. I give and bequeath unto my said grandson, William A. Ellis, one-sixth ( $\frac{1}{6}$ ) of all my personal property, other than household goods above disposed of.

"7th. I appoint my said wife, C. V. Ellis, and my said son, John T. Ellis, now residing in said county of Pike, executrix and executor of this my last will and testament.

"In testimony whereof I have hereunto set my hand this fifth day of May, 1898.

"Wm. S. Ellis."

The testator left an estate in personalty worth nearly \$4,000. His widow, the plaintiff, applied for an allowance of \$400 out of this personal estate, and her application is contested by the other legatees on the ground that she has agreed to accept the testamentary provisions made for her which are said to be inconsistent with her right to take the allowance.

The general rule of law is that a legatee must choose between testamentary bequests and the interest or estate the law gives him, independently of the will, in the property of the deceased, if the will shows a clear intention on the part of the testator that the legatee shall not enjoy both the testamentary and the legal provisions. He cannot take both under the will and in opposition to it. *Graham v. Roseburgh*, 47 Mo. 111; *Ball v. Ball*, 165 Mo. 312, 65 S. W. 552. For a widow to be deprived of her dower, or a statutory allowance, by accepting a bequest in her favor contained in the will of her deceased husband, the purpose must be plain. In support of the position that plaintiff is entitled to take both the legacies and the statutory bounty of \$400 out of her husband's personalty, reliance is placed on the decision in *Glenn v. Glenn*, 88 Mo. App. 423. In each will the testator undertook to dispose of all his personal property among his wife and certain other legatees, and there is no material difference between the two documents, except that in the will before us the bequest to the wife is expressed to be "in lieu of dower." The question for decision is whether by accepting the bequests of personalty when the terms of the will said the bequests should be in lieu of dower, the plaintiff lost her right to the statutory allowance. In the *Glenn Case* we reviewed the authorities bearing on this question. The general rule of law governing the effect on a widow's right to statutory allowances out of her husband's estate of the acceptance of bequests in her favor, is that the bequests do not exclude her right to the allowances unless the will so states in express terms, or contains provisions which clearly indicate that it was the intention of the testator that she should

not receive both the bequests and the allowances. Our statutes give a widow a dower in the personal estate of a deceased husband. If the husband leaves children, this dower right in personalty is taken absolutely, and is equal to a child's share. Rev. St. 1899, § 2937. It is subject to the debts of the deceased. The allowance given by section 107 of the Statutes is not subject to his debts. The statute does not designate the allowance of \$400 out of personal estate as dower, but says it shall be deducted from the widow's dower in the personalty. Nevertheless, it has been called part of her dower occasionally. This designation of it has been condemned as inexact in decisions holding that the allowance differs in its essential attributes from dower. Inasmuch as the intention of the testator to exclude plaintiff from the allowance must appear in order to prevent her from taking both the allowance and the bequests, she is entitled to both, unless the allowance is part of her dower, and therefore excluded by the words excluding her dower. The testator undoubtedly intended to exclude plaintiff from dower if she accepted the will; but there is nothing in the will to show he intended to exclude her from any other estate which the law gave her, except dower. That this allowance of \$400 is not dower, we regard as settled by several decisions of the Supreme Court and of this court, notwithstanding the fact that in other decisions, where the question was not material, the allowance was called dower.

In *Bryant, Adm'r, v. McCune*, 49 Mo. 546. It appeared that the deceased, Buford, had bequeathed to his wife a large portion of his estate, both real and personal, to hold during her life. A part of the will is copied in a subsequent case involving it, and therein it will be seen the wife was given all the testator's estate, both real and personal, for life, with an absolute power to dispose of one-half of it by will. *Bryant, Adm'r, v. Christian, Adm'r*, 58 Mo. 98. Shortly after the testator's death, his wife died. The litigation arose between the executors of Buford and Bryant as administrator of his wife, concerning her right to take the allowances provided by section 83 et seq. c. 121, Gen. St. 1866 (Wag. St. p. 88, § 33 et seq.). Those sections are the same as section 105 et seq. of our present statutes, and compose that part of the administration law providing for the several statutory allowances to widows. The argument advanced by the executors of Buford was, that he clearly meant for his testamentary dispositions in favor of his widow to exclude her right to dower and her statutory right to the allowances. But the decision was that the allowances were not disposed of by the general provisions of the will. It is said in the opinion that the statutory allowances are not part of dower proper, although partaking of its nature. In *Hasenritter v. Hasenritter*, 77 Mo. 162, the proceeding was for \$400 and compen-

sation in lieu of a year's support. The defense was that the will made other provisions for the widow, and she had accepted them. The will gave the widow certain insurance and her dower in the testator's real property according to law, and bequeathed the balance of the estate, real and personal, to his children. The contention was that he evidently intended all his personal estate of every kind, except his insurance money, to go to his children and, hence, intended to exclude his wife from the statutory provisions. This argument was rejected. In *Klosterman v. Langewisch*, 6 Mo. App. 314, a deceased testator had made a specific bequest of money to his wife who afterwards died, and her administrator received the \$400 allowed by the statute. The contention was that the bequest of money was in lieu of that allowance. In dealing with the proposition the court said that the statutory provision was often called the widow's "absolute dower," and that it partook of the nature of dower in being free from the claims of creditors and not subject to disposition by the husband's will. The court then said that whether or not a bequest of personalty barred a widow's right to absolute dower in her husband's personalty, depended on whether the husband intended the bequest should be in lieu of the statutory provisions; and as the provision of the statute was a clear legal right, an intention to exclude it must be demonstrated by express words, or clear implication. It was held that the will showed no such intention.

When we look to the decisions in other jurisdictions, we find a practically unanimous opinion that this statutory bounty is not dower in the strict sense, and that a provision in a will that its bequest to the widow of the testator shall be in lieu of dower does not deprive the widow of her right to the allowance. *Cheek v. Wilson*, 7 Ind. 354; *Smith v. Smith*, 76 Ind. 236; *Shipman v. Keys*, 127 Ind. 353, 26 N. E. 896; *Langley v. Mayhew*, 107 Ind. 198, 6 N. E. 317, 8 N. E. 157; *Hurley v. McIver*, 119 Ind. 53, 21 N. E. 325; *Compher v. Compher*, 25 Pa. 31; *Peeble's Appeal*, 157 Pa. 605, 27 Atl. 792; *Miller v. Stepper*, 32 Mich. 202; *Watts v. Watts*, 38 Ohio St. 480; *Williams v. Williams*, 5 Gray (Mass.) 24. There is a more elaborate examination of the authorities in the opinion in the *Glenn Case*.

The judgment is affirmed. All concur.

MOORSHEAD v. UNITED RYS. CO. et al.  
(St. Louis Court of Appeals. Missouri. May 22, 1906. Rehearing Denied June 5, 1906.)

1. STREET RAILROADS—LEASES—ORDINANCES.

A municipal ordinance authorizing enumerated street railway companies and their successors and assigns to severally sell, convey, or lease their property rights, privileges, and franchises to any of the companies enumerated, or to a company designated, its successors and as-

signs, and authorizing the company acquiring the property rights and franchises of the enumerated companies to hold the same during the term of the ordinance, authorizes a purchaser of the property and franchises of the enumerated companies to lease the same to the designated company without the special consent of the municipality, notwithstanding Const. art. 12, § 20, forbidding a street railway transferring its franchise without first obtaining the consent of the municipality.

**2. SAME—CONTRACTS BETWEEN COMPANIES—CONSTRUCTION—CREATION OF PRINCIPAL AND AGENT.**

A street railroad company entered into a contract with another street railroad company, which recited that the former, in consideration of the covenants of the latter, leased its railways, etc. The contract devested the former company of the possession and use of its properties for 40 years in consideration of a specific rent to be paid by the latter company and the performance of other duties in the nature of rent, and provided for the restoration of the property to the former at the end of that term and for re-entry if the latter defaulted in the performance of its covenants during the term. The contract did not provide that the latter should conduct the business in the name or for the benefit of the former, except as in so far as the former was benefited by the consideration to be paid by the latter. *Held* not to establish an agency, whereby the former company was principal and the latter agent.

**3. SAME—CREATION OF PARTNERSHIP.**

The contract did not make the two companies partners.

**4. SAME—LEASE.**

The contract was a lease.

**5. SAME.**

A contract entered into by one street railway company with another street railway company provided that in consideration of the covenants made by the latter company the former leased its railway to the latter. The latter company agreed to pay an annual rental, to operate the railway of the former at its own expense and make the necessary repairs, to pay all the floating debts of the former, together with assessments of all kinds, and to apply all money not needed for current liabilities or interest turned over to it by the former, or on hand at the date of the lease, or received by the former thereafter from the rent of useless property to the improvement of the demised property. *Held*, that the former company was not bound to turn over to the latter company any money received by the former from any source, so that whatever rent the latter paid would not be repaid to it.

**6. SAME—OPERATION—COMPANIES AND PERSONS LIABLE FOR INJURIES.**

Since Rev. St. 1899, § 1187, expressly authorizes a street railway company to lease its property, and since section 4160 provides that when technical words having a peculiar meaning are used in a statute they shall be understood according to their technical import, a street railroad company leasing its property and franchises to another street railroad company is not liable for an injury to a passenger resulting from the negligence of the employees of the latter company; the word "lease" importing a contract by which one person devests himself and another person takes possession of property for a term.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 169.]

Bland, P. J., dissenting.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Katie A. Moorshead against the

United Railways Company and another. From an order sustaining a motion filed by defendant United Railways Company for a new trial after verdict for plaintiff, she appeals. Affirmed.

R. P. & C. B. Williams, for appellant. Boyle & Priest, for respondent.

GOODE, J. The petition alleges that plaintiff was hurt by the negligence of defendant's servants in suddenly and violently starting a street car on which she was a passenger and while she was walking in the aisle to a seat. The action was instituted against the St. Louis Transit Company and the United Railways Company, and both are alleged to have owned and been engaged in operating the car and the line of railway on which it was running. The answers filed by the defendants were both general denials. Evidence was adduced tending to prove the plaintiff was injured in the manner alleged and that it resulted from the negligent conduct of the car's crew. It is conceded by the plaintiff that the evidence proved the car was operated by the Transit Company under and by virtue of a written instrument executed by the two companies and purporting to be a lease. The only evidence relied on to fasten liability for the accident on the United Railways Company was this contract. The jury were instructed to return a verdict against both the defendants if they found the issues for the plaintiff. A verdict against both having been returned, the court sustained motions filed by the United Railways Company for a new trial and in arrest, on grounds equivalent to an express ruling that it was not liable to the plaintiff. Similar motions filed by the Transit Company were overruled. The result was that plaintiff appealed from the order sustaining the motion of the United Railways Company and the Transit Company appealed from the judgment against it, but afterwards dismissed its appeal. The ordinances of the city of St. Louis were put in evidence, one of which is relied on as giving the city's consent to the leasing by the United Railways of the line on which plaintiff was hurt, to the Transit Company. The title and two paragraphs of that ordinance will be copied.

The title is as follows:

"An ordinance for the greater convenience and further transportation of passengers on the railways of the Cass Avenue & Fair Grounds Railway Company, Citizens' Railway Company, Southwestern Railway Company, Southern Electric Railroad Company, St. Louis Railroad Company and Baden & St. Louis Railroad Company, respectively, and for that purpose authorizing change of motive power, the connection of railway tracks respectively, and the running of cars of one or more of said companies on the tracks of one or more of the other companies, and of such companies whose tracks may be inter-

sected by the tracks of either of said companies, with authority to run ambulance, funeral, mail and express cars, and also authorizing if found desirable for said purpose, the sale, conveyance or lease of the rights, privileges, franchises and property of one or more of said companies, and of the companies whose tracks may be so intersected, to another of said companies or to the St. Louis Transit Company, its successors and assigns, and the acquisition thereof, with authority to hold, enjoy and operate the same for a period expiring with the term of the franchise of the Southern Electric Railroad Company, as provided in city ordinance No. fourteen thousand, eight hundred and thirty-seven, and to regulate the speed of cars, and authorizing the Southwestern Railway Company to extend its tracks on Gravois avenue from its intersection with the Morganford road to Bates street, and there to connect with the tracks of the Southern Electric Railroad Company, and extending the time for the completion of its tracks from Grand avenue on Chippewa street and Gravois avenue to the Morganford road, and the Southern Electric Railroad Company to extend its route on Loughborough avenue, Gravois avenue and Bates street, and to operate the same."

The first and third sections of the ordinance read:

"Whereas, it will be to the great advantage of passengers to have the tracks of the Cass Avenue & Fair Grounds Railway Company, Citizens' Railway Company, Southwestern Railway Company, Southern Electric Railroad Company, St. Louis Railroad Company and Baden & St. Louis Railroad Company, respectively, connected, and the cars of said companies respectively, run on the track or tracks of others of said companies: Therefore, the St. Louis Railroad Company is hereby authorized to connect its tracks on Broadway with the tracks of the Citizens' Railway Company at Morgan street and Franklin avenue, and to connect its tracks on Broadway and Walnut street with the tracks of the Cass Avenue & Fair Grounds Railway Company, and its tracks at Broadway and Elm street with the tracks at that point, and to connect its tracks at or near Broadway and Keokuk street with the tracks of the Southern Electric Railroad Company; and authority is given to the Southwestern Railway Company to connect its tracks with the Southern Electric Railroad Company at Chippewa street and Jefferson avenue; and thereupon with the consent of the St. Louis Railroad Company and said Citizens' Railway Company, Cass Avenue & Fair Grounds Railway Company, Baden & St. Louis Railroad Company, Southern Electric Railroad Company and the Southwestern Railway Company, respectively, the cars of said companies respectively, may be run on each other of said companies' tracks respectively, and upon the tracks of any railway company

with which any of the tracks of said companies may intersect, and as may be agreed upon between them respectively, and with such companies whose tracks may be so intersected, and for that purpose authority is hereby given to make desirable curves and switches and connections therewith, and the cars shall be run at the same rate of speed on the tracks on which they may run as is now provided by ordinance for the running of cars thereon."

"Sec. 3. For the better effecting the purpose of this ordinance, the said Cass Avenue & Fair Grounds Railway Company, Citizens' Railway Company, Southwestern Railway Company, Southern Electric Railroad Company, St. Louis Railroad Company, Baden & St. Louis Railroad Company and any company whose tracks may be intersected by the tracks of any of said companies, and their successors and assigns, are hereby severally authorized to sell, convey, or lease, if found desirable, their property, rights, privileges and franchises now owned and held or herein granted, respectively, to any of the said companies named in this section, or to the St. Louis Transit Company, its successors and assigns, the said company and its successors and assigns so acquiring such property, rights, privileges and franchises, is hereby authorized to acquire, hold and enjoy the same during the term of this ordinance; provided, however, that if such acquisition is had, passengers shall be transported over the whole or any part of said railroads or railways, in the city of St. Louis, so acquired, on one continuous ride for one fare, and for that purpose transfers may be made at convenient points."

It was admitted on the trial that the United Railways Company (sometimes called herein the Railways Company) acquired by purchase all the railroad lines named in paragraph 1 of the ordinance; that two-thirds of the stockholders of the two corporations passed resolutions authorizing the lease and that the contract of lease was duly executed. The contract recited that the United Railways Company and the St. Louis Transit Company were, at the date of the instrument, corporations organized under the laws of the state of Missouri; that the former owned several lines of railway in the city and county of St. Louis and certain bonds and stocks described in a deed to the St. Louis Transit Company of date September 30, 1899; that the United Railways Company was willing to lease its railway lines, property, and franchises, and all the income from its bonds and stocks to the Transit Company for a period beginning October 1, 1899, and ending April 1, 1939, and that the Transit Company was desirous of acquiring said lines and franchises by lease. The contract then proceeds to say: "Now therefore this agreement witnesseth, that United Railways for and in consideration of the covenants and agreement hereinafter contained on the part

of the Transit Company, to be by it made, kept and performed, has granted, devised and leased, and by these presents does grant, demise and lease unto Transit Company all of the railways," etc. The subsequent portion of the instrument may be summarized as follows:

The transit Company acquired from October 1, 1899, to April 1, 1939: First. All the railroads constructed, owned, or operated by the United Railways Company, or that it might thereafter construct, own, or operate. Second. All the property, real, personal, or mixed, held by the United Railways as owner or otherwise, or that it might acquire. Third. All the income derived from any bonds or stocks owned by the United Railways or which it might acquire. Fourth. All franchises belonging to the United Railways, or which it might acquire, except the franchise to be a corporation and any other right or franchise necessary to preserve its corporate existence and organization. Fifth. Exclusive right to use, manage, and operate the railways and fix and collect tolls, but not at higher rates than United Railways was empowered to fix them. Sixth. All money of the United Railways on hands at the date of the lease or received by it afterwards from any source (paragraph 9).

The Transit Company as consideration agrees: First. To pay a net annual rental of \$5 per share on all the preferred stock of the United Railways then outstanding or that might be issued with the consent of the Transit Company; said rental to be paid quarterly on the 10th days of January, April, July, and October of each year. Second. At its own cost and expense and without deduction from the rent (a) to maintain, operate, work, use, and run, and keep in public use the demised railways in the same manner the lessor, the United Railways, was required to do; (b) keep the demised railways and their property in good repair, working order, and condition, and supplied with rolling stock and equipment so as to develop the business; (c) make any repairs and replacements on the demised property, and all additions to and improvements thereon, and provide such new and additional rolling stock from time to time as might be necessary for the proper operation and use of the property. In payment for the additions, acquisition, betterments, and improvements made by the Transit Company to the property demised, the contract provided that the United Railways, when requested by the Transit Company or on its order, should deliver to the latter bonds of the first general mortgage bonds secured on the rented railway at par, and authorized to be issued for improvements; or, in lieu of said bonds, any unissued, preferred or common stock of the United Railways at the option of the Transit Company. Third. In addition to the regular rental, the Transit Company agreed to pay the United Railways Company \$1,000

a year for the purpose of defraying the expenses of maintaining the corporate existence of the United Railways and companies connected with it. Fourth. Pay all the floating debts of the United Railways Company. Fifth. Pay all tolls, assessments, and water rents assessed against the property of all kinds of the United Railways Company. Sixth. Pay the interest on the bonds thereon issued by the United Railways and the subordinate companies whose lines had been acquired by the United Railways Company and included in the lease to the Transit Company. Seventeen issues of bonds aggregating about \$35,788,000 are enumerated under this item of the consideration paid by the Transit Company for the lease. Seventh. Keep the demised property insured at its own expense. Eighth. Apply all net surplus earnings above 6 per cent. annual dividends on its capital stock, either to the extension and betterment of the leased lines of the railway, or the redemption of the mortgage indebtedness of the leased property. Ninth. To apply all money, not needed for current liabilities, or interest turned over to it by the United Railways, or on hand at the date of the lease, or received by the United Railways thereafter, from the rent of useless property to the improvement of the demised property. (a) The Transit Company agreed to "indemnify, save and keep harmless the United Railways during the continuance of the lease from all costs, charges and expenses arising from the management and operation of said Railways and all matters incident thereto" (paragraph 1 of lease). (b) The United Railways agreed in effect to maintain its corporate existence, and when requested by Transit Company, put in force and exercise each and every right it owned or might acquire, and do every lawful corporate act necessary or proper to enable the Transit Company to avail itself of the franchises and property demised; and the Transit Company agreed to indemnify the Railways Company "against all expenses, loss, damage or liability for such exercise of corporate power or performance of corporate acts." (c) The right of re-entry on the demised property was restored to the United Railways in the event the Transit Company failed to keep any of its covenants. It was provided that a re-entry for nonperformance of covenants by the Transit Company should not prejudice the right of the United Railways to recover damages for the default. (d) All cars, machinery, tools, appliances, and other personal property belonging to United Railways should be turned over to Transit Company as soon as the lease took effect, and, in case of the termination of the demise, should be restored to the Transit Company, or in lieu thereof its value paid; the value to be found by an appraisal. (e) On termination of the contract for breach of covenant, all betterments previously made by the Transit Company be-



came the property of the United Railways. (f) The Transit Company agreed to keep true accounts of its receipts and disbursements, and that its books should be open to inspection by the United Railways. (g) Differences arising between the two parties regarding the meaning of any part of the lease, and other matters, were to be settled by arbitration.

That the United Railways Company is liable in damages to plaintiff notwithstanding the contract between it and the Transit Company, and the operation of the line and car on which she was hurt by the Transit Company pursuant to the contract, is maintained on three grounds: First, that if the contract is a lease, it is inoperative for lack of consent to the leasing by the city of St. Louis; second, that the contract is not a lease, but in legal effect is an agreement by the Transit Company to operate the railway lines it was put in possession of for the United Railways Company as the latter's agent, or else is a partnership agreement between the two companies; third, that if a valid lease, the United Railways Company, as lessor, remained liable for all torts of the Transit Company as lessee, because the statute allowing such leases by street railway companies contains no clause expressly exempting a leasing company from liability for the acts of the lessee. The Constitution of the state forbids the enactment of a statute granting the right to construct and operate a street railway in any city without first obtaining the consent of the local authorities, and forbids, too, the transfer of a right or franchise to occupy a street with a street railroad without first obtaining such consent. Const. art. 12, § 20. The argument for the plaintiff is that the ordinance relied on as giving the consent of the city of St. Louis to the lease in question did not, in truth, give consent, because it only authorized the railway companies named in it to lease the lines of railway named, including the one on which plaintiff was hurt, and did not authorize a lease of the property by the United Railways Company, which was not named. It will be seen that the third section of the city ordinance, which we have quoted, expressly authorized the lease of the line on which plaintiff was hurt to the St. Louis Transit Company by its original owner, one of the companies named, which one is not disclosed by the evidence. It is admitted that the United Railways Company acquired by purchase all the lines of railway owned and operated by all the railway companies mentioned in the ordinance.

There is no sound reason for saying that the United Railways Company, though the owner of the line pursuant to a valid purchase, could not lease it to the Transit Company just as the original company might, pursuant to the permission given to the

latter by the city. The city had authorized the Transit Company to acquire it by lease, and municipal interests could not be helped by permitting the original owner to grant the lease, and refusing to permit a lawful purchaser to do so, when the lessee, in either event, would be the same. The decisive fact bearing on this point is not, as plaintiff's counsel insists, that the United Railways Company received no authority to lease the line of railway on which plaintiff was hurt to the Transit Company. It is that the latter was authorized to take a lease of it. Hence the argument that the words of the ordinance, purporting to empower the street railway companies named and "their successors and assigns," to lease their several railway lines, did not operate and empower the United Railways Company as purchaser of said railway lines to lease them is not relevant to the proposition that the lease is void for lack of the city's consent. The case of Oregon Railroad Company v. Oregonian Railroad Company, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837, decides that the words "successors and assigns," as used in various state statutes in connection with specific grants of power to railway companies, did not necessarily import that the Legislature intended to empower railway companies to lease or sell their entire property. There was no Oregon statute undertaking, in express terms, to empower a railway company to assign or lease all its property; but an attempt was made to deduce a sweeping power of that kind from general statutes granting authority to do many things to railway companies, "their successors and assigns." These statutes were said to show the Legislature intended that any power or franchise granted to a railway company in the general laws under which all railway companies must be incorporated in Oregon, might be exercised and enjoyed by an assignee or successor of the original company; that hence, the statutes, by implication, authorized a company to assign or lease its entire property. It is plain that this argument was far-fetched and in conflict with the rule universally enforced that a lease or assignment of all its franchises and assets by a corporation created for public purposes and charged with public duties thereby disabling it to serve the public is void unless authorized by statute. *Thomas v. Railroad*, 101 U. S. 71, 25 L. Ed. 950; *Pennsylvania R. v. Railroad*, 118 U. S. 290, 309, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Beman v. Rufford*, 1 Sim. (N. S.) 550; *Great Northern Ry. Co. v. Railway Co.*, 9 Hare, 305; *Winch v. Railroad*, 5 DeG. & S. 362. The proposition decided in *Oregon Railway Company v. Oregonian Ry. Co.* gives no support to the proposition that the lease by the United Railways Company to the Transit Company is void because not assented to by the city, for the city did

assent, and in connection with its assent attended to the detail of selecting the lessees which might take; one of them being the Transit Company, which did take. Were it necessary, other cogent reasons could be given against the position that the lease contract under examination is void because in conflict with the constitutional provision we have cited, but the foregoing are deemed sufficient.

Is the agreement between the companies a lease or a contract for the operation of the United Railways Company's lines by the Transit Company as the agent of the former company and for its benefit? Did it constitute a partnership? We will first deal with the legal effect of the instrument as ascertained from its terms, and not with a possible ulterior motive or purpose which may have prompted its execution. If the agreement was not entered into in good faith and for the purpose declared, but to defeat the creditors of the United Railways Company or enable its properties and franchises to be held and used for its benefit in a manner that would screen it from judgments and relieve it of responsibility, no doubt the United Railways Company would be held liable without regard to the contract. But such an issue would be for the jury unless the instrument itself, or facts in evidence, showed the truth beyond dispute. No fact allude to cast suspicion on the transaction was shown; and if the agreement is to be ignored on the ground that it was not entered into in good faith, the ground must be established by the contents of the instrument. This matter will be recurring to again. The question to be settled first is as to the legal nature of the agreement as written. It is apparent that the contract is more than an operating one, for it transferred to the Transit Company other property than the railways and their appurtenances belonging to the United Railways Company and required the Transit Company to perform other acts besides operating the railway lines. The Transit Company acquired every franchise held by the United Railways Company except the franchise to be a corporation; all the latter company's property, real and personal and mixed; all the income derived from its bonds and stocks; the money it had on hand at the date of the agreement, and what it might receive afterwards by the sale of unusable property. Besides operating the railways, the Transit Company was bound to do various acts, such as keeping them in repair, making extensions and improvements, and meeting the interest on bonded obligations. Therefore, it is obvious that if the agreement between the two companies was one for the operation of the railways, that term in the agreement, though perhaps the principal and most important one, was mingled with others of much importance.

We can think of only three conditions on which the Transit Company could operate the United Railways Company's lines for the benefit of the latter. These are: First, operate them for absolutely no reward and as a mere gratuity to the United Railways Company; second, for compensation either in the form of a regular payment by the United Railways Company for the service of for a percentage of the earnings; third, on a partnership arrangement between the two companies. The agreement certainly did not contemplate that the Transit Company should operate the railways for nothing, nor was it allowed a fixed stipend or a percentage of the receipts in payment for its services. On the contrary, instead of being paid to operate the line, it agreed to pay the United Railways Company for the possession and use of the property during a stated period, payments to be made at regular intervals and bearing all the characters of a fixed rent charge. The agreement did not provide that the Transit Company should conduct the business in the name of or for the benefit of the United Railways Company except in so far as the latter company was benefited by the consideration to be rendered by the Transit Company. It would be a very forced construction for us to torture the agreement by which the Transit Company was to yield fixed sums at regular intervals for the use of the property, into a contract of agency which made the United Railways Company principal and the Transit Company agent. All the elements of such a relationship are absent. Neither did the contract make the two companies partners, either between themselves, or as to third parties. A division of the profits of a business is not alone sufficient to constitute a partnership. The essential test is whether the parties asserted to be in partnership intended to establish that relation. *McDonald v. Matney*, 82 Mo. 358; *Mackie v. Mott*, 146 Mo. 230, 47 S. W. 897. Manifestly the two defendant companies had no thought of becoming partners; and, as they did not hold themselves out to the world as such, there is no ground for holding they were. Therefore, we find that neither the relation of principal and agent nor of partnership can be applied with propriety to the contract.

Does the contract possess the elements of a lease? In this connection it is proper to remark, in the first place, that goods, chattels, and franchises may be leased as well as lands and tenements. 1 Platt, Leases, p. 24; 1 Wood, L. & T. (2d Ed.) § 202; 1 McAdam, L. & T. (2d Ed.) p. 258; 1 Taylor, L. & T. (9th Ed.) §§ 17, 18. The statutes of the state gave the United Railways Company the right to lease its franchises, railway lines and every other property, and by the same statute the Transit Company had the right to acquire every character of property belonging to

the United Railways Company, including its franchises. Rev. St. 1899, § 1187. We need not be troubled about the power of the two companies to enter into a lease covering all the properties mentioned in the instrument. The contract in question devested the United Railways Company of the possession and use of the properties during the period named (40 years) in consideration of a specific rent to be paid by the Transit Company, and other duties, in the nature of rent, to be performed by the latter; provided further for the reversion of the property to the grantor, the United Railways Company, at the end of the term, and for re-entry if the Transit Company defaulted in the performance of its covenants during the term. Those ingredients in the agreement suffice to constitute a lease. 1 McAdam, L. & T. § 47, p. 127. The contract on its face shows that it was intended to be a lease and contains elements essential to constitute one. Therefore there is no reason for hesitating to pronounce it a lease in legal effect and only to be impeached by facts showing it was not executed in good faith. Documents of like tenor have been before courts for construction several times and they were treated as leases. *Mayor v. Railway*, 113 N. Y. 311, 21 N. E. 60; *Miller v. Railway Co.*, 125 N. Y. 118, 26 N. E. 35; *Driscoll v. Railroad*, 65 Conn. 230, 32 Atl. 354; *Terre Haute, etc., R. R. v. Cox*, 102 Fed. 825, 42 C. C. A. 654. In fact, most of the cases relied on by the plaintiff accept such contracts as leases, though for different reasons the lessors were held responsible to third parties for torts of the lessees.

We are cited to the case of *St. Jos., etc., R. R. v. St. Louis, etc., R. R. Co.*, 135 Mo. 173, 36 S. W. 602, 83 L. R. A. 607, as construing a contract like the one under review to be an agreement by a nominal lessee to operate a railway for the benefit of a nominal lessor, and hence, in legal effect, not a lease but an operating agreement. But in that case, the terms of the instrument construed were quite different from those of the instrument before us. The decision of the court that it was a mere operating contract, was rested principally upon the fact of there being no stipulation for rent to be paid for the use of the property which was the subject-matter of the contract. In that case the Iron Mountain Railway Company, which was alleged to be a lessee of the lines of railway owned by the Wabash Railway Company, was obligated by the supposed lease to pay nothing in the way of rent except what might be earned by the operation of the roads. That is to say, the Iron Mountain Company simply took over the roads to operate and apply the earnings for the benefit of the Wabash Company. The Iron Mountain Company did not assume any individual liability of any kind in consideration of the supposed lease, nor bind itself or its assets for any rent. It was for this fact that the contract between

the two companies was held not to be a lease but an operating agreement. The opinion says: "After a careful consideration of all its terms and stipulations, we are constrained to hold that it is not (i. e., a lease). Its use of the words 'demise' and 'lease' cannot be held to be controlling. For want of a better definition it may be styled an operating contract, under the stipulations of which the Wabash retains all the substantial and beneficial interest in its several railroads and leased lines and in which the Iron Mountain railroad, under the power of attorney therein granted, assumes to operate the Wabash System, collect the tolls and freights, and disburse them for the sole use and benefit of the Wabash, subject at all times to the supervision of the board of directors of the Wabash as to its management and the right to inspect its books and the accounts of the earnings and disbursements. It will be observed that the Iron Mountain nowhere in said contract binds itself to pay the Wabash a certain rent unconditionally out of its own moneys and revenues. It merely undertakes that, out of the earnings of the Wabash, it will, so far as they will suffice, pay the fixed charges which the Wabash had already assumed, and if there is any surplus, to pay this over as directed by the board of directors of the Wabash. Under no circumstances are the earnings of the Wabash System or any part thereof to become the property of the Iron Mountain. All idea of individual liability of the Iron Mountain over and beyond the earnings of the Wabash for any of the obligations assumed is carefully and studiously excluded. There is no right on the part of the Wabash to a certain profit issuing periodically out of its properties as rent reserved. Instead of passing to the Iron Mountain a definite, determinate estate of which it should be the absolute owner, it seems to us that the true effect of the whole instrument was to leave the beneficial estate in the Wabash and to constitute the Iron Mountain its agent to manage and operate the road subject to the supervision of the Wabash, and with the right of the Wabash to know at all times that the earnings and receipts were being disbursed for its use and benefit. While it was a perfectly valid contract, it is a misnomer to call it a lease or a sublease. *State ex rel. v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Anglade v. St. Avit*, 67 Mo. 434. To transform this carefully guarded undertaking, merely to operate the road for the Wabash and account to it for all the earnings and disburse them for its sole use, into the unconditional and absolute liability assumed by the Wabash in the lease from plaintiff to it would certainly be subversive of the clear intention of the Wabash and the Iron Mountain, and, as already said, this ought never to be done unless the established rules of law will permit no other alternative."

By the contract before us the Transit Com-

pany's liability for rent was not confined to the earnings of the leased property. The Transit Company was a corporation with a capital stock running into millions, and its property was all subject to the obligation of its contract with the United Railways Company to pay the various charges and items of rent enumerated in the lease. But it is insisted that paragraph 9 of the lease bound the United Railways Company to turn over to the Transit Company any money received by the former from any source and, therefore, whatever rent the Transit Company paid would be repaid to it; thus showing there was no real consideration for the lease. One item of rent is to be used to maintain the corporate existence of the United Railways Company. Another item to be paid quarterly, is in the nature of a dividend on the preferred stock of the Railways Company. We hardly think the ninth paragraph intends that those cash items of rent, which are to be paid to the Railways Company, must be returned by it to the Transit Company; but that the fair interpretation of the lease, taking into consideration all its terms with reference to this point, is that it aimed to transfer all the lessor's assets of every kind for an agreed rental. The Transit Company became entitled to all the assets of the Railways Company, including cash on hand, or that might come to it from the sale of property or other sources except the rent, which was the consideration to be paid for the transfer to and use by the lessee of the assets. The purpose of paragraph 9 seems to be to bind the Transit Company to use the cash received from the Railways Company in keeping the leased property in good repair. However, we are not called on to construe the ninth paragraph as to this question; because no one will contend that its language bound the Railways Company to reimburse the Transit Company for money paid by the latter as rent, not to the Railways Company, but to third persons on the obligations of the Railways Company. Now the Transit Company, as lessee, agreed to pay all the floating debts of the Railways Company (paragraph 4), all its taxes, assessments, and water rents (paragraph 5), the interest on the various issues of bonds secured on the different lines of railway (paragraph 6), and the insurance premiums on the property (paragraph 7). These chief items of the rent, running annually, no doubt, into many thousands of dollars, the lessee was bound to pay to third parties and not to the lessor, and there is nothing in paragraph 9, or any other part of the lease, which bound the lessor to reimburse the lessee for the amount thus paid. And, as said, the Transit Company was bound to pay these and the other items of rent even though the operation of the railways failed to earn enough money to meet the obligations. This contract is therefore radically different from the one con-

strued in *St. Jos., etc., R. R. v. Iron Mt. R. R. Co.*, supra, and presents the essential elements of a lease.

The proposition next to be considered is, conceding that the contract was a lease, did the United Railways Company nevertheless remain responsible for injuries to a passenger resulting from the negligence of the Transit Company? In other words, is a leasing railway company so far liable for the torts of the lessee that it must answer in damages for a tortious injury to the passenger? This question is one on which there is a great diversity of judicial opinion; but it is proper to state, as a circumstance bearing on the weight of authority, that, in most of the cases affirming the liability of the lessor, there were dissents. I think the preponderance of authority, and the great preponderance of reason, are against the liability of the lessor in such cases. I think, too, that, as a rule of law, the doctrine that the lessor is liable, is at war with the general rules and principles governing the liability of lessors for the acts of their lessees and the settled canons of statutory construction. As the statutes of this state give a street railway company power to lease all of its property to another street railway company, there was direct statutory authority for the lease in dispute; and only those adjudications are exact precedents wherein statutory authority for the controverted lease existed. The particular statute authorizing such leases appears in the Revised Statutes of 1899 as a new section 1187. It is said not to have gone into force until November 1, 1899, and too late to confer authority for the contract we are dealing with, which was dated September 30, 1899, and took effect on October 1st, or the next day. But the statute was enacted with an emergency clause and approved June 19, 1899 (Laws 1899, p. 377, c. 155, § 13), prior to the contract in question. It is further said that the enactment only conferred the power to lease on corporations formed under the act and that both the United Railways Company and the Transit Company were incorporated under prior statutes. But by section 15 of the act, any street railroad company theretofore organized under any general or special law of the state was granted all the powers, benefits and privileges of the act if it would file in the office of the Secretary of State a resolution of its board of directors, accepting the provisions of the act and paying into the state treasury the fees required by section 13. The present record does not show whether or not the United Railways Company or the Transit Company complied with section 15; but in considering this point it is to be remembered that the United Railways Company did not introduce in evidence the contract with the Transit Company as matter of defense, and hence was not bound to show affirmatively it had power to execute the contract, as would have been incumbent on it, had it

sought to evade liability by proving the lease. The instrument was introduced by the plaintiff to fasten liability on the United Railways Company, and there was no contention that the said Company was without power to execute it because of failure to take advantage of the act of July 19, 1899, in the manner provided in section 13. The plaintiff relied on an instrument, which she contended the United Railways Company had executed, to prove said company was liable to her on several grounds; none of which was lack of statutory power to make a lease. Hence it ought to be presumed, in the absence of proof to the contrary, that the two companies which were parties to the alleged lease, or at least the United Railways Company, had complied with the requirement of the statute authorizing street railway leases and had become entitled to the benefits and powers conferred on complying companies.

Cases affirming the liability of a leasing railway company for torts of the lessee should be classified with reference to the existence of such a statute when the lease was executed. All courts agree that in the absence of a statute, a lease of its property and franchises by a railway company, does not relieve it of its public duties and responsibilities, and that the lessor remains liable for the torts of the lessee. In other words, there is no common law authority for such leasing by railroad companies, at least in so far as the contract impairs the right of the public to hold the lessor answerable for the proper discharge of the duties it assumed in consideration of the powers granted to it by the sovereignty. *Railway Co. v. Brown*, 17 Wall (U. S.) 445, 21 L. Ed. 675; *Thomas v. Railroad*, 101 U. S. 71, 25 L. Ed. 950; *Chollette v. Same*, 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135; *Muntz v. Same* (La.) 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495. Before going into a discussion of the question on principle, it is well to classify the adjudications, so that those directly in point may be studied more readily, and those wherein the proposition affirmed is not identical with the one involved here may have attached to them the value they merit as containing the lucubrations of judges on the general question and not treated as precedents on the exact question before us. When the lease is authorized by statute, the leasing company, of course, remains liable for the acts of the lessee if the statute says it shall. *Smith v. Railroad*, 61 Mo. 17; *Markey v. Railroad*, 185 Mo. 348, 84 S. W. 61; *Main v. Same*, 18 Mo. App. 388; *Brown v. Same*, 27 Mo. App. 396; *McCoy v. Same*, 36 Mo. App. 445; *Quested v. Railroad*, 127 Mass. 204; *Daniels v. Hart, Treas.*, 118 Mass. 543; *Bower v. Railroad*, 42 Iowa, 546; *Whitney v. Railroad*, 44 Me. 362, 69 Am. Dec. 103; *Stearns v. Railroad*, 46 Me. 95. When the statute authorizes the leasing, but says nothing as to whether the lessor shall remain liable, a few courts hold that nevertheless the lessor

is liable as fully as the lessee itself would be for the latter's tortious acts; and, in pursuance of this extreme view, these courts have held the leasing company liable for negligent injuries inflicted by the lessee on its own servants. *Chicago, etc., R. R. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75; *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959; *Harden v. Same*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; *Singleton v. Same*, 70 Ga. 404, 48 Am. Rep. 574; *Bank v. Same*, 25 S. C. 216; *Hart v. Same*, 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794. In the case last cited the court went so far as to hold the lessor liable in punitive damages for the wrongful conduct of the lessee. The doctrine of other tribunals is that the leasing company remains liable to third persons for an injury received because of the improper construction or bad repair of the roadbed, station houses, or other real property, on the ground that it was the peremptory duty of the lessor to maintain its properties in good condition for the use of the general public, including as part of the public the servants of the leasing company. *Lee v. Railroad*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140. In certain cases which maintained the doctrine that the lessor is not exonerated by a statutory lease from responsibility for the wrong performance by the lessee of any charter power or duty, it is held that the safe operation of cars and trains on which passengers are carried is a charter duty. *Railway Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805. We have found no Missouri statute, relating either to the chartering of companies or to their regulation, which undertakes to impose on street car companies, by special legislative enactment, the duty of careful operation of cars for the security of passengers, though such companies are under a common-law duty of that sort. There are cases wherein the general principle that the leasing company remains responsible for the proper performance of its charter duties is adhered to, but the operation of trains and cars is declared not to be one of those duties. *Mahoney v. Railroad*, 63 Me. 68; and note to *Ohio, etc., R. R. v. Dunbar* (Ill.) 71 Am. Dec. 291, wherein, on page 297, it is said that a case holding the contrary does not accord with sound principle or authority. Other decisions repudiate these various distinctions as of no importance, and ground the nonliability of the lessor on the grant of statutory power to make a lease, holding that this imports a lease with all the usual incidents and consequences of that sort of a contract, one of which is that if the property is in safe and good condition when turned over to the lessee, the lessor is not responsible for subsequent injuries arising from its bad repair. *Fisher v. Railroad*, 34 Hun (N. Y.) 433; *Miller v. Railroad*, 125 N. Y. 118, 26 N. E. 35.

The foregoing cases may be classified, too, with reference to the principles on

which they hold the leasing company responsible. Some courts profess to do this because public policy requires it, but disagree as to what particular public policy is to be subserved by the rule. Some ground the responsibility, as we have seen, on the fact that a railway company is an artificial person, deriving its powers from the sovereignty and in consideration of those powers, agreeing to perform certain duties for the sovereignty; hence should be held strictly accountable for their proper performance. Other cases declare that charter duties cannot be transferred and that it is a charter duty to carry passengers safely. Others that neither charter nor common-law duties can be transferred to a lessee so as to shift responsibility from the lessor; and that if the safe carriage of passengers is not a charter duty of the leasing company, it is at least a common-law duty, for the due performance of which the company that owns the railway is answerable. Much stress is laid in some decisions on the supposed fact that if one railway company is permitted to lease its property to another, and thereby relieve itself from liability for the lessee's torts, leases may be made to irresponsible companies and the public left remediless. *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747. There is one case—perhaps there may be others—which held the lessor responsible, apparently on the ground that the lease did not transfer every franchise possessed by the lessor. *Braslin v. Somerville*, 145 Mass. 64, 13 N. E. 65. Still other cases hold the lessor responsible because, by the terms of the lease, it retains control of the management and operation of the leased property. *Driscoll v. Railroad*, 65 Conn. 230, 32 Atl. 354.

It will be seen from the foregoing analysis that there is a wide divergence of opinion among courts holding the leasing railway company liable for the misfeasance of the lessee, both as to the extent of the liability (i. e., what instances of tortious conduct it covers) and the principles on which it is founded. A more direct reference to some of the cases may aid in elucidating the doctrines held and the sources whence they are derived. The Illinois cases run back to *Ohio*, etc., *R. R. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291, in which a leasing railway company was held answerable for breach of a contract by the lessee to carry freight. The point came up on demurrer to a plea of the lease by way of defense. No statute authorizing such a lease was in force at the time and the contract was held to be ultra vires. In later cases, after such a lease had been authorized by statute, the Supreme Court of Illinois founded the liability of the lessor, at first, on the theory that the lessee was its agent for the operation of the railway. *West v. Railroad*, 63 Ill. 545. After-

wards this theory was discarded as unsound and the notion adopted that public policy forbade the leasing, because an insolvent lessee could be selected and all responsibility to the public evaded by the company to whom the state had granted franchises. *Chicago*, etc., *R. R. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75. The North Carolina cases are traceable to *Aycock v. Railroad*, 89 N. C. 321, wherein a company which had permitted another company to run trains over its track was made to pay for damage done by fire communicated to adjacent farms, from rubbish permitted to accumulate on the right of way and ignited by sparks from an engine having no spark arrester. There was no lease and it did not appear that the defendant was not actually operating trains on its road. See dissenting opinion in *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747. The Massachusetts case of *Braslin v. Railroad Co.*, supra, lays stress on the facts that only a portion of the railroad of the lessor company was leased; that said company was not going out of business and that indemnity was taken by it for the acts of the lessee, thereby showing that both parties understood defendant was not to be released by the contract from the discharge of its public duties. The Georgia cases begin with *Singleton v. Railroad*, 70 Ga. 464, 48 Am. Rep. 574, in which the defendant permitted its lessee to do business in its name, and in its name sell plaintiff the ticket on which he was traveling when hurt by the negligence of the lessee. It is apparent that, though this was a case of leasing, the defendant lessor was responsible because it had permitted the lessee to hold it out as the principal in making contracts with the public and particularly with the plaintiff. In the Kentucky case of *McCabe's Adm'r v. Railroad*, 112 Ky. 861, 66 S. W. 1054, we gather from the opinion that the Constitution of the state retained the liability to the public of the original company in the event of a lease or other transfer of its properties. In *Muntz v. Railroad* (La.) 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495, the opinion leaves one in doubt as to whether the lessor was held responsible because there was no legislative authority for the lease, or because all the franchises and property of the leasing company were not transferred, or from motives of public policy. In the *Driscoll Case*, 65 Conn. 230, 32 Atl. 354, the lessee agreed to indemnify the lessor, not only against costs, charges, and expenses in the management of the leased property, as was done in the case at bar, but also against damages incurred in the operation of the property; and moreover it was agreed that the superintendent of the lessee, who was given power to hire employes, must be satisfactory to the lessor. Two judges dissented

in that case. The majority opinion said the sole question was whether or not the defendant (lessor) had transferred the property to the lessee. In *Lee v. Railroad*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140, a brakeman was hurt because of bad rails and roadbed. The Constitution of the state contained a clause inhibiting the release of the property of a lessor from liability for damages incurred in the construction and operation of the road; but the case was decided against the defendant on the ground that, in the absence of an express statutory exemption, it remained liable, notwithstanding the lease, for the proper construction of the road, station houses, etc. The opinion approves the doctrine of *St. Louis, etc., R. R. v. Curl*, 28 Kan. 622, which holds a leasing company liable for the omission of a duty in the construction of the road, but exonerates it from responsibility for torts in the handling of trains and the management of the road. The Kansas opinion was prepared by Justice Brewer, now of the Supreme Court of the United States, and endorsed the New York decisions concerning the liability of lessors for injuries due to defects in leased property, citing *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, and *Ditchett v. Railroad*, 67 N. Y. 425. In *Railroad Co. v. Morris*, 68 Tex. 49, 3 S. W. 457, there was no statutory authority for the lease. The South Carolina cases most strongly support the plaintiff's position; whereas the Massachusetts cases can hardly be said to lend it any support. Opinions holding the lessor liable for the torts of the lessee, when the leasing is authorized by statute, leave the impression that the courts lay hold of various general rules of corporation law, having very remote bearing on the immediate question, in order to enforce what the deciding tribunal happens to think would be a salutary rule. Much stress is laid on the fact that the corporation is an artificial, instead of a natural, person and derives its powers from the state. How this dogma can restrict the right of a railway company to lease its property when the statute gives the right in unqualified terms, is not easy to perceive. The proposition that a railway company is bound to perform all its charter duties, and all its primary duties to the public, whether imposed by the charter or the common law, is sound. But the proposition that the Legislature may authorize it to transfer to any other company by lease the performance of those duties is equally sound. The mischief which it is supposed would result if leasing railway companies are not held responsible for torts, in that leases to irresponsible companies would be made for the purpose of evading liabilities, is met by two answers: First, if that was the intention, on proof of the fact, the lease would be disregarded like any other fraudulent conveyance, and the lessor held responsible;

second, our statutes require one half of the capital stock of a street railway company to be subscribed and 10 per cent. of the subscriptions to be paid up in cash; and to that extent, at least, a lessee company would have to start with assets. Rev. St. 1899, § 1186. In the case at bar the capital stock of the Transit Company is \$20,000,000, and it must have \$1,000,000 of paid-up capital.

The policy of the state in regard to such contracts was settled by the Legislature when it authorized the leasing of the property of one street railway company to another. The policy is, of course, to permit such leases; for the very highest evidence of the public policy of any state is its statutory law. But it is said that the true public purpose is to permit the lease, but hold the leasing company answerable for the torts of the lessee. Inasmuch as there is legislation on the subject, the policy of the state must, as said, be derived from the enacted laws. If it appears on a fair interpretation of the statutes authorizing the leasing that the Legislature contemplated a continuance of the liability of the lessor, the law should be so declared; but if it appears that the Legislature did not construe this liability against the leasing company, but authorized leases of street railway properties with all the legal effects pertaining to lease contracts at common law, then the courts have no right to partially annul the legislative intention, or engraft on the law an exception in the interest of what they believe would be good policy. This whole question is not one of public policy at all, but of legislative intention—of statutory construction. The public policy notion misconceives and misses the essential inquiry. We have a statute broadly authorizing contracts like the one before us, and the primary inquiry is whether or not the statute discloses an intention on the part of the Legislature to hold the leasing railway company responsible for torts after the lease is executed and the property transferred. The first rule for the interpretation of statutes is that their meaning must be collected, if possible, from the language used. Of course, if a certain interpretation would lead to absurd or iniquitous results, it will not be adopted unless compelled by the language. *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; *Fosburgh v. Rogers*, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201; *Chouteau v. Railway Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; *Lamar, etc., v. Lamar*, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157. We may allow, therefore, that the court may take into consideration what it believes would be for the common weal to this extent, namely, that if one construction would be mischievous and another beneficial, and the language of the enactment permits either to be adopted, the salutary one will be preferred. The statute with which we are deal-

ing, after enumerating other powers of street railway companies organized under the law, provides: "Seventh, to purchase, lease, or acquire by other lawful contract, which shall include the right to purchase the capital stock and bonds of other street railroad companies, and to hold and dispose of the same, and to hold, use and operate any street railroad or roads, with all and singular its or their franchises and properties of every description belonging to any other street railroad corporation or corporations: Provided, that such purchase, lease or other contract be authorized or approved by the vote of the holders of two-thirds in amount of the capital stock of the company so purchasing, leasing or otherwise contracting therefor at a meeting called for that purpose upon twenty days' notice published in some newspaper of the city or county where the general office of such street railroad company may be located, or by written notice mailed to the last known address of each registered stockholder twenty days before such meeting; and provided further, such roads connect with or intersect each other so as to allow a single passage one way over each road for a single fare. Eighth, to sell, lease or dispose of by any other lawful contract, to any other street railroad company, its railroad rights, franchises, including the right to be a corporation, and all and singular its other properties of every character and description: Provided, that such sale, lease or other contract disposing of its railroad, franchises and other properties, shall be first authorized or approved by the vote of two-thirds in amount of the holders of its capital stock at a regular or called meeting of its stockholders convened pursuant to such notice as is required in the next preceding clause." Rev. St. 1899, § 1187.

It will be seen that the statute authorizes any railway company to purchase, lease, or acquire by other lawful contract, all the franchises and property of every description belonging to any other street railway corporation, including the stock and bonds of the latter, and further authorizes the purchasing or leasing company to hold, use, and operate the railway leased. The statute further authorizes any street railway company to sell, lease, or dispose of by any other lawful contract, to another company, its railroad rights and franchises, including the right to be a corporation, and all and singular its other properties of every description. We remark that as the Legislature granted street railway companies the power to dispose of their franchise to be a corporation, it could never have been the intention to hold such companies responsible for the acts of a company acquiring the franchises. When a company disposes of its right to be a corporation, it practically passes out of existence, and cannot be held responsible in any legal method

which occurs to us. Moreover a company is authorized by said lease or other lawful contract, to dispose of all its property, which shows that the lawmaking body did not expect it to still stand responsible for the acts of the vendee; for how could it be held responsible after all its property was gone? But it is argued that those provisions take effect only in the case of sales. The words of the statute are "to sell, lease or dispose of by any other lawful contract." Take the instance of a lease for a long term of years, covering all the leasing company's property of every kind and character; in what way would it be practicable to collect judgments from such a company? It is true the reversion of the property might be sold under execution, but that would be of very little value to the purchaser if it was under an unexpired term longer than an ordinary lifetime. To our minds, it is palpable from the statute itself, that the Legislature never thought of holding the leasing company answerable for the torts of the lessee. It fully intended to make the latter responsible; at least for all torts occurring in the operation of the road. Moreover, it is repugnant to every principle of law or justice to hold one person or company responsible for the negligence of another which it had no power to prevent. The statute empowers the lessee company to operate the road, and unless the power of control is reserved by the lessor in the lease, the operation will be without any interference by the lessor. Could the Legislature expect that, in that contingency, the lessor should stand answerable for negligent torts? To so hold would largely annihilate the privileges granted by the statute—would frustrate the purpose of the lawmaking body. That the lessee company is not responsible is a view strongly enforced by our statute in regard to the construction of laws, the first clause of which declares that "when technical words and phrases, having a peculiar and appropriate meaning in law, are used in a statute, they shall be understood according to their technical import, unless that meaning is plainly repugnant to the intent of the Legislature, or of the context of the same statute." Rev. St. 1899, § 4160.

Now, the word "lease" has a settled technical import. It imports a contract by which one person, either natural or artificial, devests himself or itself of, and another person takes possession of, lands or chattels for a term. Certain immunities and responsibilities attach to every lease by the well-settled rules of law unless there are covenants to the contrary. One of these incidents is that if the demised property is turned over to the lessee in good condition, the lessor is not afterwards liable for damages resulting from the negligent use of the property by the lessee. *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650; *Gordon v. Peltzer*, 56 Mo. App. 599; *Mancuso v. Kansas City*, 74 Mo. App. 138. According



to the mandate of the statutes for the construction of laws, the word "lease" in the street railway statutes must receive its ordinary legal meaning, for there is nothing in the context repugnant to that meaning; but, on the other hand, all the contextual language points to a conclusion that the Legislature used the word in its usual sense. Hence we hold that, in authorizing a street railway company to lease its property and authorizing the lessee to operate the property thus leased, the Legislature intended that the lessee should be answerable for the manner in which it used the property and the lessor should not be. Furthermore, it happens that there have been other statutes enacted in this state authorizing a railway company to lease its property, in which the Legislature expressly provided for the retention of liability on the part of the lessor for the proper performance of the duties it owed the public. *McCoy v. Railroad Co.*, 36 Mo. App. 445. The same court which decided the *McCoy* Case, stated in *Brown v. Railroad*, 27 Mo. App. 394, 400, that railway companies cannot, "by a lease without the consent of the state, escape responsibility for the acts of the lessee \* \* \* but with such consent may undoubtedly do so"; citing various cases, including *Mahoney v. Railroad*, 63 Me. 68. The opinion then calls attention to the fact that by section 790 of the Revised Statutes of 1879 (section 1060, Rev. St. 1899) it is provided that any railroad company in this state leasing its road to a corporation of another state, should remain liable just as if it operated the road itself. See, too, *Main v. Railroad*, 18 Mo. App. 388. In *Markey v. Railroad*, 185 Mo. 348, 84 S. W. 61, the liability of the leasing company was expressly reserved by the statutes and hence the case is not in point as an authority on the question before us. But from it and other cases, and from the statutes themselves, we learn that the Legislature of this state has not omitted from enactments authorizing railway leases, clauses reserving liability against a leasing railway company for the torts of the lessee, when the purpose was to continue the responsibility of the former. Hence it is fair to presume that when no reservation of liability was made in the act, either by express words or by implication, the intention was that the lessee alone should be answerable for its torts. That this interpretation of the statute is a sound one, is maintained by practically all the elementary treatises and, in our judgment, by the weight of judicial opinion. The following cases are directly in point. *Arrowsmith v. Nashville, etc., Co.* (C. C.) 57 Fed. 165; *Heron v. Railroad*, 68 Minn. 542, 71 N. W. 706; *Hayes v. Railroad*, 74 Fed. 279, 20 C. C. A. 52; *Caruthers v. Railroad* (Kan.) 54 Pac. 673, 44 L. R. A. 737; *Mahoney v. Railroad*, 63 Me. 69; *St. L. R. R. v. Curl*, 28 Kan. 622; *Scziwak v. Railroad*, 4 Pa. Dist. R. 339; *Lakin v. Railroad*, 13 Or. 436, 11 Pac. 68, 57 Am. Rep. 25; *Gwathney* 96 S.W.—18

*v. Railroad*, 12 Ohio St. 92; *Texas, etc., v. Mangum*, 68 Tex. 342, 4 S. W. 617; *Fisher v. Railroad*, 84 Hun (N. Y.) 433; *Ditchett v. Railroad*, 67 N. Y. 425; *Mayer v. Railroad*, 113 N. Y. 311, 21 N. E. 60; *Miller v. Railroad*, 125 N. Y. 118, 28 N. E. 35.

The reasoning of these cases is, in the main, that when the Legislature by statute confers the authority on a railroad company to lease its properties, and on another company to take and operate them, and, pursuant to such statute, a lease is made turning over all property in an unrestricted way to the lessee, the proper view is that the Legislature intended that all the ordinary incidents of a lease should accompany the transaction and the lessor not remain liable for operating torts. In *Pinkerton v. Railway* (Pa.) 44 Atl. 284, the court said: "The last point made by appellant is that, even if the Pennsylvania Traction Company was incorporated, the lease to it by the Columbia & Donegal Railway did not exonerate the latter from liability. But such a proposition is contrary to all the established rules of law in regard to lessor and lessee. The latter steps into the place of the former, is substituted for him, and assumes all subsequent liabilities incurred in the operation of the property leased. That is the very ground on which it is held that a corporation cannot lease or transfer any part of its franchises without express legislative or charter authority. *Nelson v. Railroad Co.*, 26 Vt. 721, 62 Am. Dec. 614. If a lease did not exonerate the lessor, but left his liability unaffected, and only added the liability of the lessee, no one could possibly be hurt by it, or have any standing to complain. It is conceded that a franchise is a duty imposed, as well as a privilege granted, by the state, and the duty cannot be avoided or transferred to another without the state's authority. But when such authority is shown, as in the act of 1887, to motor-power companies to assume by lease the operation of passenger railway companies, it must be construed as a grant, with all the ordinary attributes of such authority between lessor and lessee, unless the statute or the contract makes a reservation of continuing liability in the lessor. Neither is alleged in the present case. Neither *Van Steuben v. Railroad Co.*, 178 Pa. 367, 35 Atl. 992, 34 L. R. A. 577, nor *Hanlon v. Turnpike Co.*, 182 Pa. 115, 37 Atl. 943, have any bearing on the present question. In the former the lessee was a New Jersey company, and it was held that the statute authorizing railroads to lease their lines did not extend to a foreign corporation; and in the latter it was said that there was no evidence of authority to make the lease. The remarks on this subject must therefore be taken as applied to the state of facts then before the court. In other states there is some conflict in the cases, and some difference of opinion among the text-writers as to the weight of authority. But, as is well said in 5 Thompson,

Corp. § 5884, note, after stating the admitted rule that, if the lease is not valid, there is a continuing liability of the lessor: 'Some of the courts state the doctrine loosely, without any apparent regard to the question whether the lease was lawful or unlawful. \* \* \* But, by running back through the decisions of these courts on the subject, it will generally be found that, in the first case stating the doctrine, stress was laid on the fact that the Legislature had not authorized the railroad company to assign its franchises, or devolve its public duties upon another person or corporation.' This points out clearly the source of most of the conflict in the cases. Two of them are specially relied on by appellant, and were cited in *Hanlon v. Turnpike Co.*, supra, *Nelson v. Railway Co.*, 26 Vt. 717, 62 Am. Dec. 614, and *Railway Co. v. Brown*, 84 U. S. 445, 21 L. Ed. 675. In the former it nowhere appears that the lease was authorized by law, and in the latter the railroad was operated jointly by the lessee and the receiver of the lessor, and the passage ticket which was the basis of the action was issued in the name of the lessor company. On the general subject, see *Booth*, St. Ry. Law, 425; *Pierce*, R. R. 283; *Patt. Ry. Acc. Law*, 130, 131; 19 Am. & Eng. Enc. Law, 891, note. After consideration of both views, we are of opinion that the settled principles of law and the decided weight of authority are in favor of the rule that, where a lease is duly authorized by law, there is no further liability of the lessor for negligence of the lessee in the operation of the road." In the *Heron Case*, 68 Minn. 542, 71 N. W. 706, it is said that, in enacting a statute authorizing the lease without retaining the liability of the lessor, the Legislature impliedly relieved it from liability. The same doctrine is maintained in the *Carruthers Case* decided by the Supreme Court of Kansas, and in most of the other cases cited above. The New York courts hold that an unrestricted lease of a railway, made pursuant to a statute which confers on the lessee the right to take and operate the property, stands like any other case of leasing, and that, if the lessor turns the property over to the lessee without any reservation of control, the latter alone is responsible for the negligent use of it. In the following textbooks the doctrine that the lessor ceases to be responsible is maintained. 2 *Elliott, Railroads*, § 469; *Pierce on Railroads*, 213, 284; *Booth*, St. Ry. Law, § 425; 5 *Thompson, Corporations*, § 5884; *Nellis, Surface Railroads*, p. 266, § 16; *Nellis, St. R. Acc. Law*, p. 488, § 6; *Noyes, Intercorporate Relations*, § 219, particularly page 818. See, also, comments made by Judge Redfield in his work on Railways on the decision of *Nelson v. Railroad*, 26 Vt. 721, 62 Am. Dec. 614. In commenting, he says that the effect of legislative consent to the lease was not met or decided in the *Nelson Case*. Redfield, *Railways*, p. 618, note.

Of course, those commentators recognize

the division of judicial authority on the question; but every one of them gives his voice in favor of the soundness, on principle, of the proposition that the leasing company is not responsible for damage entailed by the negligence of the lessee in the operation of the road when the leasing is done under statutory authority. Plaintiff's injury was not caused by a bad roadbed, or by anything but the carelessness of the crew of the car on which she was riding; that is, the carelessness of the Transit Company's employees, whom the United Railways Company had not the least opportunity to control. Therefore, for the foregoing reasons, we think the judgment in favor of the United Railways Company on the present record, was for the right party, and should be affirmed. If evidence was adduced to show that it was contemplated from the first by the incorporation of the two companies that the property should be leased to the Transit Company in order to accomplish a fraudulent purpose, and that the alleged lease was a sham; or any other fact was proved to show it was not made in good faith, but to protect the United Railways Company from debts and judgments, a very different proposition would be presented for decision. The essential fact to be shown to overthrow the lease is that it was not bona fide, but colorable—was a fraudulent conveyance. This, however, is purely a question of fact to be established by relevant evidence in the bill of exceptions touching such an issue. The proposition squarely asserted is that the United Railways Company is responsible, as a matter of law, for the injuries of the plaintiff, even if its contract with the Transit Company was a lease in legal effect and executed with an honest purpose. We do not assent to that proposition, but think the liability of the Railways Company depends on facts in pais and cannot be established by construing the writing purporting to be a lease.

The judgment is affirmed.

**NORTON, J.** (concurring). 1. It is urged with much force by the learned counsel for appellant that the document introduced in evidence is not a lease, but is rather an operating contract whereby the Transit Company operated the street railroad mentioned therein, and especially the line on which the plaintiff received her injury, either as an agent for, or the partner of, the United Railways Company, the owner, and the liability of the United Railways Company is therefore asserted, first, upon the theory that the principal is responsible for the negligent acts of the agent committed within the scope of the agent's authority, and while conducting the business of the principal in pursuing the agency; or, second, upon the principle of agency as applicable to partnerships in and about the conduct of the partnership business. As appears from the separate opinions of each of my associates, there is no disagree-

ment between the members of this court on this question. After mature deliberation we all agree: First. That the legal effect of the instrument is not such as to establish the relation of principal and agent, nor that of copartnership between the parties, so that the United Railways Company is liable for the negligent acts of the Transit Company. It is the unanimous opinion of the court on the record before us, and that is a record devoid of either allegation or proof of fraud pertaining to the transaction, that the document on its face is, as a matter of law, a lease, whereby the United Railways Company, the lessor, demised to the Transit Company, the lessee, the property therein mentioned, etc. Second. We are likewise all of the same opinion with respect to the sufficiency of the showing made to the effect that the city of St. Louis had, by ordinance, accorded its assent to the leasing of the railroads in question, in conformity with the constitutional provisions in that behalf. From these facts, it appears that there remains but one question in the case about which there is conflict of opinion, and on this question I fully and freely agree in the doctrine and reasons therefor announced in the very able opinion of the court prepared by Judge Goode.

2. Inasmuch as the identical question here presented has never been determined by the courts of last resort in this state, I deem it not improper, in view of the difference of opinion entertained by the members of this court, to set out a few of the reasons which have impelled me to the conclusion announced in the opinion of the court. I do not write because I feel that anything which should have been said, has been left unsaid, or that I can add anything of substantial worth to the very able and exhaustive review and reasoning to be found in that opinion; but, on the contrary, I contribute my views for no other purpose than to say that after an extended, careful, and candid investigation of the subject, it has revealed itself to my mind as a marvel of simplicity, which had become much enmeshed in the intricate reasoning of learned judges and confounded by the misapplication of wholesome general principles not in the least pertinent here, but pertaining to a wise and sound public policy with respect to such corporations as are chartered by the state to serve all of the people, and, therefore, in their nature, public institutions. And in this connection, I may say that I have read and re-read each and all of the authorities cited in the opinions by my learned associates, both Judges BLAND and GOODE, as well as each and all of the authorities cited in the various briefs on file and such other cases, both in this country and in England, that have come under my observation, and I have studied every case upon its merits with respect to the facts before the court in each individual instance, candidly and earnestly seeking to ar-

rive, with that degree of accuracy of which the subject is worthy, at the correct principle which should influence the court in its adjudication, if there be any principle pertinent thereto other than that which applies between citizens generally in like transactions. My labors in this behalf have been rewarded by ascertaining, beyond peradventure, as far as my own judgment and conscience are concerned, that the same principle applies here in determining the liability of the lessor with respect to the negligent acts of its lessee, in which it did not participate and over which it had no control, as applies between citizens generally arising out of the relation of landlord and tenant, and that none other than that is pertinent.

There is, indeed, a marked conflict noticeable upon the first or cursory reading of the authorities. When the cases are carefully and studiously examined, this conflict is discovered to be more apparent than real. Many of the adjudicated cases rest upon facts where no statutory authority of any sort for the lease was had, and of course in such cases, on the principle that a chartered corporation cannot absolve itself of its obligation to the public without the consent of the state, the lessor has been held liable. Yet others rest upon facts where the statute under which the lease was executed, in express terms, reserves the liability of the lessor, and of course, in these cases, the liability has been properly adjudged against the lessor. In others, the injury, for which the lessor is sought to be held to answer, was occasioned by the neglect of the lessor in the original construction of the property leased, and the lessor in such cases has been held responsible on the same principle that the landlord of a building would be held responsible for an injury resulting from the negligent construction of a building in the occupancy of his lessee. In other cases, the injury, for which the lessor is sought to be held, was occasioned by the neglect of some positive duty affixed by the charter or general statutes against the lessor, which cases proceed upon the theory that such positive statutory obligation cannot be shifted except by equally clear and positive statutory exemption therefrom. And the other class of cases, like the one at bar, present the question of a lease having been made under competent legislative authority without either express exemption from or reservation of liability in the lessor, and this latter class, and none other, are in point as precedents in the case before the court. The cases are all properly classified by Judge GOODE in the opinion of the court, and I will not increase my labor by unnecessarily pointing them out. Many of the cases are classified by Judge Lurton in *Arrowsmith v. Nashville, etc., Ry. Co.* (O. C.) 57 Fed. 165. As said, it results from all of this that but one of the several classes of cases referred to are precedents here, and that is the line of cases in which it is sought

to enforce the lessor, under a statute in broad terms authorizing the lease without any express exemption from or reservation of liability of the lessor, to respond for the negligent acts of the lessee whereby a third party, not in the employ of either, is injured. Such are the cases of *Caruthers v. Railway* (Kan.) 54 Pac. 873, 44 L. R. A. 737, where is to be found a very learned and able note on the question. See, also, *Arrowsmith v. Railway Co.* (C. C.) 57 Fed. 165; *Hayes v. Railway*, 74 Fed. 279, 20 C. C. A. 52; *Heron v. Railway Co.*, 68 Minn. 542, 71 N. W. 706; *Mahoney v. Railway*, 63 Me. 69; *Scizwak v. Railway Co.*, 4 Pa. Dist. R. 339; *Lakin v. Railway Co.*, 13 Or. 463, 11 Pa. 68, 57 Am. Rep. 25; *Gwathney v. Ry. Co.*, 12 Ohio St. 92; *Texas, etc., v. Mangum*, 68 Tex. 342, 4 S. W. 617; *Fisher v. Railway Co.*, 34 Hun (N. Y.) 433; *Ditchett v. Railway Co.*, 67 N. Y. 425; *Mayor, etc., v. Railway Co.*, 113 N. Y. 811, 21 N. E. 60; *Miller v. Railway Co.*, 125 N. Y. 118, 26 N. E. 35; *Railway Co. v. Curl*, 28 Kan. 622. In the case last cited, then Judge Brewer, now Mr. Justice Brewer of the Supreme Court of the United States, clearly and aptly pointed out what appears to me to be the correct distinction as follows: "Defendant contends that where the statute authorizes the lease by one railway company to another of its track, the lessor company is not responsible for injuries caused by the torts of the lessee company, and in support of that doctrine cites some authorities. To a certain extent this proposition is true. If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could, in the nature of things, have no control, then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance—something connected with the building of the road—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company." It presents itself to my mind as being entirely a question of statutory construction or interpretation. Inasmuch as the Legislature is presumed to know the law, and to know and understand the meaning of words in common use, it seems that when it authorized the lease in broad language without either express exemption or reservation pertaining to the liability of the lessor, it must be understood to have employed the word "lease" as reasonable men employ the same word, with the same understanding of the law and the meaning of the word, and to have authorized the lease with the same immunities and obligations as are attribute and appurtenant to a lease between citizens generally, and that the lessor could no more be held responsible under such circumstances for the negligent

acts of the lessee in which he did not participate and over which he had no control, than a lessor of a farm could be held responsible for the negligent acts of his tenant in which he did not participate and over which he had no control. And for the life of me, I can see no reason why this principle is not conducive to the end always sought to be attained by our system of jurisprudence, and that is, equal rights for one and all before the law. On principle and common justice it seems that the obligations and immunities incident to a lease should be identical between persons, natural or artificial.

Before proceeding further on this line of argument, however, I desire to comment upon that class of cases in point and holding contra to the views herein indicated. Three points are especially noticeable about those cases holding the lessor liable in a lease authorized by the statute without reservation of liability to such third parties for the negligent acts of the lessee—cases of the following class: *Railway Co. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75; *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; *Brown v. Railroad*, 131 N. C. 459, 42 S. E. 911; *Hawkins v. Railroad*, 119 Ga. 159, 46 S. E. 82. And these three points should be enough in themselves to place a careful and discriminating lawyer on his guard. They are: First. The same reasoning is scarcely employed in any two of them. Now all men must concede this to be a true proposition; that is, but one conclusion on any given subject can be the correct conclusion, and to reach that conclusion, but one set of reasons can lead inevitably thereto. Therefore, when we see several courts reaching the same conclusion on a given subject and each advancing new and different reasons therefor, we are usually dubious as to the correctness of that conclusion. One of two things is evident with respect to those cases; either the courts have reached the wrong conclusion entirely, or, if the conclusion be correct, then some of them have assigned wrong reasons therefor, as they are evidently not in accord as to why their conclusion is correct. This is sufficient to shake the confidence of the profession in the conclusion reached. Second. Another point about those cases is that many of them are decided by a divided court, and the majority opinion is usually accompanied with an able and vigorous dissent, and this is sufficient of itself, ordinarily, to shake one's confidence in the authority of the adjudication. See *Railroad Company v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, where three judges join in a forceful dissenting opinion. In *Harden v. Railroad Company*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, there is a very able dissenting opinion by Judge Cook, and also in *Brown v. Railroad Company*, 131 N. C. 455, 42 S. E. 911, Judge Cook dissents. Third. Several of those cases are predicated upon first or prior cases, where-

in the question decided in the latter case was not involved, and the thought is suggested, from the confidence with which the court has cited such prior case, that the matter could not have been thoughtfully considered with due care therein, or else such prior case would not have been cited as having decided the identical question. But all of this is fully treated of in the opinion of the court in this case by Judge Goode, and I will say no more of it except that those considerations have proved sufficient to shake my confidence in those adjudications.

Now it seems to me that the correct view to adopt with respect to this subject is that it is essentially one of statutory construction, for we are seeking to ascertain what was the true intention of the Legislature in authorizing this lease. Entertaining this view, I have sought to gather that intention from the words of the statute itself, and from such other legitimate sources as are competent, and I learn that, in section 1187, Rev. St. 1899, every street railroad corporation is declared to "have power" to do, among other things, the following: "Seventh, to purchase, lease or acquire by other lawful contract, which shall include the right to purchase the capital stock and bonds of other street railroad companies, and to hold and dispose of the same, and to hold, use and operate any street railroad or roads, with all and singular its or their franchises and properties of every description belonging to any other street railroad corporation or corporations: Provided, that such purchase, lease or other contract be authorized or approved by the vote of the holders of two-thirds in amount of the capital stock of the company so purchasing, leasing or otherwise contracting therefor at a meeting called for that purpose upon twenty days' notice published in some newspaper of the city or county where the general office of such street railroad company may be located, or by written notice mailed to the last known address of each registered stockholder twenty days before such meeting; and provided further such roads connect with or intersect each other, so as to allow a single passage one way over each road for a single fare. Eighth, to sell, lease or dispose of by any other lawful contract, to any other street railroad company, its railroad rights, franchises, including the right to be a corporation, and all and singular its other properties of every character and description; provided, that such sale, lease or other contract disposing of its railroad, franchises and other properties, shall be first authorized or approved by the vote of two-thirds in amount of the holders of its capital stock at a regular or called meeting of its stockholders convened pursuant to such notice as is required in the next preceding clause." Power to execute the lease is here conferred by the competent legislative authority of the state in broad terms without any express exemption from or reservation of liability in the lessor. The Legislature, in its

endeavor to expressly authorize the lease, went so far as to say that the lessor company is not only authorized to demise its tangible property, but expressly provided as well that it might lease out "its right to be a corporation." Now it seems to me that when the lessor is authorized to farm out its right to existence, which seems to preclude the notion of its remaining in esse, it is manifest from this alone that there could be no implication arising from a fair construction of the context of the act; that the company, after having parted with its right and rendered itself incapable of existence, should remain liable for the acts of its lessee. We are endeavoring now to ascertain the legislative intent from the words of the act. Of course it is understood that the lessor in this case did not purport to demise its right to be a corporation, but, on the contrary, it expressly reserved that right by apt words in the lease. Assuming, for the purpose of ascertaining the legislative intent, that the company did actually farm out its right to be a corporation to another, it seems to me that the lessor, in the very nature of things, having parted with its right to existence, parted as well with its existence and thereby rendered itself, as an entity, incapable of answering for the defaults of its lessee. I must confess, however, that I cannot reconcile this provision with the idea of a lease; for to constitute a valid lease, there must be a reservation of rents and the lessor must have an existence in order to enforce such reservation of rents. But be that as it may, it is a provision of the statute before the court, and it is proper to take it into consideration when seeking to determine whether the lawmakers intended that, by implication, the lessor should remain liable. The provision positively militates against the notion of implied continued liability resting upon the lessor for the negligent acts of the lessee in which it has not participated and over which it had no control. Now, in ascertaining the meaning of the Legislature in this behalf and interpreting its language, we must remember that it is fundamental and axiomatic that "the Legislature are presumed to know existing statutes and the state of the law relating to the subjects with which they deal." Sutherland on Stat. Const. (2 Ed.) § 447. With this rule before us, let us examine and ascertain what was the state of the law and existing statutes in the minds of the Legislature. The answer must be and is that the Legislature knew, when it employed the word "lease" in the statute, that the term had a well-understood and definite meaning in the law. To lease is to transfer, for a term specified therein, from the lessor to the lessee, the property therein demised. There are certain well-known qualities, incidents, obligations, and immunities pertaining to a lease which are well ascertained and settled in the law, among which is that, at common law, the lessor is not answerable for the tenant's negligence in the use or occupancy of the leased

premises resulting in injury to a third person, unless some right of control in such respect is retained by the lessor. 2 Wood, L. & T. (2d Ed.) 851. Now this being the state of the law on the question, the rule of construction stated supra requires the court to hold that the Legislature knew this full well and knew what other reasonable men knew; i. e., unless it affixed, by express language, other and additional obligations as incident to the word "lease" thus employed than those which were ascertained and settled in the law, it would be understood to have intended none.

Entertaining this view, as said before, the whole matter seems to me to be one of great simplicity and after much wandering through mazes of authorities, which, to my mind, confuse the subject by attempting the application of farfetched principles and remote doctrines pertaining to public corporations and public policy with respect thereto, I am persuaded that the only correct solution is to be found by the courts remaining in close proximity to the subject and adhere to the reasoning indicated, just as we would were a citizen attempting to hold a farmer, who had let his premises to a tenant without reserving any portion of the management or control, for the negligent acts of such tenant, in which the lessor did not participate and over which he had no control. And in such case, no one would attempt to argue or affix liability on the lessor. Now, that this is the correct view appears to me to be settled beyond all question from the language of the first clause of our statute on "laws" or the "construction of statutes" bearing in mind, as said by Mr. Sutherland, "The Legislature are presumed to know the existing statutes and the state of the law relating to the subjects with which they deal." We find that, at the time the Legislature, in its wisdom, provided the act authorized in the lease, it had before it the following statutory provision on the construction of statutes: "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law, shall be understood according to their technical import," etc. Section 4160, Rev. St. 1899. Now with this statute, addressed as it is to the courts commanding that they shall so hold with respect to the meaning of the word "lease" employed, on what legitimate process of reasoning can the court arrive at a conclusion other than that the Legislature intended that the court should perform its positive duty imposed by this statute and hold that the word "lease" employed by them is a lease as understood in the law with its ordinary qualities, incidents, attributes, immunities, and obligations, and none other.

Now, the only presumption the court can indulge is that of laudable motives and correct conduct. We cannot and we will not, for it is against common sense and good morals to do so, presume that the Legislature deliberately enacted the statute employing the word "lease," intending that the courts should stultify themselves by as deliberately proceeding contrary to the positive commands of the statute on the construction of law, quoted supra, and hold that the word "lease," as employed, was intended to have a meaning other than that ordinarily understood in the law. To sustain the contention of appellant in this case, and engraft upon the word "lease" an additional incident which affixes an obligation upon the landlord or lessor other than, and in addition to, the obligation of the same parties at common law, amounts to no more or less than the court's deliberately closing its eyes to this positive statute and stultifying itself in attempting to apply some high-toned and refined dogma of public policy to this question, when it is entirely beside the case, inasmuch as all questions of public policy are forever foreclosed to the court by the positive legislative enactment authorizing the lease. As far as I am concerned, the positive provisions of our statute on the construction of laws quoted, is conclusive on the courts of this state as to what meaning should be given to the word "lease" in this case and the consequent incidents, attributes, immunities, and obligations appurtenant thereto, and I am authorized to say that Judge GOODE fully concurs in what I have said. It seems that the matter ought to be rested on this alone, and I am perfectly willing to so rest it, but, inasmuch as the question is new in Missouri, and of paramount importance, I feel that a charitable profession will not be so unkind as to condemn me for offering further reasons in support of the judgment of the court.

It appears from other statutes that the Legislature, acting with the full knowledge of the prior state of the law as pertaining to the obligations and immunities incident to leases, and with a full understanding of its mandate addressed to the courts of the state, commanding them to give to technical words employed their technical import, has seen fit to provide other statutes authorizing railroad leases, and indulging the reasonable presumption, of course, that courts will do their duty in construing such statutes, and attach to the word "lease" its technical import as commanded, the Legislature therefore signified its intention with respect thereto when it sought to affix additional obligations upon the lessor, as in section 1060, Rev. St. 1899, authorizing the lease of a domestic railroad to a foreign and connecting road, by expressly reserving the liability of the lessor. This enactment, however, cannot be said to change the meaning of the word "lease." The result is only a positive statutory obligation

affixed against and upon those lessors who avail themselves of the provisions of the statute by leasing. But it is suggested that the lawmaking power was moved to this with the wholesome purpose of retaining within the jurisdiction of the state some responsible party for the injury inflicted by the operation of a road, in virtue of the franchises it had granted, to the end of protecting the rights of citizens by affording them ample redress for private injuries in the state courts against a domestic corporation; all of which is true, but this laudable purpose entertained and enacted into law by the Legislature can in no manner relieve the proposition of its intrinsic worth and weight in the case at bar, for it is obvious, and the thought to be gleaned therefrom is, that had not the Legislature understood full well that the lessor could not be held to respond for the acts of the lessees and that, by its statute on laws, it had commanded the courts to give to the word "lease" its technical import, it certainly would have proceeded upon the theory that, in virtue of the public policy notion, the lessor would remain liable at all hazards without the express reservation of liability contained in that statute. This statute is referred to as tending to show that it is the policy of our Legislature on this question when it seeks to enjoin an additional burden upon the lessor, it does so by express words and does not shirk its responsibility by enacting statutes silent on the subject, expecting the courts to engraft the additional incident upon the word "lease" by construction and thereby impose an additional burden upon the lessor which it is competent for the legislative authority alone to do.

Many of the cases holding the lessor in an authorized lease liable for the negligent acts of the lessee cite as authority for the proposition the earlier English case cited by Judge Redfield in *Nelson v. Railway Co.*, 26 Vt. 717, 62 Am. Dec. 614, as well as the cases of *Railway Co. v. Barron*, 5 Wall. (U. S.) 90, 18 L. Ed. 591; *Railway Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. Ed. 675; *Railway Co. v. Winans*, 17 How. (U. S.) 30, 15 L. Ed. 27; *Railway Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291, and such later cases as *Thomas v. Railway*, 101 U. S. 71, 25 L. Ed. 950, and numerous others which it could serve no good purpose here to assemble, in view of the diligence in that behalf displayed in Judge GOODE'S opinion. Now it is proper to say of the *Nelson* Case, that the author of that opinion, Judge Redfield, in the fifth edition of his work on Railroads, in a note on page 618, vol. 1, points out a fact which does not appear in the opinion, to wit, that the question of a lease authorized by statute, was not before the court in that case at all. In the other cases last above cited, resting upon considerations of public policy, there was no legislative authority for the lease, and in that event, the

public policy doctrine was certainly correct, for it is a matter within the province of the Legislature to authorize the lease or not, as it sees fit, and in the event no such authorization is had, the proposition is absolutely sound, for it is most certainly against public policy to permit the transfer of the duties and obligations appurtenant to public corporations and involved in such transfers without the consent of the state. The doctrine is eminently sound as predicated upon the principle that the act of incorporation and accepting a charter from the state, constitutes a contract between the corporation and the state. This being true, the attempted lease, whereby one party to this contract seeks to shift the responsibilities arising in virtue thereof upon a lessee of its own choice without the consent of the state, the other contracting party, first being had and obtained, must fall as being in conflict with the most elemental principles of contract law. This must be true in such cases the same as the identical proposition is true in ordinary contracts between individuals, but the doctrine of those cases should have no application in this, where the other party to the contract, the state, has first given its consent to execute the lease. Now it appears to me that this public policy notion, as applicable to an authorized lease, is in conflict with fundamental principles, unsound and entirely foreign. Where is there any question of public policy in the record before this court? I have been unable to discover any fact which raises that question for our consideration. By the legislative act authorizing the lease, all questions of public policy in this case are forever foreclosed so far as the courts are concerned.

I will devote a moment to what seems to me to be a conclusive answer to this entire proposition, and it ought not to require but a moment to dispose of a question so palpably at variance with fundamental principles. In the first place, all lawyers know that, in a representative government, it is axiomatically true that the legislative authority, within the limits of the Constitution, is the general guardian of the policy of the state pertaining to all internal affairs. This proposition must be true under our form of government, and it necessarily follows that when the competent legislative authority has, by solemn enactment, provided thus or so, on any given subject within its constitutional powers, that this enactment is a manifestation of the public policy of the state on that question, of the very highest and first importance, and that the judicial department thereof is bound thereby, and while the general sources for determining the public policy of a state are its Constitution, laws, and decisions of the judicial tribunals, it is primarily true that a legislative enactment, within the constitutional limits, is of very first importance and the judicial department is without authority to hold otherwise. This

proposition is so thoroughly grounded in both principle and the reasons underlying and supporting the constitutional and representative government that no one will dispute it. It is laid down as a proposition universally true in 15 Amer. & Eng. Ency. Law (2d Ed.) 934, as follows: "Where the Legislature, by a statute not objectionable as being unconstitutional, expressly authorizes the execution of a particular contract or class of contracts, the courts are without power to declare such contracts illegal as against public policy, as when the government through its legislative branch has determined its public policy the judicial branch is bound thereby." See, also, large number of cases cited in note 1 thereunder. It is unnecessary to multiply authorities on this proposition which is familiar to the entire profession. This being true, I am at a loss to understand how this or any other court could predicate upon a question of public policy which has been, by legislative enactment, entirely foreclosed to it and say that the contract of lease authorized by it is a different and distinct lease from that so universally understood in the law, or that any rule of public policy asserted could be violated by the lessor transferring the operation of its properties to another under such express statutory authority from the express guardian of all public policy.

Now, it is certain that the lease would be wholly invalid without legislative authority. The Legislature might permit it, if it saw fit, and it might affix whatever burdens it saw fit in connection with the authority, but, having affixed none and granted broad authority to lease, it is not for the courts to invade its province and incur the right which it has freely granted. Indeed, on this question, the reasoning of the very learned and able judge Elliott seems to me so terse, exhaustive, and complete that I adopt it here in full at the expense of prolonging the opinion: "Our opinion is that where the lease is executed under the provisions of a statute, in accordance with its requirements, is made to a company having authority to accept it, and is made in good faith and not for the purpose of transferring duties or obligations to an irresponsible party, the lessor company is not liable for injuries caused by the negligence of the lessee and not attributable to a breach of any public duty of the company that executed the lease. It must be assumed that, in granting the authority to execute a lease, the Legislature had in mind former statutes as well as the established rules of the common law. When power to execute a lease is conferred upon a corporation, the Legislature must, in the absence of countervailing language, be deemed to intend to authorize the execution of such an instrument as the established law regards as a lease. The law enters as a silent factor into every contract, and hence of every lease it is an important element. The

legal effect of a lease is to transfer for a prescribed period of time the possession and control of the property to the lessee. In authorizing the execution of a lease, the Legislature grants the right to execute and carry into effect such an instrument as divests the lessor of possession and control and places it in the lessee to the exclusion of the lessor. The possession of the one party is excluded, and that of the other is made complete by the legislative sanction. If a sale is made under valid legislative authority the company that acquires the property acquires an exclusive right and interest, and the lessee by virtue of the lease acquires a similar right, so far as possession, control, and management are concerned, for the term for which the property was leased. It cannot be doubted that a statute conferring general authority to sell means a complete and effective sale, and upon the same principle it must be concluded that the power to lease, unless qualified and limited by statute, is a power to make a complete and effective lease. A complete and effective lease certainly vests the right of possession, control, and management in the lessee, since no other effect can be assigned such a lease without a direct and palpable violation of long and well-established principles of law. The lessor company does no wrong in executing a lease which the law of the land gives it full power to execute, so that, in executing the lease, there is no improper motive, no illegal act, nor any wrongful attempt to escape a duty. In granting authority to lease, the Legislature empowers the lessor company to transfer the duty of operating the road to the lessees, and in doing what the Legislature authorizes no rule of public policy is violated. It is, indeed, inconceivable that there can be a violation of a rule of public policy where the act done by a party is done under a legislative enactment and in accordance with its provisions. The cases which hold the lessor liable, although the lease is an authorized one, upon the ground that there must be an express exemption from liability in order to exonerate the lessor, concede—what could not be denied without leaving the domain of reason—that the Legislature may, by express enactment, exonerate the lessor, so that, even upon that theory (which we believe to be unsound), the question, at bottom, is one of statutory construction. The courts which assert the theory mentioned tacitly assume that in granting authority to lease, the Legislature granted something less than an authority to lease. We believe that the only theory that can be defended on principle is that in granting authority to execute a lease the Legislature conferred authority to execute an effective instrument with all the qualities and incidents with which the law invests a lease. If this be true then the lease does not transfer possession and control from one party to the other for the term of the lease, and the rights and obligations of the



parties are such, and such only, as the law annexes to the relation of lessor and lessee. For negligence in managing and using the demised premises the lessor is not responsible. If it had performed its duty in constructing tracks and the necessary structures, it cannot be held responsible for the negligence of the lessee in employing incompetent servants, or in negligently handling trains, or in negligently overloading cars, or in negligently failing to provide a sufficient number of persons to manage trains, or for any negligence which relates solely to the mode of operating the leased road." 2 Elliott on Rys. § 469.

The reasoning of Judge Elliott, quoted, is to my mind so illuminating, exhaustive, and conclusive on the question in its entirety that I shall leave the subject except to say that we find the almost unanimous views of the text-writers to the same effect, which can only augur that those truly learned in this department of the law, who have devoted much time, careful thought, and labor to investigating the adjudications thereon, have, with marked unanimity, arrived at the conclusion announced by this court. And it is worthy in this connection to say that Judge Thompson, who is always found lifting his voice in favor of equal rights for all before the law, says, in his work on Private Corporations (volume 5, § 5884), on this question: "On the other hand, if the lease has been made under authority of law, then, on principle and the better opinion, the lessor company is not liable for damages done by the lessee company, or its servants, in operating the road, unless there is a statutory reservation of such liability." See, also, the following authors: Hutchinson on Carriers (2d Ed.) § 515; Pierce on Railroads, p. 283; Booth, Street Railway Law, § 425; 5 Thompson on Private Corporations, § 5884; Nellis, Street Railway Accident Law, p. 488, § 6; Nellis, Surface Railroads, p. 286, § 16; Noyes, Intercorporate Relations, § 219, particularly page 316. See also, comments of Judge Redfield in his work on Railways, discussing the case of Nelson v. R. R., 26 Vt. 721, 62 Am. Dec. 614, heretofore cited; 2 Elliott on Railways, § 469. It is also worthy of mention that this, too, is the opinion entertained by the author of the very able and instructive note on the subject to Caruthers v. Railway (Kan.) 54 Pac. 673, 44 L. R. A. 737, as appears on page 745, where it is said that if the lease is authorized by statute and made without reservation of any control over the operation of the road, the lessor is exempt from liability for the torts committed by the lessee.

For the reasons given, I concur with Judge GOODE, in the opinion that, under a valid lease of this character authorized by the Legislature without reservation of liability thereon, the lessor is no more responsible for the negligent acts of the lessee, in which it did not participate and over which it had no

control, than is the landlord at common law liable under the same circumstances for the negligent acts of his tenant. Entertaining these views, I am of opinion that the very learned trial judge properly ruled in sustaining the motion for a new trial as to the defendant, United Railways Company, and that his ruling should be sustained.

The judgment should be affirmed.

BLAND, P. J. (dissenting). Suit was begun against the St. Louis Transit Company and the United Railways Company, as joint owners and joint operators of the Eighteenth Street line of railroad, in the city of St. Louis. The petition alleged that, through the negligence of these two companies in operating one of their cars, on said Eighteenth Street line, upon which plaintiff was a passenger, she was injured. The answer was a general denial. Plaintiff's evidence shows negligence in the operation of a car, on which she was a passenger, on said line, causing injury to her. It is admitted that the Transit Company alone operated the car. To connect the other defendant with the Transit Company in the operation of the car, or to make it liable for the negligence of the Transit Company, the plaintiff offered in evidence the following contract of lease and showed that the Eighteenth Street line of railroad is included in the terms of the lease:

"Contract of Lease between United Railways of St. Louis and St. Louis Transit Company.

"This agreement made and entered into between the United Railways Company of St. Louis, hereinafter called 'United Railways,' a corporation duly organized and existing under the laws of the state of Missouri, party of the first part, and the St. Louis Transit Company, hereinafter called 'Transit Company,' also a corporation duly organized and existing under the laws of the state of Missouri, party of the second part, witnesseth that

"Whereas, 'United Railways' is the owner of several lines of railway in the city and county of St. Louis, in the state of Missouri, and of certain bonds and stocks more specifically described in a certain deed of trust to the St. Louis Trust Company bearing date September 20, A. D., 1899, and is willing to lease all of its said lines of railway lying and being situated in the city and county of St. Louis, including all the property and franchises appurtenant thereto, together with all income to be derived from said bonds and stocks to 'Transit Company' for the period beginning on the first day of October, A. D. 1899, and ending on the first day of April, A. D. 1939, upon the terms and conditions hereinafter stated; and

"Whereas, Transit Company is desirous of acquiring the said lines of railway including all the property and franchises appurtenant thereto, together with any and all income

derived from the ownership of the bonds and stocks now owned by United Railways or which it may hereafter acquire during the term of this lease:

"Now, therefore, this agreement witnesseth, that United Railways for and in consideration of the covenants and agreements hereinafter contained on the part of the Transit Company, to be by it made, kept and performed, has granted, demised and leased, and by these presents does grant, demise and lease, unto Transit Company, all of the railways now constructed, owned or operated by it, or which may be hereafter constructed, owned or operated by it, and all its right, title and interest in and to all its property, real, personal and mixed, now held by it, as owner or otherwise, with all franchises of every sort and kind, to it now belonging, or which it may hereafter acquire, as fully as it now holds, or owns, or may acquire the same, together with all income derived from any bonds or stocks now owned by United Railways, or which may be hereafter acquired by it, provided, always, however, that nothing herein contained shall operate to grant or demise, or be construed to include, the franchise to be a corporation heretofore granted to the said party of the first part, or any other right, privilege or franchise, which is, or may be, necessary to preserve the corporate existence or organization of the party of the first part under its charter, and all the rights, privileges and franchises last aforesaid are hereby expressly reserved and excepted from these presents.

"To have and to hold said demised property, real, personal and mixed, with the franchises unto Transit Company, its successors and assigns, for the full term from the first day of October, A. D. 1899, until the first day of April, A. D. 1939.

"In consideration of the premises United Railways covenants and agrees that Transit Company, its successors and assigns, shall, at all times during the term aforesaid, have full and exclusive power, right and authority to use, manage and operate the said railways of United Railways and shall have the right to fix the tolls thereon, but not at a higher rate than United Railways is authorized so to do; and further, that Transit Company shall have the full, free and exclusive right to charge and collect all the tolls to accrue from the railways of United Railways during the said term and appropriate the same to its own use, and shall have, use and exercise all the rights, powers and authorities aforesaid, and all other lawful powers and privileges which can be lawfully exercised and enjoyed on or about the said demised railways, properties, franchises and premises as exclusively, fully, amply and entirely as the same might or could have been used by United Railways had this lease and contract not been made.

"And in consideration of the premises Transit Company has agreed, and does by

these presents agree, to and with United Railways as follows, to wit:

"(1) That it, Transit Company, shall and will during the continuance of this lease, at its own proper cost and expense, and without deduction from the rent herein provided to be paid, maintain, operate, work, use and run, and keep in public use the said demised railways in the same manner as United Railways, as the owner or lessor thereof, is now, or at any time hereafter may be required to do. And Transit Company shall and will, at its own proper cost and expense and without deduction from the rent herein provided to be paid, at all times, during the continuance of this lease, maintain, operate and keep the railways, property and premises hereby demised, and every part of the same, in good repair, working order and condition, and supplied with rolling stock and equipment, so that the business of said demised railways shall be increased and developed. And Transit Company hereby agrees and promises to and with Railways Company, that it, Transit Company, shall and will, at its own proper cost and expense, and without deduction from the rent aforesaid, from time to time, during the term aforesaid, do, or cause to be done, to and upon the said demised premises and railways, any and all repairs and replacements and any and all additions thereon and improvements which may be reasonably required for the purposes aforesaid, and provide thereon such new and additional rolling stock, equipments and other appliances, as shall and may be reasonably required for the purpose aforesaid; and Transit Company shall and will use all reasonable efforts to maintain, develop and increase all the business of the railways hereby demised.

"Transit Company shall and will keep a complete and accurate record of all additions, acquisitions, betterments, and improvements made by it upon said demised premises and property and the amounts of money expended therefor, and shall, from time to time, file the same with Railways Company, and, thereupon, when requested by resolution of the board of directors of Transit Company, Railways Company will deliver to Transit Company, or its order, any of its unissued first general mortgage bonds at par on payment for the money so expended, which it would be authorized to use, for the same purpose under the terms and conditions of the mortgage securing said bonds; or, in payment for said sums of money so expended by Transit Company, Railways Company will deliver at par, when requested, as aforesaid, to Transit Company any of its unissued preferred or common stock.

"And Transit Company will indemnify, save and keep harmless, during the continuance of this lease, United Railways from all costs, charges and expenses arising from the management and operation of said railways, and all matters incident thereto.

"(2) That Transit Company shall pay to Railways Company a net annual rental of five dollars (\$5.00) per share upon all the preferred stock of Railways Company, now outstanding or which may hereafter be issued by Railways Company with the consent of Transit Company, said rental shall be payable quarterly on the tenth days of January, April, July and October during each and every year hereafter for the full period of this lease, provided, however, that the first quarterly payments shall be made on the tenth day of April, 1900. Payments of the rental herein provided for shall be made at the office of the Transit Company in the city of St. Louis, or at the agency of the Transit Company in the city of New York, either or both, as Transit Company shall, from time to time, determine.

"(3) That in addition to the rental provided to be paid by Transit Company in paragraph two of this lease, Transit Company shall pay to the United Railways the further sum of one thousand dollars (\$1000) per annum, for the purpose of defraying the expenses of maintaining the corporate existence of the railway and traction companies connected with, or interested in, the properties and franchises herein mentioned, which sums shall be paid semi-annually in equal installments at the times and at the place or places hereinabove provided for the payment of the rental.

"(4) That in addition to the amounts hereinabove provided to be paid by Transit Company to United Railways in paragraphs two and three hereof, Transit Company hereby assumes and agrees to pay all of the floating debts of United Railways when and wherever the same may become due and payable.

"(5) That Transit Company shall and will also during the continuance of this lease, pay all taxes and assessments and water rents which may be assessed upon the real estate, personal property, franchises, capital stock, business, rental, income, dividends and indebtedness of United Railways or any of the lines of railways or property leased or operated by it.

"(6) That Transit Company shall and will also pay the interest accrued and to accrue, as the same becomes respectively due and payable, on all the bonds heretofore issued, and now outstanding, by Railways Company, or any of the subordinate companies whose property and franchises Railway Company has acquired, said bonds being as follows:

"The Missouri Railroad Company five per cent. bonds, of date February 27th, 1896, due March 1st, 1903, seven hundred thousand dollars (\$700,000.00).

"The Forest Park, Laclede & Fourth Street Railroad Company seven per cent. bonds, of date May 1st, 1885, due June 1st, 1900, ninety-two thousand and one hundred dollars (\$92,100.00).

"The Lindell Railway Company five per

cent. bonds, of date August 1st, 1891, due August 1st, 1911, one million five hundred thousand dollars (\$1,500,000.00).

"The Compton Heights, Union Depot & Merchants Terminal Railroad Company six per cent. bonds, of date July 1st, 1893, due July 1st, 1913, one million dollars (\$1,000,000.00).

"The Taylor Avenue Railway Company six per cent. bonds of date July 1st, 1893, and due July 1, 1914, five hundred thousand dollars (\$500,000.00).

"The Union Depot Railroad Company six per cent. bonds, of date October 1st, 1890, due October 1st, 1910, seven hundred and ninety-one thousand dollars (\$791,000.00).

"The Union Depot Railroad six per cent. bonds of date June 1st, 1893, due June 1st, 1918, two million four hundred and nine thousand dollars (\$2,409,000.00).

"The Mound City Railway Company (road subsequently acquired by Union Depot Railway Company) six per cent. bonds, of date October 1st, 1890, due October 1st, 1910, three hundred thousand dollars (\$300,000.00).

"The Jefferson Avenue Railroad Company five per cent. bonds of date November 2nd, 1895, due November 2nd, 1905, two hundred and seventy-seven thousand dollars (\$277,000.00).

"The People's Railway Company (property now owned by St. Louis Traction Company) six per cent. bonds, of date May 1st, 1882, due May 1st, 1902, one hundred and twenty-five thousand dollars (\$125,000.00).

"The People's Railway Company (property now owned by St. Louis Traction Company) seven per cent. bonds, of date May 1st, 1886, due May 1st, 1902, seventy-five thousand dollars (\$75,000.00).

"The Southern Electric Railroad Company six per cent. bonds, of date May 1st, 1884, due May 1st, 1904, one hundred and sixty-four thousand dollars (\$164,000.00).

"The Southern Electric Railroad Company six per cent. bonds, of date May 6th, 1890, due May 1st, 1915, three hundred and thirty-six thousand dollars (\$336,000.00).

"The Southern Electric Railroad Company five per cent. bonds, of date August 1st, 1896, due August 1st, 1916, two hundred thousand dollars (\$200,000.00).

"The Cass Avenue and Fair Grounds Railway Company five per cent. bonds, of date July 1st, 1892, due July 1st, 1912, one million eight hundred and thirteen thousand dollars (\$1,813,000.00).

"The Citizens' Railway Company six per cent. bonds, of date July 1st, 1887, due July 1st 1907, one million five hundred thousand dollars (\$1,500,000.00).

"The United Railways Company of St. Louis first general mortgage four per cent. bonds, of date September 20th, 1899, due July 1st, 1934, twenty-three million dollars (\$23,000,000); and Transit Company shall and will also pay all interest that shall accrue upon all further issue of said First

General Mortgage Bonds issued by Railways Company, under the terms and conditions of the said mortgage deed of indenture securing the same.

"(7) That Transit Company shall and will, at all times, keep the property of Railways Company insured against loss by fire, paying the premiums therefor from its own funds, and will, at the expiration of this lease and contract, yield and deliver up the hereby demised railways and properties and their appurtenances, in the same good order and repair as the same are now in, or may be put in during the hereby demised term (reasonable wear and tear excepted), excepting any property sold in accordance with this agreement and contract.

"(8) That Transit Company shall and will during the continuance of this lease apply all net surplus earned by it over and above the six per cent. annual dividend upon the \$20,000,000.00 of capital stock which Transit Company is now authorized to issue, or so much thereof as may from time to time be outstanding, to the betterment, improvement, or extension of the property or railway lines now owned, or which may hereafter be acquired by Railways Company, or to the redemption, payment or retirement of the mortgage indebtedness of Railways Company or of its subordinate companies. In case Transit Company shall purchase out of said surplus earnings any of the underlying bonds issued by any of the subordinate companies, whose property, franchises or stock has been acquired by Railways Company, Transit Company shall have the same right to use the first general mortgage four per cent. bonds, which Railways Company, under its mortgage, is authorized to receive in exchange from said underlying bonds of said subordinate companies, in the same manner and to the same extent as Railways Company would have the right under said mortgage to use the same, the Railways Company shall and will do all things requisite or necessary on its part to be done to carry this provision into full force and effect.

"(9) That Transit Company shall and will apply all moneys received by it from Railways Company at the time that this lease goes into effect, save and except what may be necessary to meet current liabilities, including interest accrued upon all mortgage indebtedness, to the improvement of the premises hereby demised and shall make like disposition of all moneys that Transit Company may subsequently receive from Railways Company through the sale of property that may become useless in the conduct of the business of Railways Company; and Railways Company shall and will turn over to Transit Company all moneys of every character in its possession, or to which it may be entitled, at the time that this indenture goes into effect, and all other moneys that it may subsequently become possessed of from any

source whatever, during the term of this lease.

"(10) That it is the purpose and understanding of the parties hereto that these presents shall go into effect immediately upon their execution and delivery, and all the rights and liabilities of the parties hereto, as herein assumed, covenanted for and agreed to, shall, upon due execution and delivery hereof, become fixed and ascertained, United Railways Company turning over all assets of every character to Transit Company, and Transit Company assuming all liabilities of every character of United Railways.

"(11) That United Railways shall and will, during the term of this contract, maintain its corporate existence and organization, and at all times, from time to time, during the said term, and when requested by Transit Company, its successors or assigns, shall and will put in force and exercise each and every right, and do each and every corporate act, which it may now, or at any time hereafter, lawfully put in force, or exercise, to enable Transit Company to enjoy and avail itself of every right, franchise and privilege in respect to the use, management, renewal, extension or improvement of the premises herein described, or intended so to be, or the business to be carried on, Transit Company agreeing to indemnify and save harmless United Railways against all expense, loss, damage or liability for such exercise of corporate power or performance of corporate acts when exercised or done at the request of Transit Company.

"(12) That in case Transit Company, its successors or assigns, shall, at any time or times hereafter, during the continuance of this lease, fail, or omit to pay, as the same becomes due and payable, the interest due upon any of the bonded indebtedness recited in section six of this lease, or in case Transit Company, its successors or assigns, shall fail or omit to pay the floating indebtedness hereinbefore mentioned and provided to be paid by Transit Company, its successors or assigns, or any part thereof, when the same shall become due and payable, as hereinbefore specified, then immediately upon the happening of such event, it shall be lawful for United Railways, at its option, to treat this lease as forfeited; or in case Transit Company, its successors or assigns, shall fail or omit to keep and perform the covenants and agreements herein contained, or any of them, and shall continue in default in respect to the performance of such covenants or agreements for the period of sixty (60) days, then and in either and every such case it shall be lawful for United Railways, its successors or assigns, to treat this lease as forfeited; and in case United Railways shall, for any such cause, decide to treat the lease as forfeited, it shall be lawful for United Railways its successors, or assigns, at its own option, to enter at once upon the railways and premises

hereinbefore demised, and along and upon every part thereof, and remove all persons therefrom, and from thenceforth the said demised railways and premises, with the equipments and appurtenances thereof, to have, hold, possess and enjoy as of the first or former estate of United Railways in the said demised premises, and upon such entry for nonpayment of the interest on the bonded indebtedness as above provided, or for nonpayment of the floating indebtedness as herein provided, for nonpayment of rent, or breach, or nonperformance of any covenant or agreement therein contained to be by Transit Company, its successors or assigns, observed or performed, all the estate, right, title, interest, property, possession, claim and demand whatsoever of Transit Company, its successors or assigns, in or to the addition and improvements above mentioned, and in or to the same demised railways and premises, or either, or any part of them, as well as all the right, title and interest of Transit Company, its successors and assigns, in, under and by virtue of this lease, shall wholly and absolutely cease, terminate and become void, anything hereinbefore contained to the contrary in anywise notwithstanding.

"And in case of the re-entry aforesaid, the floating indebtedness, interest and rent provided herein to be paid, shall, up to and until the date of re-entry, be deemed and taken as due and payable, and the same shall be paid by the Transit Company its successors and assigns.

"And it is further declared and agreed that such re-entry shall not waive or prejudice any claim or right of Railways Company, its successors or assigns, for damages against Transit Company, its successors or assigns, on account of such nonperformance or breach of any of the terms of this lease; and all such claims and rights are hereby expressly preserved to the said Railways Company, its successors or assigns.

"(13) That all cars, machinery, tools, appliances, etc., generally called personal property, of every sort and kind belonging to the United Railways Company, or held by it as lessee, shall, when this lease goes into effect, be delivered to Transit Company. The same shall be valued by mutual agreement, and, in case said parties cannot agree as to the value, then by appraisers to be appointed in the manner hereinafter provided. In case of the termination of this lease and contract for any cause, Transit Company shall return the said property as inventoried and appraised, in as good order and condition as when received, or the equivalent thereof, or pay the amount or such valuation to United Railways, with interest from the date of the termination of this lease.

"(14) Upon the termination of this lease, for any cause arising from breach of covenant by Transit Company, all such property necessary to the operation of the lines of United Railways, as enumerated in section 13 of

this agreement, and all betterments to the property that may be made by Transit Company, by which is meant all cars, tools, tracks, rails, roadbeds, wires, poles, motors and appliances that may by Transit Company be put upon the lines and property of United Railways, and necessary to the operation of the said road, shall become the property of United Railways.

"(15) That Transit Company shall, at all times, keep at its office in the city of St. Louis, full, true and just accounts of any and all moneys received and business done upon the said demised railways, and of all moneys paid, laid out and expended, all liabilities incurred in connection with the same. The accounts to be kept by Transit Company as above provided, and any and all accounts which shall, and may be kept, in relation to the said demised railways, or the business of the same, shall, at all reasonable hours and times during the continuation of this lease, be open to the inspection and examination of the president of the United Railways and such other person or persons as United Railways shall, from time to time, by resolution of its board of directors, appoint to examine the same.

"(16) That all differences which may arise between the parties hereto at any time hereafter, as to the construction of this agreement, or as to the due performance of any covenant herein contained, or as to the value of any property to be allowed by either to the other, shall be conclusively settled by the decision of three arbitrators, or by a majority of them in case of disagreement; such arbitrators to be chosen in the manner following, to wit: Railways Company shall select one of the arbitrators and Transit Company shall select one, and the two thus chosen shall select a third. In case either party shall fail to select an arbitrator for the period of ten days, after a request in writing delivered to the president, then the arbitrator appointed by the party not in default shall select an arbitrator for the defaulting party, and these two shall proceed as herein provided in case of the selection by each party.

"(17) That all the terms and covenants of this lease and agreement shall bind the parties, their respective successors and assigns; it being intended that the benefits of all covenants shall accrue to successors and assigns, as well as to the original parties, and that performance shall be by successors and assigns as well as by original parties.

"(18) That Railways Company covenants and agrees from time to time to make any further deed or indenture to carry out these presents that Transit Company may reasonably demand."

Plaintiff also showed that on January 23, 1904, the day on which plaintiff was injured, the following constituted the board of directors of the Transit Company, to wit: Murray Carleton, Corwin H. Spencer, Henry

S. Priest, James Campbell, Robert McCullough, George L. Edwards, Finis E. Marshall, Eugene Delano, Alonson D. Brown, and Louis A. Cella—Murray Carleton being president and James Adkins secretary—and that on the same date the board of directors of the United Railways Company consisted of Murray Carleton, Corwin H. Spencer, Henry S. Priest, James Campbell, Robert McCullough, George L. Edwards, Finis E. Marshall, Eugene Delano, Alonson D. Brown, and Edward G. Conrads; Murray Carleton being president, Corwin H. Spencer, vice president, and James A. Adkins, secretary. It was admitted that since the beginning of the suit the United Railways Company has taken the leased property the Transit Company was operating under the lease, and has operated it since taking it from said company.

Defendant offered in evidence a number of ordinances of the city of St. Louis, authorizing the construction of a number of street railways in the streets of said city, including the Eighteenth Street line, and ordinance No. 19,738; in the first paragraph of the first section of which ordinance, a number of street railways, including the Eighteenth Street line, are named. Section 3 of the ordinance authorized corporations owning the roads named in paragraph 1 of section 1 "to sell, convey or lease, if found desirable, their property, rights, privileges and franchises, \* \* \* to any of the said companies named in this section, or to the St. Louis Transit Company, its successors and assigns." It was admitted that the United Railways Company acquired by purchase all the railroads mentioned in the first paragraph of section 1. It was also admitted that two-thirds of the stockholders of the Transit Company and of the United Railways Company duly passed resolutions consenting to and authorizing the aforesaid contract of lease, and that the lease was properly executed.

Under the instructions of the court, the jury found for plaintiff, and awarded her substantial damages. The United Railways Company filed its separate motion for a new trial and in arrest of judgment. The court sustained its motion for new trial on the sixth, fourteenth, and fifteenth grounds assigned in said motion. They are as follows: "(6) The court erred in allowing the case to go to the jury as to this defendant." "(14) The court erred in admitting, over the objection of this defendant, the lease offered in evidence by plaintiff. (15) The court erred in refusing to give the peremptory instructions in the nature of demurrers, offered by this defendant at the close of plaintiff's evidence and at the close of all the evidence." From the order granting a new trial, plaintiff duly appealed to this court.

By the eighth clause of section 1187, Rev. St. 1899, street railroad companies of this state are expressly authorized to lease their roads, therefore the question of power in the United Railways Company (discussed in the

briefs) to execute the lease is eliminated by the statute. The statute conferring the power to lease is silent in regard to the liability of the lessor company for the torts of the lessee company. It neither declares the lessor liable for the torts of its lessee nor exempts it from liability for the negligence of the lessee in the operation of the leased roads, and the many cases cited in the briefs, decided upon express statutes, holding the lessor company liable for the torts of the lessee company, are not in point. The facts in judgment raised but two questions for decision: The first is whether or not the contract denominated a lease is a lease, in fact, or a mere operating contract under which the Transit Company was operating the United Railways Company's lines of railroad as the agent of the latter company; second, if the contract is found to be a lease, is the defendant liable for the negligence of the lessee in the operation of cars over the leased lines of railroad, in the absence of a statute declaring it shall be so liable? An analysis of the contract of lease shows that, by the granting clause, the United Railways Company granted, demised, and leased to the Transit Company, for a term of 40 years, all the railways the lessor then owned in the city of St. Louis and the county of St. Louis, all that it might thereafter own or construct or operate, and all its right, title, and interest in all its property, real, personal, or mixed, with all its franchises of every sort, reserving, however, its right to continue to be a corporation. All the powers and rights, in regard to collecting tolls, etc., as were possessed by the lessor, were also granted to the Transit Company, subjected, however, to the same legal restrictions as were imposed on the lessor, the Transit Company agreeing to indemnify, save, and keep harmless, during the continuance of the lease, the United Railways Company from all costs, charges, and expenses arising from the management and operation of said railroads and all matters incident thereto. As nearly as could be, the contract shod the Transit Company with the shoes of the United Railways Company, the Transit Company assuming all the duties and liabilities of the United Railways Company. By paragraphs 1 to 6 inclusive, the Transit Company assumed the payment of all the obligations of the United Railways Company, including all taxes to be assessed against all its property, water rates, etc., and agree to pay, in addition, as rental, \$5 per share on all the preferred stock of the United Railways Company and \$1,000 per annum for the purpose of defraying the expenses of maintaining the corporate existence of the United Railways Company. The seventh paragraph requires the lessee to keep the leased property insured against loss by fire and to surrender the property to the lessor in good order at the expiration of the lease. The eighth paragraph requires the lease to apply surplus earnings, over and

above 6 per cent. per annum on \$20,000,000 of its capital stock, to the betterment, improvement, and extension of the leased railroads or to the redemption of bonds named in the clause. The ninth paragraph provides that the lessor shall turn over all moneys of every character in its possession at the date of the execution of the lease, all that it might thereafter receive during the life of the lease from the sale of any of its property, and obligates the lessee to pay certain liabilities out of such moneys, including accrued interest on the mortgage indebtedness and the improvement of the property. The tenth paragraph provides that the contract shall take immediate effect, and states that the United Railways Company is "turning over all assets of every character to Transit Company," and that the latter is "assuming all liabilities of every character of United Railways." The eleventh paragraph provides that the United Railways Company will maintain its corporate existence and exercise its charter rights for the purpose of enabling the Transit Company to enjoy and avail itself of every right, etc., in respect to the use, management, etc., of the leased property, the Transit Company agreeing to save the United Railways Company harmless against all expense and loss. The twelfth paragraph provides that whenever the Transit Company should fail for 60 days to pay the rent or meet the obligations it assumed, the United Railways Company should have the option to treat the lease as forfeited and take possession of the property, in which event the interest of the Transit Company in and to the property should cease. By the thirteenth paragraph, the United Railways Company agreed to turn over all its cars, machinery, tools, and other personal property to the Transit Company, the property turned over to be appraised, and the Transit Company agreed to return it in as good condition as when received, or its equivalent, or to pay the appraised value at the termination of the lease. The fourteenth paragraph is not important to a determination of the question in hand. The fifteenth paragraph required the Transit Company to keep correct books of account of all receipts and disbursements, the books to be open at all times for the inspection of the president of the United Railways Company. The seventeenth and eighteenth paragraphs throw no light on the question before us.

In *Edwards v. Noel*, 88 Mo. App., loc. cit. 440, this court approvingly quoted the following definition of a lease: "A lease is a contract for the possession and profits of land and tenements, either for life or a certain term of years, or during the pleasure of the parties." *Bouvier's Law Dictionary*. Substantially the same definition of a lease is given in *Thomas v. Railroad*, 101 U. S. 71, 25 L. Ed. 950, in *Heywood v. Fulmer* (Ind. Sup.) 32 N. E. 574, 18 L. R. A. 491, and in many other cases that might be cited. In *Moore v. Miller*, 8

Pa., loc. cit. 283, it is said: "An agreement that Miller should enter and dig for ore, build houses, etc., he to pay, as a compensation to the owner of the land, 50 cents a ton for every ton of ore, was, in substance and fact, a lease." In *Wallis v. Preston*, 25 Cal. 59, it was ruled that an agreement in writing by which one party leased to another, for a specific term, certain land, the second party agreeing to cultivate and plant the land at his own expense and deliver one-sixth of the crops to the first party, was a lease and not a contract for the services of the second party. In 18 Am. & Eng. Ency. of Law (2d Ed.) p. 597, § 1, a lease is defined to be "a contract for the possession and profits of lands and tenements on the one side, and the recompense of rent or property on the other; or, in other words, a conveyance to a person for life, years, or at will, in consideration of a return of rent or other recompense."

The contract comes within the foregoing definition of a lease, and, in terms, conveys what the statute, in effect, declares should constitute a lease of a street railroad, to wit, the right to hold, use, and operate the road. It is contended by the appellant, however, that as the contract shows the United Railways Company agreed to turn over to the Transit Company all its assets, including money on hand and any it might thereafter acquire from any source whatever, with all income derived from any bonds or stocks then owned by it or which it might thereafter acquire, retaining nothing whatever but the bare right to continue to be a corporation, the Transit Company assuming all liabilities of every character of the United Railways Company and agreeing to indemnify and save harmless the United Railways Company against all expense, loss, damage, or liability for the exercise of its corporate powers and franchises and the performance of corporate acts when exercised or done at the request of the Transit Company, and that for betterments and improvements to be made by the Transit Company it should be reimbursed by the bonds of the United Railways Company, the Transit Company became the partner or agent of the United Railways Company. The bonds and stocks the United Railways Company agreed to turn over to the Transit Company are not specifically named, but, as the lease shows that the lines of road it acquired had outstanding bonds and stocks which the United Railways Company was expressly authorized to acquire by the seventh clause of section 1187, supra, the reasonable inference is that, in making the purchase, it acquired stocks and bonds of some or all of these lines of railroad and that it was these stocks and bonds thus acquired that it agreed to turn over to the Transit Company. This inference is strengthened by the further fact that the Transit Company agreed to pay the interest on the bonds of these lines as part payment of the rent reserved, and that these identical

lines were leased to it. It is contrary to legislative policy for a corporation to become a member of a partnership (*Aurora State Bank v. Oliver*, 82 Mo. App., loc. cit. 393, and cases cited) and a conclusion should not be drawn that the purpose of the parties to the contract was to form a copartnership unless the contrary clearly appears. In *Missouri Bottler's Ass'n v. Fennerty*, 81 Mo. App., loc. cit. 534, it is said: "The fundamental idea of a partnership *inter sese* is that it is formed for the purpose of trade or gain in business, and that each has the right to part participate in the profits." The contract of lease nowhere shows that the United Railways Company was to participate in the profits to accrue from the operation of the leased property, and in no sense of the term did the contract create the relation of partners between the two companies.

An agent has been judicially defined to be "one who undertakes to transact some business, or manage some affair for another, by authority and on account of the latter and to render an account of it." *Wynegar v. State*, 157 Ind., loc. cit. 579, 62 N. E. 38; *Metzger v. Huntington* (Ind. Sup.) 37 N. E. 1084. Paragraphs 13 and 15 of the contract are relied on to bring the Transit Company within the definition of an agent. Paragraph 13 required the Transit Company to turn back all cars, machinery, tools, etc., it received in as good condition as when received, or their equivalent, or to pay their appraised value. It is immaterial whether this arrangement is called a lease or a hiring of the equipment and other personal property, the effect is the same. It shows that the Transit Company did not take it to use as the agent of the United Railways Company but to use for its own benefit. The fifteenth paragraph required the Transit Company to keep correct book accounts of all receipts and disbursements to be open at all times for the inspection of the president of the United Railways Company. This paragraph should not be construed separate and apart from the other provisions of the contract, whereby it is shown that the Transit Company agreed to expend the surplus of its net earnings in betterments and improvements or in the purchase of bonds of the acquired lines of railroad. When viewed in connection with this stipulation in the contract it has no meaning other than that the lessor should have the privilege of ascertaining from time to time whether the lessee was expending its surplus earnings in accordance with the provisions of the contract. Both corporations had a board of 10 directors at the time of the trial. Nine members of the board of directors of the United Railways were also members of the board of directors of the Transit Company, and both companies were served by the same president and the same secretary, but whether or not this or a similar condition existed at the time the lease was executed or at the time of the accident, is not shown by the

evidence. Therefore, if any unfavorable inference can be drawn from the fact that both corporations have at the present time a common board of directors and are served by the same president and the same secretary, the inference cannot be made to relate back to affect the contract of lease, which may have been executed when no such condition existed. Besides, this issue is not in the case, for it is not alleged in the answer that the two corporations were identical in government and interest, or that the lease was made in bad faith. We do not think there is anything in the contract or the evidence to show that the Transit Company was appointed the mere agent of the United Railways Company. The contract is loaded with many details not usually found in a lease, but the nature of the property leased and the purpose for which it was to be operated, and the many subordinate and varied interests that the Transit Company agreed to protect made it necessary to either incorporate these details in the contract of lease or to provide for them by a contemporaneous supplemental contract. The fact that they were put in the lease does not destroy the character of that instrument.

2. Having legislative and municipal consent to lease its lines of railroad, is the respondent, nevertheless, liable for damages caused by the negligent operation of cars on the leased lines by its lessee? The authorities on this question are not harmonious. In *Harmon v. Railroad*, 28 S. C. 401, 5 S. E. 835, 18 Am. St. Rep. 686, the defendant company, under a right given in its charter to "let or farm out," its road to another company, leased its road. The court held that the lease did not exempt the lessor from responsibility, in the absence of any provision granting such exemption, and that it was liable for cattle negligently killed by a train of cars operated by the lessee. Beach, on the authority of this case, says: "The lessor continues to be liable for all acts done by the lessee in operating the road, whether the cause of action be *ex delicto* or *ex contractu*." \* \* \* And this is so although the charter of the former authorizes it to lease its road. \* \* \* The original obligation can only be discharged by a legislative enactment, consenting to and authorizing the lease, with an exemption granted to the lessor company." 1 Beach on Private Corporations, § 366. *Harmon v. Railroad*, supra, followed *National Bank v. Railway*, 25 S. C. 225, and was in turn followed by *Parr v. Railroad*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826.

In *Chicago & Grand Trunk Railway Co. v. Hart*, 200 Ill. 414, 70 N. E. 654, 66 L. E. A. 75, the rule announced in the South Carolina cases was not only approved but was made to extend to an employé of the lessee company who had been injured by its negligence. The argument in support of the rule is thus stated by the learned judge writing the opinion: "There is a conflict in adjudicated cases on



the question whether a lessor railroad company is liable to a servant of the lessee company for injuries occasioned by the negligence of the lessee company in the operation of the leased road. Mr. Elliott, in his work on Railroads (volume 2, p. 610), says that he inclines to the opinion that the lessor company is not so liable where the injuries to the servant of the lessee company are caused solely by the negligence of the lessee company in operating the road, but this author says that the weight of authority is against the view that he is inclined to adopt. We think this court is committed to the view held by the current of authorities on the question, and moreover, that, in sound reason and as the better public policy, the doctrine should be maintained that the lessor company shall be required to answer for the consequences of the negligence of the lessee company in the operation of the road, not only to the public, but also to servants of the lessee company who have been injured by actionable negligence of the lessee company. The charter of the lessor company empowered it to construct this line of railroad and operate trains thereon. It became its duty to exercise those chartered powers, otherwise they would become lost by nonuser. The statute authorized it to discharge that duty through a lessee, and it adopted that means of performing the duty which the state had created it to perform. The statute which authorized it to operate its road by means of a lessee did not, however, purport to relieve it of the obligation to serve the public by operating the road, nor of any of the consequences or liabilities which would attach to it if it operated the road itself. 3 Starr & C. Ann. St. 1896, p. 3247, c. 114. Statutory permission to lease its road does not relieve a railroad company from the obligations cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. *Balsley v. St. Louis, Alton & Terre Haute Railroad Co.*, 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784. While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the Legislature, as the representative of the public, to perform that duty through lessees has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee companies to whom is intrusted the operation of their roads are competent and that they perform the duties devolving upon them with ordinary care and skill, for upon the character and condition of safety of such engines and cars, and on the competency and care of such employees, depend the lives and property of the general public." In *Chicago & Western Indiana Railroad Company v. Doan*, 195 Ill. 168, 62 N. E. 826, it is said: "The negligence of a lessee of the tracks of a railroad company is imputable to the lessor company." The same doctrine is stated in

*Chicago & Erie Railroad Company v. Meech*, 163 Ill. 305, 45 N. E. 290.

In *Aycock v. Railroad*, 89 N. C. 321, Smith, C. C., for the court, said: "The cases cited in the well-prepared brief of the plaintiff's counsel fully sustain the proposition that the defendant company, leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train." This case has been followed and approved in *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959, in *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, in *Smith v. Railroad*, 130 N. C. 344, 42 S. E. 139, and in *Brown v. Railway*, 181 N. C. 455, 42 S. E. 911.

In *Singleton v. Railroad*, 70 Ga. 464, 48 Am. Rep. 574, the court held: "The original obligation of the railroad company to the public could not be discharged except by legislative enactment, consenting to and authorizing the lease, with an exemption granted to the lessor company from liability. Legislative consent to the lease is not alone sufficient. There must be a release from the obligations of the company to the public," and further held that the lessor company was liable for injuries to a passenger, caused by the negligence of the lessee company in putting him off the train. At page 467 of 70 Ga. (48 Am. Rep. 574), the court said: "It is now a well-settled principle that a corporation, being the creature of the law, has only the powers conferred upon it by its charter, and that all others not necessarily implied therefrom are withheld. Its grants, whether of power or exemption, are always to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the state or to individuals. It seems also to be well settled that a railroad corporation, and it is with such that we are dealing in this case, cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease. *Thomas v. R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Railroad Co. v. Winans*, 17 How. 30, 15 L. Ed. 27; *Pearce v. R. R. Co.*, 21 How. 441, 16 L. Ed. 184; *Pullan v. Cincinnati & C. Air Line R. Co.*, 4 Biss. 35, Fed. Cas. No. 11,461; *Commonwealth v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672." This case was followed in *Hawkins v. Railway*, 119 Ga. 159, 46 S. E. 82.

In *Braslin v. Railroad*, 145 Mass. 64, 13 N. E. 65, the defendant had leased its road to another company which lease was subsequently ratified by the Legislature. The plaintiff, while a passenger on a car operated by the lessee company, was thrown from the car and injured. The court held the defendant lessor

company liable. In the discussion, Allen, J., writing the opinion (at page 68 of 145 Mass., at page 68 of 13 N. E.) said: "The provisions of the lease, including those which are incorporated by reference, define the duties and obligations of the contracting parties as between themselves, and appear to be sufficient effectually to bind the lessee to indemnify the lessor against loss. But it is nowhere stated that the lessor should be exonerated from responsibility, nor was it possible for the parties to make a contract which should have that effect. The sanction of the Legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. The lease did not purport to transfer the lessor's franchise, or the whole of its property. The lessor was not going out of business entirely, but only leased a portion of its road, with provisions for restoration of the leased property at the end of the term, and for re-entry. It was under a positive duty and obligation to the public, and the consent of the Legislature to the making of the lease did not imply a discharge from the duty and obligation. Indeed, there is a certain implication that the parties did not contemplate any such discharge, arising from the stipulation for indemnity 'during said term,' that is, during the whole term of the lease. Where a corporation seeks to escape from the burdens imposed upon it by the Legislature, clear evidence of a legislative assent to such exoneration should be found."

In *Chollette v. Railroad* (Neb.) 41 N. W. 1106, 4 L. R. A. 135, the court held: "The original obligation of a railroad company to the public cannot be discharged by a transfer of its franchises to another company, except by legislative enactment consenting to and authorizing such transfer, with an exemption granted to such company relieving it from liability. Legislative consent to the transfer is not alone sufficient; there must be a release from the obligations of the company to the public."

In *McCabe's Adm'x v. Railroad*, 112 Ky. 861, 66 S. W. 1054, it was held that a provision in the charter of a railroad corporation empowering the corporation to "make contracts with individuals, corporations, and other railroad companies for the building, completion, and operating of said road or any part thereof," authorized the corporation to lease its road, but did not relieve it from liability for the negligence of the lessee in the operation of a train whereby a person on the track was struck and killed.

In *Heron v. Railway*, 68 Minn. 542, 71 N. W. 706, it was ruled that exemption from liability on the part of the lessor company for damages for acts of the lessee company is not necessarily implied from a lease made with legislative authority, giving the lessee company exclusive control and possession of the road.

*McCoy v. Railway*, 36 Mo. App. 445, cited

by appellant, where the lessor company was held liable for damages caused by fire escaping from the engine of the lessee company, is not in point, for the reason the statute authorizing the lease expressly reserved that the lessor should not escape any of the responsibility it owed to the public. Neither is the case of *Anderson v. Railroad*, 161 Mo. 411, 61 S. W. 874, cited by appellant, in point, nor any other Missouri case cited by counsel for either side. \*

As stated in 23 Am. & Eng. Ency. of Law (2d Ed.) p. 784, "there is a sharp conflict of authority as to whether the lessor of a railroad is liable for injuries to personal property caused by the wrongful or negligent acts or omissions of the lessee in the operation of the road, as distinguished from the non-performance of a duty which the lessor's charter or the general law imposes primarily on the lessor." Judge Elliott, in his work on Railroads, after noticing the conflict of authority, says: "Our opinion is that where the lease is executed under the provisions of a statute, in accordance with its requirements, is made to a company having authority to accept it, and is made in good faith and not for the purpose of transferring duties or obligations to an irresponsible party, the lessor company is not liable for injuries caused by the negligence of the lessee and not attributable to a breach of any public duty of the company that executed the lease." 2 Elliott on Railroads, § 469. Nellis on Street Railroad Accident Law, p. 488, without referring to the conflict of authority or commenting on any of the cases, says: "Where the railroad company is authorized by law to lease its road to another railroad company, the company leasing its road is not liable for the misconduct in the management, if the persons in charge at the time are not in fact its servants or agents, but are the servants or agents of the lessee." Hutchinson on Carriers (2d Ed.) § 515b, says: "An authorized lease, however, not otherwise providing, will absolve the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road over which the lessor has no control"—citing *Nugent v. Railroad*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, and *Mahoney v. Railroad*, 63 Me. 68, as authority for this rule. But no reference is made in the note by the author to cases holding to the contrary. On the authority of the Maine and New York cases, Pierce says: "The lease of a railroad under due authority of law effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts." Pierce on Railroads, § 283. Pattison, on the authority of the Maine and New York cases states the same doctrine. Pattison on Railway Accident Law, § 131. Wood on Railroads (volume 3, p. 2056) says: "Where the lease is made under due authority, so that

there can be no objection to its validity, some authorities hold that the lessor is relieved from liability for injuries resulting from the negligent operation of the road. But this admits of serious question unless the lease contains specific provision for the lessor's exemption from liability." In a footnote the author cites some of the conflicting cases but refrains from an expression of individual opinion in regard to the rule.

In *Arrowsmith v. Railroad*, (C. C.) 57 Fed. 165, most of the authorities are reviewed by Judge Lurton and the conclusion reached is that where a railroad company leases its line by authority of law, and there is no exemption from future liability, either by express terms of the statute or the terms of the lease, nevertheless the lessor is not liable for injuries to a passenger traveling under a contract with the lessee, when such injuries are caused wholly by the lessee's negligence in operating the road. This case was followed in *Hayes v. Northern Pacific R. R. Co.*, 74 Fed. 279, 20 C. C. A. 52. In *Ditchett v. Railroad*, 67 N. Y. 425, it was held that a recovery could not be had by a plaintiff, suing as administrator for injuries caused his intestate by falling into a cut made by the defendant for the purpose of its railway, said cut having been made by the lessor and inclosed by a substantial fence before the making of the lease, which fence was permitted to become out of repair by the lessee corporation. The court applied to the case the ordinary rule that a lessor of premises, who parts with them while they are in proper condition, is not bound to see that they are thereafter properly cared for by his lessee, and is not responsible for their subsequent condition. The same ruling was applied by the same court in *Miller v. Railroad*, 125 N. Y. 118, 26 N. E. 35. In *Caruthers v. Railroad* (Kan. Sup.) 54 Pac. 673, 44 L. R. A. 737, it was held: "In the case of a lease made by one railroad company to another under the statute authorizing leases between railroad companies, the lessor company is not liable to third persons for injuries resulting from the negligent operation of the leased line by the lessee company, where the lease is general in its terms, and confers upon the lessee company 'the exclusive right to run and operate its trains of cars over and upon the track of the lessor company,' without reserving to the latter any right of control over the operation of the road by the former." In *Pinkerton v. Pennsylvania Traction Co.* (Pa.) 44 Atl. 284, it was ruled that where a lease of a street railway is duly authorized by law, the lessee only is liable for negligence in its operation. In *Buckner v. Railroad* (Miss.) 13 South. 449, and in *Virginia M. Ry. Co. v. Washington* (Va.) 10 S. E. 927, 7 L. R. A. 344, it was held that the lessor company was not liable for injuries caused by the negligence of the lessee company to its employees in the operation of the road.

The authority of the case of *Nelson v. Railroad*, 26 Vt. 717, 62 Am. Dec. 614, holding the lessor liable for the negligence of the lessee in the operation of a train over the leased road, is somewhat shaken by Judge Redfield, in a note to paragraph 3 (volume 1, p. 636) in his work on Railways. The paragraph reads as follows: "But even where such contracts have been made, by permission of the Legislature, it has been held in this country that the company leasing itself does not thereby escape all responsibility to the public; but that the public generally may still look to the original company, as to all its obligations and duties, which grow out of its relations to the public, and are created by charter and the general laws of the state, and are independent of contract or privity between the party injured and the railway." In a footnote he refers to the *Nelson Case* and says: "But it is, perhaps, worthy of consideration, in regard to this case, that the effect of the legislative consent to the lease is not made a point in this case."

The courts of all the states, except New York, so far as we have been able to see, have held that a railroad company is not absolved from its public or statutory obligations by leasing its road to another company, though authorized by the Legislature to execute the lease, unless the statute authorizing it to lease grants the exemption. A street railroad corporation is a quasi public corporation, enjoying a monopoly, and is created for the primary and almost exclusive purpose of carrying passengers, and the acceptance of its charter implies an assumption on its part of an obligation in favor of the public to operate its road until discharged from the obligation by the state, hence its duty to carry passengers is a public one. *State v. Railroad*, 29 Conn. 538; 1 *Morawetz on Private Corporations*, § 116. A distinction has been drawn between the common-law obligation of a railroad company to carry freight and passengers and its statutory obligation to fence its road, build cattle guards at public highway crossings, prevent sparks from escaping from its engine and setting out fire on the land of adjoining proprietors, and other like statutory requirements. The statutory duties are denominated public ones, from a performance of which a lessor company is not absolved unless the exemption is granted by the legislature, while the obligation to carry passengers is generally called a private duty arising out of contract. It seems to me this distinction is more subtle than sound. The duty to fence, etc., is imposed by statute. The obligation to carry passengers is grounded in the common law. Both duties are legal and the company assumes to discharge both by the acceptance of its charter, and I cannot see on what rational ground one is classed as a public and the other as a private duty. They are of equal dignity, of equal force, and the performance of either may be enforced by the state in a proceeding by

mandamus (*State v. Railroad, supra*), and it is only true in a relative sense that a passenger is received and carried by a railroad company by virtue of a private contract made by him with the company. By incorporating under the general laws of the state, the defendant agreed to carry passengers for a fare to be fixed by the municipal assembly of the city of St. Louis (§ 1187, *supra*). It also agreed to submit to and observe such reasonable municipal regulations in regard to stopping its cars for receiving and discharging passengers as the general assembly of the city might prescribe by ordinance. The fare has been fixed by ordinance, and police regulations, in regard to the operation of its cars and the reception and discharge of passengers, have been enacted; so that the state and the city on the one side, for the benefit of the public, have fixed the fare to be paid, designated the places on the streets where passengers shall be received and discharged, and the company on the other, by incorporating under the general laws, agreed to the terms prescribed by the state and city, and all that is required of the individual to become a passenger is to accept the terms of the contract exacted of the company by the state and city for his benefit, and when he presents himself for carriage at the proper time and place and tenders the fare fixed, the company is bound to receive and carry him; to refuse to do so would be a repudiation of the very purpose of its charter and a violation of the highest of its obligations to the public. The following clause in the lease, to wit: "And Transit Company will indemnify, save and keep harmless, during the continuance of this lease, United Railways from all costs, charges and expenses arising from the management and operation of said railways, and all matters incident thereto," indicates that defendant United Railways Company recognized that one of its public duties was to carry passengers, and took from the Transit Company an obligation to indemnify and save it harmless for all costs and damages that might accrue from the negligent performance of the duty by its lessee. It exacted of the Transit Company an exemption from its obligation to transport passengers in safety—an exemption the Legislature withheld when granting the power to lease. But it seems to me that, whether the obligation of a street railroad company to carry passengers is classed as an obligation the company peculiarly owes to the public, and for that reason, cannot be shifted to a lessee, without legislative grant, or as a mere private obligation to the individual passenger, arising out of contract, expressed or implied, the obligation is so far-reaching and of such paramount importance to urban populations that exemption from the obligation cannot be had in any other way than by express legislative grant. The defendant has not re-

ceived this grant, and I think it would best conserve the legislative policy of the state to follow the rule as declared by the cases cited from the states of Massachusetts, Vermont, Illinois, Kentucky, Georgia, North and South Carolina, and hold the defendant liable for injuries caused by the negligent operation of its cars by the Transit Company, its lessee.

The foregoing statement and opinion were written and in the hands of the other members of the court for months before their opinions were prepared, and, in view of the fact that they have discussed questions not noticed in my opinion, I deem it proper to add my individual views touching these questions, and proceed to do so. The argument of my learned associates, to the effect that the Legislature, by using the term "lease" in section 1187, Rev. St. 1899, without restricting or qualifying its ordinary meaning, intended the lease therein authorized should, as to the public and as to third persons, in respect to the management and use of the leased property, stand on the same footing and be governed by the same rules of law as a lease between private persons, it seems to me is strained and wholly unsound. A private person acquires property for his sole use, and, when acquired, it is wholly his own and he may do as he will with it, provided he does no legal wrong in his use or disposition of it. This is not so in respect to a street railway company. It procures a franchise to lay its tracks in the public streets of a city, with the distinct understanding that it will provide the necessary rolling stock and equipment to carry the traveling public. Property thus acquired is not for the sole use of the company, but is also for the use of the public, and the public has an interest in it, and hence is directly interested in its management and operation (*Muntz v. Railway [La.]* 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495) and is, in no narrower sense, a party in interest to every contract affecting the use and management of the property; and the rules of law defining the several duties and obligations of the lessor and lessee of private property are wholly inadequate to protect the interests of the public in street railway property operated under a lease, and it seems to me, on grounds of public policy, that the lessor company should be held to a strict performance of the duties imposed upon it by law, chief among which is to carry passengers safely. I also find in both opinions an argument, or rather an inference, which I think is unsound and not warranted by any language found in the statute. It is this, that the section (1187) evinces a legislative intent that the public policy of the statute shall be to exempt the lessor company from liability for injuries to passengers caused by the negligence of the lessee. *Sherwood, J., in Kitchen v. Greenabaum*, 61 Mo., loc. cit. 115, said: "Courts have never yet ventured to define in specific terms the meaning of the phrase,

'public policy.' In *Enders v. Enders*, 164 Pa., loc. cit. 271, 30 Atl. 129, 27 L. R. A. 56, 44 Am. St. Rep. 598, the court said: "Public policy, in the administration of the law by the courts, is essentially different from what may be public policy in the view of the Legislature. With the Legislature, it may be, and often is, nothing more than expediency." In *People v. Hawkins* (N. Y.) 51 N. E., loc. cit. 200, 42 L. R. A. 490, 68 Am. St. Rep. 736, it is said by the New York Court of Appeals: "The courts have often found it necessary to define its [public policy] judicial meaning, and have held that a state can have no public policy except what is to be found in its Constitution and laws." In *Swann v. Swann* (C. C.) 21 Fed., loc. cit. 301, it is said: "The only authentic and admissible evidence of the public policy of a state on any given subject are its Constitution, laws, and judicial decisions." A like ruling was made in *Hartford Fire Ins. Co. v. Railway*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

Prior to 1899, when section 1187 was passed, on grounds of public policy, street railroad companies were denied the power to lease their roads. By the act of 1899, the Legislature abrogated this public policy and declared a different policy by granting them the power to lease. To this extent the statute is declaratory of the public policy of the state respecting the right of street railroad companies to lease their property. The statute is absolutely silent as to whether or not a lease shall or shall not exempt the lessor company from liability for failure to perform the statutory duties required of all street railroad companies, or from liability for injuries to a passenger caused by the negligence of the lessee; and I am unable to see upon what rational ground it can be said the Legislature, by granting the power to lease, also, by its silence, declared a public policy that should follow the exercise of the power, when the policy is in nowise connected with or essential to a full and complete exercise of the power granted. In case of an absolute sale of the property and franchises of a street railway company, no question of liability of the selling company can arise. But a lease is not a sale. In the lease contract, the United Railways Company expressly reserved its right to be a corporation, maintained ownership in all its property, personal and real, held on to its charter, to its franchises and privileges, and the question is, can it do this and at the same time shift all liability for the non or mal performance of the duties it contracted to perform as a consideration for the grant of its franchise by the state by merely delegating to another company, under the form of a lease, authority to possess, manage, and operate its road? If the Legislature, with the power of a lease, had also granted the exemption, it would have declared what should be the future public policy of the state respecting the ques-

tion under consideration. As it did not do this, the question is one to be answered by the courts, not on anything that is found in the statute, for that is absolutely silent, but by the general tenor of legislation respecting these public service corporations, and the decisions of the Supreme Court, from both of which it is manifest that the public policy of the state is, and always has been, to hold railroad companies, both steam and street, to a strict accountability for the manner in which they manage and operate their roads, and to exact from them the exercise of the very highest degree of care for the safety of their passengers. If this rule of public policy is adhered to, it seems to me that nothing short of a legislative grant of exemption will be effectual to shift liability from the lessor to the lessee company for an injury to a passenger caused by the negligence of the lessee.

Entertaining these views, I am unable to concur in the reasoning or result reached by my learned associates; and from the discussion in the case of *Markey v. Railroad*, 185 Mo. 348, 84 S. W. 61, I think the opinions of the majority are opposed to the views of the Supreme Court in the *Markey* Case, and therefore ask that the case be certified to the Supreme Court for final decision.

## MERCANTILE TRUST CO. v. NIGGEMAN.

(St. Louis Court of Appeals. Missouri.  
June 5, 1906.)

### 1. BROKERS — COMMISSIONS — CONTRACTS — STATUTES — CONSTRUCTION.

Laws 1903, p. 161, makes it an offense for any person to offer for sale real property without the written authority of the owner thereof or of his attorney in fact appointed in writing. An owner orally authorized his son to offer his property for sale. The son entered into a contract with a broker, employing him to sell the property. The broker procured a purchaser, and the owner ratified the sale, and offered performance of the contract on her part by executing and tendering a deed conveying title. Held, that the broker was entitled to his commission, the statute only aiming to prevent the negotiation of the sale of real estate without the knowledge of the owner by irresponsible persons acting as real estate agents with a fraudulent intent of making a profit to themselves, and, though the broker violated the letter of the statute, he did not violate the intent thereof.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 44.]

### 2. SAME—RATIFICATION OF AGENT'S ACT.

An owner verbally authorized an agent to offer her real estate for sale. The agent, in the name of the principal, gave a broker written authority to procure a purchaser for the land. The owner subsequently ratified the agent's act by offering a performance of a contract of sale to a purchaser procured by the broker by tendering a deed conveying the premises. Held, that the defect in the appointment of the agent was cured by the owner's acts, constituting a ratification.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 41.]

### 3. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—LIENS—STATUTES.

Scheme and Charter of the City of St. Louis, art. 6, § 24 (Rev. St. 1899, p. 2513), provides for making out special tax bills for the construction of public works. Section 25 provides that the tax bills shall be a lien on the property charged therewith. *Held*, that the tax bills are not a lien until they are delivered to the person designated in the charter to receive them.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1224.]

### 4. BROKERS—COMMISSIONS—WHEN EARNED.

A broker was employed to procure a purchaser of real estate. He procured a purchaser, who contracted for the purchase thereof. The owner executed a warranty deed conveying the premises to the purchaser. The deed was not delivered and the purchase price paid over because of the refusal of the owner to pay the cost of sewer tax bills which would be subsequently issued; the construction of the sewer being in progress during the transactions. The attorney of the broker erroneously advised that the owner was liable for the tax bills. *Held*, that the broker was not entitled to his commission.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 92.]

Appeal from Circuit Court, City of St. Louis; Walter B. Douglas, Judge.

Action by the Mercantile Trust Company against Mary A. Niggeman. From a judgment for plaintiff, defendant appeals. Reversed, without remanding.

In January, 1904, the defendant was the owner in fee of certain real estate, situated in the city of St. Louis, known and designated as "No. 5807 Von Versen Avenue." Defendant verbally authorized her son, R. A. Niggeman, to offer the property for sale. On the 7th of January, 1904, R. A. Niggeman, as the agent of his mother and in her name, entered into a written contract with the plaintiff, whereby it was appointed the agent of defendant to sell the property for \$7,750, for which services it was to receive 2½ per cent. commission on the purchase price. It was agreed that defendant's title was to be perfect and the property free of incumbrances. Plaintiff in a short time found a purchaser, Mary L. Griffin, who was ready, willing, and able to purchase the property for \$7,750, and on January 8, 1904, signed and acknowledged a written agreement whereby she bound herself to purchase the property at the price of \$7,750 and deposited \$100 with plaintiff as earnest money and as part payment of the purchase price. On being informed of the sale, defendant executed and acknowledged a general warranty deed conveying the premises to Mary Griffin, and placed the same in the hands of John J. McNeary, her brother, to be by him delivered to Mrs. Griffin on the payment of the purchase price. Mrs. Griffin and McNeary met at the Mercantile Trust Building, in the city of St. Louis, to close the transaction. It appears that a city sewer, known as the "Blackstone sewer," was at the time under construction in the district in which defendant's property is situated, and that plaintiff's legal counsel-

or gave a written opinion to both parties that the proportionate share of the cost of the construction of the sewer was a lien upon the premises, and plaintiff advised McNeary to leave \$300 of defendant's money on deposit with it to pay off the special tax bill against the property when it should be issued. McNeary declined to make the deposit, tendered the deed to Mrs. Griffin, and demanded the purchase price of her. She refused to accept the deed or pay the purchase price, for the reason defendant would not make the deposit to meet the sewer tax bill when it should be issued. Plaintiff thereupon return to Mrs. Griffin the \$100 deposited with it as part payment of the purchase price of the property and brought suit in a justice's court to recover its commission for making the sale. In due course the case was appealed to the circuit court, where, on a trial anew, plaintiff recovered judgment for the agreed per cent. of commission, from which judgment defendant appealed.

Henry A. Hamilton, for appellant. E. M. Grossman, for respondent.

BLAND, P. J. (after stating the facts). 1. In 1903, the Legislature passed an act, consisting of two sections, the first of which reads as follows: "In cities of three hundred thousand inhabitants or more, any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property, with the owner thereof, shall be deemed guilty of a misdemeanor and fined in a sum of not less than ten dollars nor more than three hundred dollars." Laws 1903, p. 161. It is conceded that defendant did not, in writing, appoint her son, R. A. Niggeman, her attorney in fact to sell or offer for sale her real estate. On this evidence defendant insists that the contract relied upon by plaintiff to recover was void, and that it was guilty of a misdemeanor in accepting the contract and offering the property for sale, and for these reasons no recovery can be had. Had defendant repudiated the sale when she learned of it, or refused to carry it out, we think there would be no doubt of the soundness of her position; but she did not do this. On the contrary, she ratified the sale and offered a full performance of the contract on her part by executing and tendering a deed conveying title to the property to the purchaser, Mrs. Griffin. It is not immoral to sell real estate, nor is it contrary to any public policy of the state; nor was the statute, *supra*, enacted for the purpose of hindering or restricting the exercise of the right of the owner to sell his lands by himself, or through his duly appointed agent. This section and the succeeding one are aimed at an evil which was prevalent in the city of St. Louis, to wit, that of negotiating the sale or the mortgaging of

real estate, without the knowledge or consent of the owner, by irresponsible and unconscionable persons acting as real estate agents, with the fraudulent intent to make a profit to themselves. The two sections will effectually prevent these frauds, for in a suit to recover commission or other compensation for negotiating a sale or mortgage, if the owner denies the authority of the agent, under the statute, the agent must show his authority in writing from the owner or his attorney in fact, appointed in writing. But if the owner acknowledges the authority in the agent to make the sale, or ratifies it after it is made, and accepts or offers to accept the benefits arising therefrom, we can see no reason and know of no law that would deny him the right to recover a just reward for his labor; and the cases cited by defendant, holding that a contract prohibited by law, one that is immoral, or one that is opposed to public policy, or made to defeat the revenue laws, cannot be enforced in a court of justice or furnish the basis for a recovery for services rendered or money expended under it, have no application to the facts in this case. Nor do we agree with defendant that plaintiff committed a misdemeanor by acting on the written authority it had to sell the premises. It violated the letter, but not the spirit and intent, of the statute. The agent, who, in the name of his principal, gave plaintiff authority to sell the lot, was not without authority to sign the contract. His appointment, as agent, was only defectively made because not in writing. This defect was cured by the subsequent ratification by the principal of the agent's act. All the elements essential to constitute a crime are lacking in the transaction.

2. Section 24, art. 6, of the scheme and charter of the city of St. Louis (Rev. St. 1899, p. 2513), provides for making out special tax bills for the construction of certain public works, including the construction of district sewers (after the work is completed and accepted). The succeeding section (25) provides that these "tax bills shall be and become a lien on the property charged therewith," etc. In *Everett v. Marston* (Mo. Sup.) 85 S. W. 540, our Supreme Court, construing the provision of the charter of Kansas City relating to the same subject and containing substantially the same provisions as sections 24 and 25, supra, of the charter of St. Louis, held that special tax bills are not a lien on the property chargeable with the cost of the work until they are delivered to the board of public works. Under the St. Louis charter these special tax bills are required to be delivered to the party in whose favor they are issued. The case is authority for holding that special tax bills are not a lien until they are delivered to the party designated in the charter to receive them; hence plaintiff's counselor was in error when he gave it as his opinion that the construction work on the Blackstone district sewer (not then complet-

ed) was a lien upon defendant's lot. There is no pretense that this advice was not honestly given, but its effect was to defeat the sale, and it was plaintiff's fault; for it is bound by what its agents, including its legal counselor, did in the premises. That the deed was not delivered and the purchase price paid over to defendant resulted from plaintiff's erroneous advice to the purchaser. It innocently defeated the consummation of the sale it had made as defendant's agent, and we cannot see upon what principle of law or justice it is entitled to recover commission for undoing the very work which entitled it to compensation.

We therefore reverse the judgment, without remanding the cause for rehearing. All concur.

### KNAPP v. KNAPP.

(St. Louis Court of Appeals. Missouri.  
April 10, 1906. On Rehearing. June 5,  
1906.)

#### 1. BAILMENT—REQUISITES—IDENTITY.

Intestate on inheriting certain funds from an English estate, went to England, and, after obtaining the money, obtained a draft for a portion thereof, payable to his mother, which she cashed and gave to defendant, her daughter, \$2,000, which the daughter deposited to her individual credit with a trust company. *Held*, that defendant was a bailee though it was not agreed or intended that the identical money which she received from her mother, as distinguished from a similar sum, should be returned to intestate.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bailment, § 1.]

#### On Rehearing.

#### 2. FRAUDULENT CONVEYANCES—BAILMENTS—VALIDITY AS BETWEEN PARTIES.

Where plaintiff's intestate bailed certain funds with defendant for the purpose of fraudulently preventing a creditor from enforcing his claim, but intestate never actually divested himself of title to the funds, his fraudulent intent was no defense to an action by his administratrix to recover the fund from the bailee.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 523, 533-539.]

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Clara P. Knapp, as administratrix of the estate of Ralph H. P. Knapp, deceased, against Georgia Knapp. From a judgment for plaintiff, defendant appeals. Reversed.

John S. Leahy and Bond, Marshall & Bond, for appellant. Henderson & Trigg, for respondent.

BLAND, P. J. Omitting caption, the petition is as follows: "Plaintiff states that Ralph H. Pybus Knapp, deceased, late of the city of St. Louis, state of Missouri, departed this life on or about the 20th day of January, 1904, leaving him surviving, as his widow, the plaintiff herein; that thereafter, to wit, on the 18th day of April, 1904, the plaintiff was, by the probate court in and for

the city and state aforesaid, duly appointed administratrix of the estate of the said Ralph H. Pybus Knapp, deceased; that, under which appointment, she has duly qualified, and is now in charge of said estate as the administratrix thereof. Plaintiff states that in or about the month of May, 1902, the said Ralph H. Pybus Knapp, deceased, placed in the keeping, care, and custody of the defendant a large sum of money, to wit, the sum of \$5,000, with and under the understanding and agreement, then had and made, that said sum of money should be held and retained by the defendant for the said Ralph H. Pybus Knapp, and to be repaid and redelivered to the said Ralph H. Pybus Knapp, upon request; that the defendant, since said last-mentioned date, has continued to retain the possession and custody of said sum of money; that, though the payment of said sum of money has been demanded by the plaintiff, as such administratrix, defendant has wrongfully refused, and still refuses to pay the same, or any part thereof, to the plaintiff. Wherefore plaintiff prays judgment for the sum of \$5,000, with interest, and the costs of this action." The answer was a general denial. The cause was submitted to the court without the intervention of a jury, who, after hearing the evidence, found the issues for plaintiff and rendered judgment in her favor for \$2,180 and interest thereon. After taking the usual preliminary steps, defendant appealed.

The history out of which the litigation grew, briefly stated, is as follows: In 1902, Ralph Knapp, as the elder son of his father, was, under the law of primogeniture, entitled to an estate or interest in an estate in England of the value of about \$7,000. He employed the law firm of Dodge & Mulvihill, of the city of St. Louis, to establish his right in the estate. His attorneys were successful, and as soon as the matter was settled in his favor he sailed for England and collected about \$7,000 of the estate. He purchased a draft in London for \$5,811.43, payable to his mother, and sent it to her. She received the draft, cashed it, and out of the proceeds handed or gave her daughter, the defendant herein, \$2,000, which the latter, on January 23, 1903, deposited to her individual credit with the Mississippi Valley Trust Company. Ralph Knapp spent the greater portion of the balance of his inheritance in seeing Europe, and then returned to his home in St. Louis. On his return he refused to pay Dodge & Mulvihill their fee of \$1,800. They brought suit against him to recover the fee, and obtained a judgment for the amount claimed. The judgment was collected of Knapp's mother through garnishment proceedings.

It is practically conceded by defendant that Ralph Knapp placed the \$5,811.43 in the hands of his mother for the fraudulent purpose of defeating Dodge & Mulvihill in the collection of the debt he owed them. Defend-

ant testified that she had kept a deposit account with the Mississippi Valley Trust Company for several years prior to 1903. The state of her account on May 16, 1903, was as follows:

Balance	\$ 94 77
Jan. 23, 1903	2,000 00
Jan. 26, 1903	30 00
Feb. 4, 1903	67 00
Feb. 5, 1903	\$ 7 00
Feb. 9, 1903	2,180 00
May 16, 1903	4 77
	<hr/>
	\$2,191 77 \$2,191 77

Defendant's evidence shows that her income from all sources was, and had been, for several years, \$35 per month. She testified that after her brother returned from England she gave him several checks on her bank account for the purpose of enabling him to pay his bills, and at one time gave him a check for \$100. On February 19, 1903, defendant, accompanied by Mrs. Mullins, a friend, went to the Mississippi Valley Trust Company and withdrew \$2,180 in currency, which she placed in the bosom of her shirtwaist. Defendant and her friend then walked over to the William Barr Dry Goods Company where they met Ralph Knapp and Charles Ramlose, who had been waiting there for them for about half an hour. When the parties met, Ralph Knapp, addressing defendant, his sister, said, "Well, did you get my money, Sis?" Defendant answered, "Yes, Ralph; I have it here," pointing to the bosom of her shirtwaist. Defendant testified that after she withdrew the money from the trust company she took it home and kept it there. The evidence tends to show that defendant apprehended she might be garnished on process against her brother, and withdrew the money from the trust company to defeat the garnishment. It also shows that on several occasions she stated that she was taking care of her brother's money for the purpose of avoiding the payment of what she said was "an unjust claim against him." On the death of Ralph Knapp, defendant made arrangements for his funeral and stated she had some \$400 or \$500 of his money with which she intended to pay the funeral expenses, but she never paid them. The evidence for the defendant tends to show that the money sent from England by Ralph Knapp to his mother was in part payment of a debt he owed her, and that out of this money she made defendant a present of \$2,000.

It is contended by defendant that the evidence tends to show two theories—one, that the money sent by Ralph Knapp to his mother was in payment of a debt he owed her, and the other, that the money was transferred to her by Ralph for the purpose of defrauding his creditors; and it is strenuously contended there is no evidence that the money was deposited by Ralph Knapp with his mother to be returned to him, and, hence, there is no proof of a bailment. If either theory



of defendant is correct, then the judgment should be reversed, for if the money was sent from England to pay a debt, which Ralph owed his mother, of course, it cannot be recovered, nor can it be recovered by Ralph's administratrix if he conveyed it to his mother for the purpose of defrauding his creditors. *Brown's Adm'r v. Finley*, 18 Mo. 375; *Hall v. Callahan*, 66 Mo., loc. cit. 322; *Zoll v. Soper*, 75 Mo., loc. cit. 462; *Jackman v. Robinson*, 64 Mo., loc. cit. 292; *Roan v. Winn*, 93 Mo. 503, 4 S. W. 736; *Thomas v. Thomas*, 107 Mo. 459, 18 S. W. 27; *Goldstein v. Winkelman*, 28 Mo. App. 432. There is no evidence showing or tending to show an arrangement or understanding that Ralph Knapp's mother should hold the London draft for him, or that she should cash it and hold the identical cash to be returned to him on demand; and defendant contends that for this reason (that the identical thing or property was not to be returned) it is conclusive there is no bailment in the case. The general rule is that there can be no bailment unless the identical thing bailed is to be returned to the bailor. *Coleman v. Lipscomb*, 18 Mo. App. 443; *Potter v. Mt. Vernon Roller Mill Co.*, 101 Mo. App. 581, 73 S. W. 1005; *Trunick v. Smith*, 63 Pa., loc. cit. 23. Bailment in most instances is founded on contract, but not in every instance. As said in *Hale on Bailments*, p. 14: "Wherever possession of a thing is knowingly acquired, unaccompanied by the right of ownership, a bailment relation is established, and the person in possession holds the things acquired simply as bailee." *Schouler* says: "The simple fact of knowingly holding possession of property which belongs to another will oblige the possessor, no matter how he came by it, to apply a certain care and diligence, and stand to a certain bailment accountability." *Schouler's Bailments & Carriers* (3d Ed.) § 3.

There is evidence in the record tending to show that defendant knowingly came into possession of the \$2,000 in money belonging to Ralph Knapp, unaccompanied with the right of ownership in herself. If so, then she became and was, as to such money, a bailee. But her counsel insists that as she deposited this money with the Mississippi Valley Trust Company to her personal credit, and as there was no understanding that the identical money she received from her mother should be returned to her brother, there was no bailment. In *Repplier v. Jacobs*, 149 Pa. 167, at page 169, 24 Atl. 194, the court, speaking in respect to the necessity of identifying money, said: "The argument that it was not the same money (the same argument made here) that plaintiff originally deposited but part of the winnings of the illegal transactions is of no weight. The cases where money is required to be earmarked, or where the law will inquire whether it is the identical coin or bank notes are exceptional. For al-

ordinary purposes in law as in the business of life, the same sum of money is the same money, whether it is represented by the identical coin or not." This is sound reasoning and sound practical common sense to make use of in the ordinary purposes of the law and in business life. It has been repeatedly held in circumstances where the identical grain commingled with other grain is not to be returned to the depositor, but a like quantity of the same kind and quality is to be returned, are not sufficient to convert the transaction from a bailment into a contract of sale. See authorities cited in *Potter v. Mt. Vernon Roller Mill Co.*, 101 Mo. App. at page 584, 73 S. W. at page 1006. The same rule has been applied in replevin suits to recover specific personal property, as where the goods replevied are mixed with others, but are, nevertheless, of the same nature and value, as in the case of grain, though an actual separation cannot be made by identifying each particle, if a division of equal value can be made, it has been repeatedly held the plaintiff may seize his aliquot part. *Kaufmann v. Schilling*, 58 Mo. 218; *Groff v. Belche*, 62 Mo. 400; *Huff v. Henry*, 57 Mo. App. 341; *Story on Bailments*, § 40. As demonstrated by the foregoing cases, the law is not so much concerned with technical rules and subtle reasoning to reach a correct conclusion as it is to adopt practicable and workable rules suitable to the ordinary business of life; and we do not think it was of any consequence that the defendant, after receiving the \$2,000 from her mother, deposited it with the Mississippi Valley Trust Company to her individual credit, if the money came into her possession unaccompanied by the right of ownership, and she knew it was her brother Ralph's money; nor is it of any significance that the money was not earmarked. The same sum of money she received is, for all practical purposes and in law, the same money. There is abundant evidence in the record in support of the finding of the learned circuit judge, that the defendant held the money as bailee, and for this reason this finding is conclusive here. But we think the judgment is excessive. There is not a ray of evidence that defendant ever received more than \$2,000 of her brother's money. Out of this the plaintiff proved that defendant had returned to her brother at one time, \$100 to pay on some mining stock he had bought. Defendant also testified that she gave him checks at other times to pay his bills. The evidence shows, too, that defendant had a balance of \$94.77 to her credit on her account with the Mississippi Valley Trust Company when she deposited the \$2,000 and that she afterwards deposited \$97. There is no evidence that any part of either of these sums was the money of Ralph Knapp, therefore, the evidence shows that when defendant drew the \$2,180 from the trust company, she drew out her

individual money as well as the money she held as bailee, and placed the package of money, her own and her brother's in the bosom of her shirtwaist. The only possible theory on which the court could have found that she held the entire sum as bailee, is on the evidence that when asked by her brother at Barr's store, if she had his money, she answered: "Yes, I have it here," and pointed to the bosom of her shirtwaist. Her admission, in the circumstances, was not an admission that all the money she had in the bosom of her shirtwaist was her brother's money. At that time, according to plaintiff's own evidence, defendant could not have had over \$1,900 of her brother's money in her possession, and the judgment should have been for that sum with 6 per cent. interest thereon from the date the suit was commenced, May 20, 1904.

Wherefore it is considered by the court that the judgment be reversed, and the cause remanded with directions to the circuit court to render judgment for plaintiff in the sum of \$1,900 with 6 per cent. interest thereon from May 20, 1904. All concur.

#### On Rehearing.

**NORTONI, J.** The learned counsel for appellant insists, seemingly with much earnestness, in their motion to transfer this case to the Supreme Court, that the adjudication herein is in conflict with *Coleman v. Lipscomb*, 18 Mo. App. 443, decided by the Kansas City Court of Appeals, wherein it was held the law is well settled that in order to constitute a bailment, the parties must have intended that there should be a return or delivery of the identical article bailed, and also as being in conflict with the decision of that court in *Corn v. City of Cameron*, 19 Mo. App. 573, wherein it is said that money deposited in bank becomes so instantl the money of the bank, and not that of the depositor and the relation of creditor and debtor arises thereby between the depositor and the bank. After having re-examined the question, we are of opinion that the result in this case in no way conflicts with either of those adjudications.

1. In respect to the proposition that to constitute a bailment, the parties must have intended that there should be a return or delivery of the identical thing; it is well settled in law and the nature of some transactions is such that the rule can only be sufficiently answered by returning other property of like value and kind. As said by the Supreme Court of Pennsylvania, in *Reppler v. Jacobs*, 149 Pa. 167, 24 Atl. 194, and as said by Judge Bland in the opinion of the court in this case: "For all ordinary purposes in law, as in the business of life, the same sum of money is the same money, whether it is represented by the identical coin or not." This is certainly reasonable, and we do not understand that it necessarily infringes upon the doctrine that a deposit in bank constitutes the bank the own-

er of the money; or, in other words, *ipso facto*, transfers the title of the money to the bank and creates the relation of debtor with respect to such bank in favor of the depositor, who is thereby constituted a creditor, for, in the very nature of things, when one in such circumstances has clearly indicated that no intention is present to create the relation of creditor and debtor, but on the contrary, it is manifest that the parties intended to create the relation of bailor and bailee, we are unable to see why the court should not enforce such intention even though the bailee has employed in business or transferred the actual amount deposited to another, and was thereby rendered unable to make restitution of the identical subject of bailment. The question with which the court has to deal is the intention of the parties in creating the relation rather than the manual possession of the subject of bailment, and we know no reason why, when it is apparent that a bailment was intended by the parties, that the bailor shall be precluded of his rights therein because, forsooth, the identical thing is incapable of being returned to the owner because of no fault on his part. We are persuaded that the authorities holding that the same sum of money in bailment for the purpose of the law of bailment, is the same money when found to be in possession of the bailee under an arrangement whereby the parties intended such bailment, are sound. The same doctrine is announced with respect to grain in possession of the warehouseman where the parties intended a bailment, in the case of *Potter v. Mt. Vernon Roller Mills Company*, 101 Mo. App. 581, 73 S. W. 1005, and it was held that different grain of like kind and value is, within the meaning of the law, the same or identical grain as that bailed. It is apparent from the authorities that the crucial question in these cases with which the courts are called upon to deal, and the principle which should properly influence the adjudication, is the intention with which the subject of bailment was placed in the possession of, or is held by, the alleged bailee. When the case is measured by the question of intention, as above indicated, we are of opinion that there can be no conflict between this ruling and the cases holding to the doctrine of debtor and creditor, arising out of the ordinary business of banking. The decisive question in this case is that the case was tried in the court below on the theory that the defendant had possession of the moneys of the plaintiff's intestate, as bailee. Now on the 19th day of February, at Barr's store, the plaintiff's intestate, inquired of the defendant, in the presence of witnesses, speaking of the moneys withdrawn from the Mississippi Valley Trust Company, as follows: "Well, did you yet my money, Sis?" and she answered: "Yes, Ralph, I have it here," pointing to the bosom of her shirt waist; thus recognizing and admitting that the moneys which she held were the property of the plaintiff's intestate.

This and other circumstances in the record are sufficient evidence to support the finding of the learned trial judge that the parties intended a bailment, and that the defendant had possession of the moneys, not as a debtor, but as bailee of the plaintiff's intestate.

2 It is next insisted that the adjudication in this case is contrary to, and in conflict with, a number of decisions of our Supreme Court holding to the doctrine that one having transferred or conveyed his property in fraud of creditors, cannot afterwards invoke the power of the courts, either of law or equity, to set aside such transfer or conveyance, and reinvest title thereto in himself, and that this doctrine applies with the same force as against the executors, administrators, heirs, and devisees of such fraudulent grantor. We are persuaded that the learned counsel have entirely overlooked the fundamental distinction with reference to cases where a fraudulent grantor has actually transferred or conveyed his property whereby title is divested from him, and those cases in which he is not so divested of title, as in that of bailment. The distinction, as we understand it, and it is certainly borne out in all of the authorities, is that where a fraudulent grantor has actually transferred or conveyed property in fraud of his creditors, and actually divested himself of title thereto, the courts will not aid him or his representatives in an attempt to recover title thereto, for having thus fraudulently divested himself of the title, courts are prone to leave him where, by his own misconduct, he has placed himself. This rule obtains in both law and equity. On the other hand, where the party, as in this case, is not a grantor at all, and has done no act by which he has transferred title to the property from himself, the courts will, and do, permit him to recover the property, even though it were placed in bailment with the fraudulent intent to defeat the rights of creditors. This doctrine is sustained upon the principle that by permitting the bailor to recover the property, in no sense is the court called upon to set aside the conveyance or adjudicate title out of the fraudulent grantee and into the fraudulent grantor, but is only called upon to reinstate the fraudulent bailor in whom the title is, and has been during the entire period of bailment, in possession as well as the identical property bailed.—And in this case the same sum of money is, in the law, the same money. Authorities *supra*. Among the reasons assigned for the doctrine are that by such proceedings the contemplated fraud is disaffirmed and undone, and by reinstating the property to the party in whom the title rests, the real owner, the true facts are thereby made to appear as to its ownership. It is no longer concealed, but is uncovered and thereby rendered available to the claims of creditors as assets in the hands of the debtor and the law thus serves a wholesome purpose in lending its aid in disaffirmance and undoing of the orig-

inal wrong intended. The doctrine last mentioned is amply supported by the adjudications of the Supreme Court of this state as well as the courts of first authority elsewhere. See *Gowan's Adm'r v. Gowan*, 30 Mo. 472; *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476; *Taylor v. Bowers*, 1 Q. B. D. 291. See, also, *Bowes v. Foster*, 2 H. & N. (Exc.) 779, in which the entire case proceeds upon and recognizes this principle. As indicated, the theory upon which the courts sustain actions of this nature being that instead of the fraudulent party invoking the aid of the court to enforce a recovery upon the contract or arrangement, born in iniquity and made in fraud, he is, by this proceeding, rather seeking a disaffirmance of such arrangement and the law aids the party who is receding from his original fraudulent purpose to become repossessed of his property in those cases where the parties intended bailment, and there has been no transfer of title. Now that is the case before the court here. There are facts in the record which constitute substantial evidence sustaining the finding of the trial court that in this instance the money was held by the defendant as bailee, the purpose being, no doubt, to defraud the creditors of the bailor, and the court found the transaction to have been a bailment rather than a transfer of title. Had the court found that title to the money was transferred to the defendant for the purpose of defrauding creditors of the plaintiff's deceased, then most certainly the courts would lend no aid to the plaintiff in setting aside such fraudulent conveyance.

Now, because of the great similarity of the reasons thus given to the reasoning of the cases permitting the penitent party to recover what he has advanced under an illegal contract, which remains unexecuted, it is urged by learned counsel that the doctrine mentioned is identical with that pertaining to illegal contracts generally and therefore it is subject in its application, to the limitation of the *locus poenitentiae*, and in order for the bailor to avail himself of his right to recover from the bailee the property which he has placed in bailment in fraud of creditors, he must disaffirm the fraud and move to that end, prior to its consummation by the creditors having been actually defrauded by reason of the bailment, and therefore the purpose to defraud the creditors, *Dodge & Mulvihill*, having been actually consummated so far as was possible, and the bailor not having become penitent and receded from the fraud intended prior thereto, no right of recovery can now be predicated upon this principle inasmuch as he failed to avail himself of the right to recede from the fraud and recover within the period of a *locus poenitentiae*, properly speaking. And it is argued that the affirmance of the judgment in this case will establish the principle in Missouri that a fraudulent bailor may recover the subject of bailment from the bailee even after the fraudu-

lent purpose of the bailment is accomplished. It is error to say that such affirmance in this case will establish this doctrine, for the doctrine has long since been settled with us by the Supreme Court in *Gowan's Adm'r v. Gowan*, supra. Indeed, the principle, as applicable to illegal contracts generally, is subject to the limitation suggested and with this in mind, we have been quite diligent in attempting to ascertain if the proposition be true with respect to proceedings of this nature as well. We have been unable to discover, however, that the doctrine that the fraudulent bailor can recover from the bailee the property in bailment, is predicated entirely upon the same principle which influences cases of illegal contracts generally in the law. Now, it seems that the doctrine with respect to bailments is that although the bailment was made in fraud of creditors, yet the bailor is bound to return the goods held by him as bailee, and is precluded by the very nature of the transaction from setting up the illegality thereof. At least that is the law in this state, as appears by a case in point decided by our Supreme Court, which is controlling authority so far as this court is concerned, and we understand it to be the law universally settled in America on the question. See *Gowan's Adm'r v. Gowan*, 30 Mo. 472; also *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832; *Allgear v. Walsh*, 24 Mo. App. 134.

In *Gowan's Adm'r v. Gowan*, supra, the property in bailment, a slave, was transported by the owner from Tennessee to Missouri for the purpose of defrauding his creditors, 20 years prior to the institution of the litigation with respect thereto. The owner afterwards returned to Tennessee and there departed this life. The slave remained in the fraudulent bailment 16 years in this state, when suit was instituted by the administrator of the bailor seeking to recover therefor, and it was held by the Supreme Court that the fraudulent bailee would not be permitted to plead the fraudulent bailment in defense of that action, 20 years having elapsed after the removal of the slave to this state in order to defraud creditors, although it does not appear in the opinion, the fair inference is, the fraud contemplated and intended 20 years before, had actually been accomplished. Although this identical phase of the question does not seem to have been noticed by the court in the opinion, the adjudication that the bailor cannot set up the fraud in defense on the facts of that case, without noticing the limitation of the doctrine contended for by counsel here, is a complete answer to the argument advanced in this case, and is conclusive on this count. See, also, *Watson v. Harmon*, 85 Mo. 443; and *Charles v. McCune*, 57 Mo. 166, where the principle is recognized without mentioning the limitation contended for. It is proper to say here that the Kansas City Court of Appeals, in *Allgear v. Walsh*, supra, while going into the subject

very fully, wholly failed to notice the limitation upon the doctrine urged in this court.

In *Block v. Darling*, supra, the Supreme Court of the United States squarely adjudicated the doctrine that the fraudulent bailor may recover from the bailee for property in bailment even though it was held by the bailee in fraud of creditors, and that august tribunal did not notice the limitation contended for by the learned counsel here. Nor did it, by any expression or by inference, limit the right of recovery during the period of a *locus poenitentiae* or prior to the consummated fraud. Nor did the other cases supra express or decide any such limitation, save the English case of *Taylor v. Bowes*, 1 Q. B. D. 291, in which, although the question was not necessary to decision, inasmuch as the court said the contemplated fraud had not been actually accomplished. It was said, however, in the opinion, that the right of the bailor to recover under such circumstances exists prior to the consummation of the fraudulent purpose of bailment; or, in other words, the court in that case seems to proceed upon the principle which applies to illegal contracts generally, that courts will only aid the bailor when he has become penitent and seeks to recede from his fraud prior to its consummation. From the adjudications in all of the cases, however, coming under our observation, except the English case mentioned, it is apparent that while the courts limit the doctrine with respect to illegal contracts, that the law will aid the penitent party in disaffirmance of a fraudulent contract prior to the actual consummation of the fraud by the execution of the contract, and rest it upon the principle that in so doing, it is encouraging and rewarding the penitence of wrongdoers and at the same time undoing the contemplated fraud. The doctrine with respect to aiding a fraudulent bailor to recover property in bailment from the bailee is not precisely the same: no doubt it does rest, with respect to the plaintiff's right to recover, in part upon the same considerations. It seems, however, not to be identical therewith in this respect. The distinguishing feature of the doctrine pertaining to bailor and bailee predicates appropriately, upon the principle that the bailee cannot be heard to question the right or title of the bailor under whom he holds. Now, while the cases usually give as a reason for permitting a recovery in such cases under the theory of bailment, that by so doing they reinstate the property to the estate of the true owner, thus rendering it available to creditors, and also aid in the undoing of a fraud, this is true in so far as the plaintiff's rights are concerned, but it seems to us that the principle, entirely sound with respect to precluding the defense of fraud by the bailee in such action, upon which the doctrine must predicate, is that the bailee, having accepted the bailment of the goods from the bailor, thereby impliedly admits

title in the bailor, and is precluded from thereafter questioning his right, asserting claims adverse, or denying the bailor's title thereto, analogous to the principle which precludes a tenant from questioning the right of or asserting title adverse to the landlord under whom he occupies, and we are quite confident that the authorities, when analyzed, will sustain this proposition. The doctrine thus stated, rested upon the principle last mentioned, is in no manner subject to the influence of the principle pertaining to illegal contracts with respect to the locus penitentiae and the bailor can recover the property even after the fraud has been accomplished, for it is his property all of the time, and the bailee is precluded from denying his right. This is the law with respect to such bailments as we understand it.

3. The principle contended for here and which prevades the entire law of illegal contracts is to the effect that if money be paid or property delivered on a contract which is illegal, as being contrary to public law, good morals, or public policy, and such contract has been actually executed, then both parties are thereby rendered in pari delicti and neither of them can recover from the other money so paid or the property delivered, for in such case the wrong is consummated and the title to the money or property is vested under such unlawful contract, contaminated with fraud, and the general policy of both law and equity forbids the enlistment of the courts, either in aid of said contract, or in divesting the rights acquired or reinvesting the rights surrendered in its consummation. This principle extends no further than this, however, for on the other hand, the same policy of the law which forbids the aid of the courts in furtherance of such contract or in divesting from one and investing in another, titles and rights which have already passed and vested by such illegally consummated contract, will, in furtherance of the undoing of the unlawful purpose, aid the parties by reinstating them to their former situation, while such contract remains executory at any time prior to the consummation of the contemplated wrongful purpose, and if the party, having paid the money or property in such unlawful purpose, so desires, prior to its consummation, and seeks to recede from his original evil intention, he may do so, and the law will aid him to that end by permitting him to recover that with which he has parted. This intermediate state between the inception of the original evil purpose and its actual consummation by the execution of such contract, is sometimes mentioned as a locus penitentiae wherein the parties may become penitent with respect to the evil purpose contemplated and the rights of the parties, not having become absolutely fixed by the executed contract, and thereby contaminated with the real turpitude of the transaction intended, the power of the courts may be invoked, not in aid of the contract, but

in disaffirmance thereof in re-establishing the penitent party to his former estate. And therefore it is well settled that while courts will, in no case, lend their aid in an action which predicates upon the affirmance of an unlawful contract, it is a universal rule that they will, proceeding upon the theory that such contracts are void, prevent the defendant from retaining the benefit which he derives from the unlawful act, by reinstating the party seeking to recede from his action as in disaffirmance, and this doctrine is consonant with the spirit and policy of the law. *Adams Ex. Co. v. Reno*, 48 Mo. 264; *Skinner v. Henderson*, 10 Mo. 205; *Spring Co. v. Knowlton*, 103 U. S. 49-58, 26 L. Ed. 347; *Lawson on Contracts*, (2d Ed.) p. 69; 2 *Parsons on Contracts* (9th Ed.) 746; 1 *Story on Contracts* (5th Ed.) § 617; *Chitty on Contracts* (12th Ed.) pp. 104, 105, 672; 2 *Greenleaf on Evidence* (Lewis' Ed.) § 111; 15 *Amer. & Eng. Ency. Law* (2d Ed.) 1007; *Humphreys v. Magee*, 13 Mo. 435. This doctrine has no application to this case between bailor and bailee.

The following cases, cited by appellant as holding to a doctrine contrary to that announced in the opinion in this case, we regard as wholly inappropriate to the issue as found by the court. *Brown's Adm'r v. Finley*, 18 Mo. 375, involved the question of where the property had been transferred by gift from father to daughter in fraud of the father's creditors. The court very properly refused to aid the administrator of the father's estate in setting aside such fraudulent conveyance. In *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203, the transaction involved a transfer of lands by a father to his daughter in fraud of creditors, and the court refused to aid the administrator to set such transfer aside. *Jackman v. Robinson*, 64 Mo. 289, decided no more than that the administrator cannot impeach the fraudulent conveyance of his intestate. *Hall v. Callahan*, 66 Mo. 316, holds that a conveyance in fraud of creditors cannot be impeached by the grantor or his administrator. *Ober v. Howard*, 11 Mo. 425, decided that a father, for a fraudulent purpose, having conveyed lands to trustees for the benefit of two of his children, after his death, his heirs cannot, in equity, set such conveyance aside on the ground of such fraud. *Thomas v. Thomas*, 107 Mo. 459, 18 S. W. 27, holds that the heir cannot impeach the acts of his ancestor in the disposition of his property on the ground of fraud. *Davidson v. Dockery*, 179 Mo. 687, 78 S. W. 624, holds that the devisees of the grantor in a fraudulent conveyance cannot be heard to ask a court of equity to set aside a fraudulent deed of his grantor, for the devisees take under the fraudulent grantor and their rights cannot be superior to those of the grantor. *Zoll v. Soper*, 75 Mo. 460, announces the familiar doctrine *supra*, that an administrator cannot impeach the voluntary conveyance of his intestate for fraud as to creditors, although

the estate may be insolvent. *Merry v. Fremon*, 44 Mo. 518, holds that a conveyance by his intestate cannot be impeached by the administrator as being fraudulent on the part of the grantor. *McLaughlin v. McLaughlin's Adm'r*, 16 Mo. 242, decided that a conveyance of an intestate cannot be impeached by his administrator or heirs of the grantor for fraud as to creditors, holding that none but the creditors themselves or those in privity with them can avoid it. *Crook v. Tull*, 111 Mo. 283, 20 S. W. 8, holds that neither a grantor nor his administrator can assail the grantor's conveyance because made in fraud of creditors. *Hamilton v. Scull's Adm'r*, 25 Mo. 165, 69 Am. Dec. 460, holds that the deceased having given a note to the plaintiff in furtherance of an attempt on the part of the maker of the note to defraud his creditors, and afterwards died, such note having been filed as a demand against his estate, the administrator of the maker of the note will be permitted to say that the note had its origin in the fraudulent purpose mentioned, and in event of such showing, the court will decline to enforce the note by allowing it as a demand against the estate.

The following cases decided by the courts of appeals and relied upon by appellant as being in conflict with the adjudication in this case are as follows: *Tyler v. Larimore*, 19 Mo. App. 445, holds in an action founded on a fraudulent contract by one of the parties to the fraud, seeking to enforce its provisions against the other party that the courts will close their doors against the complainant. *Hayes v. Fry*, 110 Mo. App. 20, 83 S. W. 772, holds that neither the administrator nor the heirs can maintain an action to set aside a fraudulent conveyance of the intestate. Such action can only be maintained by creditors and those in privity with them. *Goldstein v. Winkelman*, 28 Mo. App. 432, holds that the administrator of the deceased payee in a promissory note, although also a judgment creditor of the estate, cannot disaffirm his intestate's transfer as in fraud of creditors or recall to himself the title of the note.

It is apparent that each of the cases above referred to are adjudications resting upon an entirely different proposition than that before the court in this case, and each and all of them announce the well-settled rule that the courts will not aid the enforcement of a contract made in fraud, nor will they aid an attempt to set aside a conveyance made in fraud and reinvest the title in the fraudulent grantor or his representatives, whereas the question before the court is wholly unlike that proposition, inasmuch as here, the plaintiff does not invoke the aid of the law to set aside a conveyance nor to enforce a fraudulent contract. All that she prays is that the moneys which were placed in bailment by her deceased in order to defraud creditors may be reinstated to the estate of which she is administratrix, and in which title rightfully rests; that is, that the moneys be rein-

stated to the rightful owner where the title, all of the time, has remained, for under the theory of the law of bailments, the title has ever rested in her deceased, the bailor, and upon his death, in the estate of which she is administratrix. So we see by this proceeding the court is aiding, not the fraud, but its undoing, and thus renders the moneys in fraudulent bailment available to creditors, and the bailee will not be permitted to question the right of her bailor.

We are unable to see where the principles of the cases last above cited are at all pertinent here, and the motion for rehearing and to transfer to the Supreme Court will be overruled. All concur.

#### WALD v. WALD.

(St. Louis Court of Appeals, Missouri.  
April 24, 1906. Rehearing Denied  
June 5, 1906.)

#### 1. APPEAL—FINDINGS—CONCLUSIVENESS.

The appellate court, in a suit for divorce, will defer to the finding of the trial court, who saw and heard the witnesses.

[Ed. Note.—For cases in point, see vol. 3. Cent. Dig. Appeal and Error, § 3955.]

#### 2. DIVORCE—GROUNDS—SUFFICIENCY.

A husband on innumerable occasions during a period of several years called his wife vile and abusive epithets in the presence of others. He continually nagged at her, and quarreled with her, and pursued her with petty and contemptible accusations, rendering her home life unendurable. For weeks at a time he would not speak to her, and told her that she was only his servant, and that he did not intend to treat her otherwise than as a servant. He denied her all recreations, and cut her off from all social intercourse with her friends. He refused to furnish her with sufficient medical treatment, and when she was ill he declared that she was shamming illness and running up doctors' bills unnecessarily. He frequently declared to her that he had not the slightest affection or regard for her and that he wished to be rid of her. On numerous occasions he ordered her to leave him and threatened to kick her out of the house bodily if she did not do so. Held to warrant a decree of divorce under the statute, as rendering her life intolerable.

[Ed. Note.—For cases in point, see vol. 17. Cent. Dig. Divorce, §§ 67, 68, 83.]

#### 3. APPEAL—OBJECTIONS TO EVIDENCE—NECESSITY.

Where evidence was admitted without objection, and no motion was made to strike it out, the adverse party is in no position to complain of it on appeal.

[Ed. Note.—For cases in point, see vol. 2. Cent. Dig. Appeal and Error, §§ 1253-1280.]

#### 4. APPEAL—HARMLESS ERROR—ERRONEOUS ADMISION OF EVIDENCE.

Where, in a suit for divorce, the court ruled that the wife as plaintiff was incompetent to testify to confidential communications between herself and husband, but in a few instances in the course of her examination she testified to the conduct of her husband when it was not shown affirmatively that a third person was present, it will be presumed that in weighing the evidence the court did not take into consideration the incompetent evidence, especially where the competent evidence preponderates in favor of the finding.

[Ed. Note.—For cases in point, see vol. 3. Cent. Dig. Appeal and Error, §§ 4185, 4042.]

# 5. DIVORCE—STATUTORY PROVISIONS—PUBLIC POLICY.

The Legislature, by specifically enumerating the grounds on which the courts may grant divorces, declares the policy of the state in respect to the grounds for divorce, and a party asking for a divorce is as much entitled to a decree, on establishing the statutory ground relied on by clear and convincing proof, as he would be to recover in any other civil suit on evidence clearly establishing his demand.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by Cad Scott Wald against Emile M. Wald. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel D. Hodgdon, L. Frank Ottoby, and Valle Reyburn, for appellant. Warren Hil-ton, for respondent.

BLAND, P. J. The suit is for a divorce, care and custody of a minor child, and for alimony. Omitting caption, the petition is as follows: "Plaintiff states that on the 22d day of April, 1896, in the state of Missouri, she was lawfully married to the defendant, and that she continued to live with him as his wife from and after said date until on or about the 22d day of January, 1904; that during all that time plaintiff demeaned herself toward the defendant with kindness and affection, and discharged all her duties as his wife. And for a cause of action plaintiff says that since the time of the said marriage and during the cohabitation of plaintiff and defendant as husband and wife said defendant has offered to plaintiff such indignities as to render her condition as his wife intolerable, said indignities being in part as follows, to wit: (1) That almost from the time of their said marriage the defendant has exhibited a most violent and evil temper, causing him, without the slightest excuse, to manifest toward plaintiff the most furious wrath and hatred; that on innumerable such occasions, and in the presence of their little child, Lucille, now six years old, the defendant has raved and cursed at plaintiff, telling her to 'go to hell and be damned,' and calling her 'terror,' 'devil,' 'prostitute,' and countless other vile and abusive epithets; that in the presence of their said child and of other persons defendant has said to plaintiff that she was 'a very ignorant woman,' was 'mentally, morally, and physically dwarfed,' was 'lewd and low in her thoughts and actions,' and applied to her numerous other similar expressions. (2) That during nearly all the time that plaintiff lived with defendant he continually nagged at her and quarreled with her and pursued her with petty and contemptible accusations, so that her home life became wretchedly unhappy and finally unendurable. (3) That while plaintiff and defendant lived together, defendant on several occasions refused to speak to plaintiff for long periods of time, even as long as six or seven weeks, telling plaintiff that she was only his servant, and that he did not intend to speak to her or treat her as more than a

servant. (4) That defendant has scarcely ever taken plaintiff anywhere for several years, and has insisted upon her remaining at home at all times, denying her all recreations and cutting her off from all social intercourse with her friends; that when any of plaintiff's friends would call upon her he would treat them with such insulting discourtesy that plaintiff would suffer most intense humiliation and mortification; that on one occasion, so unusual that it is clear in plaintiff's memory, defendant permitted plaintiff to attend a concert with her married sister, expecting her to return home about 10 o'clock p. m., but when plaintiff did not arrive at that hour defendant called in neighbors to care for their said child, Lucille; while he went out to hunt for plaintiff, and when plaintiff reached home, about 10:45 p. m., defendant cursed and raved at her and told her 'he would make her stay at home after that if he had to lock her in.' (5) That since the time of their said marriage plaintiff has several times been seriously ill, so as to require the services of a physician; that at such times the defendant has not only failed to display the least solicitude for her recovery, but has continually quarreled with her and railed at her, declaring that she was shamming illness and running up doctors' bills unnecessarily, and that he would not pay such bills when presented, and that he would not again permit a physician to be summoned, and insisting that she should get up from her sickbed and scrub the floors and do other heavy work about the house; that on certain occasions of this kind the defendant's conduct toward her was of so outrageous and brutal a character as to endanger her life. (6) That the defendant has frequently declared to plaintiff and to other persons that he had not the slightest affection or regard for plaintiff and that he wished he were rid of her. (7) That defendant has on numerous occasions ordered plaintiff to leave him and threatened to 'kick her out of the house bodily' if she did not do so, and that these threats have been expressed in coarse and brutal language and uttered in the presence of their child, Lucille. (8) That although defendant has property to the value of more than \$5,000, and a monthly income of over \$100, he has allowed plaintiff but \$35 per month out of which to provide food for their table, clothing for herself and child, and pay all other expenses incident to their housekeeping, except rent and fuel, and that, in spite of his niggardly provision for her, defendant continually accused plaintiff of bleeding him for his money, and continuing to live with him only for the money that she could get from him, when as a matter of fact plaintiff bore the indignities offered her by defendant only because of her consideration and love for her child. Plaintiff states that there was born of the marriage aforesaid but one child, the aforesaid Lucille, a girl, now about six years of age. Plaintiff

further states that she is now a resident of this state, and of the city of St. Louis, and has resided within this state one whole year next before the filing of this petition. Plaintiff further states that defendant is seised and possessed of real estate of the value of \$5,000 and personal estate of the value of \$2,000, and that she is wholly without the means of support and for the prosecution of this suit. Wherefore plaintiff prays to be divorced from the bonds of matrimony contracted as aforesaid with defendant; that she may have the custody and care of her said infant child, and that the court will adjudge to her out of the property of said defendant such support and maintenance, and for such time, as the nature of the case and circumstances of the parties may require; that, if necessary, defendant may be compelled to give security for such maintenance; and that the court will make such further orders and judgments from time to time, touching the premises, as to the court shall seem meet and just." The answer was a general denial. The decree was for plaintiff, granting her a divorce and awarding her the care and custody of the minor child, Lucille, and a judgment for alimony at \$30 per month. Defendant appealed.

The evidence of the plaintiff tends to prove each of the seven specifications of indignities alleged in her petition; that especially during the last 12 months plaintiff lived with her husband his conduct was most vexing and provoking; that he was fault-finding and quarrelsome, scolded her when she was sick, constantly nagged at her, ordered her about as though she was a hireling, exacting of her unremitting toil and menial service, practically cutting her off from the amenities of social life by refusing to escort her to entertainments or places of amusement, by insulting her friends and neighbors when they called to visit her, by shutting the door in their faces, or, if in, by sulking in a corner or refusing to see them at all. His conduct, according to plaintiff's evidence, was such as to make the life of any woman possessing ordinary sensibilities intolerable. Plaintiff testified that defendant was so violent and ill-tempered that she became alarmed and left him for fear he would do her some personal violence. Plaintiff's evidence tending to prove the indignities charged was corroborated by her mother, sister, and brother-in-law, by J. A. Mateer, E. L. Bartlett and wife, and Dr. L. M. Camp. Her evidence, in which she was also corroborated, tends to show that at all times she treated her husband with kindness and affection and faithfully discharged all her duties as his wife. The defendant testified in his own behalf. He emphatically denied all the indignities specified in the petition, but admitted that at one time he said to his wife that she was "a mental and moral dwarf," but said he was provoked to make this remark by his wife insinuating that he had visited an immoral re-

sort the previous night. He it said to his credit, defendant testified to nothing against his wife, professed to love her very sincerely, and expressed a desire to live with her. Defendant also testified, and in this he was corroborated by other witnesses, that, while he was not fond of society himself, he did not object to his wife entertaining her friends or attending places of amusement, and during the heated terms of two seasons, by his permission, she was entertained for two or more weeks at a time by his brother-in-law at Arcadia, Mo. The trial court, after hearing the evidence, held the case under advisement for some time, and evidently carefully considered and weighed all the evidence before rendering its judgment. We have carefully read the testimony of all the witnesses, as preserved in the bill of exceptions, and have no hesitancy in saying that the evidence preponderates in favor of the plaintiff. In these circumstances, an appellate court should defer to the finding of the trial court, who saw and heard the witnesses and was therefore in a much better position to judge of their credibility than is an appellate court, who has neither seen nor heard the witnesses and must form its conclusions on the testimony as it appears in print. *Penningroth v. Penningroth*, 72 Mo. App., loc. cit. 333; *Griesedieck v. Griesedieck*, 56 Mo. App. 94. That the indignities alleged in the petition and established by plaintiff's evidence were sufficient under the statute to warrant a decree of divorce, we do not think admits of a doubt. *Lynch v. Lynch*, 87 Mo. App. 32; *Goodman v. Goodman*, 80 Mo. App. 274.

Error is assigned in the admission of evidence for plaintiff over the objection of the defendant. The objection was made that plaintiff was incompetent to testify to any communications between herself and husband, unless some third person was present. The court sustained the objection. But in a few instances in the course of plaintiff's examination she testified to the conduct of her husband (such as threatening to kick her out of the house and to opprobrious epithets he applied to her) when it was not shown affirmatively a third person was present. This evidence went in without objection at the time it was offered, nor was a motion made to strike it out after it was in. Therefore defendant is in no position to complain of it on this appeal; and, besides, as the court ruled that plaintiff was incompetent to testify to confidential communications between herself and husband, it is to be presumed that in weighing the evidence the court did not take into consideration incompetent evidence, if any was admitted. Especially should this presumption be indulged in a case like this, where the competent evidence on the issues of fact preponderates in favor of the plaintiff. As opposed to the decree, counsel for defendant ably and earnestly urges upon our consideration the fact that the public policy of the state is oppos-



to the granting of divorces. This policy had its origin in the ecclesiastical courts of England, and was founded upon the idea that marriage is a religious sacrament and therefore sacred in the eyes of God and man. We have separated our civil government from the church, but we have not separated ourselves from the public policy that opposes the granting of divorces. We adhere to it for the reason marriage is the cornerstone of civilized society. Some of the rigors of that policy, as established by the ecclesiastical courts, have been ameliorated by legislative enactment. Our Legislature has specifically enumerated the grounds upon which the courts may grant divorces, and has thus declared what the policy of the state is in respect to the grounds for a divorce. This phase of the policy opposing the granting of divorces, to wit, what shall be grounds for a divorce, is therefore no longer a subject of judicial interpretation with us; and a party to a suit asking for a divorce is as much entitled to his or her decree, if he or she establishes the statutory ground relied on by clear and convincing proof, as he or she would be to recover in any other civil suit on evidence clearly establishing his or her demand. *Ulrey v. Ulrey*, 80 Mo. App. 48; *Kilpatrick v. Kilpatrick*, 80 Mo. App. 70; *Lynch v. Lynch*, supra. Plaintiff alleged one of the statutory grounds in her petition (such indignities as to render her condition in life intolerable), and we think satisfactorily proved her case by competent evidence.

The judgment is therefore affirmed. All concur.

### BADER v. JONES.

(St. Louis Court of Appeals. Missouri.  
May 22, 1906. Dissenting Opinion,  
June 5, 1906.)

#### 1. JUSTICES OF THE PEACE—APPEAL—DEFECTIVE AFFIDAVIT—EFFECT.

Under Rev. St. 1899, § 4071, providing that the circuit court shall be possessed of a cause on lodgment of the papers therein on appeal from a justice, and section 4072, providing that no appeal shall be dismissed for want of a proper affidavit, a defective affidavit for appeal from a justice confers jurisdiction on the circuit court on the justice transmitting the papers in the case in the manner prescribed by section 4064, though section 4062 forbids him to allow an appeal where the affidavit is insufficient.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 539, 540, 605.]

#### 2. SAME—RIGHT TO DISMISS APPEAL—WAIVER.

Where appellee, in an appeal to the circuit court from a judgment of a justice, failed to avail himself of his right to demand by motion a sufficient affidavit for appeal, or have the appeal dismissed for the insufficiency thereof, as authorized by Rev. St. 1899, § 4072, he waived the defective affidavit and the circuit court had jurisdiction.

#### 3. JUDGMENT—DEFAULT—RIGHT TO OPEN—TIME OF APPLICATION.

A justice of the peace rendered judgment in favor of defendant. Plaintiff took an appeal

to the circuit court. Defendant failed to appear, and plaintiff recovered a judgment by default. The judgment was recovered at the November term, 1902. At the February term, 1904, defendant filed a petition to set aside the judgment on the ground that the circuit court acquired no jurisdiction. Held, that the petition was filed too late, and was properly dismissed under the express provisions of Rev. St. 1899, § 777.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 300–304.]

Bland, P. J., dissenting in part.

Appeal from Circuit Court, Pemiscot County; Henry O. Riley, Judge.

Action by John W. Bader, administrator of the estate of Charles Hill, deceased, against H. B. Jones. From a judgment dismissing defendant's petition to review the judgment of the circuit court rendered against him on appeal from a judgment of a justice's court in his favor, he appeals. Affirmed.

Plaintiff, as administrator of the estate of Charles Hill, deceased, commenced this suit in unlawful detainer before Charles A. Griffith, a justice of the peace in Pemiscot county, for the recovery of the possession of the parcel of land described in the complaint, and for one year's rent. The defendant filed a counterclaim. A change of venue was awarded to B. F. Allen, justice of the peace in Hayti township, in said county, where a trial was had resulting in a verdict and judgment for the defendant on his counterclaim. Within 10 days from the rendition of the judgment, plaintiff filed with the justice the following affidavit (omitting caption) for an appeal to the circuit court, to wit: "J. W. Bader, being duly sworn, upon his oath says that his application for an appeal is not made for vexation or delay, but because he believes the appellant to be injured by the judgment of the justice, in an action of unlawful detainer, and he believes himself entitled to recover possession of the premises described in the complaint." At the same time, the plaintiff filed his appeal bond with the justice, which was approved. The justice made no entry in his docket allowing the appeal, but transmitted the papers, with a transcript of his docket entries in the case to the clerk of the circuit court of Pemiscot county, who entered the case on the court's docket for the June term, 1902. Notice of the appeal was timely served on defendant. The cause was continued from the June to the November term, 1902, at which term, defendant failing to appear, the plaintiff filed his motion for judgment, which was sustained by the court, and judgment rendered for the plaintiff for the possession of the premises, \$85 damages for their wrongful detention, and the values of the monthly rents were found to be \$10.70. Shortly after the rendition of the judgment, it is recited in the transcript, Bader resigned as administrator, and J. D. Hoffman, public administrator of the county, took charge of Hill's estate as administrator de bonis non, and by order of the court was substituted as

party plaintiff in the judgment. It is not stated just when this order of substitution was made. The inference is, and the presumption should be indulged, that it was at the same term the judgment was rendered. At the February, 1904, term of court, defendant filed his petition asking to have the judgment reviewed, set aside, and the case opened for hearing, alleging that he had a good and valid defense to the action; that he was prevented from attending the November, 1902, term of the court, by reason of suddenly becoming so sick as to be physically unable to attend court. It is also alleged in the petition for review that the circuit court acquired no jurisdiction of the cause by the attempted appeal. Plaintiff filed his motion to dismiss the petition, for the reason Bader was not the administrator of the Hill estate and was not a proper party to the proceedings for a review. The court sustained the motion to dismiss the petition in review. Defendant, after taking the proper steps to preserve his exceptions to the rulings of the court in dismissing his petition in review, appealed to this court.

W. W. Corbett, for appellant. S. J. Corbett and Duncan & Bragg, for respondent.

BLAND, P. J. (after stating the facts). In respect to appeals from justices' courts, the statute (section 4062, Rev. St. 1899) provides: "No appeal shall be allowed unless the party applying therefor, or some person for him, will make affidavit that the application for an appeal is not made for vexation or delay, but because he believes the appellant is injured by the judgment of the justice, and stating whether such appeal is from the merits or from an order or judgment taxing costs." In *Van Scoyoc v. Wolfe*, 73 Mo. App., loc. cit. 432, the Kansas City Court of Appeals, in respect to a defective affidavit for an appeal, said: "While this defect did not altogether deprive the circuit court of jurisdiction, yet when attention was called to the insufficiency of the affidavit by motion of the opposite party, the defendant was bound to amend before the motion was determined, or his appeal should have been dismissed. It has been several times so ruled by this court. *Spencer v. Beasley*, 48 Mo. App. 97; *Welsh v. Railway*, 55 Mo. App. 599; *Greischar v. Alexander*, 56 Mo. App. 56. In this case the defendant, who was the appellant in the circuit court, did not offer to amend his affidavit. His appeal then should have been dismissed." In *Whitehead v. Cole & Rodgers*, 49 Mo. App., loc. cit. 429, the same court said: "In every case of an appeal from one court to another it is a fundamental principle that it is essential to the jurisdiction of the appellate court that the appeal was taken in the manner prescribed by law, and that, where it is not so taken, the appellate court has no jurisdiction to proceed to an examination on the merits." This court, in *Green*

*v. Castello*, 35 Mo. App. 127, made a like ruling on an appeal from the judgment of a probate court; and in *Hyatte v. Wheeler*, 101 Mo. App., loc. cit. 359, 73 S. W. 1100, through Reyburn, J., writing the opinion, said: "A literal compliance with the requirements of the statute is the only mode by which the appellate tribunal can acquire jurisdiction of the subject-matter of the former trial. The decision of the inferior court is final, unless reopened according to law. *Robinson v. Walker*, 45 Mo. 117; *Green v. Castello*, 35 Mo. App. 127; *Devore v. Staackler*, 49 Mo. App. 547."

In these cases, the courts from which the appeals were taken had exclusive, original jurisdiction of the subject-matter of the suits, and the rulings were put upon the well-settled doctrine that it is not within the power of parties to a suit to confer jurisdiction of the subject-matter by consent. In that class of cases where concurrent jurisdiction of the subject-matter is given to the court from which and to which the appeal is taken, a different rule obtains. In such cases, if the appellee appears to the action, and makes no objection to the defective or insufficient affidavit for appeal, he will be deemed to have waived the defect, and will not be heard to urge the insufficiency of the affidavit after judgment or in the appellate court. *Poston v. Williams*, 99 Mo. App. 513, 73 S. W. 1099; *Gerhart Realty Company v. Welter*, 108 Mo. App. 248, 83 S. W. 278. Justices of the peace, by chapter 44, Rev. St. 1899, are given exclusive original jurisdiction in all actions of unlawful detainer. The affidavit for the appeal from the judgment of the justice neither literally nor substantially complies with the statute, and, therefore, was ineffectual to confer jurisdiction of the subject-matter on the circuit court, and for this reason its judgment is utterly void. But the appeal is not from the judgment, but from the refusal of the court to set it aside at a term subsequent to the one at which it was rendered. Defendant not only appeared at the trial before the justice, but was the successful party in that court, and was personally served with notice of the appeal. His petition for review—motion for new trial would be the more appropriate title—came too late, and no error was committed by dismissing it or refusing to entertain it. Rev. St. 1899, § 777; *Jones v. Driskill*, 94 Mo. 191, 7 S. W. 111; *Hyatt v. Wolfe*, 22 Mo. App. 191. But we think, when the court's attention was called to the fact that the judgment was a nullity, it should have set the same aside, ordered the case redocketed, and granted plaintiff leave to amend the affidavit for appeal. This may yet be done, but the record before us is not such as to warrant us to order it done.

The judgment is therefore affirmed. All concur.

NORTONI, J. We do not concur in that portion of the opinion saying the judgment of

the circuit court which was sought to be reviewed in this case was void. The doctrine announced by the Kansas City Court of Appeals in *Whitehead v. Cole & Rodgers*, 49 Mo. App. 429, which is to the effect that a defective affidavit for appeal from a justice of the peace confers no jurisdiction upon the circuit court, is expressly disapproved in *Welsh v. Railway*, 55 Mo. App. 599, by the same court. Now, our statute with respect to appeals from justice of the peace courts to the circuit courts, among other things, provides as follows: "No appeal allowed by a justice shall be dismissed for want of an affidavit or recognizance, or because the affidavit or recognizance made or given is defective or insufficient, if the appellant or some person for him will, before the motion to dismiss is determined, file in the appellate court the affidavit required, or enter into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such defect or omission, with respect to such affidavit or recognizance." Section 4072, Rev. St. 1899.

We are of the opinion, inasmuch as this statute expressly authorizes the amendment of the affidavit for appeal in the circuit court, and authorizes the court to dismiss the appeal for the failure of appellant to amend upon motion to dismiss because of a defective affidavit, that the question is therefore not one going to the jurisdiction of the court in any class of cases within the purview of the statute quoted. As a proposition, it must be true that if there is sufficient affidavit upon which an amendment can operate, then this affidavit, although insufficient, is a thing of substance, which, together with the certification by the justice and lodgment of the papers and the transcript by him in the circuit court confers upon the court initial jurisdiction of the cause. If the affidavit may be amended, it must be a thing of substance on which an amendment can operate, and will necessarily have an operative effect in removing the cause from an inferior to a superior court. It is no doubt true that the justice may refuse to allow the appeal unless the necessary affidavit is made in conformity with the statute. In truth, he is forbidden by section 4062, Rev. St. 1899, from allowing the appeal in the first instance except the affidavit be sufficient under that section, but if the justice, notwithstanding the affidavit is defective, nevertheless allows the appeal and certifies the transcript and papers to, and lodges them with, the circuit court, as is his duty under section 4060, then we understand that this certification of the case on an insufficient affidavit and the lodgment thereof in the circuit court is sufficient to and does confer jurisdiction thereon. At least section 4071, Rev. St. 1899, says: "The court shall be possessed of the cause" upon lodgment of the papers therein. The section reads as follows: "Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and

shall proceed to hear, try, and determine the same anew, without regarding any error, defect or other imperfection in the original summons or the service thereof, or on the trial, judgment or other proceedings of the justice or constable in relation to the cause."

Now there is no question but that if the appellee had appeared and moved the dismissal of the appeal in this case because of the insufficiency of the affidavit for appeal, and the appellant either failed or refused to file an amendment and sufficient affidavit under the statute first quoted, it would have been the duty of the court to dismiss the cause for such failure. No such motion was filed in this case. The facts are, the case was certified on the insufficient affidavit to, and the papers and transcript were lodged in, the circuit court. Afterwards, due notice of the appeal under the statute was given and served upon the appellee, his counsel accepting service thereof, and he failed to appear and avail himself of his right to demand, by motion, a sufficient affidavit for appeal, or have the appeal dismissed for the insufficiency thereof. Having thus failed to appear and move, the defect in the affidavit must be considered as waived by him and the circuit court was "possessed of the cause." The judgment of the court thereafter rendered in the case is not void for want of jurisdiction. The reasoning of the case of *Welsh v. Railway*, 55 Mo. App. 599, is satisfactory to a majority of this court on this proposition. For numerous authorities, see, also, reply brief of appellant in that case.

GOODE, J., concurs in the views herein expressed.

WILLIAMS v. ST. LOUIS, M. & S. E. R. CO.  
(St. Louis Court of Appeals. Missouri. May 22, 1906. Rehearing Denied June 5, 1906.)

1. CARRIERS—RAILROADS—EJECTMENT FROM CAR—MISCONDUCT OF PASSENGER—ACTIONS—INSTRUCTIONS.

In an action against a railroad for wrongfully ejecting plaintiff from defendant's train. It was not error to fail to instruct that the use of profane and vulgar language in the presence of ladies on board a railroad car was misconduct.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1498.]

2. TRIAL—INSTRUCTIONS—REQUEST—NECESSITY.

A party desiring an extension of an instruction must request it.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

3. CARRIERS—RAILROADS—DUTY TO PROTECT PASSENGERS—RIGHTS OF CONDUCTOR—EJECTMENT FROM CAR—ACTIONS—INSTRUCTIONS.

In an action for wrongfully ejecting plaintiff from defendant's car, an instruction that it was the duty of the railroad to protect its passengers from rude, boisterous, or unseemly conduct on the part of other passengers, and from annoyance by profane, obscene, or vulgar language, and that if, at the time defendant's conductor compelled plaintiff to leave the car,

plaintiff was rude, or was using profane, or vulgar language in the presence of other passengers, the conductor did no more than he was authorized to do, sufficiently informed the jury of defendant's duty to protect its passengers, and of the right of the conductor to enforce such protection.

#### 4. SAME—MEASURE OF DAMAGES.

In an action for wrongfully ejecting plaintiff from a train, an instruction authorizing the jury to assess plaintiff's damages at such sum as they believed would fairly compensate him for any pain of body and mind suffered by him as a result of the wrongful act of defendant's conductor in ejecting him was proper.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1483-1491.]

#### 5. SAME—PUNITIVE DAMAGES—EVIDENCE.

In an action against a railroad for wrongfully ejecting plaintiff from defendant's train, evidence that the assault on plaintiff by defendant's conductor was unprovoked, and the conduct of the conductor wanton, reckless, and malicious, justified the assessment of punitive damages.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1489.]

#### 6. SAME—EXCESSIVE DAMAGES—PASSION OR PREJUDICE.

Where, in an action against a railroad for wrongfully ejecting plaintiff from defendant's train, plaintiff testified that the blow inflicted upon his head by defendant's conductor caused him a great deal of pain and was still the source of frequent headaches, and the evidence showed that the assault on plaintiff by the conductor was unprovoked, and that the conduct of the conductor was wanton, reckless, and malicious, a verdict for plaintiff for \$400 as compensatory damages and \$150 as punitive damages, was not excessive nor indicative that the jury was influenced by passion or prejudice.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 357, 372; vol. 9, Cent. Dig. Carriers, § 1490.]

Appeal from Circuit Court, Butler County; W. N. Evans, Judge.

Action by Joseph Williams against the St. Louis, Memphis & Southeastern Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

James Orchard, for appellant. David W. Hill, for respondent.

BLAND, P. J. On December 25, 1902, plaintiff was a passenger on one of defendant's trains traveling south from Poplar Bluff, in this state. Plaintiff's evidence tends to show that while he was peaceably in the car, the conductor of the train accosted him in a rude, violent manner, struck him on the head, arm, and hand with a revolver and forced him from the first-class passenger coach, where he was and had a right to be, into the smoking car. To the contrary, defendant's evidence tends to show that plaintiff entered the car, where there were ladies, in an intoxicated condition, was indecent in his behavior, used loud, offensive, and profane language, to the disturbance of the ladies and other passengers, and persisted in this misconduct, though warned by the conductor to desist, until it became necessary, for the protection of the other passengers,

to remove him from the car; that he was removed in an orderly and peaceable manner, and was not assaulted or struck by the conductor. The court gave the following instructions for the plaintiff: "The court instructs the jury that if you believe and find from the evidence in this cause that the defendant's conductor wrongfully and recklessly cursed plaintiff and assaulted plaintiff by striking him on the head, arm, and hand with a pistol and forcibly ejected plaintiff from the car by punching plaintiff in the back with a pistol, and that prior to such assault plaintiff had not been requested to leave said car by any one, and that plaintiff had not at any time used improper language, and had not been guilty of improper conduct, then you will find the issues in this cause for the plaintiff. The court instructs the jury that, if you find the issues in this cause for the plaintiff, you should assess his damages at such sum as you may believe from the evidence will be a fair compensation to him for any pain of body or mind suffered by him as a result of the wrongful act of defendant's conductor, not to exceed the sum of \$1,000, and, if you further find that the wrongful acts of defendant's conductor towards plaintiff were malicious and wanton, you may assess such further damages by way of punishment as you see fit, not to exceed the sum of \$3,000." And the following for defendant: "You are instructed that it is the duty of the railroad company carrying passengers to protect those passengers from rude, bolsterous, or unseemly conduct on the part of other passengers, and from annoyance caused by the use of profane, obscene, or vulgar language by other passengers; and if in this case you find that at or immediately prior to the time defendant's conductor compelled this plaintiff to move from one car to another, or from one compartment to another, he was rude, bolsterous, or was using profane, obscene, or vulgar language in the presence of the other passengers, then the conductor did no more than he was authorized to do, and your verdict should be for the defendant." The jury returned the following verdict: "We, the jury, find the issues in this cause for the plaintiff and assess his personal damages at \$400. Furthermore we assess \$150 as punishment damages against the defendant. J. N. Cardwell, Foreman." A timely motion for new trial was filed and overruled, whereupon defendant appealed.

1. Defendant's chief contention is that the court failed to define the duties of the conductor, or to define what would be misconduct of a passenger traveling in a first-class passenger coach in which there were ladies. We do not think it necessary to instruct the average Missouri jury that it would be misconduct, on board a railroad car, or elsewhere for that matter, for any one to use profane and vulgar language in the

presence of ladies. If defendant's able counsel is of the contrary opinion, and thought such an instruction to a Butler county jury necessary, he should have asked it. The defendant's instruction was sufficient to inform the jury of defendant's duty to protect its passengers, and of the right of the conductor of the train to enforce such protection. No further instruction on this score was needed.

2. We see no objection to the instruction on the measure of damages; in fact, other elements of damages, not mentioned in the instruction, might have been included. On the plaintiff's evidence, the case was a proper one for the assessment of punitive damages, as it tended to show the assault was unprovoked, and the conduct of the conductor wanton, reckless, and malicious.

3. Complaint is made that the compensatory damages are excessive. Plaintiff testified that the blow upon his head caused him a great deal of pain, and was still the source of frequent headaches. In *Waechter v. Railroad*, 113 Mo. App. 270, 88 S. W. 147, in respect to similar evidence in a like case, we held: "Where pain of body and mental anguish, resulting from an injury, are elements which enter into the estimate of damages sought to be recovered, the question of amount is one which must be deferred to the jury and the trial court; a verdict of the jury in such a case will not be disturbed on account of being excessive, unless so excessive as to shock the moral sense, or else it clearly appears that the jury was influenced by passion or prejudice." We do not think the damages are excessive, or indicate that the jury was influenced by passion or prejudice.

The judgment is affirmed. All concur.

#### NOE v. HEADLEY et al.

(St. Louis Court of Appeals. Missouri. May 22, 1906. Rehearing Denied June 5, 1906.)

#### 1. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RIGHTS.

Where real estate belonging to a corporation which had expired by lapse of time was illegally conveyed by two of the corporation's trustees to a third trustee, and by him to innocent purchasers for value, stockholders of the corporation could not disturb such purchaser's title.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 583-591.]

#### 2. CORPORATIONS—TERMINATION—LAPSE OF TIME—CONVEYANCE TO TRUSTEES—PROFITS.

After the expiration of the life of a corporation two of its directors, acting as trustees, conveyed certain of its land to H., a third trustee, and he later conveyed the land to others at a profit. *Held*, that H., being solvent, was alone liable to account for the profits so made for the benefit of the stockholders of the corporation.

Appeal from Circuit Court, Greene County; J. E. Mellette, Special Judge.

Action by D. M. Noe against O. M. Headley

and another. From a judgment for plaintiff, defendants appeal. Judgment reversed, and judgment for reduced sum rendered against defendant Headley alone.

Benj. U. Massey, for appellants. W. D. Tatlow, for respondent.

BLAND, P. J. In November, 1881, plaintiff and others associated themselves and incorporated under the laws of this state, under the name of the Springfield Driving Park & Fair Association, with a capital stock of \$4,000, divided into 40 shares of \$100 each, paid up. Plaintiff took 1 share of stock, which he still holds. With the \$4,000 subscribed and paid in, the corporation acquired about 76 acres of land in or near the city of Springfield. Afterwards the capital stock of the corporation was increased to \$10,000, and 16 additional shares of stock were sold for \$1,600. With this money and \$600 or \$700 additional borrowed by the corporation, it constructed a race track and made other improvements on the land. At a still later date the tract of land was leased to the Springfield District Fair Association (another corporation) for a rental of \$100 per annum. The rent money was expended in the payment of taxes and the \$600 or \$700 of borrowed money. About 1886 O. M. Headley, C. B. McAfee, and H. F. Denton were chosen as directors of the corporation, and continued to act as such until the life of the corporation expired by limitation, November, 1901. In August, 1903, Headley, McAfee, and Denton, having first obtained the consent of all the stockholders in the corporation, except plaintiff, sold 46.76 acres of the 76-acre tract to the Springfield District Fair Association for \$12,525, and two days thereafter McAfee and Denton sold the remainder of the 76-acre tract to O. M. Headley for \$10,000. Deeds purporting to be made by the Springfield Driving Park & Fair Association were executed and delivered to each of the purchasers. Afterwards a deed was executed to the Springfield District Fair Association by Headley, McAfee, and Denton, as trustees of the defendant corporation, and a deed to Headley was made by McAfee and Denton, as trustees. The case was tried to Hon. J. E. Mellette, as special judge, who found, and there is evidence to support the finding, that Headley, by the resale of the land he acquired, realized \$17,296, or a profit of \$7,296. The court found that the deed from McAfee and Denton, as trustees, to Headley, was void; but, for the reason the land had passed to innocent purchasers for valuable considerations, the plaintiff was not in a position to disturb their title. It also found that plaintiff, as a stockholder in the defunct corporation, was entitled to participate in the profits made by Headley, and found his share of such profits to be \$134, and rendered judgment in his favor against McAfee and Headley for \$400, the amount conceded to be his

distributive share from the proceeds of the sales of the 76 acres of land, plus the \$134 found to be his share of the profits made by Headley. The suit was in equity, brought against Headley, McAfee, and Denton, and all other parties who claimed any interest in or title to any of the land, and whose title was derived through the deed made by Headley, McAfee, and Denton, and the one made by McAfee and Denton. The petition alleged the lands were sold at much less than their actual value, and prayed for an accounting. Denton died pending the suit. It was dismissed as to him, and the court found that plaintiff had no cause of action against any of the defendants, except McAfee and Headley. They alone appeal.

There is not a syllable of evidence showing or tending to show any actual fraud in the sale to Headley, or that the sale to him and the one to the Springfield District Fair Association were for less than the market value of the land at the time the several sales were made. To the contrary, the evidence shows that the land had been on the market for over a year, and but for the fact that the Springfield District Fair Association wanted the land it purchased for fair purposes, it could not have been sold for the price obtained, and that Headley was enabled to make a profit on the portion of the land he purchased, for the reason it was subsequently selected to make up the site of the Southwest (or Springfield) Normal School, established by the state. The evidence shows that plaintiff never took any interest in the affairs of the Springfield Driving Park & Fair Association during the life of said association and made no effort to close up its affairs after it expired by limitation. There is no evidence in the record to show that plaintiff assented to the sale to Headley; hence, under the well-settled rule that a trustee must account to his cestui que trust for profits made out of the trust property, Headley, the trustee, who made the profit, is liable to plaintiff for his share of such profits, found by the court to be \$134. McAfee, though a co-trustee, was not a co-owner in the tract of land out of which Headley made the profit, received none of said profits, is not entitled to any of them, and there is no principle of law or equity by which he should be held liable in this suit; Headley being entirely solvent. There was no occasion to sue for the \$400, plaintiff's pro rata share of the assets of the corporation; for, according to the evidence, this sum, ever since the sales of the land were made, has been held for him, and the only reason he has not received it is because he has refused to call for it. According to the facts found by the learned trial judge, and we think they were correctly found, the judgment should have been against Headley alone, and only for \$134. If the \$400 is not paid on demand, then suit against McAfee and Headley to recover it will be in order. But a suit to recover the \$400 and the profits

made by Headley cannot be joined, for the reason McAfee is not liable for the profits.

The judgment is reversed, and judgment will be entered here against Headley alone for \$134, with interest thereon at the rate of 6 per cent. per annum from July 8, 1905, the date the suit was commenced.

NORTONI, J., concurs. GOODE, J., not sitting.

#### GLASSEY v. SLIGO FURNACE CO.

(St. Louis Court of Appeals. Missouri. June 5, 1906.)

#### 1. PLEADING—OBJECTIONS TO RULINGS ON DEMURRER—WAIVER BY PLEADING OVER.

A pleading over on the overruling of a demurrer waives the demurrer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1403-1406.]

#### 2. TROVER AND CONVERSION—DEMAND—SUFFICIENCY.

In an action for the conversion of cattle placed by plaintiff in defendant's pasture under a contract of pasturage for a season, the evidence showed that plaintiff was notified to come for his cattle; that in response to the notice he sent his agent to receive them, when it was discovered that 14 head were missing; that defendant's superintendent promised plaintiff's agent to have the cattle hunted up, and to notify plaintiff when they were found. The cattle were never found, and defendant's agent never gave the notice. Held to show a demand for the lost cattle, sufficient to entitle plaintiff to maintain the suit.

#### 3. ANIMALS—AGISTMENT—CONTRACT—CONSTRUCTION.

An owner of a pasture inclosed by a fence contracted with an owner of cattle to pasture the cattle for a season in consideration of receiving a specified sum per head. He also agreed to employ a man to give his entire attention to looking after the stock in the pasture, and to see that the same were properly salted, and had access to water. Held, that the owner of the pasture obligated himself to use reasonable care to confine the cattle to the pasture, either by watching and keeping up its fence around the pasture or by herders, and if, on account of his negligence or that of his employees cattle escaped and were lost, he was liable.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 43.]

#### 4. APPEAL—RULINGS AS TO EVIDENCE—OBJECTIONS IN TRIAL COURT—NECESSITY.

A ground of objection to the admissibility of evidence, not made at the trial, cannot be made on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1258-1280.]

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by Armstrong Glassey against the Sligo Furnace Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Defendant is a corporation organized under the laws of this state, and has its principal place of business at Sligo, Dent county, Mo. It owns a body of land containing 2,700 acres, lying in Dent county and the adjoining county of Crawford, inclosed by a post and wire fence. It is pasture land,

and much of it is covered with a thick growth of underbrush. On May 5, 1904, defendant received from plaintiff 26 steers and 4 heifers to be pastured on its land during the season of that year, and executed and delivered to plaintiff the following receipt and contract respecting the cattle: "Received of J. W. Glassey this day, May 5th, 1904, twenty-six steers and four heifers, branded as follows: 17 'G' on right hip, 13 'G' on left hip, labeled on right ear—on which this company has received one dollar (\$1.00) per head, being in advance on the season's pasturing of 1904, balance of the dollar (\$1.00) per head to be paid when cattle are taken out, the price agreed upon being two dollars per head for the season of 1904, in consideration of which the Sligo Furnace Company agrees to allow the aforementioned J. W. Glassey to place the aforementioned number of cattle on what are known as its fenced pastures in Crawford and Dent counties, Missouri, and to employ a man who will give his entire attention to looking after the stock in said pasture and who will see that the said stock are properly salted and have access to plenty of water, at the expense of the Sligo Furnace Company, and it is further agreed and expressly understood that having complied with the above, the Sligo Furnace Company will not be held responsible nor guarantee the return of each and every head of stock, but will use due diligence and give all attention above enumerated, with the intention of returning to the rightful owner of stock placed and paid for in its care and pastures. All stock must be plainly labeled or branded at the owner's expense and any unruly or breachy stock must be taken away at the owner's expense, when the said owner has been duly notified by mail of such unruliness or breachiness, said notice to be mailed to his last known P. O. address, Cuba, Missouri. What is understood by the season is that stock, when placed there, whether remaining until the close of the season or a part of the same, shall be paid for as if they remained there the entire time. Sligo Furnace Company (G. L. Morrison)." Plaintiff paid defendant \$30—\$1 per head—in advance for the pasturage of the cattle. In October following, plaintiff was notified by James Cooksey, an employé of defendant having charge of the cattle, to come to Sligo and get his cattle. Plaintiff sent his agent to receive the cattle. When the round-up of the cattle was made, 14 head of the steers were missing and have never been found. The suit is to recover the value of these 14 steers. The evidence is all one way, that the pasture was well watered and plenty of salt was kept in it at all times for the cattle; also that defendant employed James Cooksey to look after the cattle. In regard to the fence, the defendant's evidence tends to show that it was composed of white and post-oak posts, set 10 feet apart, upon

which were strung 8 strands of barbed wire, making the fence  $4\frac{1}{2}$  feet high; that on a Saturday in June of 1904 some person or persons cut the wire in one panel of the fence and left it open; that this mischief was not discovered by Cooksey until the following Monday, when he closed the breach. There is no evidence showing or tending to show at what date plaintiff's cattle escaped from the pasture. They were not missed until the round-up in October. After they were missed, defendant had the pasture and the surrounding country hunted over to find them but no trace of them was ever discovered. Cooksey testified that either he or one of his boys went around the fence at least three times each week, and at no time discovered a breach in the fence before or after the one made in June. In rebuttal plaintiff's evidence tends to show that the fence had been built for about 8 years; that some of the posts had rotted off and others were burned off, and in places the staples holding the wire had dropped out and the wire had been pressed down so that a steer could easily step over it; and in one other place, where the fence crossed a ravine, the wire had pulled loose from the posts and sprung up; leaving a space large enough for a steer to walk under the wire.

The court of its own motion gave the following instructions to the jury: "(1) The plaintiff has sued the defendant for the loss of certain cattle which were put in defendant's pasture under contract made with defendant about May 5, 1904. (2) Under said contract the defendant has agreed to employ a man who should give his entire attention to looking after the stock in said pastures and who should see that the said stock were properly salted and had access to plenty of water, and if it complied with the provisions it was not to be responsible for the loss of any of said cattle. The said contract would also require the defendant to maintain the fences as hereinafter defined. (3) If the plaintiff has shown that he put cattle in said pasture, under said contract, for the season of 1904, and at the end of said season made demand of defendant for the return thereof, and if any of said cattle were not so returned, then it devolves upon the defendant to show and prove that its failure to return said cattle was not caused by its failure to comply with the conditions of said contract to be performed on its part, and in such case, if it has not so proven, your verdict should be for the plaintiff on the first count of the petition. (4) Under the said contract the defendant was required to have a man give his entire attention to looking after said stock and provide them water and salt, and also to use reasonable diligence in maintaining the fence around said pasture. (5) Reasonable diligence to maintain the fences means that he should use reasonable diligence to discover any breaks in the fence

through which the cattle might escape, and if any such breaks occurred to mend the same in a reasonable time after the discovery of such breaks or after he should have discovered them by use of reasonable diligence. (6) Reasonable diligence and reasonable time, as used in these instructions, means such diligence and time as a prudent man could exercise or employ in or about his own affairs. (7) If you find for the plaintiff you will assess his damages at such sum as you may find, from the evidence, that would have been the reasonable value of said cattle, at the close of the season, that you find were lost if any, by reason of the failure of defendant to comply with the requirements of said contract, as herein defined, if you so find; less \$1 per head, pasture rent still due. (8) Although you may find that the defendant did fail to comply with any of the requirements of said contract, this would not make it liable in the case, unless you find from the evidence that the loss of the cattle was the result of, or was caused by, such failure." And refused the following asked by the defendant: "(1) The court instructs the jury that defendant did not agree to be responsible for the loss of said cattle, provided that it gave the attention specified in said contract, to wit: to employ a man who should give his entire attention to looking after said stock, salting and seeing that same had access to plenty of water, and if said man did so give his entire attention to looking after the same, and provided them with plenty of salt and access to plenty of water, you will find for the defendant. (2) The court instructs the jury that if the defendant employed James Cooksey to give his entire attention to looking after the cattle in its pastures; and that said Cooksey did give his entire attention to looking after the stock in said pastures, and saw that said stock was properly salted and had access to plenty of water, then said company fully complied with the terms of said contract, and are not liable for the loss of said cattle." The jury found the issues for plaintiff and assessed his damages at \$462. A motion for new trial proving of no avail, defendant appealed.

Wm. P. Elmer and J. J. Cope, for appellant. J. A. Watson and A. E. McGlasham, for respondent.

BLAND, P. J. (after stating the facts).

1. Defendant demurred to plaintiff's petition. The court overruled the demurrer. Defendant did not stand on its demurrer, but answered. One of the assignments of error is that the court should have sustained the demurrer. That an answer ever waives a demurrer is too well settled to require the citation of authorities.

2. Defendant insists that the evidence fails to show a demand was made on it for the missing steers. The evidence is that plaintiff was notified by Cooksey to come to Silgo for his cattle, and in response to the notice he sent his agent to receive them, and when it was discovered 14 head were missing, McRoberts, defendant's superintendent, promised plaintiff's agent to have the cattle hunted up and to notify plaintiff when they were found. As they were never found, McRoberts never gave the notice. This evidence, for all practical purposes, shows a demand for the cattle, and there was no necessity, under the circumstances, of making a formal demand to entitle plaintiff to maintain the suit.

3. Defendant's construction of the contract is that it did not obligate itself to keep its pasture fence in a reasonably safe condition to hold the cattle, that it only undertook to provide salt and water and a man to look after the cattle. Fencing is not mentioned in the written contract, but the pasture is, and it is in the contract that plaintiff's cattle should be kept upon the 2700-acre pasture. It was a matter of indifference to plaintiff whether the cattle were held in restraint on the pasture by a fence or by herders. Defendant, for a consideration, obligated itself to use reasonable care to confine the cattle to the pasture. It undertook to discharge this duty by watching and keeping up its fence around the pasture and if on account of its negligence or that of its employé, in the discharge of this duty, the cattle escaped and were lost, it is unquestionably liable, and the trial court took this view of the contract, as is shown by its instructions to the jury. We think it was clearly right and correctly refused defendant's instructions.

4. Respecting the value of the cattle, plaintiff's evidence tends to prove they were worth from \$30 to \$35 per head at the date of their delivery to defendant. Defendant objected to this evidence, on the ground "that under the terms of the contract the defendant is not liable for the escape or loss of any cattle thereunder, and for the further reason the testimony does not show any grounds for the liability at this time against the defendant for the loss of said cattle." It now makes the objection, that the evidence was inadmissible for the reason the approved measure of damages in such cases is the value of the property at the time of the conversion. This ground of objection was not made on the trial, and cannot be made here for the first time. *Wibracht v. Annan*, 89 Mo. App. 363; *Carls v. Nimmons & Bennett*, 92 Mo. App. 66; *State v. Goddard*, 162 Mo. 198, 62 S. W. 697; *Kansas City v. March Oil Co.*, 140 Mo. 458, 41 S. W. 943; *Gayle v. Missouri Car & Foundry Co.*, 177 Mo. 427, 76 S. W. 987.

Discovering no reversible error in the record, the judgment is affirmed. All concur.



**HEATH v. SCHROER.\***

(Kansas City Court of Appeals. Missouri.  
June 4, 1906.)

**1. FRAUD—FALSE REPRESENTATIONS.**

Where property owned by plaintiff and subject to certain incumbrances was condemned by a city, judgment for a certain amount in plaintiff's favor less the total of the incumbrances being rendered, and to secure such judgment for a sum greatly less than its value, defendant employed an agent to obtain from plaintiff a quitclaim deed to the property by paying her a small amount through fraudulent representations that the incumbrances which would have to be paid out of the judgment would more than consume it, and, after securing such deed, secured from plaintiff an order on the city comptroller for the amount of the judgment by representing to plaintiff that she had no interest therein amounting to anything remaining over the incumbrances, defendant was liable to plaintiff for the amount of the judgment, less the total incumbrances and the sum paid by him for the deed.

**2. PRINCIPAL AND AGENT—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.**

The agency of the party employed by defendant to secure the deed from plaintiff rendered defendant liable for his part in the fraudulent representations and deceptions practiced on plaintiff so far as regarded the money unjustly realized by reason of such fraud.

**3. EQUITY—RELIEF ON GROUND OF FRAUD—PARTIES.**

In an action for equitable relief on account of such fraud, it was unnecessary to make either defendant's agent, the grantee in the quitclaim deed executed by plaintiff, or the city comptroller parties defendant.

Appeal from Circuit Court, Jackson County; Wm. B. Teasdale, Judge.

Action by Mary E. Heath against Gerhard Schroer. Judgment for plaintiff, and defendant appeals. Affirmed.

Milton Campbell, for appellant. W. C. Culbertson and Scarritt, Griffith & Jones, for respondent.

ELLISON, J. This action is in equity, and the plaintiff prevailed in the trial court. It appears: That in the year 1902 plaintiff was the wife of Frank H. Heath, though they were not living together. At that time she was the owner of a certain lot in Kansas City, Mo., which was incumbered by a deed of trust and various special taxes and penalties for paving, sewers, sidewalks, etc., as well as general taxes. That the city of Kansas City had instituted proceedings for condemnation of said property with other lots or tracts, which resulted in the condemnation thereof and an allowance to plaintiff by the jury of \$2,000, which allowance was confirmed by a judgment of the circuit court of Jackson county, whereby plaintiff was entitled to receive said sum, less the total of incumbrances to which we have referred, amounting to \$930.69, leaving the sum of \$1,069.31 to which plaintiff was entitled to be paid by said judgment. The defendant became aware of the existence of this judgment in plaintiff's favor and of the incumbrances thereon, and, conceiving the fraudulent design to obtain it from her for a

sum greatly less than its value, he engaged or employed said Frank Heath (who was at that time plaintiff's husband but from whom she was separated, as before stated) to obtain from plaintiff a quitclaim deed to the lot by paying her \$100. That said Heath, acting for defendant, induced plaintiff to sign a quitclaim deed to the lot for \$100 to one Fudge, by fraudulently and falsely representing to her that the incumbrances aforesaid, which would have to be paid out of her judgment of \$2,000, would more than consume it and that the \$100 was more than she could otherwise get out of it. That plaintiff did not know the amount of the incumbrances and relied upon Heath's fraudulent and false statement. That in order to conceal from plaintiff the real purchaser, the deed was made to Fudge, who immediately conveyed to defendant. The deed from plaintiff did not convey or assign the judgment, and when defendant endeavored to obtain the benefit of the judgment, the city officials so advised him. Afterwards, the defendant and his wife called on plaintiff, and, representing to her that she had no interest in the judgment, that she had conveyed it by her deed, and that after deducting incumbrances, there was very little, if anything, left, induced her to give him an order on the comptroller of the city for the amount of said judgment for \$2,000. That defendant thereupon presented said order and received from the city said sum of \$2,000, less the incumbrances heretofore mentioned, amounting to \$930.69.

The foregoing is the substance of the finding of facts made by the trial court. That court thereupon stated an account between defendant and plaintiff in which the total incumbrances are placed at \$930.69, to which is added \$100 paid by defendant through Heath for the deed to Fudge, making a total of \$1,030.69, which deducted from the \$2,000 fraudulently obtained from plaintiff, as herein set out, left a balance of \$969.31, for which judgment was rendered. An examination of the evidence has satisfied us with the finding of the trial court. The unfair treatment of plaintiff and the fraud of defendant and his agents were fully established. The agency of Heath for defendant makes the latter liable for his part in the fraudulent representations and deceptions practiced upon the plaintiff so far as regards the money unjustly realized by reason of such fraud. *Greer v. Lafayette County Bank*, 128 Mo. 559, 30 S. W. 819; *Phipps v. Mallory Com. Co.*, 105 Mo. App. 67, 78 S. W. 1097. Many objections are made to the judgment. In great part, they are based upon technicalities which do not involve the merits of the controversy. We do not consider any of them is well founded. We do not consider that plaintiff made any mistake in not making either Heath, Fudge, or the comptroller parties defendant. It could serve no useful purpose and need not prevent a full and fair investigation of defendant's conduct,

\*Rehearing denied July 2, 1906.

nor complete relief against him. The several agencies used by a wrongdoer in consummating a fraud, are not, necessarily, joint parties in compelling him to disgorge a sum of money he has received which belongs to the one defrauded.

Though it was not necessary that Fudge, Heath, or the comptroller be made a party in order to obtain the relief granted the plaintiff by the trial court; yet it is doubtless true that defendant's objection on account of insufficiency of parties has arisen by reason of plaintiff asking in the prayer to her petition that her quitclaim deed to Fudge and her order to the city officials given to defendant be set aside and cancelled. It was not necessary to plaintiff's relief that she put that request in her prayer and the trial court in the decree in response to that part of the prayer only set aside those instruments "in so far as they or either of them affect the right of the plaintiff to have and recover from the defendant the residue of the amount of said award" to plaintiff. It is plain that the whole scheme was to get from plaintiff her judgment of condemnation money and not the land. The quitclaim deed to the land was a mistaken means to that end. The land upon payment of the money for condemnation, which has been paid to defendant, became public property. The deed, whether set aside, or left untouched, is equally of no practical consequence. The reference in the decree to a partial setting aside, so far as is necessary, need not have been made; but it is not of sufficient moment or importance in this controversy to require that the cause be remanded for correction to be made in that respect. There is no effort made against the action of the comptroller or the city in paying the money to the defendant, nor is there any pretense of affecting the rights or obligations of either.

We have examined the several objections made by defendant, though we do not deem it necessary to enter into any further comment thereon, suffice it to say that we think plaintiff pursued the right remedy and that the result was manifestly for the right party.

The judgment is affirmed. All concur.

**CITY OF LANCASTER v. BRIGGS et al.**  
(Kansas City Court of Appeals. Missouri.  
June 4, 1906.)

**1. MUNICIPAL CORPORATIONS—USE OF STREETS—TELEPHONE.**

The use of the streets and alleys of a city to carry the poles, lines, and wires necessary to the operation of a telephone exchange is a proper and legal use.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1463.]

**2. SAME—REGULATIONS.**

The use of streets and alleys for the maintenance of a telephone system is subject to regulation by the city, including the power to impose a money charge as a condition to the enjoyment of the right.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1470.]

**3. SAME—ORDINANCE—TELEPHONE FRANCHISE.**

Where a city ordinance granted a franchise to maintain a telephone system "within the present and future corporate limits of the city," on condition that 2 per cent. of the gross receipts collected from the use of the system be paid to the city, while the city is not entitled to collect the percentage of the receipts from the operation of long distance lines, it may collect the percentage of the receipts from the use of the system within the city in connection with the long distance line.

**4. APPEAL—PRESENTATION OF CASE IN LOWER COURT.**

Where, in the trial of a cause, both parties proceeded on the theory that a city ordinance was a valid contract between the parties, an objection that there was no proof that the ordinance and acceptance thereof was in writing and signed by the parties could not be made on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1066.]

Appeal from Circuit Court, Schuyler County; N. M. Shelton, Judge.

Action by city of Lancaster against R. W. Briggs and another. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

P. O. Sansberry and Higbee & Mills, for appellant. C. C. Fogle, for respondents.

JOHNSON, J. Plaintiff, a city of the fourth class, brought this action to recover 2 per cent. of the gross receipts derived by defendants from the operation of a telephone exchange in the city during the period beginning June 1, 1900, and ending January 1, 1905. A demurrer to plaintiff's evidence was sustained, and plaintiff appealed. The right of plaintiff to receive 2 per cent. of the gross receipts of the exchange during the period mentioned is predicated upon an ordinance of the city, which it is alleged in the petition and shown in proof was approved December 17, 1898, and which it is alleged was immediately accepted and acted upon by defendants who built and operated the exchange under the terms of the agreement thus expressed. The ordinance was admitted in evidence and the first section thereof provides "that a right, franchise, and privilege to erect, maintain, operate, and use a telephone system for a period of 20 years within the present and future corporate limits of the city \* \* \* is hereby granted to Robert W. Briggs and Winfred Melvin [defendants], their heirs, etc., upon the following conditions: In consideration of the grant of franchise herein stated, the said Briggs and Melvin agree to pay to the city \* \* \* 2 per cent. per annum of the gross receipts collected from the use of said telephone system; the same being payable quarterly, and they shall present the city treasurer's receipt therefor, \* \* \* together with a sworn statement of the gross receipts from said telephone system during that quarter. \* \* \* The parties to whom the franchise is hereby granted shall have the right to use the public streets and alleys, highways, and public grounds of

said city for the erection of poles and wires, and all other necessary appliances for the successful construction and operation of said telephone system." The next section fixes the maximum rates that defendants may charge "for the use of a telephone in said system for the first five years" and then follows a section requiring defendants to give a "bond with approved security \* \* \* for the construction and operation of said system, and for payment of all moneys due the city from the owners and operators of said system, and for full compliance with the ordinance herein granting said franchise." The ordinance contains other stipulations, but those detailed suffice for the consideration of the questions now before us. Defendants filed the required statements, and paid to the city the sums shown in them to be due under the ordinance; but it is contended by plaintiff that items of revenue earned by the business and received by defendants were omitted and this suit is for the recovery of 2 per cent. of the aggregate of such omitted items. It is conceded by defendants that the receipts reported were confined to those derived solely from the rental of telephones in the city, and it is argued by them, and this was the view taken by the learned trial judge, that the ordinance imposed no other burden on defendants than to pay to the city 2 per cent. of the gross receipts from such rentals, while plaintiff insists that the words "gross receipts collected from the use of said telephone system" include earnings received from "long distance" service rendered by defendants to their patrons as well as rentals collected for telephones used in the city. The use of the streets and alleys of a city to carry the pole lines and wires necessary to the operation of a telephone exchange is a proper and legal use. *City of Plattsburg v. Telephone Co.*, 88 Mo. App. 306; *Julia Bldg. Ass'n v. Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 898; *Schopp v. City of St. Louis*, 117 Mo. 136, 22 S. W. 898, 20 L. R. A. 783; *California v. Telephone Co.*, 112 Mo. App. 722, 87 S. W. 604. But the exercise of the right to such use is subject to regulation by the municipality and the power to regulate carries with it the power to impose a money charge as a condition to the enjoyment of the right. Authorities, *supra*; *St. Louis v. Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 87 L. Ed. 380.

An ordinance accepted and acted upon by its grantees, which provides that in consideration of the granting of the right so to use the public streets the grantees are to pay to the city a stated percentage of the gross receipts derived from the conduct of their business, does not impose a tax; but, as was said in the case of *City of Plattsburg v. Telephone Co.*, *supra*, is to be construed as "a sale or rental of necessary portions of the streets of the city for a specified time for the purpose of carrying on a business in which defendants had a right to engage." The charge imposed

is not to be regarded as a demand of sovereignty, but as a demand of proprietorship: *St. Louis v. Telegraph Co.*, *supra*. These conclusions require us to look upon the accepted ordinance as a contract which both parties thereto had the legal right to make, and, in the interpretation of the term in dispute, a controlling influence must be accorded to the mutual intention of the parties to be collected from the language of the instrument and from the circumstances in which it was made. Evidently, it was not intended that the charge provided should apply to proceeds received by defendants from the operation of telephone lines or exchanges outside the present or future limits of the city. In the term "gross receipts collected from the use of said telephone system," the last three words refer to a system "within the present and future corporate limits of the city." This clearly appears from the context, and leaves no room for doubt that the city agreed to restrict its charge to the earnings of that part of defendants' system within the territory over which the city exercised jurisdiction. Therefore, if defendants operated long distance lines connecting Lancaster with other cities and towns over which they conducted a toll business, or as a part of their business operated exchanges in neighboring towns, the earnings of such divisions of their telephone system would not be subject to the charge under consideration. But it equally is as clear the parties intended that the earnings from all sources of the system within the city should be included in the term "gross receipts." These earnings, it is fair to assume in the state of the case before us, consisted not only of rentals paid for the use of telephone instruments in the city, but also included a percentage received by defendants of the proceeds of toll line business that required the service of the Lancaster exchange in its transaction. All such income actually received by defendants under contracts with the owners of independent connecting lines on account of the service of the Lancaster exchange in the transmission or delivery of long distance business certainly belong to the gross receipts of that exchange and with respect to tolls received by defendants for long distance service over lines and exchanges operated entirely by them, the reasonable value of the services rendered by the Lancaster exchange to that class of business should be regarded as a part of the gross receipts of that exchange. This is the plain meaning of the contract, and we perceive no good reason for withholding the enforcement of the manifest intention of the parties. In answer to the argument that the city was without power, even by contract, to levy tribute on the earnings of lines and exchanges beyond its territorial limits, we have already observed that the contract so restricts the imposition of the charge, and consequently the question is here without practical importance. The city is entitled to its

percentage of all of the earnings of that exchange received from all classes of patronage, and to nothing more, and the court erred in its interpretation of the term "gross receipts."

Further, it is argued by defendants that the judgment should be affirmed, for the reason that under section 6759, Rev. St. 1899, the ordinance and defendants' acceptance thereof were required to be in writing and signed by the parties, and that these facts are neither pleaded in the petition nor proven. Conceding for argument that this statute applies to the subject in hand, we find that the substance of the ordinance and the facts of its passage, approval, and acceptance by defendants are all pleaded in the petition, and that no objection to the sufficiency of the petition was made by motion or demurrer. At the trial, plaintiff introduced the ordinance in evidence, and proved the facts of its approval, and did not make formal proof of its acceptance by defendants nor of the fact that ordinance and acceptance were in writing, etc. The case, however, was tried by both parties, and the court on the assumption of the existence of all facts necessary to make the ordinance a valid contract between the parties as will appear from this extract from the proceedings. Counsel for Plaintiff: "We offer to show by the witness that they received various sums during the years mentioned in the petition amounting to some thousand dollars a year in excess of the sums from the telephones in the city of Lancaster." Counsel for Defendants: "We object, it is not within the provisions of the ordinance—of the contract existing between the plaintiff and defendant." Counsel for Plaintiff: "Do you say that you made returns for the year prior to 1900?" Counsel for Defendants: "Yes, sir, made returns for every year."

Defendants waived the objection, and will not be permitted to profit by it now. Being made here for the first time, it comes too late.

The judgment is reversed, and the cause remanded. All concur.

#### STATE v. LOONEY.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

#### CRIMINAL LAW—APPEAL—JURISDICTION—REVENUE LAWS—FEDERAL CONSTITUTION.

Where a prosecution for peddling without a license involved a construction of the revenue laws of the state and the interstate commerce clause of the federal Constitution, the Supreme Court, and not the Court of Appeals, had jurisdiction of an appeal therein.

Appeal from Circuit Court, Oregon County; W. N. Evans, Judge.

One Looney was convicted of peddling without a license, and he appeals. Case transferred to Supreme Court.

Geo. M. Miley, for appellant. L. P. Norman, for the State.

PER CURIAM. We incline to the opinion that the jurisdiction of this appeal is in the Supreme Court as involving a construction of the revenue laws of the state. It involves, too, the interstate commerce clause of the national Constitution, if that point was properly raised below. Several appeals in identical cases have been taken to the Supreme Court and retained by it. *State v. Emert*, 103 Mo. 241, 15 S. W. 81, 11 L. R. A. 219, 23 Am. St. Rep. 784; *State v. Smithson*, 106 Mo. 149, 17 S. W. 221; *State v. Parsons*, 124 Mo. 436, 27 S. W. 1102, 46 Am. St. Rep. 457.

Order transferred to the Supreme Court for decision.

#### HARDISTER v. SUPREME ORDER OF MARRIED MEN'S LEAGUE OF AMERICA.

(Kansas City Court of Appeals. Missouri. June 4, 1906.)

#### INSURANCE—BENEFIT CERTIFICATE—INSTRUCTIONS.

In an action on a benefit certificate, the court charged that if, after the issuance of the certificate and before the injuries causing insured's death, he changed his occupation and the change imposed a greater hazard on his life, the jury should find for the defendant. Another instruction required plaintiff to prove that insured did not violate any of the conditions of the certificate or of the application, and did not, during the life of the certificate, change his occupation to one more hazardous than his occupation when the certificate was issued. *Held*, that such instructions covered a requested charge that in order for defendant to be entitled to a verdict it was not necessary that it should prove that deceased at the time of his death was engaged in any special line of duty connected with the mill where he was killed, but that if, after becoming a member of defendant association, he abandoned his occupation as a farmer previous to his death and engaged in operating a sawmill, and such changed occupation was more hazardous than the occupation of a farmer, and such change was without the consent of the defendant association, and deceased met his death after having abandoned his occupation as a farmer and after having engaged in such new line of occupation, defendant was entitled to a verdict.

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by Rose E. Hardister against the Supreme Order of Married Men's League of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Will A. Rothwell and Thomas H. Bacon, for appellant. Willard P. Cave, for respondent.

BROADBUSH, P. J. This is a suit by plaintiff on a benefit certificate issued by defendant on the life of her father, W. P. White. The petition makes the usual allegations of the issuing of the certificate, a compliance with its conditions in every essential particular, the death of the insured and proof thereof, demand, and refusal of defendant to pay the amount of the insurance. The answer denies that said White complied with all the terms and conditions in said certificate,

and for a defense alleges that in his application, which was made a part of the contract of insurance, the said White represented himself as a farmer, and that in said application he agreed, among other things, that he would not change his occupation to a more dangerous one without the written consent of defendant; that he did not keep said agreement in this: that after said certificate was issued, from December, 1902, he changed his occupation up to the time of his death, without the written consent of defendant, to a more dangerous one, to wit: He bought a steam sawmill and personally engaged in running and conducting the same, when, on the 22d day of May, 1903, he was struck and killed by the operation of the machinery of said mill. The defendant further alleges that whatever premiums were received by defendant on said certificate were received without notice or knowledge of the change the said White had made previously of his occupation. The plaintiff recovered judgment in the sum of \$1,000, from which defendant appealed.

As the only question raised on the appeal relates to the alleged error of the court in refusing to give instruction numbered 5, asked by defendant, it will only be necessary to state evidence that has a bearing upon that matter, and for that purpose we adopt the statement made by appellant, which respondent admits to be correct:

Statement: "The plaintiff read in evidence the deposition of Mrs. Addie L. Higgs, daughter of insured. Witness did not see the accident but saw her father immediately afterwards. The mill was not running, but, while he was looking at the machinery, he slipped and fell in the sawdust, and, in falling, he caught a rope that started the engine to running, whereby he was caught in the machinery and injured so that he died about five hours later, May 21, 1903. 'He did not make a hand at the mill but he was overseer, paid off the hands, and saw that the men were working.' R. A. Hardister, plaintiff's husband, testified that Mr. White was very seldom there at the mill, and the witness was looking after that part of the business. The mill had become out of order and the cylinder had to be bored out, and it had been brought back from Texarkana. Steam had been raised but the engine was not running. Mr. White, standing near the sawdust pit, slipped and fell in among the belts and started the machinery, so as to inflict mortal injuries. Deceased had in his hand a piece of broken rope. G. B. Goodson was not at the mill at the time. He was over in the woods. E. Russell Jones was at the northwest corner of the boiler room—not near the place of the accident. The persons present were Jack Halney, the fireman, Mrs. Higgs, and Mrs. Hardister, plaintiff, the wife of witness. Mr. Ernest Powell had been the regular sawyer. He had left there about May 1st; the first part of May, 1903. Witness went to the mill about March 10,

1903. Mr. Powell was there then and had been. Cross-examination: Mr. White had owned a farm in Randolph county, Mo., but had sold it. Then he went down to Arkansas. About March 1, 1903, the witness and his wife and sister-in-law loaded all their household goods in a chartered emigrant car and went down to Boggy, Miller county, Ark., where the mill was. Mr. White was not engaged in any farming business there. He was on the road selling. Witness attended to making the payments of dues and assessments. They were all paid up to June, 1903. Harry McCullough, brother-in-law of witness, paid them to the agent at Moberly, Mo., Mr. Seelen. Recross-examination: Mr. White attended to all outside business, the delivery of ties. It was admitted and agreed that all the dues and assessments against W. P. White were paid under the original application of said W. P. White as a farmer. H. E. Powell testified that he arrived at Boggy, Ark., February 1, 1903, and then and there took charge of the sawmill of W. P. White as his sawyer, and the mill was so in charge of witness until May 9, 1903, when the witness went back to his home in Glasgow, Mo. Mr. White did not make a hand at the mill. He delivered ties to the railroad; he saw after that and the timber business, cutting timber, and paid the hands—that was all. Witness did not suppose that Mr. White was there an hour in the day. And then he was not about the mill but in the log yard and the lumber yard measuring lumber, loading lumber, etc. His dwelling house was about a hundred feet from the mill. Occasionally he was in Shreveport three or four days at a time, and he also went to Texarkana—looking after the tie business. Mrs. Rose Emma Hardister, the plaintiff, testified that she was present at the accident, but did not see it as a stack of lumber intervened. The mill was not running. As her father fell, he grabbed a rope which started the machinery, so it seemed."

Instruction numbered 5 is as follows: "The court instructs the jury, as a matter of law, in this case that in order for the defendant association to be entitled to a verdict in its behalf, it is not necessary that said defendant be required to prove that the deceased, W. P. White was, at the time of his death, engaged in any one special or particular line of duty connected with the mill where he was killed; but on the contrary, if the jury believe and find from the evidence that W. P. White had, after becoming a member of defendant's association, abandoned the occupation of a farmer previous to his death, and had engaged in a different line of occupation relating in anywise to the running, managing, and overseeing or operating of the sawmill described in evidence; and that such changed and different line of occupation was more hazardous than the occupation of a farmer; and that such changed occupation was engaged in by said White without the consent of said defendant association; and

that said White met his death after having abandoned the occupation of a farmer and after having engaged in such new line of occupation, then the finding of the jury must be for the defendant, and the jury will so state."

It is not denied by respondent that said instruction contains the law, but she claims that the same was a mere repetition of others given. The defendant's third instruction is as follows: "The court instructs the jury that if, from the evidence, they find that after the issuance of the certificate sued on, and prior and up to the time of the injuries causing the death of said W. P. White, he changed his occupation as a farmer to the occupation of running and conducting a saw-mill; and that said change of occupation, if any, imposed on the life of said W. P. White a greater hazard than the hazard of his occupation as a farmer, the jury will find for the defendant." The plaintiff's instruction numbered 1 contains the following as one of the conditions of the contract; that plaintiff must prove to the satisfaction of the jury before she was authorized to recover: "And that said William P. White did not violate any of the conditions of the said policy, or of the application forming a part thereof, and did not, during the life of said policy or certificate of insurance, change his occupation to one more hazardous than his said occupation at the date of said certificate of insurance," etc.

The appellant, to sustain its position, cites the following cases: McClure v. Feldmann, 184 Mo. 710, 84 S. W. 16, and Porter v. Harrison, 52 Mo. 524. In the former, the court holds that "where the defense to an action of negligence is along two lines not inconsistent with themselves, instructions which separately present each defense are not inconsistent" and should be given. In the latter case, the holding is that "instructions should always be framed with reference to the facts in evidence to which they apply, and it is much more satisfactory for an instruction not only to be framed in reference to the plaintiff's theory of the case, but also to cover the grounds assumed by the defendant in his defense; but this is not always so, provided the instructions given, all taken together, fairly present the law of both sides of the case to the jury, and all the whole case in a way that is not calculated to mislead." There was only one question before the jury and that was, was the changed occupation of the deceased more hazardous than that of a farmer? The defendant's third instruction presents the issue in a clear and comprehensive manner; and, supplemented as it was by plaintiff's instruction, the whole issue was fully and fairly presented to the jury, and, strictly speaking, in compliance with the rule announced in Porter v. Harrison, supra, and all the authorities.

Affirmed. All concur.

# GREENE et al. v. DAVIS.

(Kansas City Court of Appeals. Missouri.  
June 4, 1906.)

## INTERPLEADER—INTEREST IN CONTROVERSY— NEUTRALITY BETWEEN CLAIMANTS.

Defendant executed a note, which was indorsed to his father, who indorsed it to plaintiffs, and also prior to his death executed a contract assigning to plaintiffs all his property. After the death of his father, defendant procured an administrator to be appointed of the father's estate, defendant signing the administrator's bond as surety, and then, while admitting that he owed the note, filed an answer in the nature of a bill of interpleader alleging that the note was claimed by the administrator, and that at the time the contract was made deceased was incapacitated, and that the contract was made through fraud and undue influence. At the trial, defendant did not testify and refused to identify his father's indorsement to the note. Held, that defendant was not neutral between plaintiffs and the administrator, and was therefore not entitled to maintain a bill of interpleader.

Appeal from Circuit Court, Putnam County; Geo. W. Wanamaker, Judge.

Action by Sarah J. Greene and another against Irving Davis, in which defendant filed an answer in the nature of a bill of interpleader. From a judgment dismissing the bill, he appeals. Affirmed.

Wilson & Clapp, for appellant, N. A. Franklin and B. L. Robison, for respondents.

JOHNSON, J. Action on a promissory note. The amended answer on which the case was tried is in the nature of a bill of interpleader. The issues presented by that answer and plaintiffs' reply thereto were decided adversely to defendant. Judgment was entered in favor of plaintiffs on the note, and defendant appealed.

October 20, 1903, defendant executed and delivered to Clara Davis his negotiable promissory note for \$400, payable on or before one year after date. Before maturity the payee sold and transferred it to C. J. Davis, and indorsed it as follows: "For value received I assign the within note to C. J. Davis, Clara Davis." After this and before maturity, C. J. Davis delivered it to plaintiffs with this indorsement: "For value received I assign the within note to Sarah J. Greene and Samantha E. Piercy, C. J. Davis." On June 28, 1904, while he was the holder of the note and before he assigned and delivered it, Mr. Davis entered into a contract in writing with plaintiffs (his daughters) whereby, in consideration of past services and of their agreement to "pay all of his funeral expenses, doctor bills for his last sickness," etc., he declared that: "I, Ceburn J. Davis, \* \* \* hereby give, grant and assign to them [his daughters] all of my property of every name and nature including personal effects, money and certificates of deposits, notes and other property of which I am now seised or which I may own at the time of my death, I to re-

tain possession and full use and control of all my said property until my death. That my said daughters to take possession of as their own of all my property immediately after my death." He died July 19, 1904, and on or about October 13th, following, George W. Davis was appointed administrator of his estate by the probate court of Putnam county. Defendant signed the administrator's bond as surety. The petition in this suit was filed October 25th. The original note bearing the indorsements above mentioned was attached to it as an exhibit, and plaintiffs alleged that: "On the ——— day of July, 1904, said C. J. Davis for value received sold and transferred said note to these plaintiffs and they are now the legal owners and holders of the same." In his original answer, filed November 28th, defendant, a son of C. J. Davis, admitted the execution and delivery of the note and its assignment before maturity to C. J. Davis; denied its transfer to plaintiffs, and its ownership by them; and alleged "that by operation of law the title to said note passed to and became vested in the said administrator, and that he alone has the right to sue and recover on said note." Defendant also filed a motion that plaintiffs be required to give security for costs and pressed it to a determination. On November 30th, defendant filed his amended answer. In that pleading he admits "that the said note is past due, and that he owes the same"; but avers that "the said administrator ever since his appointment has been and is now demanding the payment of the same to him as administrator. \* \* \* has always claimed and still claims that the said C. J. Davis never assigned or transferred the said note to plaintiffs, and that at the time of his alleged assignment to them the said C. J. Davis was incapable of transacting his business or of managing his affairs, and, if any such transfer or assignment was in fact made, the same was obtained through fraud and undue influence." He then avers his willingness "to pay the said note to whomsoever it of right belongs," but "is in doubt as to whether the same should be paid to plaintiffs or the administrator." He prays "that he may be allowed to bring the amount due on said note into court," and that the administrator "be made to interplead therefor." He was permitted to pay the money into the registry of the court. Plaintiffs, in their reply, in effect charge that all of the steps taken by defendant in relation to this suit were the result of collusion between him and the administrator, who, it is alleged, "have at all times since the institution of this suit had a full, complete, and perfect understanding with each other and have been and are conspiring together to defeat the plaintiffs out of the proceeds of said note." One of defendant's attorneys testified that, when he prepared and filed the motion for costs and the first answer, he did not know of the indorsement and delivery of the note to plaintiffs by

decendent, but, supposing that he retained the possession and ownership of the note to the date of his death, and that the title asserted by plaintiffs was founded upon the written contract they had with their father, advised defendant that the legal title to the note passed from decendent to the administrator of his estate, and consequently plaintiffs could not maintain their action. After filing the answer, witness chanced to meet the attorney, who had drawn the contract, and was informed by him of the fact that the note itself had been transferred by indorsement to plaintiffs. He then advised his client to file a bill of interpleader. It is worthy of note that this attorney prepared and presented the application for the appointment of the administrator. Neither defendant nor the administrator testified, and plaintiffs offered no testimony bearing on the subject of the good faith of defendant in filing his bill. After the court dismissed the bill, defendant refused to plead further, and this colloquy occurred. "By Mr. Franklin (counsel for plaintiffs): Will you admit this is the signature of C. J. Davis? By Mr. Wilson (counsel for defendant): I don't know anything about it. Mr. Franklin: Show it to your client. I can swear to it, but don't want to. Mr. Wilson: Mr. Irving Davis (defendant) says it is not like his father's signature the way it used to be, whether his signature just before his death or not he doesn't know." Mr. Franklin then testified that the name signed to the indorsement was in the handwriting of Mr. C. J. Davis, and the statement was suffered to go unchallenged by defendant.

The conduct of defendant exhibited in the facts detailed clearly betrays a fixed purpose to defeat the object expressed in the written contract. As an heir of the grantor, he had a pecuniary interest to serve. The appointment of an administrator was a preliminary step to an attack on any claim of plaintiffs based on the contract, and defendant participated in, if he did not wholly instigate, this initial movement. The right to an administration, in the face of a contract that attempted to give all of his father's property to plaintiffs, was predicated on the assumption that the contract by its terms does not show a gift either *inter vivos* or *causa mortis*, and that, as the legal title to the property was vested in the grantor at the time of his death, it passed by operation of law to his estate, and not to plaintiffs as the beneficiaries of the contract. This view finds support in the case of *Tye v. Tye*, 88 Mo. App. 330, and in the authorities there cited. With the legal title to the property vested in the administrator, defendant expected to destroy the efficacy of the contract by showing that its execution by the grantor was the result of undue influence exerted over him by plaintiffs when he was incapable of transacting business. The success of such effort would clear the way for defendant to share in the distribution of the estate. It is

not necessary to look beyond the pleadings and record evidence in reaching a correct understanding of the attitude of defendant towards the claim of plaintiffs asserted in this action. Admitting that he owed the debt, he actively contested plaintiffs' title to it, assisted in the procurement of an adverse claimant, and espoused his claim.

A bill of interpleader cannot be maintained by one who has an interest in the subject of controversy. *Hathaway v. Foy*, 40 Mo. 540; *Hartsook v. Chrissman* (Mo. App.) 90 S. W. 116; *Groves v. Sentell*, 153 U. S. 465, 14 Sup. Ct. 898, 38 L. Ed. 785. Nor by one who denies the title of one of the claimants, lends aid to another in the establishment of his claim (*Marvin v. Ellwood*, 11 Paige [N. Y.] 365), or instigates a contest for the fund in his possession (*Swain v. Bartlett*, 82 Mo. App. 642). He who invokes this form of relief must stand in the position of a neutral between conflicting claimants, who is in danger of being drawn into a controversy in which he has no concern save as an impartial stakeholder. A manifestation of partisanship for one or hostility to another claimant is incompatible with a position of neutrality, and therefore destructive of an essential element of the right to relief. *Arn v. Arn*, 81 Mo. App. 133; *Wing v. Spaulding*, 64 Vt. 83, 23 Atl. 615; *Wells v. Miner* (C. C.) 25 Fed. 533; *Cogswell v. Armstrong*, 77 Ill. 139; *Patterson v. Perry*, 14 How. Prac. (N. Y.) 505; *Greene v. Mumford*, 4 R. L. 313; 3 *Pomeroy's Eq. Juris.* § 1825; *Tiedeman on Eq. Juris.* § 570; 11 *Ency. Pl. & Pr.* 458; *Story's Eq. Pl.* (9th Ed.) § 297. Counsel for defendant say that his opposition to the enforcement of plaintiffs' claim ceased when he learned of the fact that his father had indorsed and delivered the

note to plaintiffs, and thenceforth his conduct was wholly impartial and disinterested. It devolved on defendant to show affirmatively that his attitude was that of a disinterested stakeholder. Very pertinent is this excerpt from the opinion of Judge Ellison in *Swain v. Bartlett*, supra: "The whole theory upon which an interpleader is allowed is that the claims against the plaintiff have been made against him without his procurement (*Belcher v. Smith*, 9 Bing. 82) and without collusion with either claimant. Indeed, an oath to that effect is, in many jurisdictions, required of him. In this case, Bartlett himself brought the rival claim into existence by voluntarily going into the probate court and having an administrator appointed to the end that there might be contested claims. He brought his trouble upon himself." Defendant has failed to establish his neutrality. Manifestly, his purpose now is the same as it was at the beginning—to use an administration as the instrument to defeat plaintiffs' claim and thus advantage himself. Charged with collusion in plaintiffs' reply, and burdened with the duty to show impartiality between rival claimants, he failed to testify, though present in court during the hearing, but relied on his attorney's want of knowledge of an important fact as an excuse for the open fight he made on plaintiffs' title, and even refused to identify his own father's signature to the indorsement on the note.

All of the facts convince us, as they did the learned trial judge, that defendant, notwithstanding the averments of his amended answer, is yet engaged in waging war on plaintiffs' title, and this he cannot do in the guise of a disinterested stakeholder.

The judgment is affirmed. All concur.



## MOORE v. STATE.

(Court of Criminal Appeals of Texas. March 14, 1906. On Rehearing, June 28, 1906.)

## 1. CRIMINAL LAW — VENUE — REMAND — CONSTRUCTION OF JUDGMENT.

The judgment of the district court of F. county reciting that the venue in the cause had been improperly changed to that county from the district court of L. county, by reason whereof the district court of F. county had no jurisdiction of the cause, and adjudging that the cause be stricken from the docket of said court, and transferred back to the district court of L. county, with all papers in the cause, is not a dismissal of the cause, but merely a retransfer of it.

## 2. SAME — PROCEDURE.

Code Crim. Proc. art. 475, providing that when a cause has been improvidently transferred to a court which has no jurisdiction of it, such court shall order it retransferred to the proper court, the same proceedings to be had as in the case of the original transfer, has no application to transfers on change of venue, where the cause goes from one county to another, but only to transfers from one court to another in the county in which the indictment was preferred, for the purpose of taking it from a court not having jurisdiction to one having it.

## 3. SAME — APPEAL — BILL OF EXCEPTIONS — CHANGE OF VENUE.

To authorize review on appeal of the action of the court in changing the venue, a bill of exceptions must be reserved in the county from which the venue was changed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2337.]

## 4. SAME — CHANGE OF VENUE — PROOF OF PREJUDICE.

The fact that on a motion in L. county, where the indictment was presented, to change the venue, the court found that prejudice existed in D. county which would prevent defendant having a fair trial there, and changed the venue to F. county, does not show error in the refusal of the court of D. county, on the venue being transferred there at a subsequent term, to transfer the venue to another county, as the feeling in D. county towards defendant may have changed.

## 5. WITNESSES — LEADING QUESTIONS.

The question asked a witness in a homicide case "Did defendant stoop as he came along the fence with the gun in his hand?" is not sufficiently suggestive of a desired answer as to make it prejudicial to defendant.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 838.]

## 6. CRIMINAL LAW — HARMLESS ERROR — QUESTION TO WITNESS.

Allowing the question in a homicide case, whether or not witness saw or knew of a pistol being put in the pocket of deceased while lying on the ground, was not prejudicial to defendant; it having been answered in the negative.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3130.]

## 7. SAME — CHARACTER OF DECEASED — EVIDENCE.

Where defendant in a homicide case was relying for a defense on threats made by deceased, and a previous assault by deceased on defendant was shown, it was not error, as allowing the state to prove the good character of deceased, to permit it to ask defendant on cross-examination whether there had been any charge against deceased except the one in which the difficulty occurred between them.

## 8. SAME — EVIDENCE — DECLARATION.

Evidence that a few minutes after the shooting, as witness entered the place where deceased was lying, struggling and groaning and in

great agony, deceased exclaimed, "Why did he do it?" is admissible; the idea of a concocted story being precluded.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 811.]

## 9. SAME — MOTIVE — EVIDENCE.

The admission in a homicide case of an indictment against deceased, found before the killing, charging with aggravated assault against defendant, is harmless, even if it is not admissible to show motive; the facts in regard to the assault of defendant, forming the basis of said indictment, having been fully proved.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3138.]

## 10. HOMICIDE — SELF-DEFENSE — INSTRUCTIONS.

A charge is not erroneous as making self-defense depend on defendant being attacked, where it also states that the homicide was justifiable if it reasonably appeared to defendant from the demonstration of deceased that he was in danger of death or serious bodily harm.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 620.]

## 11. SUNDAY — RECEIVING AND ENTERING VERDICT.

A verdict may be received and entered on the minutes on Sunday.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Sunday, § 82.]

## 12. CRIMINAL LAW — JUDGMENT — TIME OF ENTRY — RECITALS.

The recitation in a judgment that on a certain day, which was a Sunday, there was returned into court, and received by it and "is here now entered on its minutes," a certain verdict, does not show that the judgment was entered on that day.

## On Rehearing.

## 13. SAME — CONTINUANCE — ABSENT WITNESS — SHOWING DILIGENCE.

An application for a second continuance for an absent witness, who had been indicted for perjury and was a fugitive from justice, stating merely that information had recently been received by defendant that he was in a certain county in another state, and that there had not been time to get his deposition, is insufficient in not showing the efforts to ascertain the whereabouts of the witness.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1336.]

## 14. SAME — CHANGE OF VENUE — REMAND — JURISDICTION.

Where the court to which venue is erroneously changed retransfers the case to the court from which it came, the latter acquires jurisdiction.

Appeal from District Court, Delta County; R. L. Porter, Judge.

R. H. Moore was convicted of manslaughter, and appeals. Affirmed.

B. B. Sturgeon, B. M. McMahan, Fred Dudley, and Bennett & Spearman, for appellant. Jas H. Lyday, McGrady & McMahon, and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, and his punishment fixed at five years' confinement in the penitentiary.

The opinion delivered on the former appeal is found in 79 S. W. 565, 10 Tex. Ct. Rep. 26. To dispose of some of the questions

arising on the plea to the jurisdiction and the motion to change the venue, it is necessary to recite a brief history of the case. The killing occurred in Lamar county, and on change of venue was transferred to Fannin county. Conviction was had. Appeal was prosecuted resulting in a reversal, because of error in changing the venue to Fannin county. When the case was first called in Lamar county, motion was made by appellant to change the venue to Red River or Delta county. After hearing the testimony the court, as before stated, sent the case to Fannin county. One of the questions upon which reversal occurred was the order of the court changing the venue to Fannin county. When the mandate was returned to the district court of Fannin county, the court there entered an order returning the case to Lamar county. It is urged that, by the peculiar verbiage of the judgment retransferring the case, the prosecution was actually dismissed from the docket, and therefore it was necessary to find another indictment in order to further prosecute appellant. The judgment retransferring the case, among other things, recites that the venue in said cause had been improperly and erroneously changed to Fannin county, Tex., from the district court of Lamar county, at a former term of said district court of Lamar county; and it further appearing that by reason thereof the district court of Fannin county has no jurisdiction of said cause. "It is ordered, adjudged, and decreed by the court that said cause be stricken from the docket of this court, and the cause be transferred back to the district court of Lamar county, of the Sixth judicial district, and that the clerk of this court transmit to the clerk of the district court of Lamar county, for the Sixth judicial district, forthwith, all of the papers, records, and mandates in this cause, together with the bill of indictment and the appearance bond of defendant herein, to be refiled and docketed by said clerk of the district court of Lamar county, Tex., on the docket of said court, together with a certified copy of this order and decree." We cannot concur with the view of counsel that this was a dismissal of the prosecution. The wording of the decree and order itself excludes this idea, and shows the only purpose of entering the decree was to retransfer the case to Lamar county in obedience to the mandate of the Court of Criminal Appeals. There is nothing to indicate the purpose on the part of the state in making the motion to retransfer, or the court in entering the judgment thereon, to dismiss the prosecution. The only purpose was to send the case back to Lamar county. Nor do we think that article 475 Code Civ. Proc. has any reference to cases that have been improperly transferred on change of venue. That article has reference only to cases that have been improperly transferred from one court to another in the county where the indictment was preferred; that is, from a court not having jurisdiction to one that did. It

has no connection with or relation to transfers on change of venue where the cases go from one county to another. When the court met in Lamar county, the judge transferred the case on change of venue to Delta county, and it seems from the bill of exceptions and the record that he used the former application of the appellant to change the venue as the basis for his action. We will let that matter rest with the statement that a bill of exceptions was not reserved in Lamar county to the action of the court changing the venue to Delta county. In order to bring before the court for review on appeal the action of the court changing the venue from one county to another, a bill of exceptions must be reserved in the county from which the venue was changed. This was not done.

When the case was called in Delta county for trial, plea to the jurisdiction was urged, insisting that the prosecution had been dismissed in Fannin county. It was further urged that the change of venue should have gone from Fannin to Red River. We do not purpose discussing this matter any further, and dispose of it by the statement that a bill of exceptions was not reserved as above stated. This motion having been overruled, appellant filed an application to change the venue from Delta to Red River county. The evidence introduced and the grounds relied upon as a basis for this change of venue was the former decree in Lamar county, wherein the court adjudicated, in the first instance, that the same condition of things existed in Delta as in Lamar county, and in which the court refused to change the venue to Delta on account of such condition. The state controverted this and introduced in support thereof the testimony of the sheriff of Delta county. His evidence was to the effect that there was no such prejudice against appellant as precluded a fair trial; and further attacked the only compurgator of appellant by showing he was a comparative stranger in the county, not having lived there more than one or two years, and that his means of knowledge was not sufficient to justify his supporting affidavit. The circumstances found by the court existing in Delta county originally may have been true or not. Even if they were true at the time the court so held, it would not be conclusive evidence of the fact that the condition of public sentiment had not changed, and it would not be sufficient as a predicate for this court to hold erroneous the ruling of the trial court in the subsequent application. In order to have raised such question properly, the condition of the public sentiment in regard to appellant, and that it was adverse, should have been made to appear by the evidence and incorporated in bill of exceptions on the second application. The fact that the court had, at a former term in Lamar county, adjudicated that the circumstances were adverse to appellant having a fair trial in Delta county,

was not a sufficient basis for the change of venue on the subsequent application from Delta county. As we understand the law in this state, the fact that prejudice may exist at one term of the court is not evidence that it exists at a subsequent term. The condition of the public feeling may have undergone a change, and the only evidence we have in regard to it is from the sheriff, which shows that there was no such prejudice in the county as militated against a fair and impartial trial. So there was no error in the court refusing to change the venue from Delta to Red River county as this record presents the matter to this court.

Miss Jennings testified that she saw defendant, just before the shooting, coming towards South Main street, along the partition fence between defendant's house and the Brown house, where deceased then was with the gun in his hand. The state then asked the following question: "Did the defendant stoop as he came along the fence with the gun in his hands?" Objection was urged to this question as being leading and suggestive of the desired answer; and that it was intended by this, to show that appellant was slipping up on the deceased. The objections being overruled, she answered in the affirmative. While the question may have been somewhat leading in its character, yet the answer was proper, if the question had been free from the intimation of its being leading. It is hardly sufficiently suggestive of an answer on the part of the witness that appellant was slipping up on the deceased. The fact that he was going along the fence in a stooping position was clearly admissible; and if it be conceded that the question was leading in its character, still it is not of sufficient importance to require a reversal. But it did not necessarily suggest an affirmative answer.

Dr. Hooks was asked if he saw a stranger or anybody place a pistol in the pocket of deceased while stooping over him; and whether or not he knew a pistol was placed in the pocket of deceased while lying on the ground. Objection was urged, and overruled; and the answer was in the negative. This could not have injured appellant. An affirmative answer might have possibly made this ruling error. But as the answer was in the negative there was nothing drawn out from the witness calculated to injure appellant.

Appellant on cross-examination was asked, whether or not there had ever been any charge against McLaughlin, the deceased, except the one in which the difficulty occurred between appellant and McLaughlin. The answer was in the negative. The objection was that it tended to place McLaughlin's character in issue before the jury. The court qualifies the bill by stating that appellant had voluntarily testified to some reports in regard to the deceased seeking to burn certain houses. Whether this qualification has anything to do with the bill or

not, we do not see how this testimony could have injured appellant. He was relying upon threats made by deceased. Deceased had made a previous assault upon appellant, which was shown. We do not believe there was any error in admitting this testimony. Nor is it in conflict with the former opinion of this court in this case, where the state was erroneously permitted to prove the good character of deceased and his chivalrous bearing towards women.

Witness Maxwell was permitted to testify that when he entered the store where deceased was lying on his back, with his head in Mrs. Breneman's lap, he was struggling and groaning and in great agony; and that he exclaimed, "Why did he do it?" This was in a very few moments after the shooting occurred. Witness had gone hurriedly the distance of about 100 yards; and deceased was shown to be in great agony—precluding the idea of a concocted story. It was not urged that this was an opinion of the witness, put in the form of a query. The main insistence was that it was not *res gestæ*, and did not preclude the idea that parties had so worked upon his mind as to induce him to make the statement. The bill of exceptions shows none of the environments further than as stated, and we think precludes any idea of a concocted story.

Nor was there any error in admitting in evidence the indictment against deceased, charging him with an aggravated assault upon appellant. This was a previous matter, and it was introducible for the purpose of showing the relations of the parties and the motive on the part of appellant. *Crass v. State*, 31 Tex. Cr. R. 312; 20 S. W. 579.

Objection is urged to the thirteenth, fourteenth, and fifteenth paragraphs of the charge, because they made appellant's right of self-defense depend upon the fact that he was "attacked" by deceased. These charges, taken as a whole, are not subject to this criticism, as we understand them; but present clearly, in appellant's favor, the law of self-defense. To illustrate, the court charges the jury: "Homicide is justifiable, and is no offense against the law when committed in necessary self-defense. This occurs when one is attacked in such a manner as to produce in his mind a reasonable apprehension of death or serious bodily injury, or where it reasonably appears to one from the act or acts coupled with the words of the person killed that he, the slayer, is thereby in danger of death or serious bodily injury, and he kills to protect himself from such danger, then such killing is deemed to be justifiable self-defense." Again, "When a person is attacked by his adversary, and his adversary makes a demonstration as if to draw a weapon and his adversary retreats, and it reasonably appears to the person so attacked, or against whom the demonstration is made, that his adversary is only retreating for the purpose of getting in to a

better attitude or condition to carry on or renew such attack, then the person so attacked or the person against whom the demonstration has been made has the right to inflict violence upon his adversary so long as such reasonable appearances of danger continue." The same charge is given in connection with threats. This charge is favorable to appellant. It is true that he charges with reference to an attack, but the charge goes further and gives the appearances of danger independent of the attack, and in the alternative. So it places before the jury two avenues of escape for appellant along the theory of self-defense, independent of threats; and then, in addition gives the same charges in connection with threats. Swain's Case, 86 S. W. 335, 12 Tex. Ct. Rep. 812; Phipps v. State, 34 Tex. Cr. R. 560, and 608, 81 S. W. 397, are not in point. In those cases the charge on self-defense confined appellant's right to an attack, omitting the question of appearances of danger from any other view than from such attack. In this case, however, he is given the benefit of both theories, and instead of it being injurious, in our judgment, it was favorable to appellant.

Appellant assigns error on the recitation in the judgment that the verdict was received, and the judgment entered on June 25, 1905, and that this court judicially knows that day was Sunday. It is shown that the case came on for trial on the 20th of June. The judgment makes the following recitation in regard to the return of the jury into court, to wit: "June 25, 1905, were brought into open court, by the proper officer, and defendant and his counsel being present, and in due form of law returned into open court the following verdict which was received by the court, and is here now entered upon the minutes of the court, to wit;" and then follows the verdict. It is contended that the court will take judicial knowledge of the fact that June 25, 1905, was Sunday. Concede this to be true, this recitation does not show that the judgment was entered on that day. It simply recites the fact that the verdict was received and entered upon the minutes of the court. As to the legal authority for this act, there can be no question. This is not a sufficient showing that the judgment was entered on Sunday, and it will be noted in this connection that the point was raised for the first time on appeal, and was not urged in the court below. If, as a matter of fact, the judgment was entered on Sunday, it was easily susceptible of proof. There is no evidence showing that the judgment was so entered, and the recitations in the judgment do not manifest that the judgment was entered on Sunday. Brown v. State, 32 Tex. Cr. R. 19, 22 S. W. 596. It is unnecessary, in the condition of the record as this point is presented, to discuss further the question as to whether a judgment can be entered on Sunday, where the verdict is

returned on that day. It is not shown that such was the case here, and therefore we do not discuss that phase of the law.

Without reviewing the bills of exception at length in regard to the argument of attorneys for the prosecution, we are of opinion that, as qualified by the trial judge, the argument did not go sufficiently beyond what was right and proper to authorize a reversal. Much of the argument complained of was in reply to statements made by appellant's counsel. As the record is presented to us we do not believe the errors complained of are of such importance as require a reversal of the judgment, and it is therefore affirmed.

#### On Rehearing.

At the Dallas term, the judgment was affirmed. On motion for rehearing it was transferred to the present term for disposition.

Appellant insists that the original opinion is in several respects erroneous. Among others, that we should have reversed because of a failure of the trial court to grant a continuance. The court qualifying the bill says that there had been a previous application for continuance which had been overruled for one of the witnesses, and that the diligence was totally insufficient for both witnesses. In regard to the second witness, he was indicted for perjury, and was a fugitive from justice, and the application states that information had recently been received by appellant to the effect that witness was probably in Miller county, Ark., and no effort had been made to get his testimony because, since the alleged discovery of his whereabouts, sufficient time had not elapsed to prepare the depositions. We do not believe the showing was sufficient. The application does not show the efforts to ascertain the whereabouts of the witness who had left the state, and in addition to this, the fact that he was indicted for perjury would strengthen the proposition that they would not be able to find and obtain his testimony. This being a subsequent application, the question of diligence is much more important and requisite than if it had been the first application. We do not believe there was any error in the court's refusal to continue the case.

Without going into a restatement of the facts in regard to the change of venue from Lamar to Fannin county, and retransfer to Lamar and filing and redocketing the case in Lamar county, we refer to the original opinion for these matters. Perhaps it may be necessary to state this much in addition in regard to the transfer from Lamar to Delta county after the case had been retransferred to Lamar from Fannin county. When the case was called in Lamar county, after its retransfer, it is stated in the bill of exceptions that Judge Denton (of the Lamar district court) sustained appellant's demurrer to the state's contest of his original application for a change of venue from Lamar to

Delta county. It was upon the hearing of this original application that Judge Denton transferred the case to Fannin county, over the protest of appellant, and it was upon appellant's application that the case was returned from Fannin to Lamar county. When Judge Denton sustained appellant's demurrer to the state's contest, after the retransfer, he ordered the case sent to Delta county. It is contended by appellant that in doing this, Judge Denton, having eliminated the state's contest, acted upon the original application to change the venue, filed at a previous term of the court as a basis of the order changing the venue to Delta county; and that this was error, because Lamar county was without jurisdiction to entertain the case on retransfer from Fannin county. In fact, as we understand appellant's contention, when the case was retransferred from Fannin to Lamar county, by the peculiar expression of the judgment the cause was entirely dismissed, and that all jurisdiction or attempted jurisdiction in Lamar county by reason of the transfer was void, and that court could not acquire jurisdiction. If the order of retransfer from Fannin to Lamar county was correct, then Lamar county obtained jurisdiction, and Judge Denton had authority to dispose of the case as if it had not been transferred to Fannin. We are of opinion that the retransfer and redocketing and refiling of the case in Lamar county was legal, and that court obtained jurisdiction and authority over the case and the person of the defendant. Defendant appeared before the court, and was present in court at the time the order was entered changing the venue from Lamar to Delta county, and made no objection, and reserved no exception. When the case was called in Delta county, plea was filed to the jurisdiction of Delta county, because of the fact that the case was improperly transferred from Lamar to Delta county. We do not agree with appellant's contention in regard to this matter. We believe, in the first instance, that Lamar county had jurisdiction; and second, that Judge Denton had the authority, either of his own motion, or for any of the reasons set out in the statute, to change the venue. He did have the authority to change the venue, and in our judgment if appellant wanted to raise any question in regard to that change of venue, and the orders moving the case from Lamar to Delta, he should have reserved his bill of exceptions at the time the order was entered in Lamar county. Our statute requires this, and the uniform and unbroken line of decisions in this state sustains this view. If as a matter of law or in fact Lamar county did not acquire jurisdiction by reason of the retransfer from Fannin to Lamar, then appellant's contention would be correct, and the authorities cited by him would be in point and sustain that contention. But, as before stated, we are of opinion that Lamar county

did have jurisdiction by reason of the transfer from Fannin to Lamar county.

This plea to the jurisdiction of Delta county being overruled, appellant filed an application to change the venue from Delta to Red River county, relying mainly upon the previous ruling of Judge Denton, overruling appellant's original application to transfer it to Delta, and ordering it to Fannin county, contending that this order of Judge Denton at the previous term of the court was res adjudicata of conditions in Delta county as being adverse to appellant obtaining a fair trial in that county. One of appellant's counsel also testified in the case identifying these matters and connecting them up so as to show that there was no further application made to change the venue from Lamar county than that originally filed by appellant. The state introduced the testimony of Tuberville, sheriff of Delta county, showing that appellant, under existing conditions, could obtain a fair trial in said county. The trial judge explains this bill of exceptions at some length, showing that when the case was transferred from Lamar to Delta there was no objection in Lamar county urged by appellant and the matters were raised for the first time in Delta county. In impaneling the jury he saw nothing to indicate that there was any sufficient feeling in the county to authorize the conclusion that appellant could not obtain a fair trial. Be that as it may, the only testimony that was introduced as to the then condition of the public mind and state of feeling in Delta county was through the testimony of the sheriff of Delta county. So we gather from the contest over this application to change the venue from Delta to Red River county that appellant relied upon the previous orders and rulings of Judge Denton in Lamar county, finding that a state of feeling at that time existed in Delta county which authorized him to refuse in the first instance to transfer the case to that county; and the state, by the testimony of the sheriff, that at the time of the trial such a state of feeling did not exist. It has been the uniform ruling in this state in regard to this question that the condition and state of feeling in the county at a prior term of the court is not the criterion of the condition and state of feeling at a subsequent term of the court. We are cited to *Blain v. State*, 34 Tex. Cr. R. 448, 81 S. W. 368, to sustain the contention, we suppose, that the state of feeling as found by Judge Denton originally existing in Delta county still existed subsequently and at the time of the application for a change of venue from Delta to Red River county. If such was the intended contention, the *Blain Case* does not support it, as we understand the case. In the *Blain Case* this language is found: "These records show that on the 18th day of July, 1892, as to said case, which was an indictment for murder, there exist-

ed against the defendant, in connection with said case, so great a prejudice that he could not get a fair and impartial trial, in the opinion of the judge trying the motion for a change of venue, and that this state of prejudice still existed against defendant on July 25, 1894, in said case, which was a new indictment for the same charge of murder. Said records, giving them their fullest effect, only showed that in connection with said charge of murder there existed prejudice at that time against defendant. It cannot be held, as claimed, that they show, even as to said case, that such prejudice still existed when this case was tried in March, 1895, and much less do they establish that such prejudice existed against the defendant with reference to the case for which he was then being tried. Conceding, however, that they were admissible as evidence tending to show the standing of defendant in Gonzales county as to the prejudice against him at that time, we will consider said orders along with the other testimony in the case offered by the state and the defendant on the question of a change of venue." The Blain Case is not authority that the matter was res adjudicata. The effect of the decision is to hold the other way. Nor do we understand that the Blain Case is out of line or out of harmony with the general current of opinion in this state or with the original opinion in this case. The matters in regard to the previous action of Judge Denton in Lamar county in regard to the condition of things in Delta county was introduced in evidence by appellant, and was met by the state through the testimony of the witness, Tuberville. The fact that Judge Denton had decided adversely to appellant's contention in regard to Delta county in the original application was used as a fact to be taken into consideration by the district judge of Delta county on the trial of the motion to change the venue from that county to Red River. It was not a conclusion, nor was it res adjudicata any further than to ascertain the condition of feeling in Delta county at the time Judge Denton rendered his decision. That decision could not have affected the future state of feeling in Delta county. The feeling in that county was subject to change, and when the application under discussion was made the condition of the feeling towards appellant in Delta county was the correct criterion, and not that previously ascertained by Judge Denton in the original application in Lamar county. So we are of opinion that the retransfer from Fannin to Lamar was legal and correct; that Lamar county had acquired jurisdiction of the case and person of appellant by the retransfer; that Judge Denton had the legal authority to transfer the case from Lamar to Delta county on change of venue, and that in order to revise his action in the matter it is necessary for appellant to reserve a

bill of exceptions. We do not believe with counsel that it was a question of jurisdiction under the record before us. His different pleas to the jurisdiction of the different courts are not well taken.

It is urgently insisted that the court should have reversed the case on account of the testimony of Miss Jennings. We have reviewed this question again, and the authorities cited by appellant to support his contention. In most of the cases cited, the judgments on appeal were affirmed. In the Rangel Case, 22 Tex. App. 642, 3 S. W. 788, the question was there held to be leading and suggestive of the answer. However, the judgment was reversed and in part upon another proposition. While it was held the trial court was in error in regard to the admission of the testimony of the witness Bravo, it does not put the reversal upon that ground; in fact, we are led to believe that it was put upon the error in the court's charge. We have not been cited to any case where a judgment was reversed exclusively for the reason that leading questions had been asked and answered. It is not impossible that such a case might arise. But as before stated, we do not believe that this question was sufficiently suggestive of a desired answer to place it within the category of a leading question that would require a reversal of the judgment by reason of any damaging effect. The answer of the witness would have been yes or no to the question. It was in the affirmative. But it barely suggested any more an affirmative than a negative answer; and if so, rather slightly. We do not believe it is of sufficient importance, even if erroneous, to require a reversal of the judgment.

It is earnestly insisted that we were in error in holding that the trial court did not err in admitting in evidence the indictment against deceased charging him with an aggravated assault upon appellant. The objection mainly was that this was a matter occurring between other parties, and for which appellant was in no way responsible, and could in no manner be bound. The mere fact that the grand jury returned an indictment was not binding upon appellant, and may not have affected him one way or the other, so far as the deceased is concerned. But this character of testimony has always been introducible, as we understand the authorities in Texas. In this connection, we might state that the record shows by the verbal testimony that deceased had shot at appellant three times prior to this transaction, and it seems to have formed the basis of the indictment introduced in evidence. Previous difficulties between the accused party and the deceased (for whose death the accused was being tried) is introducible on the question of motive, and even for other reasons. *Kunde v. State*, 22 Tex. App. 65, 3 S. W. 325; *Hudson v. State*, 28 Tex.

App. 323, 13 S. W. 388; *Barkman v. State* (Tex. Cr. App.) 52 S. W. 78; *Attaway v. State*, 41 Tex. Cr. R. 397, 55 S. W. 45; *Weaver v. State*, 46 Tex. Cr. R. 617, 81 S. W. 89. If it be conceded that we are in error in regard to the admission of this indictment against deceased, as this record is before us it will be, in our judgment, harmless or at least of not sufficient gravity to require a reversal. The facts in regard to the shooting of appellant by deceased, which occurred some time prior to this homicide, and forming the basis for said indictment, were fully proved, and without objection. The full effect of the previous difficulty was before the jury through the testimony of witnesses.

We have gone over this case with considerable care, because of the earnestness with which appellant's counsel urged the grounds of the motion for rehearing, but we do not believe there was any such error committed on the trial of the case as would justify a reversal.

The motion for rehearing is overruled.

BROOKS, J., absent.

#### MOORE v. STATE.

(Court of Criminal Appeals of Texas. March 7, 1906. On Rehearing, March 23, 1906.)

**1. CRIMINAL LAW—APPEAL—EXCEPTIONS.**  
The overruling of a motion for continuance cannot be considered, in the absence of a bill of exceptions.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2812.]

**2. SAME—CONTINUANCE.**

The mere statement that a continuance was desired to examine into the case and to ascertain what testimony could be procured was not a sufficient showing of ground therefor.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1315-1341.]

**3. WITNESSES—CHILDREN—COMPETENCY.**

A child witness must manifest sufficient intelligence to convince the court that the nature and obligation of the oath administered was understood.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 97, 98, 105.]

**4. CRIMINAL LAW—APPEAL—PRESUMPTIONS.**

In the absence of a showing in the bill of exceptions of the facts attending the examination of a child witness, it will be presumed that enough facts were developed to sustain the ruling of the court that the witness was of sufficient intelligence to understand the nature and obligation of the oath.

**5. SAME — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.**

Where the prosecutrix in a prosecution for rape testified as to the facts, no charge on circumstantial evidence was required, even if she be regarded as an accomplice.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1883.]

**6. RAPE—PUNISHMENT.**

Confinement in the penitentiary for 99 years is not an excessive punishment for rape on a female 9 years old.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 105.]

Appeal from District Court, Williamson County; V. L. Brooks, Judge.

Albert Moore was convicted of rape, and appeals. Affirmed.

H. N. Graves, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of rape, and his punishment fixed at confinement in the penitentiary for a term of 99 years; hence this appeal.

Appellant complains of the action of the court overruling his motion for continuance. There is no bill of exceptions to the overruling of said motion, and consequently the same cannot be considered. However, an examination of the motion does not disclose a cause for continuance. Where a trial occurs shortly after the offense was alleged to have been committed, and a few days after indictment found, there might occur equitable causes, outside of the statute, which should induce the court to grant a continuance, but here such a cause is not disclosed. It is stated generally that a continuance was desired to examine into the case, and to ascertain what testimony could be procured for appellant. If in this connection it had been shown that, by being hurried into trial, appellant was deprived of important testimony, and the nature of that testimony shown, there might be cause for continuance, and on refusal a reversal might ensue. But the application does not show that appellant was deprived of any testimony, or that any testimony has been since discovered that would have been important in his case. Indeed, no facts are stated in connection therewith. Even if a bill of exceptions had been reserved, we could not say that the court erred in this regard.

Appellant reserved an exception to the action of the court permitting Suaddle Brown, who was over nine years of age, to testify against appellant. Since the decision in *Freasier v. State* (Tex. Cr. App.) 84 S. W. 360, the last Legislature has passed an act which authorizes such witness to testify. Of course a child witness must manifest sufficient intelligence to convince the court that the nature and obligation of the oath administered was understood. It is shown in the bill that the child witness was examined as to her intelligence, and the court was satisfied that she sufficiently understood and comprehended the nature and obligations of the oath, and permitted her to testify. But the facts developed in said examination in regard to the child's intelligence are not disclosed in the bill. In order to have been a good bill, the facts should have been shown. Of course, in the absence of a showing in the bill itself of the facts attending the examination of the witness, it will be presumed that enough facts were developed to sustain the action of the court regarding the witness be-

ing of sufficient intelligence to understand the nature and obligations of the oath.

Appellant complains that there was a failure on the part of the court to charge the law in regard to circumstantial evidence. This was not a case of circumstantial evidence; prosecutrix, on whom the offense is alleged to have been committed, being present at the time and testifying to the facts. Even if it be conceded that she was an accomplice, which under our decisions is not the case, it would still be a case of positive testimony.

It is also strenuously insisted by appellant that the verdict of the jury is excessive. Of course, more outrageous cases of rape are committed than is shown by this testimony, yet prosecutrix at the time was only nine years old, and she testified to the act of penetration, and other circumstances support her testimony. Though she as well as appellant were evidently a low class of people, still, under the law, the amount of punishment was authorized, and we are not prepared to say, under the circumstances of this case, that the jury were not justified in assessing such punishment.

There being no errors in the record, the judgment is affirmed.

#### On Rehearing.

The judgment was affirmed at a previous day of the term, and is now before us on motion for rehearing. Appellant strenuously insists that the case should be reversed because the court below should have postponed this case when it was called for trial and the continuance requested. In that connection he insists the showing filed by him since the adjournment of the district court of Williamson county should be considered as a sufficient showing as in the nature of newly discovered evidence in regard to the insanity of appellant. In the original opinion we held that the application for continuance did not show that appellant had been deprived of any testimony by the action of the court overruling his motion for continuance, or that any testimony had since been discovered that would have been important in his case; that indeed no facts were stated in connection therewith, even if the bill of exceptions had been reserved, which was not the case. In urging his motion appellant relies on *Ransom v. State* (Tex. Cr. App.) 70 S. W. 960, which is authority for holding that the court had jurisdiction of its judgments during the term, although a motion for new trial may have been previously overruled during the term, that same can subsequently during the term be set aside, and the question of a new trial reconsidered. However, we fail to see how this can help appellant. As we understand appellant's contention, he went to the judge on next to the last day of the term with a motion for new trial, and asked the court to set aside the previous order made overruling

his motion, and let him file the same. This the court refused to do. No other action was taken during the term. If appellant had a meritorious cause for setting aside said order overruling his motion for new trial on the ground of newly discovered evidence, and the court refused his motion to file the same, he should then during the term have taken a bill of exceptions to the action of the court. If the court had refused to allow him his bill of exceptions, he should have proven up his bill by bystanders as provided by statute. It does not appear that he pursued this course. After the adjournment of the term, and without any order to file bill of exception subsequent to the term, he procured a certificate from the judge and appended his amended motion for new trial thereto, and also appended some letters and affidavits. We know of no authority of law which authorizes us to consider these, even if it be conceded that they contain merit.

Accordingly the motion for rehearing is denied.

#### PARKS v. STATE.

(Court of Criminal Appeals of Texas. May 30, 1906.)

##### 1. ELECTIONS—NOTICE OF HOLDING—LOCAL OPTION LAW—TERRELL ELECTION LAW.

The Terrell election law (Gen. Laws 28th Leg. 1903, p. 133, c. 101) did not repeal the local option law, and hence notices of local option elections, posted as required by the local option law, were not objectionable because not posted for the length of time required by the Terrell election law.

##### 2. INTOXICATING LIQUORS—OFFENSES—C. O. D. SALES—PLACE.

Whisky was sent C. O. D. to defendant in C. county, and he, on the application of the witness S., gave an order on the express agent, directing him to turn the package over to S. S. presented the order, paid the C. O. D. and express charges, and received the whisky. Held, to constitute a sale of the whisky in C. county.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 162.]

Appeal from Coryell County Court; R. E. West, Judge.

L. D. Parks was convicted of violating the local option law, and he appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment fixed at a fine of \$25 and 20 days' confinement in the county jail.

It is agreed that the local option election was valid and in force in Coryell county at the time of the alleged offense, unless notices of the holding of the election should have been posted under the Terrell election law. (Gen. Laws 28th Leg. 1903, p. 133, c. 101). This question was decided adversely to appellant's contention in *Ex parte Keith*,



83 S. W. 683, 11 Tex. Ct. Rep. 501, it being there held that as to notices of local option election, the Terrell election law did not apply; that it was only necessary to comply with the character of notices required under the local option election law. It is not stated whether this election was held under the former Terrell election law, or under the one passed by the Twenty-Ninth Legislature. We take it, that it was under the former election law.

The question is presented whether, under the facts, this was a sale at Gatesville, Coryell county, by appellant. The statement of facts shows that the whisky was sent C. O. D. to L. D. Parks, at Gatesville; and Parks, on the application of witness Shoaf, gave an order on the express agent to turn over the package of whisky to Shoaf; Shoaf presented the order, paid the C. O. D. and express charges on the whisky, and received the package. This would constitute a sale in Coryell county. *Dunn v. State*, 86 S. W. 328, 12 Tex. Ct. Rep. 803; *Caton v. State* (May 2, 1906) 95 S. W. 540; *McElroy v. State* (April 18, 1906) 95 S. W. 539. The same question as to S. P. Sadler, being with the grand jury when the indictment was presented, is decided against appellant's contention in *McElroy v. State*, supra.

No error appears, and the judgment is affirmed.

BROOKS, J., absent.

#### MAYS v. STATE.

(Court of Criminal Appeals of Texas. May 9, 1906. On Rehearings, May 30, & and June 26, 1906.)

On Rehearing.

#### 1. JURY—TALESMEN—SELECTION—STATUTES—CONSTRUCTION.

Gen. Laws 29th Leg. p. 17, c. 14, amending Code Cr. Proc. 1895, art. 647a, provides that whenever the names of persons selected by the jury commissioners to do jury service for the term shall have been drawn once to answer a venire facias, the names of the persons selected by the commissioners, and which form the special venire list, shall be taken into court, from which shall be drawn the number of names required for further venire service, from which names shall be drawn and a list made and delivered to the sheriff for service, etc. *Held*, that such act had no application to the selection of talesmen, and hence, where the original special venire drawn and summoned in a capital case was exhausted, it was proper for the court to direct the sheriff to summon talesmen according to his own selection, as authorized by Code Cr. Proc. 1895, art. 649.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 333-342.]

#### 2. CRIMINAL LAW—ARRAIGNMENT—TIME.

Where, because of oversight, accused was not arraigned at the beginning of the trial, an arraignment while the trial was in progress and the jury was being impaneled was sufficient.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 618.]

#### 3. SAME—ABSENCE OF JURORS.

Before accused could complain of being compelled to proceed in the absence of certain jurors who had been summoned, he must have asked that the case be postponed a reasonable time to enable the absent jurors to be procured.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Criminal Law, §§ 2847, 2859.]

#### 4. JURY—QUALIFICATIONS—HOUSEHOLDERS.

Where a juror owned and controlled a room, he was qualified as a householder.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 256.]

#### 5. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT.

Remarks of the district attorney in his closing argument, in which he attempted to picture to the jury the graveyard, the new-made grave, etc., the gray-headed father and the broken-hearted mother shedding tears over the grave of their only son, slain by the defendant, while objectionable, were not reversible error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1676.]

#### 6. HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.

A day or two before the homicide, deceased, a boy 18 or 20 years of age, called defendant, a negro, "Irish." Defendant was offended, and warned deceased not to so refer to him again; but deceased did so on two subsequent occasions, whereupon defendant drew a pistol and shot deceased, causing his death. *Held*, that such facts were insufficient to require a charge on manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 650-653.]

#### 7. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—PREJUDICIAL ERROR.

Where a bill of exceptions recited that accused was forced to exercise a peremptory challenge with reference to a juror claimed to be disqualified because he was not a householder, and was thereby compelled to accept S., a further objectionable juror, it was insufficient to show prejudice, for failure to allege that accused exhausted his peremptory challenges, or in what manner S. was objectionable.

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

H. L. Mays was convicted of murder in the first degree, and he appeals. Affirmed on rehearing.

T. M. West and C. A. Davies, for appellant. McGrady & McMahon and J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death; hence this appeal.

The circumstances of the case, briefly stated, are to the effect that appellant (a negro) was working about the yards of the Southern Pacific Railroad Company, and deceased, a white boy about 18 or 20 years old, was also an employé about the yards. A day or two before the homicide it appears that the white boy called appellant "Irish." Appellant seemed to get offended, and told him not to call him that; that his name was Mays. That evening or the next day he called him "Irish" again.

Appellant again warned him not to call him "Irish," that his name was Mays, and told him, if he called him that again, the third time was the charm, or something to that effect. Subsequently on the same day, or the next day, as appellant was passing where deceased was, deceased remarked to those with him, so appellant could hear him, "There goes Irish," or "What is the matter with Irish?" Whereupon appellant drew a pistol and shot deceased through the window; deceased at the time being in the office. He shot a second time. These shots caused the death of deceased. The plea of appellant was insanity.

In the view we take of this case, it is only necessary to determine one question; that is, the action of the court in ordering talesmen to fill out the special venire after the original list was exhausted. It appears that after the original special venire was exhausted the court ordered the sheriff to summon talesmen; that is, to select them himself. The first list of talesmen ordered was 80, and after this was exhausted a second list was ordered for 100. From these lists the jury was completed; only three of the jurors being impaneled from the original special venire. This action of the court is challenged in two bills of exceptions, which bring in review the proper interpretation of the act of 1905, with reference to talesmen or special venires, as required by the amendment to title 62, cc. 4, 5, Rev. St. 1895, and of title 8, c. 2, Code Cr. Proc. 1895, passed by the Twenty-Ninth Legislature. Acts 29th Leg. p. 17. An interpretation of this act has been before this court so far in only two cases, to wit, *Gabler v. State* (decided at present term) 95 S. W. 521, in which it was held that the original venire list must be drawn according to the old law (article 647, Code Cr. Proc. 1895), and *Thomas Moore v. State* (decided at the present term) 95 S. W. 514, in which it was held that, if the name of a juror appears more than twice on the special venire, the same is not a ground for quashing said special venire, but only affords a ground for excusing or challenging the particular juror. Formerly, after the original special venire, as drawn by the clerk and issued under article 647, was exhausted, then the sheriff was authorized under the order of the court to summon talesmen to complete the jury of his own selection under article 648, Code Cr. Proc. 1895. The amendment by the Twenty-Ninth Legislature, referred to above, was evidently to change this mode of procedure, and to require of the court, in order to constitute a list of talesmen from which the jury should be completed, after the original special venire had been exhausted, to require the jury commissioners to "select one man for every one hundred of population in any county, or a greater or less number, if so directed by

the court, and these shall constitute a special venire list from which shall be drawn the names of those who shall answer the summons to the special venire facias, after the petit jurors for the term have been drawn on any venire one time during such term," etc. Evidently it was intended by the Legislature to take out of the hands of the sheriff entirely the selection of talesmen to complete the jury after the special venire list had been exhausted, and to provide a list of jurors selected by the jury commissioners, which should in every capital case constitute a list out of which should be drawn talesmen to complete the jury, and these should be furnished to the sheriff, and he directed to summon only these. We think this construction is manifest from all the provisions of the act. As was held in *Moore's Case*, supra, the provisions of said act providing against a juror being drawn more than twice on any venires at that term, etc., does not render the act of the clerk void, or the writ void, in case a juror is drawn more than twice from said venire list, but affords merely a privilege to the juror, etc.; thus not antagonizing, but strengthening, the construction we have placed upon the act of the Legislature which provides for the repeal of all laws and parts of law in conflict with the provisions of the amendment. Now, as stated above, the court did not follow this amended law of the Legislature, but proceeded under the law as it existed before the amendment; and this was done over appellant's exceptions. Was the jury so constituted a legal tribunal for the trial and disposition of his case? It is not a question as to the fairness or impartiality of the jury that tried the case, but simply involves the proposition, was the appellant tried by a jury provided by law for the trial of his case? The law, as we have seen, required the court to resort to a special venire list, provided to be drawn by jury commissioners. Instead of using this list, he authorized the sheriff to proceed to select talesmen himself, thus doing the very thing which we believe the new law was intended to provide against. We hold that appellant was thus deprived of the jury list of talesmen which the law authorized, and the list thus furnished was not one authorized by law. As was said in *Clay v. State*. 40 Tex. Cr. R. 603, 51 S. W. 370: "And if the court can abrogate the statute, as was done in this case, he can do it in every instance; and, instead of furnishing the defendant with a special venire as provided by law, the court may furnish the defendant with a jury selected by the court, and not through the legal machinery as required by our statutes on the subject. It is not necessary here to discuss the importance to a defendant in a capital case of being tried by a jury of his peers as provided by law. Its importance is too well recognized to re-

quire discussion or authority, and all of our statutes in this connection are made as safeguards to preserve it; and to hold that the jury as summoned in this case, and who responded to the summons, was a legal venire, would be to undo and destroy the procedure provided by law, and to authorize another mode of summoning the jury in a capital case." *Burries v. State*, 36 Tex. Cr. R. 14, 35 S. W. 164; *Farrar v. State*, 70 S. W. 209, 5 Tex. Ct. Rep. 907; *White v. State*, 45 Tex. Cr. R. 597, 78 S. W. 1066. We accordingly hold that the court committed reversible error in authorizing the sheriff to select and summon talesmen to complete the jury which tried appellant.

In view of another trial, we would suggest that the court's charge on murder in the second degree be more fully given, and that the court in that respect define adequate cause. We would further suggest that, while a sudden transport of passion without adequate provocation may reduce to manslaughter, this charge is not comprehensive of all manslaughter. There may be manslaughter, as defined by our statutes and decisions, without same originating in a sudden transport of passion. *Gaines v. State* (Tex. Cr. App.) 53 S. W. 623. We would further observe that it does not occur to us, as the record now presents itself, that manslaughter is in this case. However, if proof should be made on a subsequent trial that by the use of the term "Irish" appellant understood deceased to question his legitimacy—that is, to refer to him as a bastard—a charge on manslaughter may become necessary.

For the error discussed on the formation of the jury, the judgment is reversed, and the cause remanded.

#### On Rehearing.

This case was reversed at a previous day of the term, and now comes before us on the state's motion for rehearing. In connection with the brief of the Assistant Attorney General, there is also filed a very able brief by Messrs. McGrady & McMahon, of the Bonham bar. By the motion and briefs the original opinion construing the special venire law passed by the Twenty-Ninth Legislature (Gen. Laws, p. 17, c. 14) is questioned, and we are asked to reconsider the holding of the court on that subject. In the original opinion we held that after the original special venire drawn and summoned in the case was exhausted, in summoning talesmen the court was required to resort to the special venire list drawn by the jury commissioners at the preceding term of the court, and draw them from this and make a list of them, and that the sheriff should summon these as talesmen in order to complete the jury, and that the sheriff was not authorized to summon talesmen in-

discriminately of his own selection as under the former law. A careful review of the amendment constrains us to hold we were wrong in our interpretation and construction of said amended law. It will be noted that the act of the Legislature is an amendment, in one act, of the Revised Civil Statutes, and is also an amendment of article 647a of the Code of Criminal Procedure of 1895. The amended or added articles all relate to special venires. We held that one of the objects and purposes of the amendment was to take from the sheriff the selection of special veniremen. We were in error as to that matter, as a closer scrutiny of the act in question indicates that the purpose of the new law was to equalize, as near as practicable, the jury service among those amenable to the same, and to prevent imposing on any one juror the burden of service in more than two special venires at any one term of the court. Of course, the amended statutes have the right of way, and by the very terms of the act (section 4) repeal all laws and parts of laws in conflict with the provisions of the amendment. It was not meant, however, to repeal other laws not in conflict therewith, and, before we would be authorized to indulge a repeal by implication, the evidence of legislative intent to make the repeal must be clear and manifest.

Now, bearing in mind the object and purpose of the Legislature in making the amendment as above stated, we find that article 3159a gives to the jury commissioners simply a new authority to that possessed by them under the old law, and this authority is stated, "to select one man for every one hundred in population in any county, or a greater or less number, if so directed by the court, and these shall constitute a special venire list," and in addition they are authorized to be drawn after the petit jurors for the term have all been drawn one time on venires, provided that no citizen shall be compelled to serve more than twice on special venires during one term of the court, or, if such juror has served one week during the term on petit juries, he cannot be compelled to serve on more than one special venire. There is nothing here, nor in any part of the amended act, suggesting a change as to the manner of procuring the original special venire, as was held in the original opinion; but, as is manifest, the purpose of the act being to equalize jury service among the citizens amenable thereto, in order to increase the number of special veniremen—that is, those who shall constitute special venires in the first instance, after the jurors for the week have been exhausted in obtaining special venires in capital cases to be tried during the term—this amended article provides a further list of names from which special venires are to be

drawn after the jurors for the term have been drawn once on any special venire. By reference to article 647a, which is intended to take its place in the Code of Criminal Procedure immediately succeeding article 647, it is provided that, in drawing special venires, "whenever the names of the persons selected by the jury commissioners to do jury service for the term shall have been drawn one time, to answer summons to venire facias, then the names of the persons selected by the said commissioners, and which form the special venire list, shall be placed upon tickets," put in the box, and drawn as is provided for drawing special venires, etc., and it makes it the duty of the clerk to prevent the names of any person from appearing more than twice on all special venires. Of course, this, being on the same subject, is construed in *pari materia* with what had gone before, and evidently refers, not to talesmen, but to additional special venires. This article nowhere mentions talesmen, and only authorizes the special venire list drawn by the commissioners in accordance with the amended Civil Statutes to be resorted to after the jurors for the term have been exhausted by drawing each of said jurors once upon any special venire list. Nothing is said about talesmen, and no provision of either of the amended articles relates to the selection and summoning of talesmen. Nor is there any conflict between the provisions of said amended articles, and article 649, Code Cr. Proc. 1895, which relates to the selection and summoning of talesmen. Said article 649 is as follows: "When from any cause there is a failure to select a jury from those who have been summoned upon a special venire, the court shall order the sheriff to summon any number of persons that it may deem advisable for the formation of the jury." There being no inconsistency between the amendment to the old law relating to talesmen, of course, both stand, and the manner of selecting talesmen remains unchanged.

It appears from appellant's bill of exceptions No. 2 that after the original special venire list was exhausted the court ordered the sheriff to summon 80 men, selecting the same as he was authorized under article 649. Bill No. 3 shows that this list of 80 men was exhausted and the jury was left incomplete, when the judge ordered the sheriff to summon 100 additional talesmen out of which to complete the jury, to be selected by him as heretofore stated. It further appears from the bills that the oath was administered to the sheriff and his deputies by the court at the time the talesmen were ordered. Said oath is provided for in article 3194, Sayles' Rev. Civ. St. Appellant's exception, as shown in the original opinion, challenged this method of selecting talesmen. We now hold, in accordance with the

views hereinbefore expressed, that the method adopted was correct and in accordance with law.

We note that appellant made a motion to quash the original special venire because of alleged defective return of the sheriff. We have examined the same, and in our opinion the return was sufficient, and there was no error in the action of the court. Only 78 out of the list of 100 ordered to be summoned were served, and we think as to those not served the excuse shown by the sheriff for failing to serve them was sufficient; at least, it did not authorize a quashal of the writ.

Appellant excepted to the time and manner of his arraignment. The bill shows that appellant, from some cause, was not arraigned at the beginning of the trial; but while it was in progress, and while the jury was being impaneled, the attention of the court was called to the matter, and he was then arraigned. We think this was sufficient.

Appellant excepted to the action of the court in forcing him to proceed in the absence of certain jurors who had been summoned. The court shows that in each instance, when a juror who had been summoned failed to answer, the court ordered the clerk to issue an attachment for him to appear instantan, which was done; and it is not shown in the bill that appellant craved a postponement of the case on account of the absence of any particular juror, to enable said juror to be procured. Before he would be in condition to complain, he should have asked that the case be postponed a reasonable time to enable the absent juror to be procured.

We think the juror Fritz Strubner was a householder. He owned and controlled a room.

Appellant excepted to certain remarks of the district attorney in his closing argument, in which he suggested to the jury to go with him to the graveyard, see a new-made grave, etc., and the gray-headed father and broken-hearted mother shedding tears over the grave of their only son slain by this defendant. Appellant asked a special charge eliminating this matter from the consideration of the jury. The court, in explanation, says that it was in response to an appeal by defendant's counsel to consider his relatives. It does not occur to us that such an appeal on the part of defendant would authorize the remarks made by the district attorney. However, this is not reversible error.

The charge of the court on murder in the first and second degrees, as stated in the original opinion, is not subject to the exceptions urged by appellant. A special charge given at the instance of appellant supplemented the charge on murder in the second degree given by the court, and that, in connection with the original charge, fully

safeguarded appellant's rights. There was no charge on manslaughter, nor do the facts presented in this record require such a charge. The charge on insanity was full. The requested charges of appellant on manslaughter and insanity were not required; the court having given a sufficient charge on manslaughter.

No error appearing in the record, the judgment is affirmed.

BROOKS, J., absent.

On Second Rehearing.

HENDERSON, J. Appellant has filed a motion for rehearing. Among other things he urgently insists that, if we adhere to the holding in the McArthur Case, 57 S. W. 847, which followed Lane's Case, 29 Tex. App. 310, 15 S. W. 827, this case must be reversed, because the court overruled appellant's challenge to the juror Fritz Strubner, whom appellant claims was, in accordance with the decisions, not a householder. It does appear in said cases that said juror would not be regarded as a householder, though there is some difference between the facts connected with the juror's qualification in this case and those cases. However, if it be conceded that said cases are correct,

and that this juror comes within the rule there laid down, and not under the doctrine of Robles v. State, 5 Tex. App. 346, still appellant's bill is not in a condition to raise this question. It does not show that appellant exhausted his peremptory challenges and an objectionable juror was forced upon him. The bill says in that respect as follows: "That the defendant was forced to exercise a peremptory challenge as to said juror, and thereby force upon him a further objectionable juror, to wit, H. L. Scott." This does not show that appellant exhausted his peremptory challenges, nor does it show, in accordance with the decisions of this court, that H. L. Scott was in any wise objectionable; that is, that he was not a fair and impartial juror. The mere statement that H. L. Scott was objectionable is not sufficient. We hold that no error was shown by appellant's bill of exceptions with reference to the action of the court as to this matter.

We have reviewed sufficiently the other questions raised in the motion, and do not deem it necessary to discuss them further. We adhere to the views expressed in the original opinion.

The motion for rehearing is overruled.

BROOKS, J., absent.

**SECOND NAT. BANK v. PREWETT et al.**  
(Supreme Court of Tennessee. Sept. 1, 1906.)

**1. BILLS AND NOTES—INDORSEMENT—PAYMENT—DISCHARGE OF INDORSERS.**

Plaintiff held a note on which defendants were indorsers, subject to a collateral agreement that the maker was entitled to pay off the note at any time and obtain a rebate of interest. The makers paid the note, and within a few days thereafter, a petition in bankruptcy was filed against them, and the trustee recovered the amount of such payment from plaintiff as a preference. *Held*, that such payment was insufficient to discharge the indorsers.

**2. SAME—BANKRUPTCY OF MAKER—FAILURE TO FILE CLAIM IN BANKRUPTCY.**

Where after the makers of a note had paid the same to the holder, their trustee in bankruptcy recovered the payment as a preference, it was the holder's duty to file the note as a claim against the bankrupt's estate, and hence on its failure so to do, it was entitled to recover from the indorsers only the difference between the amount of the note and interest, and the amount of the dividends it would have received from the bankrupt's estate, if the note had been properly filed.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 706, 715.]

Appeal from Chancery Court, Madison County; A. G. Hawkins, Chancellor.

Action by the Second National Bank against R. E. Prewett and another. From a judgment in favor of the latter, the former appeals. Reversed.

W. H. Biggs, for appellant. C. G. Bond, for appellees.

NEIL, J. On the 10th of January, 1900, Prewett & Co. executed to the order of J. T. Rushing, R. E. Prewett, and J. T. Jones, a note in the sum of \$2,500, maturing 12 months after date. This note was indorsed by the payees, waiving demand and notice to the Second National Bank. The indorsers had no beneficial interest in the transaction, the note having been made merely for the accommodation of Prewett & Co. When the note was negotiated to the bank, there was a collateral contract entered into between it and Prewett & Co. to the effect that the latter should have the right to pay the debt before due, and to have a rebate of interest from the time between the date of payment and maturity.

On the 18th of September, 1900, Prewett & Co., through their representative, J. J. Prewett, claimed of the bank the right to pay off the note, and were permitted to do so; a rebate of \$68 being allowed for the difference of time.

Within a few days after this payment, the creditors of Prewett & Co. filed a petition in bankruptcy against them, and they were duly adjudged bankrupt. An action was brought by Harris, the trustee in bankruptcy, against the bank, and he recovered in this action the full amount which had been paid to the bank. The aggregate was \$3,100, and interest. This included not only the payment on the \$2,500 note, but likewise payment of

an overdraft of about \$600, and part payment of a note of \$793, indorsed by J. T. Rushing.

The controversy in the Harris Case is reported under the name of *Harris v. Bank*, 119 Tenn. 239, 75 S. W. 1053.

The amount recovered from the bank was paid into the bankruptcy court, and was there prorated among the other creditors of Prewett & Co.; the bank not having filed any claim.

After the bank had paid the judgment, it brought the present suit against R. E. Prewett and J. T. Rushing, indorsers on the \$2,500 note, to recover two-thirds thereof; the other indorser, J. T. Jones, having already paid one-third without suit.

The defendants insist that they are not liable and refer for authority to *Harris v. Bank*, supra. In that case, the court did not have before it the question here presented, and what was said upon the liability of indorsers, appeared only in a quotation from *Bartholow v. Bean*, 18 Wall. (U. S.) 633, 21 L. Ed. 866. There is nothing in the opinion in *Harris v. Bank* that in any way bears upon the present controversy, except the observation that the bank was not compelled to accept payment of the amount of the note on penalty of releasing the indorsers. In the present case, it appears there was a collateral agreement between the bank and the makers to the effect that the makers would have the right to pay the note before maturity and obtain a rebate. This agreement was in the nature of a security or counter security for the benefit of the indorsers, and if the bank had refused to accept the money thereon, the indorsers could afterwards have claimed a release.

The bank was, then, in this position. A valid payment was offered to it, which it dared not refuse on penalty of losing its indorsers. It is said, however, that Prewett & Co. were insolvent, and the bank knew such to be the fact. This is true, but there might never be any proceeding in bankruptcy instituted against them. In that event, the payment would continue good. The indorsers were entitled to this benefit, and if the bank had refused when offered, they would have had just ground of complaint. What was said in *Bartholow v. Bean* as to the nonliability of the indorser was mere dictum. The case did not call for it. The action there was by the assignee in bankruptcy against a creditor who had received a preference to recover the amount so paid. No question of the liability of an indorser was involved. See, on the general subject, *Swarts v. Fourth National Bank*, 117 Fed. 1, 9-13, 54 C. C. A. 387; and cases cited; *Watson v. Poague*, 42 Iowa, 582, 583; *Pritchard v. Hitchcock*, 6 Man. & G. 151; *Petty v. Cooke*, L. R. 6 Q. B. 790, 794-796.

The facts in *Watson v. Poague et al.* were these: *Watson* held a promissory note for \$500 executed jointly by *Poague*, and *Wood*

and one John W. Griffith. After the note became due, Griffith made a payment of 409.95 on it, and within four months thereafter was adjudged a bankrupt on the petition of creditors other than Watson. After the adjudication in bankruptcy, Poague and Wood paid to Watson's clerk, who was ignorant of the circumstances, the residue of the note, and took it up. The assignee in bankruptcy recovered of Watson the amount which had been paid him by Griffith. Watson thereupon brought his suit in equity against Poague and Wood, praying that they be ordered to deliver up the note, that the entry of credit thereon of \$409.64 paid by Griffith, be declared void, and that the plaintiff, Watson, have judgment against the defendants Poague and Wood for that sum, with interest and costs. In affirming a judgment in favor of Watson for the amount claimed, the court said that the true ground of relief was, not that the entry of credit was made by mistake, but that Watson had lost the benefit of the payment for which the entry of credit was made on account of the subsequent proceedings in bankruptcy, "an event which, at the time of payment, was wholly contingent, and, therefore, beyond the knowledge of any human being"; that it was immaterial whether he did or did not know the provisions of the bankrupt act, or whether he did or did not know that Griffith was insolvent; that it was proper for him to receive the payment, but if he received it knowing that Griffith was insolvent, he received it subject to the rightful claim of an assignee in bankruptcy should an adjudication take place upon petition filed within four months thereafter.

"It is true," continued the court, "that the receiving of the payment under such circumstances is called, in the bankrupt act, accepting a fraudulent preference, but it was not an actual fraud, nor would it have been even a constructive fraud, if an adjudication in bankruptcy had not taken place upon a petition filed within four months. Besides, whatever was done was not done with intent to wrong the defendants, but rather to protect them. If plaintiff had declined to receive the payment, especially if Griffith was insolvent, the defendants might justly have complained. There was at least a possibility that no adjudication in bankruptcy would take place upon a petition filed within four months. But it did take place, and now the plaintiff asks relief, not against his own fraud, but because the payment which he properly received has been held, by reason of what afterwards transpired, and under the peculiar provisions of the bankrupt law, to have been made to him in trust, for all of the creditors of Griffith."

In *Pritchard v. Hitchcock*, it appeared that the plaintiff had lent to William Hitchcock a large sum of money, the payment of which was guaranteed by George Hitchcock. Subsequently William paid the debt, but was

at that time "in a state of complete insolvency." Within a few days thereafter a "flat in bankruptcy" issued against William, the assignee under which brought an action against Pritchard to recover the money so paid by the bankrupt, upon the ground that the payment was a fraudulent preference, in which action they succeeded. Thereupon Pritchard brought his action against the guarantor, George Hitchcock. It was held that the payment did not amount to a satisfaction.

In *Petty v. Cooke*, the facts were that Cooke for the accommodation of Steele executed with him a promissory note for \$100, payable to Petty. Steele paid it in contemplation of insolvency, and Petty innocently accepted the amount. Afterwards Steele's trustee in bankruptcy recovered of Petty the amount which the latter had received from Steele. Petty then brought an action against Cooke, the accommodation maker, and he pleaded that the acceptance by the plaintiff of the payment which had been made by Steele discharged him, Cooke, from liability as a co-maker or surety. The court of Queen's Bench held otherwise.

Blackburn, J., said: "Is there any case which says that an innocent act, unconsciously done, discharges the surety? \* \* \* The creditor accepts the money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety. He therefore did no act injurious to the surety, and the surety is not discharged." Lush, J., said: "I am of the same opinion. The rule of law and equity with regard to the rights of a surety is the same. I do not entertain the slightest doubt that the act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done, and which interferes with the rights of a surety; an acceptance of money from the debtor, which the creditor thought at the time he accepted it was a good and valid payment, cannot, therefore, discharge the surety. The creditor, under the present circumstances, could not have refused to accept the money; its acceptance was an advantage, not an injury, to the surety." Hanner, J., said: "I am also of the same opinion. Lord Eldon puts it that the surety is discharged when the creditor has done anything which is 'against the faith of his contract.' How can it be against the faith of his contract for the creditor to do that which it was his duty to do, namely, to receive payment? It turned out afterwards that the payment was not a good payment, and therefore the surety is not discharged."

Judge Sanborn, after citing the foregoing opinion, said in *Swarts v. Fourth National Bank*, supra, a case presenting a similar question:

"Those opinions are well grounded in reason, clear and persuasive. They lead to just

and equitable results, and they are exactly applicable to the facts of this case. The bank was guilty of no fraud or wrong when it accepted payment from the insolvent. The indorsers, as well as the bank, knew that any payments made upon the notes by the principal debtor were liable to be recalled as a condition of the allowance of the claim of the bank against its estate, if the maker of the note was adjudged a bankrupt upon a petition filed within four months of the payments. Their contract was conditioned by this fact, and by the statute which called it into being. The acceptance of such payments was not forbidden by the moral or by the civil law. The bank did not know, and could not foresee, that the principal debtor on the note would become a bankrupt within four months from the payments. The holder of a surety's obligation may discharge it if he knowingly does any act to diminish his security or his opportunity to enforce it, or any act to increase his liability. But the acceptance of these payments did none of these things. A refusal to accept them might well have been held to be an act so likely to entail unnecessary loss upon the accommodation makers that it would discharge them. But the receipt of the money was an act of reasonable diligence—an act in the rational discharge of the duty of the bank towards the sureties. It hoped and believed that the money it received would be a payment upon the debt. If it returns it, no payment has been made by the receipt of it. The debt remains unpaid, because the money received turns out to be the property of the bankrupt estate, which the bank holds in trust for and returns to the state under the law. The sureties are not discharged by the payment and satisfaction of any part of the notes, because no payment and satisfaction were affected. They are not discharged by any act or negligence of the creditor, because it has been guilty of none which either increased their liability or diminished their security or their opportunity to enforce it. The only just and equitable conclusion is that the accommodation makers, indorsers or sureties upon the obligation of an insolvent debtor are not discharged from liability to pay them by the innocent acceptance by their creditor, of payments thereon from the insolvent debtor which the creditor is subsequently required to and does surrender to the latter's trustee in bankruptcy as a condition of the allowance of its claim under section 57g of the bankruptcy act." Act July 1, 1898, c. 541. 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

The duty of the present complainant was, upon the adjudication in bankruptcy of Prewett & Co., to surrender the preference and file its claim for allowance. 5 Cyc. 330, 331. It was compelled to restore the money, but failed to file its claim against the estate. The extent of the injury suffered by the in-

dorsers through this failure is measured by the amount that would have been realized by the bank if it had filed the claim, and which was lost by not filing it. For this injury the bank must account in the abatement of its demand.

The record shows, without controversy, the amount of the debts filed in this proceeding, the assets, and the pro rata paid. To the debts should be added the \$2,500 note, and the pro rata figured on that basis as of the date of the pro rata which was made in the bankruptcy proceedings. The pro rata amount thus ascertained for the \$2,500 note will show the sum the bank would have received had it filed its claim. The amount so found must be deducted from the note.

It is conceded that on the basis above fixed, the pro rata amount applicable to the \$2,500 note would have been \$837. Deduct this amount, also the sum paid by Jones, the third indorser, and enter judgment for the bank for the balance and interest, against defendants Prewett and Rushing.

It is insisted that the settlement should be made on the basis of the bank's filing the whole of its demand against Prewett & Co., that is the overdraft and the amount which had been received on the Rushing note. We cannot deal with that phase of the matter in the present case. The bank had no duty resting on it to any third party in respect of the overdraft. Nor can we deal with the \$795 note; that matter is not before us. We have referred to it in a preceding part of the opinion, merely in an incidental way, in stating the history of the transaction.

Judgment as above directed.

## WATERS-PIERCE OIL CO. v. BURROWS.

(Supreme Court of Arkansas. Nov. 11, 1905.)

### 1. JURY—PEREMPTORY CHALLENGES—NUMBER ALLOWED.

Under Kirby's Dig. § 4536, declaring that in civil cases each party shall have three peremptory challenges, and section 4540, providing that where there are several persons on the same side, the challenge of one shall be the challenge of all, all the defendants in a case are entitled in the aggregate to only three peremptory challenges.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 607-609.]

### 2. EXPLOSIVES—INJURIES FROM ACCIDENT—ACTIONS—EVIDENCE—PREJUDICIAL EFFECT.

In an action against an oil company for damages caused by an explosion alleged to have resulted from the negligence of the oil company in delivering gasoline to a tank connected with a private lighting system, it appeared that the gasoline was emptied from the barrel into the tank by means of a siphon and a funnel. An employé of the defendant was asked why the oil company got a certain rotary pump, and answered that the one they had would not do, and was further asked if it was not true that they got the pump for the purpose of delivering gasoline into the tank in question, and responded that he did not remember. *Held*, that this testimony was not prejudicial to defendant.



### 3. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of evidence tending to establish an undisputed fact is not prejudicial.

### 4. SAME.

In an action against an oil company for injuries resulting from an explosion of gasoline which it was alleged escaped because of the negligence of one of defendant's servants in filling a tank connected with a private lighting system, it was claimed that defendant was negligent in the use of a siphon and funnel in filling the tank. Evidence was admitted of a conversation between defendant's servant and the person who installed the lighting plant, which conversation occurred on an occasion prior to that when it was alleged that the gasoline was negligently spilled and during which the person who installed the plant told defendant's servant not to undertake to fill the tank with a siphon, but to use a rotary pump, and that the siphon was not safe because the rate of flow could not be controlled as it could when a pump was used. *Held*, that the testimony as to this conversation was incompetent, but not prejudicial.

### 5. EXPLOSIVES—INJURIES FROM ACCIDENTS—ACTIONS—EVIDENCE.

Evidence by the person who installed the plant that the pump was safer than the siphon, because the flow of gasoline in the former could not be controlled, and that he had tested the siphon and had found it impracticable, was competent.

Appeal from Circuit Court, Garland County; A. M. Duffie, Judge.

Action by J. C. Burrows against the Waters-Pierce Oil Company and others. From a judgment for plaintiff, the above-named defendant appeals. Affirmed.

This action was brought in the Garland circuit court by J. C. Burrows against Waters-Pierce Oil Company, Arkansas Gas Company, Chambers & Walker, Sam Mayer, and Leo Mayer, to recover damages for personal injuries caused by an explosion of gasoline vapor, which occurred on the 24th day of December, 1902, in a building at Hot Springs known as the "Turf Exchange," while gasoline was being delivered by an employé of the Waters-Pierce Oil Company in a storage tank connected with a gas generating machine on the premises of the Turf Exchange. Plaintiff alleged in his complaint that the defendants, "acting together and in concert through their agents, servants, and employés, then and there unlawfully, carelessly, and negligently proceeded to transfer the gasoline from the vessel in which it was carried" to the lot on which the Turf Exchange is situated, "and in so transferring the gasoline the defendants unlawfully, negligently, and carelessly allowed the gasoline to escape and run out and under the floor of the building on the lot, and unlawfully, negligently, and carelessly allowed the gasoline to explode and wreck the building, and inflict great and serious injuries" upon the plaintiff, he being in the building at the time. For the damages sustained by him he asked for judgment in the sum of \$10,000.

The defendant Waters-Pierce Oil Company answered and denied specifically each

allegation of the complaint as to its negligence, or that of its agents or employés.

The action was dismissed as to Sam and Leo Mayer, and the jury returned a verdict in favor of the Arkansas Gas Company and Chambers & Walker, and in favor of the plaintiff against the defendant Waters-Pierce Oil Company, and assessed his damages at \$1,100.

### Statement of Facts.

The evidence adduced at the trial in the case tended to prove the following among other facts:

The defendants, Chambers & Walker, "were lessees of a two-story building in Hot Springs, in this state, known as the 'Turf Exchange' in which they conducted a saloon and gambling rooms. The first floor was a large single room which opened on Central avenue and extended back westwardly the entire length of the building to an open area extending back to Exchange street. There was a bar in the front of this room on Central avenue, and in the portion back of the bar, separated by a low partition, Sam and Leo Mayer, as copartners and sublessees of Chambers & Walker conducted a poolroom in which they sold pools, or accepted wagers on horse races."

A short time before the 24th of December, 1902, "Chambers & Walker entered into a contract with the defendant, Arkansas Gas Company, to place on the Turf Exchange premises an automatic gas machine plant for supplying vapor illuminating gas \* \* \* in the entire Turf Exchange Building." This was done, and the machine "was accepted and put in operation by Chambers & Walker four or five days before the explosion occurred."

"In the rear and a few inches lower than the first floor of the Turf Exchange was an open area or yard, which was of the same width as the building, and extended back about 16 feet to a stone retaining wall 12 or 13 inches thick located on the line of Exchange street, on which the rear of the premises abutted. The top of this retaining wall was 8 or 9 feet above the area and on a level with the adjoining sidewalk, and had on it a board fence 6 or 7 feet high, with a door opening from the street to a platform and stairway leading down into the area.

"The area was paved with granitoid, except inside of a coal shed located at the southwest corner of the area. This shed was about 10 feet by 6 feet square, and its west wall was a part of the stone retaining wall and of the board fence on top of the latter.

"At the time the gas machine plant was placed on the premises, there was near the rear wall of the Exchange Building, at the northeast corner of the area, a drain opening, with a grated cover, for draining the

area; there were also two narrow horizontal ventilator openings, one on either side of the rear door, through the wall, two or three inches above the floor of the area, which opened into the space over the pool-room. On the south side of the area there was a wall of a building, partly bricks and partly boards, and on the north side was a high board fence.

"The gas machine plant consisted of an engine, generator, etc., a galvanized iron storage tank for holding a supply of gasoline, with pipes (two), connecting the engine and tank, and also a line of pipe connecting the storage tank with an iron receiving box in the sidewalk on Exchange street outside of the retaining wall.

"The engine and generator were placed in a small house, covered with sheet iron, and located in the southeast corner of the area next to the rear wall of the Turf Exchange Building and the wall of the building adjoining on the south. This little engine house was raised on blocks two or three inches above the granitoid paving so as to leave a clear space underneath, and there was a space of three feet three inches between it, and the east wall of the coal shed. That (the east) wall of the coal shed was double. The outside boards of the same were nailed into the frame of the shed, horizontally, close together, the lower board resting on the granitoid pavement, and a tier of open board shelves were hung on the outside wall, and extended over towards the opposite wall of the little engine house. On these shelves were laid a lot of empty glass bottles.

"The galvanized iron storage tank was cylindrical in form, 6 feet 6 inches long, and 18 inches in diameter, and would hold 67 gallons of gasoline. It was placed horizontally between the engine house and the coal shed, by cutting through the granitoiding of the area and excavating sufficient soil to permit of its being laid about one-half of its diameter below the surface. After it was laid in the trench, the tank was covered with two layers of brick laid on edge in cement plaster, and the whole was plastered over with a thick layer of cement, in such a way as to form a smooth arched mound, 7 to 7½ feet long and rising about 12 inches above the level of the area floor, which practically filled up the space between the engine house and the coal shed, with a slope towards each.

"The tank was connected with the generating machine proper by two small iron pipes, through one of which the machine automatically drew from the tank its supply of gasoline, and through the other discharged back into the tank any surplus of fluid. Neither these connecting pipes nor the engine, were involved in any way in the explosion, but still a knowledge of their

location, etc., is essential to a proper understanding of how the explosion occurred.

"There was also attached to the top of the tank, near its south end as it lay embedded in the area, an upright iron pipe 10 or 12 inches long and 1½ inches in diameter, which is called in the testimony the 'T-pipe' or the 'upright T-pipe.' The upper end of this pipe had threads cut in it, and was fitted with an iron cap which could readily be screwed off or on the pipe. Inside the tank was a 'float' with an upright wooden stick less than an inch in diameter, which extended up through the upright T-pipe for the purpose of indicating the quantity of gasoline there was in the tank while the latter was being filled, etc. With the cap of the upright pipe off, the end of this stick would rise up out of the pipe as the gasoline was filled into the tank. When the tank was full, the stick would stand about 6 or 8 inches out of the pipe, and when empty the end of the stick would be flush with the end of the pipe. This pipe was to be kept closed except when the tank was being filled, or it was desirable to know how much gasoline was in the tank.

"The line of pipe connecting the storage tank with the receiving box was arranged as follows: The end of a line of pipe, of the same inside diameter as the upright T-pipe on the storage tank was attached at right angles to the latter pipe where it joined the top of the tank, and extended thence, horizontally and obliquely with the tank, from 3 to 3½ feet to very near the outside east wall of the coal shed; thence up vertically through the tier of shelves 6 feet 3 inches; thence at right angles with the tank, through the east wall of the coal shed, and the stone retaining wall, to a point about 12 to 15 inches outside the latter wall and 12 inches below the surface of the sidewalk on Exchange street; thence vertically about 6 inches to the bottom of a cast-iron box, designated in the testimony as a "receiving box," and having a 1½ inch opening through the bottom to which the end of the 6-inch vertical pipe was attached.

"The receiving box was about 6 inches long, 5 inches wide, and 6 inches deep, with a hinged lid, and lock for locking the same when the box was not being used. It also had extending up from the bottom some 2 or 3 inches an open nipple or pipe, with thread on it for receiving a cap. This open nipple was a continuation of the opening in the end of the pipe attached to the bottom of the box. The box had also another open nipple extending through its bottom, but it was not utilized in any way in connection with this particular apparatus, and was filled underneath with the soil which the bottom of the box rested on. The box was sunk in the sidewalk a few inches outside the stone retaining wall, and bricks were laid around

it, and covered with cement in a way to leave about one inch of the box projecting above the bricks and the surface of the sidewalk. The sidewalk was not otherwise paved, but was reasonably solid and even.

"The line of  $1\frac{1}{2}$  inch pipe and the receiving box at the Turf Exchange were placed in the manner mentioned, so that the storage tank could be filled from time to time with gasoline, by passing the gasoline through the pipe opening, in the receiving box on the sidewalk, and permitting it to run, by gravitation, through the line of pipe into the storage tank in the area."

The Water-Pierce Oil Company is a wholesale dealer in petroleum oils, etc., and keeps a stock of oils, including gasoline, also an agent at Hot Springs, Ark., and at other towns and cities in the state. Four or five days before the explosion in question the Waters-Pierce Oil Company's agent at Hot Springs, in pursuance of an order received over the telephone that day, sent an iron barrel of what is known commercially as "88 degree gasoline" to the Turf Exchange, in charge of Ben Murray, the company's driver, for use in the gas plant. At that time the storage tank was sunk in the ground in the area, and had the upright T-pipe attached in position, but the tank was not bricked and cemented over, nor was the line of pipe extending up and out to the receiving box on the sidewalk, in position or connected with the upright T-pipe. When Murray reached the rear of the Turf Exchange on Exchange street, with the barrel of gasoline, he found the superintendent of the Arkansas Gas Company, Humphrey by name, directing the work then in progress on the gas plant, and Murray unloaded the barrel of gasoline, and placed it on end on the platform at the top of the flight of steps leading into the area. Murray had with him a hose having an iron "goose neck" nozzle at one end, used for siphoning oils and gasoline from one receptacle to another, and proceeded to siphon the gasoline from the barrel into the tank, immediately through the upright T-pipe on the tank. The inside diameter of the hose was one inch, and of the nozzle three-fourths of an inch. Murray at that time was standing in the area at the tank, and when the gasoline started to flow through the hose, for some reason, a small portion of it was spilled or escaped through the opening on the side and near the base of the upright T-pipe, in which the end of the line of the pipe leading to the receiving box was intended to be inserted. Murray says that it escaped there, while Humphrey says that it splattered out of the goose neck when Murray quit sucking and put his hand over the end of the "goose neck." Whatever the cause may have been, Murray, at Humphrey's direction, quit siphoning the gasoline and left the barrel of gasoline standing on the platform.

Some time later the receiving box was

placed in position in the sidewalk and connected with the tank by means of the line of pipe, in the manner heretofore explained. And, according to the testimony of Humphrey, the barrel of gasoline was emptied into the storage tank by placing the barrel on its side near the receiving box, inserting a three-fourths inch spigot in the end of the barrel immediately over the funnel inserted in the pipe opening in the receiving box, opening the spigot, and permitting the oil to run into the funnel.

When that barrel of gasoline was transferred to the storage tank, the gas machine was started, and the entire Turf Exchange premises were illuminated with the gas generated from it.

The explosion in question here occurred while the next barrel of gasoline was being delivered into the storage tank, and the facts and circumstances leading up to it were these:

On December 24, 1902, four or five days after the first barrel of gasoline was delivered at the Turf Exchange, the Waters-Pierce Oil Company's agent at Hot Springs, received over the telephone an order to deliver at the Turf Exchange another barrel of gasoline, with directions for the driver to go to the porter at the Turf Exchange for the key to the receiving box. Thereupon, an iron barrel containing 53 gallons of 88 degree gasoline was loaded on a platform wagon and driven by Murray, the same driver who delivered the other barrel, to the Turf Exchange premises on Exchange street. Murray arrived at the rear of the premises about 4 o'clock p. m., left his team, and went into the poolroom to look for the porter. Murray there saw a negro with a uniform cap on which indicated that he was a porter about the place. It afterwards developed that the porter's name was Arthur Harris. Murray said to him that he had a barrel of gasoline for the place. The porter replied in substance: "All right. We have got it fixed all right now." The porter testified that he got the key, and then went with Murray, and unlocked the receiving box. On the other hand, Murray testified that they went out on the sidewalk first, found the receiving box closed, and the porter then said, "I will go, and get the key." Murray discovered he had no wrench with him to take the iron cap off of the bung in the head of the barrel, and went to a neighboring store to procure one while the porter went for the key. When Murray returned with the wrench he found the porter at the receiving box, and the end of the receiving pipe in it open. Murray asked the porter for a funnel, and the porter said they did not have one. Murray then made a funnel with a piece of manilla wrapping paper, and placed it in the receiving pipe of the box, took the cap off of the bung hole in the iron barrel, inserted one end of the same hose in the barrel, and by sucking at the end of the goose

neck started the gasoline to flowing into the funnel. The barrel was at the time standing upright on the wagon about six feet from and about three or four feet above the receiving box, and part of the hose between the barrel and the goose neck laid on the ground. Murray testified that the porter was holding the funnel when the gasoline started to flow into it, but could not remember how long he held it; that he could not remember how long the porter stayed at the box before going down to the area, but thinks it was five or eight minutes; nor whether the porter went down of his own accord or at Murray's suggestion; that "perhaps" half of the gasoline had run into the receiving box when the porter left him, and went down into the area, and that the porter "hollered right after he got down there."

"On the other hand, the porter testified that as soon as Murray got ready to start the gasoline to flow from the siphon he left Murray, and went down to the storage tank, unscrewed the cap from the end of the upright T-pipe, and sat down astraddle of the mound over the tank, facing the pipe, to watch the indicator stick which at that time protruded out of the end of the pipe.

"It appears that Humphrey, the manager of the Arkansas Gas Company, had, with the concurrence of Chambers & Walker's representative, selected the porter to see to the filling of the tank, and told him that he (Humphrey) would order another barrel of gasoline to be put in the tank that day. Humphrey also told the porter to watch the indicator stick when the tank was being filled, and when it rose to a certain height, indicating that the tank was nearly full, to stop the filling. This precaution was necessary, as the person at the receiving box on the sidewalk directing the flow of gasoline into the box could not, because of the intervening fence and coal shed, see the mound of the tank and the upright T-pipe in the area below.

"The porter, Arthur Harris, also testified that after he sat down on the tank—he did not know how long—a man named Guy Woolstan came out of the poolroom into the area, and called his attention to a stream of gasoline running over the granitoid paving from under the front, or north side, of the little engine house, diagonally and near the foot of the stairs toward the rear wall of the Thrift Exchange Building and the drain opening in the northeast corner of the area. The stream reached to the drain opening. The porter at once called to Murray to "Hold! Stop!" got up from where he was sitting on the mound, and walked over to the steps leading down from the sidewalk.

"Guy Woolstan testified that about 4 o'clock in the afternoon of December 24, 1902, as he passed out of the back door of the poolroom into the area, he saw a stream of gasoline, seven or eight inches wide, running over the pavement of the area from under

the door of the little engine house over to the drain opening in the northeast corner of the area. He did not see gasoline anywhere else. The porter, Arthur Harris, was at this time sitting on the mound over the tank, with his back towards Woolstan. Woolstan at once said, 'This is gasoline.' The porter immediately cried, 'Hold on!' or something like that, and Murray came down the steps into the area from the sidewalk. Woolstan remained in the area but a moment, walked quickly through the crowd in the poolroom, about 80 feet, to a point near the partition between the poolroom and the bar, when the explosion occurred. He did not notice the upright T-pipe while he was in the area.

"Murray testified that as soon as he heard the porter call, 'Hold! Stop!' he stopped the flow of gasoline into the receiving box, hung the siphon hose on the wagon, and went down the steps to the area. He saw the gasoline running over the granitoid pavement from under the little engine house, as mentioned by Harris and Woolstan. Murray started to find where the gasoline was escaping from, and to close the door and windows opening from the poolroom, where the explosion occurred. This was all the testimony on this feature of the case.

"The center or main force of the explosion was under the floor of the poolroom. Appellee was in the room at the time and was, with a number of others, injured."

Other facts will be noticed in the opinion.

Mehaffy & Armistead and John D. Johnson, for appellant. Wood & Henderson, for appellee.

BATTLE, J. (after stating the facts). In the impaneling of the jury in the case the trial court refused to allow the Waters-Pierce Oil Company to peremptorily challenge three jurors. The appellant insists that the court erred. But we do not think so. The statutes (section 4536, Kirby's Dig.), expressly provide in civil cases that "each party shall have three peremptory challenges;" and (section 4540) that "where there are several persons on the same side, the challenge of one shall be the challenge of all." All the defendants are not entitled in the aggregate to more than three peremptory challenges. The statutes do not provide that they shall, in any case, be entitled to more. Kirby's Dig. §§ 4534-4540.

During the progress of the trial the following questions were asked E. R. Russell, a witness, and answered by him, over the objections of the Waters-Pierce Oil Company. "Why did you (oil company) get that rotary pump?" He answered, "The one we (oil company) had there would not do." He was then asked: "Had you and him (Humphrey, employé of Arkansas Gas Company) had any conversation about getting a rotary pump for the purpose of delivering this oil into this tank? He answered: "He asked me if I had anything to empty this barrel with." Plaintiff asked him: "State whether or not it is

true that you got that pump for the purpose of delivering gasoline into this tank put in by Humphrey?" And he answered: "I don't remember now whether we got it for that purpose or not." There is no reason given in the answer to these questions for purchasing the rotary pump, except the one the oil company had would not do, and no opinion as to the relative merits of the siphon and the rotary pump was expressed. We do not think that the testimony was prejudicial.

A witness was allowed to testify over the objections of the oil company as to an agreement of that company with the Arkansas Gas Company to deliver gasoline into the tanks of the latter wherever its plants were used in this state, and wherever the former had an agent. This was for the purpose of showing that gasoline was dangerous, and required careful handling. This was an undisputed fact, and the testimony was not prejudicial.

The appellant says:

"The court also erred in permitting counsel to ask John Humphrey about filling the tank on Saturday evening before, and to ask him what occurred there. He was asked: 'Was Murray there?' and answered: 'Yes.' He was also asked: 'Did you undertake to empty that or put it into the tank?' and he answered: 'Yes.' He was then asked: 'How?' The court also permitted the plaintiff to ask this witness and the latter to answer questions as to the situation and condition of the tank and connections on the Saturday evening before the explosion, and where Murray was and what he did. Witness, in answer to question, said: 'He (meaning Murray) came down, and took the pipe out of my hands, and undertook to siphon it.' And he was asked: 'What were you doing with the hose?' and he answered: 'I just had my hand on the hose. Had the goose neck stuck in that opening there, and he came down and grabbed hold of it, and as soon as I saw what he started to do, I grabbed it away. Meanwhile, I hallooed to the man above, and he had pulled the hose out of the tank.' He was then asked: 'Did you say anything about the manner of filling that tank at that time, and how it should be filled; state to the jury?' The witness answered: 'When he undertook to siphon it after taking the nozzle out of the opening away from me, I saw what he was doing, I grabbed it away from him, and I got very angry about it, because I thought he knew better. I told him never to undertake to siphon gasoline out of one of those barrels into the storage tank. I told him he couldn't control the flow; that he had his tank upon a high elevation and it wasn't safe to do it. I told him to do it no more. I told him it wasn't safe at all, that he could not control the flow was the main thing. I knew that we could put it in there by the use of a rotary pump, and thought they were using it. I gave Murray instructions to use the rotary pump. Counsel then asked: 'State what you said' and the wit-

ness answered: 'I thought he was using it; that's how I come to tell him not to try and siphon it when he took it from me.' He said: 'The pump won't work.' I said: 'Then we will not put any in there, but we will let the barrel stay on the sidewalk and let it remain there until Monday morning.' I said, 'We won't fill it by siphon,' and for him never to undertake to fill the tank that way because it wasn't safe, because he couldn't control the flow of gasoline. He was then asked: 'Did you tell him how to fill it?' and the witness answered: 'With the rotary pump always, because he could control it; that the slower he pumped the slower it would flow.' Counsel asked: 'Did you tell him to use anything else?' The witness answered: 'A metal funnel.' This witness was asked: 'Didn't you mean by that that this was the only place by which it could get out if it went in at that pipe?' to which he answered: 'Yes.'" This testimony was inadmissible. But the effect of it was to show that the witness was of the opinion that the rotary pump was safer than the siphon, because the flow of the gasoline in the former could be controlled, and it could not be in the latter, and for this reason the former should be used. This was the only objection he urged against the use of the siphon. He testified to the same effect, and that he had tested the siphon, and found it impracticable. This was competent. We think the incompetent testimony was not prejudicial.

Appellant complains, because the court refused to instruct the jury to return a verdict in its favor. The court instructed the jury as follows:

"The mere fact of an explosion and that plaintiff was injured thereby, is not sufficient to warrant a verdict against the Waters-Pierce Oil Company. Before you can find a verdict against it, you must also find by a fair preponderance of the evidence, that Murray was guilty of negligence in the manner in which he delivered the gasoline into the pipe in the receiving box, and that his negligence in so delivering it, without the intervention of any other independent agency, caused or contributed to the injury; and unless the plaintiff has established by a fair preponderance of the evidence each of these facts, your verdict must be for the defendant, Waters-Pierce Oil Company."

"Even if you should believe from the evidence that Murray was guilty of negligence in the manner in which he delivered the gasoline into the pipe in the receiving box on Exchange street, still, you could not find against the defendants, Waters-Pierce Oil Company, unless you should further find by a fair preponderance of the evidence that the gasoline, escaping because of his negligence, got down into the area and caused the explosion, and if the plaintiff has failed to establish either of these facts by a fair preponderance of the evidence, your verdict must be for the defendant, Waters-Pierce Oil Company."

"The jury are also instructed that if they believe and find from the evidence that either the defendant, the Arkansas Gas Company, or the defendants, Chambers & Walker, employed witness Harris to watch the open, upright pipe attached to the tank in question while gasoline was being poured into said tank through the receiving box and pipe by the witness Murray and to observe whether the gasoline flowed out of said upright pipe; that, as a matter of fact, the gasoline which caused the explosion, and resulted in injury to plaintiff did flow out of said upright pipe, without the knowledge of said Murray, while gasoline was being passed into said receiving box and pipe, by the said Murray on the 24th day of December, 1902, and the said Harris negligently failed to observe the same, or if he observed the same, failed to notify the said Murray in time to enable him to stop the flow of gasoline into said receiving box and pipe, and thereby prevented said overflow and resulting explosion, then the said Murray was not guilty of negligence, and you should find a verdict for the Waters-Pierce Oil Company."

Before the jury could have returned a verdict in favor of appellee, J. C. Burrows, against the appellant, Waters-Pierce Oil Company, according to these instructions, it was necessary for them to find that the stream of gasoline that ran over the granitoid pavement through the engine room on the premises leased by Chambers & Walker, known as the "Turf Exchange," was caused by Murray transferring gasoline into the pipe in the receiving box, in a negligent and careless manner. They obviously so found, and there was evidence sufficient to sustain their verdict in this court. They so found under instructions given at the request of appellant, and it cannot legally complain in this court, of the court's refusal to instruct the jury to return a verdict in its favor.

Numerous instructions were given to the jury, and exceptions to many of them were saved.

Instructions were asked by appellant and refused by the court. Construed as a whole, as they should be, we find no reversible error in those given. The instructions refused, so far as they are correct and were applicable, were included in instructions that were given.

Judgment affirmed.

#### WATERS-PIERCE OIL CO. v. KNISEL.

(Supreme Court of Arkansas. July 9, 1906.)

#### 1. EXPLOSIVES—CARE REQUIRED IN HANDLING.

A company engaged in selling and delivering gasoline is required to use ordinary care in transferring the gasoline into a tank connected with a private lighting system, and if it fails to do so it is liable for any injury which is the direct result of such want of care.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Explosives, §§ 3, 4.]

#### 2. NEGLIGENCE—ACTIONS—BURDEN OF PROOF.

In an action for personal injuries alleged to have been caused by defendant's negligence, the burden of proving negligence is on the plaintiff.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 217, 224.]

#### 3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT—VERDICT IN CONFLICT WITH PHYSICAL FACTS.

In determining whether the evidence is sufficient to support the verdict, the court will give the strongest probative force to all the testimony tending to support the verdict and indulge every presumption which can be fairly drawn from such testimony; but, if the physical facts are such that the sustaining of the verdict would require the court to believe that which, in the very nature of things, could not be true, and is contrary to human experience and common observation, it is the duty of the court to reverse the case upon the ground that the evidence is not sufficient to sustain the verdict.

#### 4. EXPLOSIVES—NEGLIGENCE IN HANDLING GASOLINE—EVIDENCE.

In an action for injuries caused by an explosion of gasoline which had escaped while defendant's servant was filling a tank connected with a private lighting plant, evidence held insufficient to show that the gasoline escaped because of the negligence of defendant's servant in using a defective funnel in filling the tank.

Appeal from Circuit Court, Garland County; Alex. M. Duffie, Judge.

Action by Martin Knisel against the Waters-Pierce Oil Company and others. From a judgment for plaintiff, the above-named defendant appeals. Reversed.

This is a suit brought by Martin Knisel in the Garland circuit court against the appellant, Waters-Pierce Oil Company, hereafter called the "Oil Company," Arkansas Gas Company, R. C. Chambers, Charles Walker, Ed Burke, and Sam and Leo Mayer, to recover damages on account of personal injuries alleged to have been caused by the joint negligence of the defendants in producing an explosion of gasoline vapor in a building called the "Turf Exchange," in Hot Springs, on the 24th day of December, 1902. It is alleged in the complaint that "the defendants, acting in concert through their agents, servants, and employes, then and there wrongfully, unlawfully, carelessly, and negligently proceeded to transfer the gasoline from the vessel in which it was carried" to the Turf Exchange premises, "and in so transferring said gasoline the defendants unlawfully, negligently, and carelessly allowed a large quantity of said gasoline to leak, escape, and run on, and under, the floor of the Turf Exchange Building, and unlawfully, negligently, and carelessly allowed said gasoline to explode and wreck said building, thereby inflicting serious and permanent injuries upon the person of the plaintiff, he being in said building at the time," and prays judgment for \$10,000 on account of such injuries. The defendants filed separate answers denying all the material allegations, and were represented by different counsel. A jury trial was had, and a verdict was rendered against

the oil company alone, and it appeals to this court.

The physical and established facts, as disclosed by the record, are substantially as follows: The building known as the "Turf Exchange" was located between Central avenue and Exchange street in the city of Hot Springs, about 40 feet wide and fronting east on Central avenue. The building was two stories high. On the first floor was a large single room which opened on Central avenue and extended back west to an open area which extended back to Exchange street. Chambers and Walker, as copartners under the firm name of Chambers & Walker, were lessees of the building, and they conducted a saloon in the front part, and Sam and Leo Mayer, as copartners and sublessees of Chambers & Walker, ran what is called a "pool-room" in the rear of the building, where pools on horse races were sold, the saloon and poolroom being separated by a low partition or screen. Immediately in the rear of the poolroom was an open space or area the full width of the building and extending back about 16 feet to a stone retaining wall some 12 inches thick on a line and parallel with Exchange street. The top of this retaining wall was some 8 or 9 feet above the area, and practically on a level with the adjoining sidewalk on Exchange street. On the top of this stone retaining wall was a close board or plank fence some 6 or 7 feet high with a door opening from Exchange street to a small platform and stairway leading down to the floor or base of the open area. On the north side of this area there was a high board or plank fence; the south side was the wall of a building, and the east side was the rear end of the poolroom, thus entirely inclosing this area, except a door leading into it from the rear end of the poolroom, and a small stairway leading down into it from Exchange street, as before mentioned. The floor or base of this open area was originally dirt, and practically level, slightly inclining to the north and east. In the northeast corner there was an open grate or drain opening for draining the area. There were also two small ventilator openings about on a level with the floor or base of the area opening into the space under the poolroom. There was a coal shed or house in the southwest corner of this area about 10 feet north and south by 6 feet east and west. Its west wall was a part of the stone retaining wall and the close board or plank fence on top of it. There was a doorway opening into the coalhouse through the board fence above the stone retaining wall near the stairway leading down to the area from Exchange street. The south wall was the wall of the building adjoining the area and the Turf Exchange building on the south. The north wall was made of plank, and the east wall was a double wall made in this way: There was scantling or stud-

ding 2 by 4 or 2 by 5 inches placed perpendicular, the usual distance, some 2 or 3 feet, apart, along the east side of the coalhouse, and planks three-fourths of an inch thick were placed horizontally close together, and nailed to these studding on the east and west side of the same, the lower plank resting on the floor, thus making the thickness of the east wall 6 or 7 inches with the inner opening the width of the studding, 4 or 5 inches. The floor of the coalhouse was made of loose plank running north and south. About a year or so before the explosion which caused the injuries complained of, a granitoid floor was placed over the entire area, except that portion of it occupied by the coalhouse above described, thus making that part of the floor covered by the granitoid higher than the floor of the coalhouse; the thickness of the granitoid not being definitely disclosed by the record.

A short time before the explosion which caused the injuries complained of the defendants Chambers & Walker entered into a contract with the defendant Arkansas Gas Company to install on the premises at the Turf Exchange a gas-generating machine to supply the entire Turf Exchange building with vapor illuminating gas generated from gasoline. This gas machine was installed by the gas company and was accepted and put in operation by the defendants Chambers & Walker some four or five days before the explosion. This gasoline plant consisted of a small engine, generator, etc., a galvanized cylindrical iron storage tank for holding a supply of gasoline, about 18 inches in diameter and about 6 feet 6 inches long, which would hold about 67 gallons of gasoline, with two small pipes connecting the engine and tank, one for the purpose of supplying the machine with gasoline to be converted into vapor illuminating gas, and the other to return from the machine to the tank any excess or surplus of gasoline conveyed by the other pipe from the tank to the machine; and also a line of pipe connecting the storage tank with a small iron receiving box placed in the sidewalk on Exchange street outside of the retaining wall, and about 12 inches from said wall. The engine and generator were placed in a small house covered with sheet iron, and located in the southeast corner of the area next to the rear wall of the Turf Exchange building and the wall of the building adjoining on the south. This little engine house rested on blocks two or three inches above the granitoid floor, thus leaving an open space underneath. The space between the west wall of the engine house and the east wall of the coalhouse was 3 feet 3 inches. A storage tank was placed horizontally between the engine house and the coalhouse, by cutting through the granitoid floor and excavating the soil beneath, so as to let about half of the diameter of the tank rest below the surface. It was then covered with two

layers of brick laid on edge in cement, and the whole plastered over with cement, thus making a smooth arched mound and rising about 12 inches above the floor, which practically filled the space between the little engine house and the coalhouse. Near the south end of the tank there was inserted an upright iron pipe, called a T-pipe, 10 or 12 inches long and  $1\frac{1}{2}$  inches in diameter. Threads were cut on top of this pipe, and it was fitted with an iron cap which could be easily screwed off or on the pipe. Inside the tank there was a float with an upright wooden stick less than an inch in diameter, which extended up through the upright T-pipe for the purpose of indicating the quantity of gasoline in the tank while it was being filled. With the cap of the upright T-pipe off, the end of this stick would rise as the gasoline was put in the tank. This pipe was to be kept closed except when it was desired to know how much gasoline was in the tank. The pipe connecting the storage tank with the receiving box placed near and outside the retaining wall was arranged as follows: The end of the line of pipe of the same inside diameter as the upright T-pipe on the storage tank was attached at right angles with the latter pipe where it joined the top of the tank, and extended thence horizontally and obliquely with the tank from 3 to  $3\frac{1}{2}$  feet to very near the outside east wall of the coalhouse; thence up vertically through several shelves 6 feet 3 inches; thence at right angles with the tank through the east wall of the coalhouse and extending on through the coalhouse and stone retaining wall to a point about 12 inches beyond the outer edge of said wall and about 12 inches below the surface of the sidewalk on Exchange street; thence vertically about 6 inches into the bottom of the receiving box, and was there connected with a short receiving nipple or pipe about 5 inches long extending from the bottom of the receiving box to within about 2 inches of its top. This receiving box was about 6 inches long and 5 inches wide and 6 inches deep, with a hinged iron lid and lock for locking it when the box was not being used. The receiving box had also another open nipple or pipe extending through the bottom, and extending up to within about one inch of the top of the box. The opening at the bottom of this nipple or pipe rested upon the earth immediately below the box. The box was sunk in the sidewalk about 12 inches outside of the stone retaining wall, and bricks were laid around it and covered with cement so as to leave the top of the box about one inch above the surface of the sidewalk. The sidewalk was not paved, but had a slight descent towards the street. The  $1\frac{1}{2}$ -inch pipe connecting the storage tank with the receiving box was about  $19\frac{1}{2}$  feet long, 12 feet of which was horizontal and 7 feet 6 inches vertical. The receiving box was thus placed connecting with the  $1\frac{1}{2}$ -

inch pipe which extended from the receiving box to the storage tank, so the storage tank could be filled from time to time by passing the gasoline through the pipe opening in the receiving box on the sidewalk, and thus allowing it to run by gravitation through the line of pipe into the storage tank. Another small pipe, about half an inch in diameter, was connected with the top of the tank and extended horizontally to the outside wall of the little engine house, and thence up vertically about 3 feet. The upper end of this pipe was left open, but immediately above it a little metal hood was attached to the wall of the engine house so as to extend or hang over the open end of the pipe. The purpose of this pipe was to permit the escape of vapor gas which would rapidly form in the tank while the same was being filled with gasoline, because if there were not such vent the gas thus generated would prevent the free inflow of gasoline.

A few days before the explosion which occasioned the injuries, the agent of the oil company, pursuant to an order received over the telephone, sent a barrel of gasoline to the Turf Exchange in charge of one Murray, its driver, for use in the gas plant. At that time, the pipe extending from the storage tank had not been connected with the receiving box in the rear of the retaining wall on Exchange street, and the barrel of gasoline was placed upon the platform at the top of the steps leading down into the area, and a part of the gasoline emptied into the storage tank by means of a hose having what is called an "iron goose-neck nozzle" at one end, and the other end was placed in the barrel, and the gasoline was siphoned into the storage tank through the T-pipe. The inside diameter of the hose was one inch and the nozzle three-fourths of an inch. A day or two after this, the storage tank was connected with the receiving box, and the balance of the first barrel of gasoline was put into the tank by placing the barrel on its side near the receiving box and inserting a spigot three-fourths of an inch in diameter in the end of the barrel immediately over the funnel inserted in the small receiving pipe in the receiving box, thus allowing the gasoline to flow into the storage tank. On the 24th day of December, 1902, some four or five days after the first barrel of gasoline had been delivered at the Turf Exchange, the oil company received over the telephone an order to deliver another barrel of gasoline at the Turf Exchange with directions for the driver to go to the porter at the Turf Exchange building for the key to the receiving box, into which the gasoline was to be emptied. Thereupon a barrel containing 53 gallons of gasoline was loaded upon a wagon, and driven by the same driver, Murray, to the Turf Exchange premises on Exchange street. Murray reached there with



the oil at about 4 p. m., and called for the porter, a colored man by the name of Arthur Harris, who he was told would show him where to deliver the oil. The porter got the key, and went with Murray to the receiving box, and unlocked it. Murray had no funnel to insert into the receiving pipe, so he made one of a piece of manilla wrapping paper about one foot square, and placed it in the receiving pipe of the box, and inserted one end of the same hose into the barrel on the wagon, and by sucking at the other end of the goose neck started the gasoline to flowing into the funnel. About this time, the porter, Arthur Harris, went down into the area to watch the indicator while the gasoline was being emptied into the tank, and before Murray finished drawing the gasoline from the barrel he was told to stop by some one down in the area, and he did so immediately, and went down into the area. When he reached there, the gasoline in quite a large stream some 8 or 10 inches wide was flowing from under the north side of the little engine house, and moving in the direction of the open grated sink in the northeast corner of the area. A few moments after this, the explosion occurred. The porter, Arthur Harris, had been designated by Humphreys, the manager of the gas company, with the consent of Chambers & Walker, to see to the filling of the tank. He was instructed to watch the indicator in the T-pipe and when it had risen to a certain point, indicating when the tank was full, to stop the filling. This was necessary because the person at the receiving box on the sidewalk directing the flow of the gasoline into the box could not see the tank below in the area on account of the plank fence resting on the retaining wall. The receiving box had been designated as the place where the gasoline was to be delivered, and emptied into the storage tank by means of the pipe extending from the receiving box to the storage tank.

There was other testimony in the case, and that part of it which is considered material will be referred to hereafter.

Mehaffey & Armistead and Rose, Hemingway, Cantrell & Lorborough (J. D. Johnson, of counsel), for appellant. Wood & Henderson, for appellee.

HOUSE, Special Judge (after stating the facts). Several questions are raised in the record as to alleged errors in not permitting certain witnesses to answer certain questions propounded to them by the appellant, the answers to which it is contended would have had a tendency to discredit or impeach such witnesses before the jury, and it is also contended by appellant that the trial court erred in giving certain instructions asked by appellee; but, in view of the opinion of the majority of the court, it is unnecessary to pass upon these questions. The real ques-

tion to be considered and determined is as to whether the evidence is legally sufficient to sustain the verdict of the jury. Under the facts in this case, it was the duty of the oil company to use ordinary care in transferring or emptying the gasoline delivered by it into the receiving box on Exchange street, and if it failed to exercise such care and the plaintiff was injured thereby, the oil company would be liable if such injury was the direct result of such want of care, or if such injuries could have been reasonably anticipated or foreseen as the probable result of such want of care or negligent act; otherwise, it would not be liable. In *Derry v. Flitner*, 118 Mass. 181, the court said: "The rule is well settled, and is constantly applied in this commonwealth, that one who commits a tortious act is liable for an injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries that are caused directly and immediately by his acts, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. \* \* \* The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might be reasonably anticipated." In *Braun v. Craven* (Ill.) 51 N. E. 657, 42 L. R. A. 199, the court said: "That before the plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act, and reasonably to be anticipated as the result." In *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 108, the court said: "The legal damages that follow any wrong are only such as, according to common experience and the usual course of events, might reasonably be anticipated. The defendant's liability extends only to natural and probable consequences." In *Hoag v. Railroad Co.*, 85 Pa. 293, 27 Am. Rep. 653, the court said: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his acts." In *Railway Co. v. Elliott*, 5 C. C. A. 349, 55 Fed. 951, 20 L. R. A. 582, the court said: "An injury that is the natural and probable consequence of an act of negligence is actionable, but an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable." The burden of proving the oil company was negligent in transferring or emptying the gasoline into the receiving box was upon the plaintiff. Negligence is never presumed, but, like any other fact must be proven. Hence, it necessarily follows that to entitle the plaintiff to recover he must show that the oil company was negligent in the matter of

the delivery of the gasoline into the receiving box, and that his injuries were the direct result of such negligent act, or that such injuries might in the usual course of things have been reasonably anticipated or foreseen.

It is contended by the appellee (plaintiff in the court below) that the oil company was negligent in emptying the gasoline into the receiving box; that in the use of a paper funnel it became crumpled and stopped the flow of the gasoline to some extent through the receiving pipe, and, therefore, a part of the gasoline flowed into the receiving box until it was filled to a point above the other small nipple or pipe in the receiving box, and then made its way down this little pipe to the earth, then following the track or line of pipe connecting the receiving box with the storage tank through the soil some 10 or 12 inches to the stone retaining wall; then through the retaining wall into the coalhouse; then it flowed down the wall a foot or two to the loft or old door, with one end inserted in the retaining wall, the other end extending obliquely downward to or near the inner wall of the east side of the coalhouse; then to the bottom of the said inner wall; then through the double wall of the coalhouse; then on to the granitoid floor; then flowing between the south end of the mound covering the tank and the south wall of the open area; then under the engine house, coming out at the north end, continuing down to the grated sink in the northeast corner of the area, and in a few moments after the oil was seen thus flowing the explosion occurred wrecking the poolroom where the plaintiff was at the time with perhaps 150 or 200 other persons, and the plaintiff was injured as alleged. The oil company controverts this contention. It denies that it was negligent in any way whatever in emptying the gasoline into the receiving box. It contends, first, that all the gasoline which was taken from the barrel was conveyed into the receiving pipe in the receiving box; second, that, even if the gasoline had flowed into the receiving box and above the opening of the other small nipple or pipe, in the very nature of things it could never have found its way into the open area as contended by appellee; third, that, even if it should have reached the area in this way, Murray, who delivered the gasoline for the oil company, could not have reasonably anticipated or foreseen such a result, and, therefore, the oil company is not liable for the injuries complained of; and, the oil company further contends that the gasoline which caused the explosion escaped from the T-pipe or from some leak in the engine or generator while in the process of being emptied into the receiving box, that gasoline is exceedingly volatile and when subjected to great commotion it readily forms a gas, and as it was turned into the receiving pipe to flow through the pipe connecting the receiving box with

the storage tank its tendency was to form a gas, which forced a part of the gasoline to flow or spurt out at the top of the T-pipe, and then run under the engine house and over the granitoid floor to the grated sink. In the effort to sustain these conflicting theories, a great deal of testimony was taken on both sides, and to understand and give this testimony its proper bearing upon the issues thus presented has entailed upon the court much time and care. It appears from the testimony that when the driver Murray reached the Turf Exchange premises with the second barrel of gasoline, there was 15 gallons in the storage tank, that after the explosion there was 40 gallons in it, thus showing that 25 gallons of the second delivery was in the tank. There was 53 gallons in the barrel. When it was returned there was 17½ gallons in it, thus showing that the driver Murray had drawn 35½ gallons from the barrel, 25 gallons of which was in the tank after the explosion, while 10½ gallons found its way into the open area, and its flow was seen coming from under the north end of the engine house and extended down to the opening in the northeast corner of the area. This was the gasoline which caused the explosion.

Now, the question is, how did the gasoline escape, and how did it reach the open area? The oil company introduced a number of witnesses showing that it had made two or more tests with tank and pipe like the one at the Turf Exchange under conditions as near as practicable the same as there, the only difference perhaps being in the temperature, and it was shown at all of these tests that when gasoline was emptied into the receiving box it would bubble or spurt out of the T-pipe at intervals at different heights from an inch to two feet high; that in putting in 25 gallons, 10 gallons of it would escape through the T-pipe. One of these tests was made publicly at the courthouse in Hot Springs, at which everybody was invited, and among those present were the learned counsel for the appellee. On the other hand, the testimony shows that the gas company also made two or more tests of similar character, but the conditions were not the same as they existed at the Turf Exchange. At these tests, the bottom of the barrel was only raised high enough to siphon it out of the barrel into the receiving box. The hose used was 10 or 12 feet long. The bottom of the barrel from which the gasoline was taken was about a foot and a half higher than the tank, and on a level with the receiving box, thus showing that the gasoline in flowing from the barrel into the receiving box and into the tank through a hose 10 or 12 feet long only had a fall of about one foot and a half, while at the test made by the oil company the gasoline was taken from a barrel which stood in the wagon some 2½

or 3 feet above the receiving box, and when it reached the receiving box it was conveyed through a line of pipe 19½ feet long, about 12 feet of which was horizontal and 7 feet 6 in. vertical, and adding to this the 2½ feet the barrel stood above the receiving box, the gasoline had a fall of 10 feet. At the test made by the gas company, it was shown that no oil would escape from the T-pipe.

While we do not intend any harsh criticism as to the manner in which the tests were made by the gas company, it is perfectly obvious that they were not made under the same conditions as existed at the Turf Exchange, and can serve but little purpose in solving the question at issue. The height of the source of supply above the tank would have some effect on the flow of the gasoline. The higher the source of supply, the greater would be the weight of the column, and the gasoline would thereby be forced more rapidly into the storage tank, causing great commotion, and thus increase the tendency to form gasoline vapor or gas, and thereby force the gasoline out of the T-pipe. The oil company made further tests by pouring first about 20 gallons of water in the space occupied by the receiving box on the outside of the retaining wall, and none of it found its way into the coalhouse, but the water flowed south and west. Then waiting about 10 minutes, they discharged 20 gallons of water through a siphon against the retaining wall, the west side of the coalhouse. Then, waiting 10 minutes longer, 20 gallons were discharged against the inside of the east wall, and 20 gallons in the southeast corner of the coalhouse, thus making 60 gallons of water turned onto the coalhouse, and none of it found its way to the granitoid pavement in the open area. There was a little coal in the coalhouse, the most of it slack. On the other hand, the colored porter, Arthur Harris, testified in behalf of the appellee to the effect that when the driver Murray began to empty the gasoline into the receiving pipe, he (Harris) went down to the storage tank, took the cap off of the T-pipe, and sat right over it to watch the indicator, so as to notify Murray when the gasoline tank was full; that he watched the indicator; that it never moved while he was there, and no gasoline came out of the T-pipe. The evidence tends to show, however, that after the explosion the indicator stick was in perfect order, and that in putting in as much as 25 gallons of gasoline the indicator stick would rise several inches.

It is contended, however, by appellee that the evidence only shows two places at which the gasoline could have escaped—one at the receiving box, the other at the T-pipe—and the porter, Arthur Harris, having testified that it did not escape at the T-pipe, the jury had a right to believe him, and that their

finding is conclusive, and that the effect of this finding is to establish the fact that the gasoline escaped at the receiving box, and made its way to the granitoid floor. If the determination of the question as to whether the evidence is legally sufficient to sustain the verdict depended solely upon the testimony of the porter, Arthur Harris, and the driver Murray who testified that he exercised due care in transferring the gasoline from the barrel to the receiving box, that none of it escaped into the receiving box, but all of it was emptied into the receiving pipe, our duty would be at an end. We should affirm the case upon the doctrine that this court will not disturb a verdict based upon the weight of evidence. But, in determining this question, we must look also to the physical facts disclosed by the record about which there is no dispute, and if, upon a full and fair consideration of these facts, to sustain the verdict would require the court to believe that which in the very nature of things could not be true, to believe that which is contrary to human experience and common observation then it would be the duty of the court to reverse the case, upon the ground that the evidence is not sufficient to sustain the verdict. It has been the settled policy of this court, in passing upon this question, to give the strongest probative force to all the testimony tending to support the verdict, and to indulge in every presumption which could be fairly drawn from such testimony, and when the evidence is conflicting or when the facts are of such character that different minds might honestly draw different conclusions, the verdict of the jury is upheld. In other words, a case should not be reversed for the want of testimony to support the verdict unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which could be properly or reasonably taken of the facts the evidence tends to establish, and the court has no inclination or disposition to modify or change this ruling. This doctrine is sanctioned and approved by the Supreme Court of the United States and by nearly or quite all of the courts of last resort in the states.

It is, however, often difficult to apply a principle of law to the facts of any given case; hence the variety of expressions used by the courts, such as: "The case will not be reversed where there is a conflict in the evidence." "A verdict will not be set aside if the evidence is legally sufficient to sustain it." "A verdict will not be disturbed because it is against the weight of evidence." "A verdict supported by the evidence is conclusive." "A finding of the jury is conclusive though against the weight of evidence." "Where the evidence is not sufficient to support a verdict, a new trial will be awarded." "Where there is no evidence to support the verdict, a new trial will be

granted"—and many other like expressions. These expressions do not convey a concrete, definite idea which can be applied to every given case, but they all tend alike to the same result. The thought intended to be conveyed in them is that the jury should be permitted to return a verdict according to its own view of the facts, unless, upon an honest consideration of the whole evidence and giving effect to every inference to be fairly and reasonably drawn from it, the case is manifestly for the party asking a peremptory instruction. When a case reaches this point, it then becomes a question of law for the court, and not one of fact for the jury. *Railway v. Martin*, 61 Ark. 549, 33 S. W. 1070; *St. Railway v. Hildreth*, 72 Ark. 572, 82 S. W. 245. In *Railway v. Rice*, 51 Ark., at page 476, 11 S. W., at page 700, Justice Sandels, in delivering the opinion of the court, said: "It is the settled policy of this court to uphold the verdicts of juries where they have passed upon disputed matters of fact, provided the evidence be legally sufficient to support their finding. Of this, it is the province of the court to judge move." In *Catlett v. Railway*, 57 Ark., at page 466, 21 S. W. 1062, 88 Am. St. Rep. 254, Chief Justice Cockrill, speaking for the court, said: "The Constitution provides that 'judges shall not charge juries with regard to matters of fact, but shall declare the law.' Article 7, § 23. This provision shears the judge of a part of his magisterial functions, but it confers no new power upon the jury. It was the jury's province before this provision was ordained to pass only upon questions of fact about which there was some real conflict in the testimony, or where more than one inference could reasonably be drawn from the evidence. The Constitution has not altered their province. It commands the judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts. As Judge Battle expressed it in *Sharp v. State*, 51 Ark. 155, 10 S. W. 231 (14 Am. St. Rep. 27) 'the manifest object of this prohibition was to give the parties to the trial the full benefit of the judgment of the jury, as to facts, unbiased and unaffected by the opinion of judges.' If there is no evidence to sustain an issue of fact, the judge only declares the law when he tells the jury so. 'The legal sufficiency of proof, and the moral weight of legally sufficient proof are very distinct in legal idea. The first lies within the province of the court, the last within the province of the jury.'"

Under these familiar rules, when all the evidence in this case is fairly considered, and giving to it its strongest probative force and every inference which can be fairly drawn from it, we do not think the evidence is legally sufficient to support the verdict. While the evidence tends to show that the soil immediately below the small nipple or

pipe in the receiving box through which it is contended the gasoline which caused the explosion passed, was firm and solid, and it may be conceded that the soil immediately under this pipe and the soil filling around the receiving pipe from the receiving box to the stone retaining wall was open or porous, and it may be further conceded that 10 or more gallons of gasoline found its way into the small nipple or pipe, yet, in the very nature of things, the gasoline which caused the explosion could not have passed along the line of pipe through or on the soil to the retaining wall, then through and down the wall to the loft or door, then along the loft or door to the east wall of the coalhouse, then down the wall to the board floor, then through the double wall of the coalhouse to the granitoid floor in the open area. Such a contention would be not only highly improbable, but it would be irrational, and at war with the physical facts, and contrary to all human experience and common information. Hence, the testimony of Arthur Harris can have no probative force when it is in direct conflict with the conceded or physical facts, and to believe it would involve an absurdity in reason and common experience. This doctrine has been frequently applied. In *Continental Life Ins. Co. v. Yung (Ind.)* 15 N. E. 222, 3 Am. St. Rep., at page 632, the court said: "That the evidence which tends to support the finding may be contradicted does not justify this court in ordering a new trial. Where competent evidence appears in the record which, if believed, necessarily tends to support the finding, unless the evidence relied on is of such character as that to believe it would necessarily involve an absurdity in reason, or an impossibility according to the very nature of things, this court cannot say, however much such evidence may be opposed by other testimony, that it is conclusively contradicted."

The question has, perhaps, arisen more frequently in suits for personal injuries received at railroad crossings. Suppose the plaintiff in such a case testifies that his sense of sight and hearing are good, that just before stepping on the track he stopped, looked and listened for an approaching train, and neither saw nor heard one, that the day was clear and bright, and after stopping, looking and listening he immediately attempted to step on the track, and was injured by the train, when the physical or conceded facts showed that the track at the place of the accident was straight and level for a distance of a quarter or half a mile, and there was nothing to obstruct his view, and nothing to prevent his hearing an approaching train. Could the court hesitate a moment to set aside a verdict based upon such testimony? Certainly not. Why? Because such evidence would be conclusively contradicted by the physical facts, and would be entitled to no probative force whatever. *Stafford v. Chippewa County*, 110 Wis. 331, 85 N. W. 1036; *Marland v.*

Railway, 123 Pa. 487, 490, 16 Atl. 624, 10 Am. St. Rep. 541; Myers v. Railway, 150 Pa. 388, 390, 24 Atl. 747; Railway v. Stick, 143 Ind. 449, 459, 463, 41 N. E. 365; Kelsay v. Railway (Mo.) 30 S. W. 339; Payne v. Railway (Mo.) 38 S. W. 308, 311-314. In Payne v. Chicago & A. R. Co., supra, at pages 311-313, the court said: "The headlight was brightly burning. The bell was ringing and the train was on time. The engineer and fireman were at their respective posts. The train was making the usual noise and the plaintiff was expecting that very train. But he, alone, of all others, when he went to cross the track, though a bright, active boy, with a good mind and eyesight, and acquainted with the locality and the dangers incident to crossing the track, though he listened, could not hear the whistle blown, nor the bell constantly ringing, nor the rumble of the train, nor see, with his good, young eyes, the blazing headlight of the train as it rapidly advanced upon him. Such testimony as this is so contrary to the daily experience of common life, so at war with the conceded and indisputable physical facts in this case, that neither courts nor juries can, without stultifying themselves, yield to it an iota of probative force or effect. It is a proposition too monstrously improbable for rational human belief. To argue to the contrary of this is to endeavor the transmutation of the impossible into possibility.

\* \* \* But, in this instance, it is plainly proved, beyond peradventure, that the statement of plaintiff 'that he did all in his power to ascertain whether there were any trains approaching,' etc., was not, and indeed, could not, be true. This matter of denying probative force even to direct and affirmative testimony, when such testimony is plainly at war with the physical facts and surroundings, has passed into precedent. Thus, in the leading case of Artz v. Railroad Co., 34 Iowa, 153, it is said: 'But it is urged by the appellee's counsel that the plaintiff testified that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made that a question of fact for the jury. The difficulty, however, with the position is, that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that, at the time, he looked, and did not see it shine. Could the testimony be true? The witness may have been told that it was necessary to prove in the case that he did look, and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity; and, possibly, he even may testify to it in the self-consciousness of integrity.

But, after all, in the very nature of things, it cannot be true, and, hence, cannot, in the law, form any basis for a conflict upon which to rest a verdict.' "

The same doctrine has been frequently upheld in criminal cases where life or liberty was involved. Suppose a man was to be tried upon a charge of murder, and at the trial half a dozen witnesses were to swear that they witnessed the homicide through a solid brick or stone wall 8 feet thick, 100 feet long and 50 feet high with no openings in it; that the defendant was the aggressor; that he brought on the attack and stabbed or shot the deceased to death—in other words, that the killing was a cold-blooded murder—while, on the other hand, the defendant alone testified that the deceased was the aggressor; that he brought on the attack, and the killing was done in actual self-defense; and upon this testimony alone the defendant was convicted. Could such a verdict stand? Certainly not. Why so? Because the finding of the jury would be in direct conflict with the physical facts. The testimony of the six witnesses would have no probative force. It would not even amount to what is called "a scintilla of evidence," and the court could not sustain such a verdict without closing its eyes to reason and common experience and stultifying itself. This it should not do. State v. Anderson (Mo.) 1 S. W. 140; State v. Turlington (Mo.) 15 S. W. 141. So it is here. If it be conceded that the only two places where the gasoline could have escaped were at the receiving box and at the T-pipe, and the porter, Arthur Harris, testified that it did not escape at the T-pipe, his testimony is not entitled to any credit because he is contradicted by the physical facts about which there can be no doubt. In State v. Turlington, supra, at page 147, the court said: "All the other facts and circumstances point to the same conclusion. Defendant's words cannot be believed when contradicted, as they are by the physical facts. Neither courts nor juries should be required to base their actions or beliefs on physical impossibilities." This view of the case is strengthened by the other testimony in the case. In the first place, gasoline has a tendency to rapid evaporation, and if it was poured into the small nipple or pipe in the receiving box it would have been rapidly absorbed and deflected through every crack and crevice over which it flowed, and the process of evaporation would have been so rapid that no part of it would have ever reached the granitoid floor. In the second place, the experiments made by the oil company with pipe and tank and all equipment under substantially the same conditions as existed at the Turf Exchange on the day of the explosion show that with the T-pipe uncovered the gasoline would escape through it in greater or lesser quantities during the process of emptying it into the storage tank. And, in the third place, the pouring water in the coalhouse at the

points where it is contended the oil passed, and none of it reached the granitoid floor furnishes a very strong and potent reason that the gasoline poured into the small nipple or pipe in the receiving box could never have reached the granitoid floor below.

It follows from these views that this case must be reversed and remanded; and it is so ordered.

### SHACKLEFORD v. WILLIAMS.

(Supreme Court of Arkansas. June 18, 1906.)

#### 1. APPEAL—CONCLUSIVENESS OF VERDICT.

If a verdict is supported by legally sufficient evidence, it will not be interfered with on appeal.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3928.]

#### 2. MONEY RECEIVED—ATTORNEY AND CLIENT—PAYMENTS TO ATTORNEY—EVIDENCE.

In an action by a client to recover money which he alleged he had paid to defendant as his attorney to satisfy a judgment, evidence held sufficient to support a verdict for plaintiff.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Alexander Williams against John D. Shackelford. From a judgment for plaintiff, defendant appeals. Affirmed.

Alex Williams alleged that he was an ignorant colored man, and that he employed Jno. D. Shackelford, an attorney at law, to represent him in a suit in the chancery court of Pulaski county in which a decree was rendered against him for about \$2,400, and foreclosing a vendor's lien on a certain tract of land which he had, some 20 years before, purchased from one W. N. Young. He says that on the advice of his attorney (the appellant) he appealed the case, and in order to supersede the decree of the Pulaski chancery court, until the appeal could be heard in the Supreme Court, he requested appellant and one W. E. Lenon to make bond for him, which they did upon his executing to them a mortgage on his homestead, and upon his paying to Lenon \$100 in cash, and his further agreeing to deposit with appellant from time to time money to pay off the decree against him, should the decree be affirmed. He says that on or about November 1, 1900, he commenced to deposit with appellant money to pay off the decree in case it was affirmed, and continued to do so until he had deposited with appellant for the purpose mentioned \$2,250. He avers that appellant promised to refund the money if the decree should be reversed, and to apply the money deposited with him on the decree if it should be affirmed. He says the decree was affirmed, and appellant failed to pay the money deposited with him on the decree, and failed on demand to pay same over to appellee, wherefore he brought this suit, and asked judgment for the amount named with inter-

est. Appellant answered, denying that appellee ever deposited with appellant any money to be used in the payment of any claim or debt other than amount due by appellee to appellant, and he averred that after all amounts due appellant had been paid there would be a small balance, the exact amount of which could not then be ascertained. He set up that judgment had been rendered against appellee in a justice court, that an appeal had been taken from that judgment, and that appellant had made bond for appellee to appeal, and that it was agreed that whatever balance there might be in appellant's hands due appellee should remain until said judgment was defeated or satisfied, and that the cause was still pending. Wherefore he asked that the complaint be dismissed, etc.

The cause was submitted to a jury upon the following evidence on behalf of appellee:

Appellee testified: "I gave Mr. Shackelford \$2,100. I gave it to him to be paid on the judgment against me, should my case be affirmed in the Supreme Court. He said he could get me a bondsman and I paid him \$100 for him. He never said anything to me about the briefs. He never said anything about the fees for the trial or the bond in the justice of the peace court. He was to try my case in the Supreme Court for nothing unless he could win it, and then I was to pay him \$500. I did not want to appeal the case. He never said anything to me about keeping any of the money when he went on my bond in Lonoke county. I paid him \$300 for the trial of the case in chancery court. I have receipts for \$1,858. I paid him more. I paid him fees in chancery court, in addition to these receipts, that he gave me no receipts for. He owes me now about \$2,100. That is the money I put in his hands to pay on the judgment against me, which he has refused to do. I went to see him about settling with me after the case was decided, and he gave me this statement. He would not settle with me. Here are the receipts he gave me for the money I paid him. He gave me no receipts for the money I paid him for the trial of my case in chancery court. I paid him money for which I have no receipts. No receipts here for money I paid him before case was appealed. When the Supreme Court affirmed the judgment, I borrowed the money and paid it off, the amount being more than \$2,500, and I then asked Mr. Shackelford to pay me, but he never paid me anything." Appellee exhibited receipts signed by appellant, amounting in the aggregate to \$1,858. These are set forth in the record. The first five, amounting to \$250, show on their face that they are "on attorney fee"; the next is a receipt for "sixty dollars in case of Young v. Williams in Pulaski chancery court"; the next is a receipt for "one hundred dollars on payment on supersedeas bond

in case of Maggie Young et al. against Alexander Williams et al. in Pulaski chancery court"; the next is for "seventy dollars to be paid on costs and taxes"; the next is for "eight dollars on his case with C. N. Alexander." This receipt is dated April 3, 1900. All the receipts to that date specify what they are given for. After that, beginning in November 1, 1900, various receipts are given from time to time till November 24, 1902, but they do not specify on their face for what purpose the money was received.

W. E. Lenon testified: "Mr Shackleford requested me to go on bond for Alex Williams with him. I was to get \$100. Mr. Shackleford paid me \$50."

J. E. Bush testified: "I was at Mr. Shackleford's office with Alex Williams, and they were at my office. They wanted me to make bond for Williams. Mr. Shackleford said if I would make bond for Williams he would attend the case in the Supreme Court for nothing, unless he could win it. I refused to make the bond."

The testimony on behalf of appellant is as follows:

John D. Shackleford testified: "I am the defendant in this case. In the fall of 1897, just before Christmas, Alex Williams came to my office and told me he was getting into trouble with C. N. Alexander. I took the matter up for him, and on New Year's day, 1898, I drove down to Galloway to see Mr. Alexander. Mr. Alexander was the administrator of the estate of Capt. W. N. Young. He showed me his books, and there seemed to be a balance of some \$600 or \$700, and two notes for \$400 each, executed in 1880 and given as part purchase money for certain lands. Williams brought me his receipts, and, after examining into the matter, I advised him that I thought he had a good defense to the notes. It was agreed between us that I should have a fee of \$300 for the trial of the case in the chancery court. The suit of Maggie Young et al. v. Alex Williams was filed, the case was tried, and judgment was given against Williams. He, of course, was very much worried about it. He wanted to appeal the case, and the question was who would go on his bond. He was about town here some ten days or two weeks before the matter was arranged. He tried to get Ches Cates and J. E. Bush to make his bond, and I went with him to see them. I told them that as they were men of Williams' own color they ought to make his bond, and if they were willing to stand by him on his bond I would go through the Supreme Court for nothing, if I could not win; that I thought he had a good case. They finally refused to make the bond. Williams then consulted Col. Caruth, and came up and told me that Col. Caruth wanted to see me and for me to bring the papers in the Williams' Case. I went to Caruth's

office and carried the papers. After that Williams and I called to see what Col. Caruth had to say about it. The colonel was not sure, but thought we had a good fighting chance, and if he (Williams) could make a bond so as to keep the land from being sold he would try it. Williams told me that he thought he could make the bond, and that if we could win the case he told Col. Caruth and I that he would give us half the amount of the judgment; that is, \$1,200. He failed to make the bond, and Col. Caruth had no more to do with it. He then wanted me to make the bond. I told him that I was not worth it, but that I might get some one to go on the bond with me, and that I would see about it. I did so. I went to see Mr. Lenon, who said he would go on the bond with me if I would see that no liability come against him on the bond. I agreed to protect him from liability, and asked him what he would charge Williams for going on the bond, and he said \$100. I reported to Williams that I had found a man who, for \$100, would go on the bond with me. 'Now,' I said, 'you say the rent on the land is worth \$300 per year to you, and I have already kept you in possession of it for two years, and if I make a bond for you I will be able to keep you in possession of it for two or three years more, and then the liability I assume in going on your bond. I will save you from \$600 to \$900 in rents. I will tell you what I will do. I will make your bond and do the necessary work in briefing your case, and if necessary will make an oral argument to the court, and whatever else may be necessary, for a fee of \$500, and if I win the case you are to pay me enough more to make \$1,200.' This he agreed to, and I never thought there was any misunderstanding about it. He said the rents would more than pay the expenses. I never heard of any disagreement or dissatisfaction on his part until he fell in the hands of Lofton, the Jew, on East Markham street. By our agreement Williams was to put money in my hands to pay all necessary expenses. I gave him receipts for all the money he gave me. I gave him receipts for \$1,858. This is every dollar that he gave me, except \$50, which I kept out of a \$300 note which I indorsed for him on September 12, 1900, and \$5, which he borrowed on the 9th day of August and returned on the 21st day of August, 1902. The receipts Williams has are correct. On the 12th day of September, 1900, I indorsed a note for \$300 for Williams, and got Mr. Lenon to go on it with me, so Williams could raise the money to pay his part on a cotton gin that he and two other parties had decided to build near Williams'. Here is the note. By arrangement the money was placed in bank in my name and I checked it out at Williams' direction. On that date I began to keep a book account of all moneys received and

expended on Williams' account. Here is my book entries. Williams was to bring me the money with which to pay off the notes, as well as the other matters. I charged him up with the note and the other items as they appear in this account after September 12, 1900, and gave him credit with all moneys paid me after that date. The reason I did not make a charge for this \$500 in this account was because the matter was understood between us. The purpose of making the other matters was because I could not recollect all those small matters on the different dates, and I put them down, so that I would have something to refer to, the same as I did when I made a note of the items that make up the \$300 note, so I could tell what went with it. I paid his taxes, as the receipts show, and as these entries show, and let him have cash to the amounts and on the dates shown in the account. The charges for fees, as the entries show, were all made by agreement. The first \$50 was for looking after deed to his first piece of land. The other \$50 was for bringing ejectment against O. N. Alexander to stop him from destroying Williams' fence and interfering with his house and barn and horse lot. The \$100 was allowed me to cover making and printing of brief in case of Young v. Williams in Supreme Court. This was satisfactory to Williams. The printer's fee was \$49.55, as I remember it. I may be mistaken about the exact amount. I am not sure. The brief had 49 pages. The rest of the money was to compensate me for the manual work in preparing the brief, such as I would have paid a typewriter or shorthand reporter. In the fall of 1902 Williams got into several lawsuits with parties in his neighborhood over a pile contract he got into. There was some five or six cases at Kerr Station and three cases at Scott's Crossing, for attending to which I charged him \$25. Afterwards there were three or four more cases at Kerr Station and one at Baucum Station, and for attending to which I charged him \$15. I beat all the cases except the ones at Scott's Crossing. Then I had to appeal to the Lonoke circuit court. I paid my railway fare, and for the transcript and appeal \$3.25. I made Williams' appeal bond, and it was agreed between us that the balance I had in my hands, which was not much more than the amount of the bond, which was for \$150, should remain in my hands until the cases were disposed of to indemnify me on the bond. The bond was not made on the day the cases were disposed of at Scott's, but afterwards at my office. Williams came to my office, and we fixed up the bond. The cases are still pending in the Lonoke circuit court. I owe him nothing under our contract until the cases are disposed of at Lonoke and liability satisfied. The \$50 paid me on January 5, 1898; the \$100 paid me February 8, 1898;

the \$50 paid me on November 15, 1898; the \$25 paid me on October 27, 1899; the \$25 paid me on November 22, 1899; the \$60 paid me on December 13, 1899—was for fees in the trial of the Young-Williams Case in chancery court. The \$100 paid me, for which I receipted him on the bond, was \$50 of it to be paid Mr. Lenon and the other \$50 was to be paid him later, I becoming responsible to Mr. Lenon for it. Fifty dollars of the \$100 I was to keep on the fee for the deed matter. The \$70 was to be paid on taxes that had been unpaid on a part of his land that had forfeited, and on the costs of the transcript in the appeal in the chancery case, and that was not enough and I had to advance the rest. The \$8 was paid to me to pay cost in the suit against Mr. Alexander to prevent him from going through Mr. Williams' house and horse lot and stables. The \$250 paid me on November 1, 1900, was to pay on the \$300 note, and the other \$300 paid me on December 15, 1900, and the \$330 paid me on February 25, 1901, and the \$40 paid me on October 18, 1901, and the \$160 paid me on November 23, 1901, and the \$100 paid me on December 23, 1901, and the \$190 paid me on March 24, 1902, was all paid me on the \$500 agreed upon between us and for such other expenses as might come up, and to cover the contingency as to the other \$700 as far as what might be left would go if I won the suit in the Supreme Court. I went to see Williams in the fall of 1902 and called his attention to the fact that the case was likely to be disposed of at any time, and that I felt sure that I would win it, and I wanted him to get me some more money. He said he would have some more. He did not bring it as agreed, and I saw him again, and he refused to give me any more until the case was decided, saying he had given me enough to cover everything up to date. He would not pay me any more. So, after the case was decided against him in the Supreme Court, he came to my office one day when I was in from the country, complaining that I had no business to pay his taxes without letting him know about it, and wanted a statement of what I had been paying out for him. He seemed to be very much dissatisfied. I was in a hurry, and had but a few minutes to talk to him. I was then living in the country on account of the condition of my eyes. I gave him a copy of the entries contained in my book. He made no complaint about anything, except he thought I ought not to have paid his taxes without letting him know about it. He went away, and the next time I saw him was in the fall, and he wanted me to give him some money. I called his attention to our agreement when I went on his bond in the appeal cases to the Lonoke circuit court, and he said he would take care of that and see that I would not have any of



that to pay. He came back another time not long after, and told me that if I did not give him some money he would sue me. The next thing I knew about it summons was served on me in this suit."

Appellant exhibited his book showing the following:

Account with Alex Williams:

Note for.....	\$ 300 00	
Interest .....	8 20	
Rosenbaum .....	225 00	
Cash .....	3 85	
Williams .....	15 00	
Shackleford .....	50 00	
	<b>\$ 300 05</b>	
		Dr.
1900.		Cr.
Sept. 12. Note for.....	\$300 00	
April 10. Balance due on taxes.....	9 30	
April 10. Back taxes for '97, '98, '99..	20 69	
Sept. 12. Deed by C. N. Alexander...	50 00	
Sept. 12. Williams v. Alexander.....	50 00	
Sept. 12. Williams v. Alexander.....	\$ 50 00	
Nov. 1.....	250 00	
Dec. 15.....	300 00	
1901.		
Feb. 25.....	330 00	
April 10. Taxes for 1900.....	40 11	
July 13. Cash.....	20 00	
Sept. 15. Briefs.....	100 00	
Oct. 18.....	40 00	
Nov. 23.....	180 00	
Dec. 23.....	100 00	
1902.		
Feb. 25. Cash .....	10 00	
March 24.....	190 00	
May 14. Cash .....	25 00	
May 14. Tax 1901 .....	35 10	
June 14. Cash .....	25 00	
August 9.....	5 00	
August 21.....	5 00	
Sept. 4. Cash .....	2 50	
Sept. 19. Cases at Kerr and Scott's..	25 00	
Oct. 18. Fare to Scott's, transcript and appeal.....	2 25	
Nov. 7. Trip to Kerr and Baucum...	15 00	
	<b>\$736 35</b>	<b>\$1,425 00</b>
		<b>736 35</b>
		<b>\$688 15</b>
		<b>500 00</b>
		<b>\$188 15</b>

The verdict and judgment were for \$1,321.05. The motion for new trial contained the following grounds: "First. Because the verdict is not sustained by the evidence. Second. Because the verdict is excessive and not supported by the testimony. Third. Because the verdict is contrary to law."

T. M. Mehaffy, J. H. Harrod, Gus Fulk, and J. H. Carmichael, for appellant. W. S. McCain, for appellee.

WOOD, J. (after stating the facts). We have set forth the evidence in full, because the only question presented here is the sufficiency of the evidence to support the verdict. It will be observed that appellant received from appellee, according to the receipts, \$1,858. Appellant contends that this was all he received, and that it was not to be used in paying off any decree against the appellee but for other purposes; while appellee, on the other hand, contends that appellant received more money from him than the written receipts show, that he paid appellant fees in the chancery court in addition to these receipts, that appellant gave no receipts for,

96 S.W.—23

and that he paid appellant \$2,100 "to be paid on the judgment," etc., which "he, appellant, now owes." It is not the province of this court to reconcile conflicting statements in the testimony of any witness, or to harmonize contradictions among different witnesses. That is peculiarly the province of the jury. However much we might differ with the jury on mere questions of fact, where there is legally sufficient evidence to support the verdict, we will not disturb it. This is the established doctrine of this court by a long line of decisions. *Waters-Pierce Oil Co. v. Burrows* (Ark.) 96 S. W. 336; *Railway Co. v. McMillan* (Ark.) 83 S. W. 846; *St. Louis Southwestern Ry. Co. v. Byrne*, 73 Ark. 377, 84 S. W. 469, and cases cited. We cannot say, as matter of law, that there was no evidence to support this verdict.

The judgment is therefore affirmed.

#### WATERS-PIERCE OIL CO. v. PARKER.

(Supreme Court of Arkansas. June 9, 1906.)

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by J. W. Parker against the Waters-Pierce Oil Company. From a judgment for plaintiff, defendant appeals. Reversed.

Mehaffy & Armistead, Rose, Hemingway, Cantrell & Loughborough (J. D. Johnson, of counsel), for appellant. Wood Henderson, for appellee.

HOUSE, Special Judge. This is also a suit for personal injuries alleged to have been caused by the same explosion, and the facts are substantially like those in the case just decided (96 S. W. 342); and the same order will be made in this as in the other case.

WOOD, J., disqualified.

#### LITTLE ROCK RY. & ELECTRIC CO. v. DOYLE.

(Supreme Court of Arkansas. June 18, 1906.)

1. CARRIERS—INJURY TO PASSENGER—SETTING DOWN PASSENGER.

Where, on the signal of a passenger for a stop, the speed of a street car was slackened to the speed at which it was usual for passengers to alight, it was negligence for the operatives of the car to then cause it to start suddenly forward.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1223, 1223½.]

2. NEGLIGENCE—ACTION—INSTRUCTIONS—BURDEN OF PROOF.

In an action for injuries the court instructed that, if plaintiff was guilty of negligence in certain respects and it contributed to his injury, he could not recover, though defendant might have been negligent, and also instructed that the burden of proving contributory negligence was on defendant. Held, that the latter instruction was not prejudicial to defendant, because it did not contain the qualification that the burden was upon defendant,

unless such negligence appeared from plaintiff's evidence.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Negligence, §§ 382-399.]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by T. N. Doyle against the Little Rock Railway & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rose, Hemingway, Cantrell & Loughborough, for appellant. J. W. & M. House, for appellee.

BATTLE, J. T. N. Doyle brought this action against the Little Rock Railway & Electric Company. He alleged in his complaint "that on the 5th day of June, 1903, the defendant injured him through the carelessness and negligence of its employes operating a car; that plaintiff was a passenger on a South Main car, and when the car was near 18th and Main, he motioned the conductor to stop for him to get off, and the conductor obeyed and slowed the car as plaintiff was advancing to the rear end, and continued to slacken its speed until he reached the step on the rear platform; that while he was standing on the rear of the car with his left hand holding the hand rail of said car, and when the speed had been slackened to a speed when it was customary for male passengers to alight, and so that plaintiff could step from the car with safety, and just as he raised his right foot with the intention of stepping to the ground, his left hand still holding the handle bar and his left foot still upon the step of the car, the car was negligently started forward and the sudden jerk threw him backwards and caused him to fall to the ground, thereby fracturing the bones of his left wrist, and lacerating the ligaments at his wrist and elbow, and bruising his left knee; that the injuries are permanent, and greatly impair his ability to work, and that his left arm has been permanently disfigured at the wrist. He prayed damages for medical expenses, \$250, and for pain and suffering \$10,000."

The defendant answered, and denied the allegations in the complaint, and alleged that, "if he was injured by falling from the car, the accident was due to his own negligence in attempting to alight from a moving car in a negligent manner, and pleaded, generally, his contributory negligence."

A jury tried the issues in the case and returned a verdict in favor of the plaintiff for \$780, and the defendant appealed.

The evidence adduced in the trial tended to prove the allegations in the complaint.

The court instructed the jury over the objections of the defendant, in part, as follows:

"(3) The jury are instructed that if they believe from the testimony that at the date of the alleged injuries the plaintiff was a passenger on one of the defendant's cars, and

that at or near where Eighteenth street would intersect Main street he signaled or notified the conductor that he desired to get off, and thereupon in response to such signal the speed of the car was slackened or slowed up, and the plaintiff, while the speed of the car was being slackened, stepped upon the rear step of the platform when the car was moving slowly, and, while he was in the act of stepping from the car, its speed was suddenly increased and thereby threw the plaintiff down, causing the injuries complained of, then the defendant company would be guilty of negligence, and you must find for the plaintiff unless you further believe from the testimony that the plaintiff, in undertaking to step from the car while in motion, was guilty of contributory negligence, which proximately contributed to the injuries complained of."

"(5) The burden of proving the negligence of the defendant company is upon the plaintiff, and the burden of proving the contributory negligence of the plaintiff is upon the defendant company."

And the court instructed the jury, in part, at the request of the defendant, as follows:

"(4) If you find from the evidence that the plaintiff was guilty of negligence, either in attempting to alight from the car while it was in motion, or in the manner in which he stepped from the car, and that his negligence contributed to cause his injury, then he cannot recover in this case, even though you may find that defendant's employes were negligent.

"(5) If you find from the evidence that plaintiff attempted to alight from the car while it was in motion, and in doing so he stepped off backwards (that is, with his back to the front of the car), at the same time holding on to the hand rail with his right hand, and was thrown by the forward motion of the car, then he was guilty of contributory negligence and cannot recover, even though you may find that the car moved forward with a sudden or accelerated motion.

"(6) If you find from the evidence that plaintiff failed to exercise reasonable care in alighting from the car, and that such failure proximately contributed to cause his injury, if any, then he cannot recover, even though you may further find from the evidence that the defendant's employes were also negligent in operating the car."

Appellant objects to the instruction numbered 3, given over its objection, because "it told the jury that if plaintiff notified the conductor that he wanted to get off, and the conductor then caused the speed of the car to be slackened for that purpose, and while plaintiff was in the act of alighting from the slowly moving car, its speed was suddenly increased, then the defendant was guilty of negligence." And contends that there was no evidence that the speed of the car was suddenly increased. But this is not accurate. There was evidence which tended to prove

that "the speed of the car was slackened so that it was only running at a speed of from three to four miles an hour, or about as fast as a man would ordinarily walk" when it was started forward with a sudden jerk, and it ran from 100 to 200 feet uphill before stopping. There was evidence, as we understand it, which tends to prove that the speed of the car was suddenly increased.

Appellant further insists that it was objectionable for the "reason that it required the defendant to anticipate that plaintiff would alight from the car before it stopped." If such was its effect, it is not erroneous. It might reasonably have anticipated that plaintiff would alight when the speed of the car was so slackened that he could do so in safety, and that he might be injured if it was started forward while he was doing so with a sudden jerk. The evidence tended to show that it was usual for male passengers to alight when the car was running so slowly that they could do so in safety.

Appellant also contends that "Instruction No. 5, given by request of the plaintiff, was also erroneous, because, in announcing the burden of proving contributory negligence to be on the defendant, it did not contain the qualification that this was true unless such contributory negligence appeared from the plaintiff's testimony." What the court said in *Indianapolis & St. Louis Railroad v. Horst*, 98 U. S. 291, 298, 23 L. Ed. 898, in answer to an objection to a similar instruction is an appropriate answer to appellant's objection. "The court did not say that if such negligence were established by the plaintiff's evidence, the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence, coming exclusively from the party on whom rested the burden of proof. It is not improbable that the charge was so given by the court from an apprehension that the jury might, without it, be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof, or insufficient proof, on the subject, there was a fatal defect in his case. It was therefore eminently proper to say upon whom the burden of proof rested, and this was done without in any wise neutralizing the effect of the testimony the plaintiff had given, if there were any, bearing on the point adversely to him."

Other instructions of the court which were given upon the same subject were sufficient to prevent the jury being misled by the instruction objected to.

Construed as a whole with reference to the evidence in the case, as they should have been, there was no prejudicial error in the instructions of the court, and the evidence was sufficient to sustain the verdict of the jury.

Judgment affirmed.

## DICKINSON v. HARDIE.

(Supreme Court of Arkansas. June 18, 1906.)  
TAXATION—TAX TITLE—ACTION AGAINST  
CLAIMANT—LIMITATIONS.

Kirby's Dig. § 5061, requiring seisin within two years by one bringing action for the recovery of land sold for "nonpayment of taxes," protects the purchaser at a sale which was made, though the taxes were in fact paid at the time of the sale.

Appeal from Desha Chancery Court; Marcus L. Hawkins, Chancellor.

Action by W. T. Hardie against J. W. Dickinson. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

J. W. Dickinson, for appellant. Baldy Vinson, for appellee.

HILL, C. J. Passing other questions raised and discussed, and going to the core of the controversy, these facts are developed: Dickinson bought the land in suit at tax sale in 1888 and received clerk's deed therefor in 1890, and went into possession immediately and held actual possession continuously until this suit was brought in 1896. After many delays the case finally came to trial as to this tract (other tracts in the suit had been previously disposed of) in September, 1904, in which it was found that the taxes were paid on the land two days before the sale, and a decree was entered for Hardie, who had succeeded to the title of the person who owned the land at time of the tax sale. The action is barred by section 5061, Kirby's Dig. The appellee argues that this section cannot apply, because this could not be a sale for nonpayment of taxes; that the collector no more than any other citizen of the state has the right to sell lands unless in fact there has been a nonpayment. It is true that the collector has no such right, but still he did sell for an alleged nonpayment, and the purchaser went into possession under deed based upon such sale and continued in possession for more than two years before this suit was brought. This is purely a statute of limitations, and runs against void sales as well as voidable sales or regular sales. The statute is not in favor of those holding under valid deeds issued pursuant to valid tax forfeitures and valid sales, but is in favor of the possession for two years under deeds therein mentioned, one of which is the deed under which Dickinson held here.

A statute of repose is not needed in favor of purchasers at valid tax sales. The validity of the sale and precedent proceedings effectually carries the title and renders unnecessary such statutes, and they are enacted for the benefit of those acquiring these state titles and quieting these questions after two years' possession under them. This whole matter was gone into fully and conclusively in the recent case of *Ross v. Royall* (Ark., Dec. 23, 1905) 91 S. W. 178.

The judgment is reversed, and cause remanded, with directions to enter decree for Dickinson.

### BROMLEY v. ATWOOD et al.

(Supreme Court of Arkansas. June 18, 1906.)

#### 1. WILLS—FORGIVING DEBT—CONSTRUCTION.

After making various bequests to a legatee a will provided that the said legatee was to make no charges "against my estate for anything I owe her, or for waiting on me during my sickness at any time. Said gifts above being given to satisfy all of such claims, and her kindness to me during her lifetime, and waiting on me during my sickness." *Held*, to show on its face an intention to give such bequests in lieu of a business settlement of testator's affairs with the legatee.

#### 2. EVIDENCE—PAROL TESTIMONY—ADMISSIBILITY.

Parol testimony on an issue whether or not a legacy or devise was intended to forgive a debt due from the legatee or devisee is admissible, and does not offend against the rule forbidding the varying or altering of a written instrument by parol testimony.

#### 3. WILLS—FORGIVING DEBT—SUFFICIENCY OF EVIDENCE.

Evidence examined, and *held* sufficient to show that testator intended to forgive a debt owing to him by a legatee.

#### 4. APPEAL—FINDINGS OF CIRCUIT COURT—EFFECT.

Where the evidence is undisputed, and it is a mere question of its effect and construction, the findings of the circuit court are not binding on appeal.

[*Ed. Note.*—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3955-3969.]

Appeal from Circuit Court, Cleveland County; Zachariah T. Wood, Judge.

Petition by M. A. Bromley against G. C. and W. D. Atwood, executors. From the decree, petitioner appeals. Reversed.

C. B. Atwood died in Cleveland county, Ark., about the 3d day of May, 1904, leaving personal property of the value of \$10,292.10 and also certain real property. His will, made May 1, 1904, after providing for the payment of his debts was substantially as follows: "(2) I give, bequeath, and devise to Mrs. M. A. Bromley, who is now keeping house for me, the following real and personal property, to wit: East half of northeast quarter of section seven (7) in township nine (9) south, range ten (10) west, containing 80 acres, with all improvements thereon, and my horse, one-horse wagon, and harness; all household and kitchen goods and furniture of every kind and description that I may own at my death; all corn and other feed stuff; one tool chest and all carpenter tools; all farming tools and implements, and all provisions, meat, corn, etc., that I may own at my death (except one mower and reaper); two baskets; all chickens that I may own; two cows and calves, and seven head of sheep to be selected by her; also the sum of five hundred (\$500.00) dollars to be paid to her by my said executors as soon as possible after my death. But the said Mrs. M. A. Bromley is

to make no charges against my estate for anything I owe her, or for waiting on me during my sickness at any time. Said gifts above being given to satisfy all of said claims, and her kindness to me during her lifetime, and waiting on me during my sickness. (3) I give, bequeath, and devise to my brothers and sister all the rest of my real and personal property of every kind and description, debts or evidences of debts, after the first and second paragraphs are complied with, and all moneys or anything else that I may own at my death, to have and to hold, sell, and dispose of as they may see fit. (4) I do hereby appoint my brothers, G. C. Atwood and W. D. Atwood, my executors of this my last will and testament, to take charge of my property and dispose of same as directed above, directing my said executors not to disturb said Mrs. M. A. Bromley in any way in the possession of land or stock, or anything given to her, but to let her remain on said land, and at once allot to her the property so given, and to pay over to her the money so given as soon as possible."

Plaintiff, Mrs. M. A. Bromley, filed a petition in the probate court of Cleveland county, stating that deceased had devised and bequeathed to her certain lands and personal property, including \$500 in money, and directing a payment thereof to her as soon as possible after testator's death; that she was not indebted to the estate of deceased, nor to the latter at his death, deceased, on the contrary, being largely indebted to her for cooking, washing, keeping house, and waiting on him; that she was willing to relinquish all demands against the estate, accepting in lieu thereof the money and property bequeathed to her—and prayed that the executors be directed to pay over to her such sum of \$500. It was admitted by the executors that plaintiff commenced keeping house for deceased in the year 1886, under a contract whereby he was to pay her \$45 per year for her services. An account book kept by deceased in his own handwriting showed an account against plaintiff for \$374.93 for merchandise, money, and orders to various stores for clothing, etc.; the last credit in plaintiff's favor entered in the account being in January, 1893, as follows, to wit, "Work, 1891 and 1892, \$90.00," and the account subsequent to such last entry never having been balanced or changed. A witness for plaintiff testified that he was present when deceased made the will, and that immediately after the signing thereof testator requested him to put down on paper what he had willed to plaintiff; that witness did so, putting down the \$500 mentioned in the will, together with what testator considered the value of the other property devised to her; that when it was all added testator remarked that "he had done a very good part by Mrs. Bromley [plaintiff]." Soon after the will was probated, the executors turned over to plaintiff all the property given her thereby, except the \$500, from

which they deducted the account of \$374.93, which they claimed she owed the estate, and tendered plaintiff the balance of \$125.07, which she declined. The court adjudged that plaintiff owed the estate such sum of \$374.93, and gave her judgment against the executors for the balance of \$125.07. Plaintiff's motion for a new trial was overruled, to which plaintiff excepted and appealed.

Taylor & Jones, for appellant. W. S. Amis, for appellees.

HILL, C. J. The reporter will state the issues, set out the will, and give a summary of the evidence, and from this statement of facts it will be seen that three questions are in the case: (1) Does the will on the face of it forgive the legatee's debt to the testator? (2) Does the evidence show that the testator intended to forgive the debt of the legatee to him? (3) Was a debt in fact proved against the legatee?

1. After making various bequests to Mrs. Bromley amounting to a substantial sum, the instrument proceeds: "But the said Mrs. M. A. Bromley is to make no charges against my estate for anything I owe her, or for waiting on me during my sickness at any time. Said gifts above being given to satisfy all of said claims, and her kindness to me during her lifetime, and waiting on me during my sickness." This shows the object of the devise to be twofold: (1) The satisfaction of charges which the testator felt Mrs. Bromley would be entitled to make against his estate for services for which he owed her; and (2) in gratitude for her kindness the legacy and devise is evidently made much larger than a mere payment for services. While this language does not literally reach to a forgiveness of a debt due him from her, yet it does indicate that there is no such debt. He could not be indebted to her for services if they had been overpaid by the matters set forth in this account when he made this will, which was only two days before his death. The account exhibited against Mrs. Bromley is all in Mr. Atwood's handwriting and, of course, he was possessed of exact knowledge of it. While not free of doubt, it seems that the will on its face showed an intention to give these bequests in lieu of a business settlement of his affairs with Mrs. Bromley.

2. Whatever doubts there are on this subject derived from an examination of the will alone are dispelled when the testimony is considered. In the first place, it may be said that parol testimony on an issue whether or not a legacy or devise was intended to forgive a debt from the legatee or devisee is admissible, and does not offend against the rule forbidding the varying or altering of a written instrument by oral testimony. Rood on Wills, § 737; Ziegler v. Eckert (Pa.) 47 Am. Dec. 428; Gilliam v. Brown, 43 Miss. 641. After the will was written the testator

had Mr. Sadler to cast up the value of the property given Mrs. Bromley, putting estimates upon each item, and then said when the total was stated that he had done a very good part by her. Clearly having in mind that this total was what she was to have, not that sum less what she owed him.

3. It is doubtful whether under the evidence that appellees have proved the debt Mrs. Bromley was charged with the various items making up the account from time to time, but she was not credited since January, 1893, with her services at the agreed sum of \$45 per annum. It was proved that these services continued until Mr. Atwood's death in May, 1904. If she was credited with this salary then Mr. Atwood would have been in her debt \$130 instead of the account standing \$394.93 against her. There is but one way to escape the conclusion that Mr. Atwood was in debt to her; and that is to infer that he paid her salary in cash and, hence, it was not entered upon the account. It is much more probable that it was a fixed charge, and he did not think of entering it, and merely charged her with items as she got them. It is not necessary to pursue this question whether the debt was proved or not. The court is of the opinion that the will and the evidence shows that Mr. Atwood intended to give Mrs. Bromley the items named in the will irrespective of the state of the account between them and in lieu of all compensation for her services, and also as a token of his gratitude to her. It is not consistent with his conduct that he intended the accounts to be cast up, and a balance recovered. This is not a case where the findings of the circuit court are binding. The evidence is undisputed, and it is a mere question of its effect and construction.

Judgment reversed, and cause remanded.

#### ST. LOUIS, I. M. & S. RY. CO. v. BILLINGSLEY.

(Supreme Court of Arkansas. June 11, 1906.)

##### 1. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The mere fact that a woman passenger who had boarded the passenger coach of a mixed train at the station platform went to the front end of the coach to get a drink of water while the coach was standing and while switching was being done by the engine for the purpose of making up the train did not make her guilty of contributory negligence as a matter of law.

##### 2. SAME—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held to support a finding that an injury to a passenger caused by the bumping of a car against a passenger coach was due to the negligence of the defendant's employés.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by W. A. Billingsley, administrator of the estate of Mary L. Hurley, deceased,

against the St. Louis Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Johnson, for appellant. Stuckey & Stuckey, Joseph W. Phillips, and S. D. Campbell, for appellee.

RIDDICK, J. On the 30th of November, 1903, a mixed passenger and freight train of the defendant company was scheduled to leave Batesville for Newport, Ark., at about 7 o'clock in the morning. Mrs. Mary L. Hurley, a lady 77 years old, went to the depot at Batesville for the purpose of going to Newport on this train. The passenger coach of the train was standing on the track opposite the waiting room of the depot. It being near the time for the departure of the train, Mrs. Hurley got on the passenger coach. About a half car length from this coach was a freight car standing on the track. After Mrs. Hurley got in the passenger coach she went to the front end of the coach for the purpose of getting a drink of water, and while she was in the act of getting the water, two freight cars were kicked back against the freight car standing a short distance from the passenger coach. They struck the car with considerable force, and it rolled back and struck the passenger coach in which Mrs. Hurley was standing getting water, and the force of the collision was such that she was thrown down and injured. A part of her thigh bone near the hip joint was fractured. On account of her age, or for some other reason, the fractured bone did not unite, and, after three weeks, she died from the effect of the injury. The administrator of her estate brought this action to recover damages for the pain and suffering caused by the injury. On the trial he recovered a judgment for \$5,000.

It seems to be conceded that the court instructed the jury correctly as to the law of the case. But the defendant contends that the facts show that Mrs. Hurley was guilty of contributory negligence, and that, on that account, her administrator cannot recover. The only act of negligence shown on her part is that she went to the front of coach to get a drink of water. It was not shown that she remained standing longer than was necessary for that purpose, and the mere fact that she attempted to get a drink of water while the coach was standing and while switching was being done by the engine, for the purpose of making up the train does not, in our opinion, conclusively show negligence on her part. The defendant employees had placed the passenger coach on the track in front of the waiting room of the depot with doors unlocked. It was near the time for the departure of the train, and Mrs. Hurley was justified in supposing that the coach was ready for the reception of passengers. While a passenger on a lo-

cal freight or mixed train might be charged with negligence if he stood up and unnecessarily exposed himself to danger, yet it is often necessary for passengers to have water, and the law requires passenger coaches to be supplied with it. It is not usually considered dangerous for a passenger who exercises due care in other respects to stand up the short time required to get a drink of water and the court cannot say, as a matter of law, that it is negligence to do so; that question we think was properly left to the jury. A box car had been placed on the track, about a half car length distant from and in front of the passenger coach. The brakes on this were set, and it thus acted as a sort of fender for the passenger coach to protect it from being struck by other cars kicked down by the engine or allowed to roll down. But two cars were allowed to strike this box car with such force that the brakes did not hold it, and it rolled on down and struck the passenger coach, causing the injury complained of. The evidence was sufficient, we think, to support the finding of the jury that the injury was caused by negligence of the defendant's employees.

The result of this injury was that Mrs. Hurley suffered greatly for three weeks, and then died. We are not able to say that a verdict for the amount recovered is excessive, and the judgment is affirmed.

#### KELLEY v. McDUFFY.

(Supreme Court of Arkansas. June 11, 1906.)  
TAXATION—LIMITATIONS—TAX OR DONATION DEEDS—CONSTITUTIONALITY.

The two-year statute of limitations under tax deeds or donation deeds from the state is constitutional.

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

Action in ejectment by Harry E. Kelley against Massillon McDuffy to recover a tract of land in Phillips county. From a verdict and judgment in favor of the defendant, the plaintiff appeals. Affirmed.

W. G. Phillips, for appellant. R. W. Nicholls and John I. Moore, for appellee.

McCULLOCH, J. The defendant claimed title to the land in controversy under a donation deed from the state of Arkansas, and, as a defense to the action, he pleaded actual, adverse occupancy under said deed for more than two years next before the commencement of the action. Counsel for appellant contends that the two-year statute of limitation under tax deeds or donation deeds from the state is unconstitutional and void, and he relies mainly on the decision of the United States Circuit Court of Appeals in the case of *Alexander v. Gordon*, 101 Fed. 96, 41 C. C. A. 228.

This court had previously upheld this

statute in numerous cases, but we recently re-examined the question in the case of *Ross v. Royal*, 91 S. W. 178, and adhered to the former decisions of the court. We see no reason now for receding from that position.

Judgment affirmed.

#### HENDERSON v. STATE.

(Supreme Court of Arkansas. June 11, 1906.)

##### LARCENY—ASPORTATION—NECESSITY.

Evidence that defendant resold lumber which he had previously sold to another, and that the buyer hauled it away is insufficient to sustain a conviction of larceny in the absence of evidence to connect defendant with the carrying away of the lumber, as to constitute larceny there must be an asportation of the goods.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 30.]

Appeal from Circuit Court, Scott County; Styles T. Rowe, Judge.

Frank Henderson was convicted of grand larceny, and appeals. Reversed, and remanded for new trial.

Carmichael, Brooks & Powers, for appellant. Robt. L. Rogers, Atty. Gen., and G. W. Hendricks, Asst. Atty. Gen., for the State.

HILL, C. J. Henderson was indicted for grand larceny charged with stealing 16,000 feet of lumber, the property of Oliver & Hudson, was convicted, sentenced to one year in the penitentiary, and appealed.

The state proved that Henderson bought of Oliver & Hudson a boiler and engine for \$100 payable in lumber at \$5 per 1000; that 16,000 feet were delivered, checked up, and left standing in stacks on Henderson's lumber yard. That it staid there for several months for the convenience of Oliver & Hudson; in the meantime Henderson moved his mill sat to another place. Hearing that the lumber was being hauled away, Hudson went to see Henderson about it, and was told that the haulers were taking it away, and that he could not prevent them doing so; he told Hudson where seven or eight loads of it were. Hudson tried to get Henderson to have it hauled back and replace what was beyond recovery, and, upon Henderson failing to do so, had him arrested. The state also proved that Hudson sold this lumber to Harris, and that Harris had caused it to be hauled away. Appellant testified, and he was corroborated by others, that in the sale to Harris this lumber was excluded, and that he had tried to prevent Harris' haulers carrying off this lumber; that he had posted it as belonging to Oliver & Hudson, and had made haulers unload it when he found them taking from these stacks. But, disregarding appellant's evidence where it is found in conflict with the state's evidence, and testing the conviction by the state's evidence alone, it is found insufficient. There is a total dearth of

evidence to connect Henderson with the carrying away of the lumber; on the contrary the state's evidence showed he tried to prevent it, and, on this point, there is contradicted evidence on behalf of the appellant of instances where he tried to prevent it.

The question narrows, then, to whether the evidence of Harris that Henderson sold this lumber to him of itself is sufficient to sustain a conviction for larceny. To constitute larceny there must be an asportation of the goods. 2 Bishop Crim. Law, § 794; *Rapalje on Larceny & Kindred Offenses*, §§ 26, 27. The sale to Harris, if a good sale, authorized Harris to have the lumber hauled away. Henderson was not present, permitting or consenting to the hauling other than by the implied authorization to it. This may have made him an accessory before the fact justifying the state proceeding against him in that way, or the sale may have been a crime against Harris in obtaining money from him for the sale of property not his. These are not questions in this case; the question being whether this sale of itself made larceny when Harris, not Henderson, caused the lumber to be taken, and manifestly it did not. 2 Bishop Crim. Law, § 836, par. 6.

Judgment reversed, and cause remanded for new trial.

#### NATIONAL COOPERAGE & WOOD- ENWARE CO. v. A. L. AYDE- LOTT & CO.

(Supreme Court of Arkansas. June 11, 1906.)

##### APPEAL—CONFLICTING EVIDENCE—CONCLUSIVENESS OF FINDINGS.

The finding of the trial court on conflicting evidence is binding on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3983.]

Appeal from Circuit Court, Prairie County, Southern District; George M. Chapline, Judge.

Action by the National Cooperage & Wood-ware Company against A. L. Aydelott & Co. to set aside a default judgment. From a judgment for defendants, plaintiff appeals. Affirmed.

C. F. Greenlee, for appellant. J. H. Harrod, for appellees.

HILL, C. J. There was an action in the common pleas court of Prairie county (Southern district) wherein the appellees, Aydelott & Co., were plaintiffs, and G. W. Evitts and the appellant, National Cooperage & Woodenware Company, were defendants. Judgment by default was rendered and subsequently execution issued, and then appellant commenced an action in the common pleas court to vacate the judgment. The substance of the complaint and evidence to sustain it was that there had been an agreement between the respective attorneys for the cause to be continued unless a certain

contingency occurred in which the attorney for the plaintiffs (appellees here) was to notify appellant's attorney, in that event appellant's attorney had arranged for another attorney to try the case, as he could not be present at that time, and appellant's witnesses were notified not to be at that term of court, and that in violation of this agreement and without this notice the judgment was taken. The attorneys for appellees denied that any such agreement was reached, and on the contrary said the attorney had told him he would not ask further time, and if he could not be present would have some one else to represent him. There was also evidence that appellant's attorney asked appellee Aydelott a few days after the judgment, about the case and Aydelott told him of the default judgment, and the attorney said that he had overlooked the matter and did not know that court had been held. These facts were heard by the circuit court, trying the case on appeal, and it found in favor of appellees. If appellees' testimony is true certainly appellants were not entitled to relief, and the finding of the circuit court upon this conflict in the evidence is binding on this court.

Judgment affirmed.

#### THRASH v. STATE.

(Supreme Court of Arkansas. June 11, 1906.)

##### 1. RECEIVING STOLEN GOODS—STATUTES.

Receiving a stolen hog is an offense, though Kirby's Dig. § 1829, relating to the crime of receiving stolen animals, does not mention hogs; section 1830, providing that whoever shall receive any other goods or chattels, knowing them to be stolen, with intent to deprive the owner thereof, shall be punished as for larceny of such goods or chattels.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receiving Stolen Goods, § 4.]

##### 2. WITNESSES — INCOMPETENCY—CONVICTION OF CRIME—EVIDENCE.

Incompetency of a witness by reason of his conviction of an offense cannot be established by his admission, but only by the record of the conviction.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 199.]

##### 3. LARCENY—INTENT—EVIDENCE.

It is sufficient evidence of intent to steal a hog belonging to A. that it was found in defendant's possession with its earmarks changed, that he offered to and did then buy it of A., that he claimed to have bought it of P., and that P. testified that he did not sell or deliver it to defendant.

Appeal from Circuit Court, Monroe County; George M. Chapline, Judge.

Wes Thrash appeals from a conviction. Affirmed.

The grand jury of Monroe County returned an indictment against appellant, Wes Thrash, containing two counts; one charging the crime of grand larceny by stealing a hog, and the other the crime of receiving stolen property. He was tried and convicted. The

jury returned a general verdict, without specifying the count upon which the verdict rested, and fixed the punishment at a term of one year in the penitentiary.

Geo. F. Chapline, for appellant. Robert L. Rogers, Atty. Gen., and G. W. Hendricks, Asst. Atty. Gen., for the State.

McCULLOCH, J. (after stating the facts).

1. It is contended by appellant that the second count of the indictment for receiving stolen property does not charge the commission of a public offense, and in support of that contention it is pointed out that section 1829, Kirby's Digest, relating to the crime of receiving stolen animals, does not mention hogs. Counsel for appellant has doubtless overlooked section 1830, Kirby's Digest, which provides that "whoever shall receive or buy any other goods, money or chattels, knowing them to be stolen, with intent to deprive the true owner thereof, shall, upon conviction, be punished as is, or may be, by law prescribed for the larceny of such goods or chattels in cases of larceny." The indictment, in apt terms, charges an offense under this section.

2. The state introduced as a witness one James Parks to prove an essential element of the crime, and on cross-examination he admitted that he had been convicted of petit larceny before a justice of the peace of the county. The defendant then asked that the testimony be excluded on the ground that he was incompetent to testify, and saved exceptions to the refusal of the court to exclude the testimony. This court held in Vance v. State, 70 Ark. 272, 68 S. W. 37, that the incompetency of a witness, by reason of previous conviction of an infamous crime, could be established only by introduction of the record of the conviction; that the admission by the witness of his conviction was insufficient to establish his incompetency, though the admission might go to the jury on impeachment of his credibility. We do not feel disposed to overrule that case, and it is conclusive of the question.

3. It is earnestly argued that the evidence is insufficient to warrant a conviction of the defendant in that it fails to establish, beyond a reasonable doubt, an intent to steal. The defendant is charged with stealing a hog, the property of one Blas Anderson. Anderson found the hog with the earmarks changed, in defendant's possession, and the latter, after a parley, offered to buy and did buy it from Anderson. He claims to have bought the hog from James Parks. Parks was introduced by the state and testified that he did not sell or deliver the hog to defendant. The defendant's explanation of his possession of Anderson's hog was corroborated, in some measure, by the testimony of other witnesses introduced by him; but we cannot say that the jury were unwarranted in believing the statement of Parks, instead



of those of defendant, and in rejecting his explanation of the possession of the hog.

Appellant also complains at the refusal of the court to give certain instructions which he asked, but we find that they were substantially covered by the instructions given by the court of its own motion. There was, therefore, no error.

**Affirmed.**

### WESTERN COAL & MINING CO. v. HONAKER et al.

(Supreme Court of Arkansas. June 11, 1906.)

#### 1. MASTER AND SERVANT—NEGLIGENCE—PLEADING AND PROOF.

Evidence in an action for injury to one employed in a coal mine to tend a door to let cars through, by being struck by a car, that slack, slate, and rock thrown up loosely was piled to a height of 2 to 2½ feet beside the track, sloping back from it to the wall 2½ to 3 feet back from the rail; that the jar of cars would shake rocks loose and cause them to fall down; and that the car was thrown from the tracks by a rock lying on the rail, is responsive to the allegations of the complaint that defendant allowed slate, rocks, stones, and other debris to accumulate in and on the track in such quantities as to allow the flanges of the car to rise thereon, thereby causing the car to run off the track and strike plaintiff.

#### 2. DAMAGES—INJURY TO CHILD—EVIDENCE.

Testimony of plaintiff in an action for damages by reason of injury to his minor son, who was confined in bed for six months, that he lost eight whole days in nursing him, and that he was earning at the time \$120 per month, is not improper, in connection with his testimony that he had to quit his work one or two hours earlier in the evening and go home and assist in dressing the son's wounds; such testimony indicating that the condition of his son made it necessary for him to quit his work to assist in dressing the son's wounds, and the measure of his damages, if such was the case, being what he lost by reason of having to quit his work.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 490.]

#### 3. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission of evidence as to improper damages is harmless, where, excluding it, the verdict is not excessive on the undisputed proof.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153, 4175.]

#### 4. DAMAGES—PERMANENT INJURY—EVIDENCE.

Evidence in an action for injury to a boy, the calf of one leg having been torn from the bone down to the ankle, and the muscle having been torn from the bone just above the ankle on the other leg, held sufficient to go to the jury, on the question whether there would be any diminution in his earning capacity after attaining his majority.

#### 5. TRIAL—SUBMISSION OF THEORIES OF ACCIDENT.

Where, in an action for injury to one employed in a coal mine to let cars through, caused by being struck by a car, plaintiff's evidence was that slack, slate, and rock was piled up loosely close to the track to a height of 2 to 2½ feet; that the jar of cars would shake rocks loose and cause them to fall down, and that a rock several inches in diameter on the rail caused the car to leave the track, and defendant's evidence was that the accident was caused by plaintiff slipping off a rail beside the track onto the car, it was proper to refuse to

submit to the jury the theory that the injury might have been produced by a rock in some "unknown and accidental way getting on the track."

Appeal from Circuit Court, Franklin County, Ozark District; Jephtha H. Evans, Judge.

Action by J. M. Honaker and another against the Western Coal & Mining Company. Judgment for plaintiffs. Defendant appeals. **Affirmed.**

Joe Honaker, minor son of J. M. Honaker, was injured in appellant's coal mine, for which injuries suit was brought by the father to recover loss of his son's services, medical expenses, etc., and suit also brought by the father, as next friend of his son, to recover for mental and physical suffering, and for reduced capacity to earn money after arriving at full age. By agreement, as both suits grew out of the same accident, they were tried together, separate verdicts being rendered. The father recovered judgment for \$200 and the son for \$1,000, from which appellant appealed.

The allegations of negligence upon which plaintiffs relied are the same in both cases, and are as follows: "That the defendant allowed and permitted slate, rock, stones, coal slack, and other debris to accumulate in and upon the track in said mine and entry over which the said car was to pass, in such quantities as to allow and permit the flanges to the wheels on said car to rise upon and mount said slack, rocks, stones, slate, and other debris, thereby causing the said car to run off the rails of said track and strike, knock down, and run over plaintiff as herein complained of." The answer denied all the material allegations, and set up defenses of assumed risks and contributory negligence. Appellee, Joe Honaker, a youth between 13 and 14 years of age, was in the employ of appellant as trapper in one of its coal mines. It was his duty to stand near the track in the entry and open and close a large door across the entry, so as to let in and out through this door a mule and its driver with a car load of coal. Honaker had worked as trapper in coal mines for about one year, but had been working at the particular entry where he was injured about one week. He earned, as wages, 75 cents per day, which were paid to his father. The track in the entry on which the cars were run was built like a railroad track, only it is much smaller. The cars hold about two tons of coal. They have trucks under them at each end and the wheels have flanges that extend down below the surface of the rail about 1¼ of an inch and run on the inside of the rail to hold the cars on the track. A witness for appellee who went to the place where Honaker was injured about a half hour afterwards testified in part as follows: "I found where the head car had been off of the track—that is the car next to the door.

I could see where this car had run along on top of the dirt between the rails and the dirt on the outside of the rails. The gob wall had been built too close to the track; it had been piled up about 2 or 2½ feet high and slanted back from the rail in the track to the rib or wall of the entry. This gob wall was made of slack, slate, and rocks; they were just thrown up loosely for a distance of 30 or 40 feet along the side of the track. The jar of the cars passing by it or rats (and the mine was full of them) in running over this gob wall could shake the rocks loose, and cause them to fall down. I found a rock lying on the rail of the track back up 20 or 30 feet from the door. This rock was about three or four inches thick and nine inches in diameter, and was mashed and showed that it had been run over by the car. It was here at this rock, or near it, where I noticed the marks of a car wheel on the ground between the rails and outside of the rails. The car that struck Joe was off of the track and up against the door. It had crushed the timbers in the door, and had knocked some of the timbers down and splintered them up. I know that this was the car that struck him, because I found some pieces of flesh and blood on the bolt at the front end of the car. The dirt between the rails of the track where the car went off was up so high that the flanges of the car wheel would cut grooves in it near the rails. This gob wall that I speak of was made by some of the company's men cutting out a place in the roof of the mines for the purpose of putting in this door, and in cutting it out this rock and slate had been piled up along by the side of the car, and had been there for a month or two before Joe was hurt. I saw nothing there to cause this car to leave the track except this rock and the dirt being too high between the rails so that the wheel would not run on the rails without the flanges cutting into the dirt." He further testified that he and another employé "put off that morning a steel rail about 10 feet long on the gob wall between the rail and the rib on the south of the track." The rail was just thrown off on the gob wall. The conditions when this witness was examined were the same as they were immediately after the accident; they had not been changed. Honaker himself testified in part that he did not know how he got hurt. He was knocked senseless, and did not know anything for a day or two. At the time he was struck by the car he was at his post of duty, and was holding up the door for the car to pass through. He did not know of anything he could be knocked against except the door or post on which it was hung, or the rib of coal. It was near a foot or two from the track to the rib of coal, and this rib was near the wall of the entry. Honaker was asked on cross-examination if he did not

tell Claude McIntosh, shortly after he was hurt, and while they were taking him out of the entry, that he was standing upon a piece of track rail that had been thrown off near the track, and that he slipped off this piece of rail, or that it turned, and, by slipping off, his legs were thrown under the cars. He was also asked if he did not tell Tom Green shortly after he was hurt, and while he was being carried out of the entry, that he slipped or stumbled on the rail near the track, and that it rolled him under the car and caught his legs. He denied telling the witnesses named this or anything like it. One witness, testifying on behalf of appellee, said: "I was there the next day after he was hurt and noticed that the rock, slate, and dirt taken out of the entry for the purpose of putting in a door across the entry was piled along near the south rail and the track and between the rib or wall of the entry and the track. From the rib to the south rail is supposed to be 2½ or 3 feet. This gob was on the outside near where the boy would have to stand to open the door. There was loose slate and rock lying on top of this gob. The track between the rails is 2 feet 10 inches, and in some places it gets pretty muddy in the center of the track, and mud gets up to the top of the rails. There was dirt up near the top of the track. I saw where the car had been off of the track. I saw a mark on the gob like that made by the flanges of the wheel of the car." Another witness, speaking of this gob, says: "There was dirt, rocks, and slate piled along the entry on the south side near the track. It was piled down towards the door to the frog near the switch where the track turns in to the southeast entry. This dirt, rock, and slate was called 'a gob,' and it was piled about as high as it could be to keep from going down on the track. It was five feet from the bottom to the top, and this gob wall was piled about one-half way up. It was about 2½ or 3 feet from the south rail to the rib or wall of the entry. I noticed where the car had jumped off the track just before the car got to the trap." The appellant objected to the testimony as to the gob, its construction, and as to it being composed of rock, slate, and dirt, because the same was incompetent; there being no allegation in the complaint charging negligence in regard to the condition of the gob or that slate, dirt, or rock was improperly piled in the gob, and no allegation that the construction of the gob in any way contributed to the accident, and moved the court to exclude this testimony, which objection was overruled, and defendant excepted.

The complaint of J. M. Honaker, the father, contains the following allegation: "Plaintiff says that in nursing and caring for him, the said Joe Honaker, that he has been compelled to lay out and expend for doctors and surgical

bills, nurse hire, and attention, the sum of \$200, as shown in Exhibit A, hereto attached, and made part hereof." The account referred to is as follows:

"Exhibit A.

To nursing of Joe Honaker by self 124 days at \$1 per day.....	\$124 00
To three syringes, \$1.25 each.....	3 75
To services of Henry Honaker for nursing Joe Honaker 10 days, at \$2.00 per day....	20 00
To amount paid Mrs. Elmer Smith for services in nursing Joe Honaker, and washing soiled clothing and bedding.....	40 00
To amount paid for medicine to Western Coal & Mining Co. and Schriver Drug Store at Altus.....	12 25."

The elder Honaker told of the injuries, and sufferings of his boy, and of his own losses incident to the attention in nursing him, etc., as follows: "I found the calf of his left leg had been punctured with some blunt instrument; it had entered the flesh just below the back of the knee and had torn the calf of his leg entirely from the bone as low down as his ankle; just above the heel.

\* \* \* We could see a part of the bone in his leg where it was exposed from the flesh being torn from it. I also found that some kind of blunt instrument had penetrated my son's right leg just above the ankle, and had torn the muscle from the bone. Joe was in bed from these injuries, and unable to walk or help himself for a period of about six months. He complained a great deal, and for three months he had more or less fever from it, and seemed to suffer a great deal most all of the time except when he was under the influence of some easing powders that we gave him. He was not able to work on account of these injuries for seven or eight months. I was getting out of his wages at the time he was injured about \$15 a month. He is not able now to work all the time, and has not been since he was injured. \* \* \*

While he was sick I did not work all the time because I had to quit my work an hour or two earlier in the evening and go home and assist in dressing his wounds. My wife and one of my older sons were with him nursing him every day during these six months. Besides this, I had to employ help to look after him. I employed a Mrs. Smith, and paid her for her services, \$40. I lost the services of my other son, who was also a miner, and earning about \$20 a month. I paid out \$12 or \$15 for medicine for Joe, and \$3 or \$4 for syringes used in washing his wounds. I lost eight whole days in nursing Joe, and was at that time earning \$120 a month myself. \* \* \*

To the statement contained in the last sentence above appellant objected, and, upon its objection being overruled, saved its exceptions. The wounds of Honaker were exhibited to the jury. They had not yet healed.

Claude McIntosh, a witness for appellant, testified that he was driver on the entry where the accident happened, and had been for a good while before it occurred; that the accident happened about 10 o'clock in the morning; that he passed the place where it

occurred with a trip of cars about every 20 minutes since 7 o'clock in the morning; that during the two or three months he had driven on the entry he would average about three trips an hour. At the time of the injury, Tom Green was on the front car driving, and he on the second. There were four cars in the trip and the third one ran over Joe Honaker. Cars had never been off the track at this place while he had been driving. Some few minutes before the accident, he laid a piece of rail on the gob. After getting Joe Honaker from under the cars he asked him how it happened, and he said that he got on or was standing on this rail and that it turned and threw him under the car. He went back with Pearl Abbott after the accident and saw no rock or anything on the track to cause a wreck. There was nothing on the track where Joe Honaker was taken out except the end of the rail, which, as above stated, he put on the side of and parallel with the track. This rail, when Honaker was gotten out, was on the track up against the car wheel and in front of it, and Honaker's leg up against the rail and the front wheel of the car was off the track. "Joe's statement was that he was holding the door open, stepped on the rail, and it turned and rolled under the car. He was conscious, and I was holding his head on my lap when he was telling about it." Cross-examination. "Did not see where he was standing, but he was holding the door open for me to drive through. The rail spoken of was put on top of the gob along the track one or two feet from it. The gob had loose rock and shale on it. Can't swear the rail derailed the car. Saw no signs of the cars leaving the track except where Honaker was caught. Conversation with Honaker occurred in this way: I said, 'Joe, what in hell caused this?' and he replied that he got on the rail and it turned and threw him under the car. There was dirt between the track, and there might have been some pieces of slate on it that had been there all the time. There were bumpers on each side of the car in front, which extended forward five or six inches. Body of the cars extended over the track about one inch. The cars did not uncouple. The door across the entry was jammed up but not knocked to pieces. I have been convicted of larceny, but have been pardoned."

Tom Green, also for appellant, testified that he had been driving on the entry about a month or so before Honaker was hurt; that he was on the front car when the injury happened, and, as he passed through the door, saw Honaker holding it open. After two cars had passed the door, he felt a jar and heard Honaker call, stopped the trip quick, went back, and found his legs and the rail in front of the car wheel that was off the track, and the end of the car up against the door. After getting Honaker out, he stated that he slipped or stumbled over the rail that was lying on

the gob, and that it rolled him off and under the car. "When we got him out, found some blood and flesh on the car next to him. I think McIntosh was on the fourth car instead of the second. There had never been any wrecks or any cars to go off the track at that place since I had been driving, except this time."

The court gave the following among other instructions: "(2) The gravamen of the charge in each case is the charge that the defendant was negligent in the maintenance of its track in the mine, and that this negligence caused the injury sued for. Negligence as charged means the absence of that care to keep and maintain the track in a reasonably safe condition for service that a man of ordinary care and prudence under the circumstances of the business, considering its perils, dangers, and necessities, would have used. If defendant used such care as this, it is not negligent, but if it failed to do so, it was negligent, and, if this negligence, if it existed, caused the injury sued for, you should find for the plaintiff." "(4) It was the duty of the defendant to use the care and prudence that a man of ordinary care and caution would use under the circumstances of defendant's business of operating a mine to provide and maintain a reasonably safe track for the cars of coal to run, or be pulled upon, and if it used such care it is not guilty of negligence, but if it did not, then it is guilty of negligence. Of this the jury are to be the judges from all the evidence in the case." "(6) If you find for the plaintiff, Joe Honaker, you will assess his damages at such a sum, not exceeding the sum sued for in the complaint, which is \$2,000, as will from the evidence, in the judgment of the jury, compensate him for the pain and suffering, mental and physical, which he suffered, if any, arising from the injury, whether such pain and suffering be past, present, or prospective, and for the inconvenience and diminution of capacity to earn a livelihood, if any, arising from the injury existing after he arrives at 21 years of age, if you find any such will then exist from the injury." To these appellant objected and saved its exceptions. The other instructions given by the court on its own motion relate to the burden of proof and assumed risks and contributory negligence. Appellant does not abstract them and urges no objection to them here.

At the request of appellant, the court gave the following: "(4) If the jury believe from the evidence that plaintiff, in some way, slipped, fell, or was thrown under the cars as the trip was passing, and in this way was injured, he is not entitled to recover." "(7) If the evidence is equally balanced in weight and credibility, as to whether the accident was caused by the negligence alleged in the complaint or by reason of plaintiff falling or slipping from and off the rail or other substances near the track, or by

reason of the rail turning over, or by his stumbling over same, and in this way having his legs thrown under the car wheels, they should find for defendant."

The court refused to give each of the following instructions: "(A) You are instructed to return a verdict for the defendant. (B) The negligence charged against defendant in plaintiff's complaint is that it allowed and permitted slate, rock, stones, coal slack, and other debris to accumulate in and upon the track in its mine and entry over which defendant's cars passed, in such quantities as to cause, allow, and permit the flanges of the car wheels to mount such slate, rock, stones, and other debris, and to cause same to run off the said track and to run over Joe Honaker. Now, if the evidence shows that no obstructions were allowed or permitted by defendant to accumulate upon its said track, but that the accident was caused on account of a rock being thrown, carried, sliding, or falling from the gob near the track, or by a rock in some unknown and accidental way getting on the track, then under the complaint plaintiff cannot recover. (C) The law does not require defendant to insure its employees against accidents and injuries, nor is it required to so conduct its business that accidents will not happen. If the evidence in this case shows that the plaintiff was injured by and on account of a rock in some way accidentally getting on or near the track, then plaintiff is not entitled to recover. (D) If the jury believe from the evidence that about one month before the accident a trapdoor near where plaintiff was injured was constructed; that he was put to work at this door; that when said door was constructed the waste substances were thrown into the space near the track, called a 'gob'; that after this cars at the rate of an average of about 40 trips a day passed over the tracks near this gob without accident or injury; that on the day of the accident several trips had passed over said tracks; that then, and after the two front cars of the trip injuring plaintiff had passed, the third car was derailed by and on account of a rock in some unknown manner getting on the track—this would not in law show such negligence under the allegations in the complaint as would entitle the plaintiff to recover. (E) If the jury are unable to determine from the evidence whether the injury to plaintiff was caused by the specific acts of negligence alleged in the complaint, or by reason of plaintiff slipping from the steel rail, rocks, or debris along and near the track and thereby falling under the passing cars, they should find for the defendant. (F) If the jury believe from the evidence that the accident to plaintiff was not caused by reason of rock, slate, or other debris accumulating on the track, but that same was caused by reason of a rock, between trips made in hauling cars along the track, getting on the track in some unknown way from the

gob or from some place outside of the track after one or more cars had safely passed, then, under this state of facts, no such negligence is shown as would make defendant liable." To the ruling of the court refusing these, appellant objected and excepted.

Ira D. Oglesby, for appellant. Sam R. Chew, for appellees.

WOOD, J. (after stating the facts). 1. The testimony as to the construction and condition of the gob as explained in the evidence was competent, and responsive to the allegation of the complaint that "the defendant allowed and permitted slate, rock, stones, coal slack, and other debris to accumulate in and upon the track in said mine and entry over which the said car was to pass," etc. The gob was so close to the track that it was impossible to allow the accumulation of rock, stones, coal slack, etc., upon it, beyond a certain limit, without endangering the track itself. This is clearly shown by the evidence. The evidence tended to show that debris had accumulated on the gob to the extent of making it dangerous to the track. The testimony only disclosed the manner in which and the means by which the track had become obstructed.

2. The testimony of J. M. Honaker, that he lost eight whole days in nursing Joe, and that he was earning at that time \$120 per month, was not improper, when taken in connection with the other part of his statement, to wit: "I had to quit my work an hour or two earlier in the evening, and go home and assist in dressing his wounds." This testimony indicated that the condition of his son made it necessary for him to quit his work to assist in dressing his son's wounds. If such was the case, then the measure of his damage would be what he lost by reason of "having to quit" his work. Appellant did not undertake on cross-examination, or otherwise, to show that the condition of young Honaker was not such as to require the attention of his father for eight whole days. The proof showed that Honaker was confined to his bed about six months. Losing an hour a day for that length of time would make many more than eight whole working days of 10 hours per day. But if the testimony showed an improper measure of damage, its only effect would be to produce excess in the amount which J. M. Honaker, individually, recovered. The other proof in the record showed that the amount he recovered (\$200) was not excessive. Young Honaker was earning \$15 per month, which his father received. He lost seven or eight months, and was not able at the time of the trial to work regularly. His father paid for nurse hire, medicine, etc., at least \$55, and he testified that on account of the injury to Joe he lost the services of another minor son who had to attend him \$20 per month. Upon the undisputed proof the ver-

dict' was not excessive even if the testimony complained of is excluded; therefore appellant was not prejudiced by it, if it were erroneous.

3. We find no error in the court's instruction on the measure of damages to be awarded Joe Honaker. Objection is urged to that clause which permits the jury to consider damages "for the inconvenience and diminution of capacity to earn a livelihood, if any, arising from the injury existing after he arrives at 21 years of age." The nature of Honaker's injuries was described to the jury, and, in addition to this, his wounds were exhibited, and were shown to be still unhealed at the time of the trial. We are of the opinion that it was a question for the jury from the description in the evidence, and their observation of the boy's injuries, as to whether or not there would be any diminution in his capacity to earn a livelihood after he arrived at 21 years of age. But, aside from this, the sum of \$1,000 for the actual pain and suffering which this boy must have endured from the terrible injury he received, at the time, and during the months following while he was confined to his bed, was not excessive.

4. We find no error in the court's refusal to present specifically appellant's theory that Honaker's injuries might have been produced by a rock in some "unknown and accidental way getting on the track." This idea was couched in some of the refused requests. There is nothing in the evidence to justify such a theory. Under the proof this injury was produced either by the negligence of appellant in allowing rocks, slate, coal dust, mud and other debris to accumulate on or so near its track as to obstruct and endanger same, or it was caused by Joe Honaker stumbling over or slipping off of the steel rail that was lying on the gob onto the track. These were the conflicting theories presented by the evidence. The court's charge covered the questions of negligence, contributory negligence, and assumed risks, as they were presented in the pleadings and proof, and it was correct.

The judgment is affirmed.

PEOPLE'S FIRE INS. CO. v. GOYNE.  
SAME v. BIRD. SAME v. H. J.  
FREELAND & BRO.

(Supreme Court of Arkansas. June 11, 1906.)

1. INSURANCE—ACTS OF AGENT—ESTOPPEL.

An insurance company is estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question in an application for insurance, or other breach of warranty or violation of the provisions of the application, notwithstanding the application or policy provides that the company shall not be bound by any such conduct of its agent.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 952.]

## 2. SAME—STIPULATION IN APPLICATION— WAIVER—PAROL EVIDENCE.

That the agent of an insurance company employed to procure insurance waived the falsity of answers in an application for insurance may be proved by parol evidence, though the application or policy stipulates that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1020.]

Appeal from Circuit Court, Ashley County; Zachariah T. Wood, Judge.

Separate actions by W. R. Goynes, by E. L. Bird, and by H. J. Freeland & Bro. against the People's Fire Insurance Association of Arkansas. From judgments for plaintiffs in each action, defendant appeals. Affirmed.

There was a jury trial in Goynes's Case resulting in verdict and judgment for him against the insurance company in the sum of \$1,018.24. Bird's Case and Freeland's Case were tried before the court sitting as a jury, by consent, and resulted in judgment for \$1,044.40 and \$569, respectively. The insurance company appeals, and this is its statement of facts: These three actions are based upon three policies of insurance issued by the appellant on the 14th day of December, 1903. The applications for the policies were taken by the same agent of appellant, were made by the respective appellees on the same day upon property alleged to be situated in the same town, and the losses claimed to have been sustained were caused by the same fire, which occurred on the 10th day of January, 1904. The facts and principles of law involved are practically the same in each case. Hence counsel have agreed to submit them together.

In Goynes's Case, No. 5,902, the appellant denied liability because, it alleged, the policy was obtained by fraud and misrepresentation and concealment of a material fact on the part of appellee, in this, that in his application for the insurance, which, by the terms and conditions of the policy, formed a part of the contract of insurance, he represented that there was no building nearer to his store building, upon which he desired insurance, than 90 feet, when in fact there was another building less than 10 feet therefrom, thereby largely increasing the risk assumed by appellant without its knowledge or consent, either at the time of issuing the policy or at any time previous to the fire.

In Bird's Case, No. 5,903, the complaint stated that appellee was the owner of lot 3, in block 11, in the town of White, Ashley county, together with a one-story frame building situated thereon and occupied as a store, and that this building and a stock of goods, etc., located and being therein, were insured by appellant. The policy of insurance issued by appellant was filed with and made part of the complaint. In its answer appellant denied that appellee was the owner of said lot and building. It admitted the issuance of the policy upon the building and

goods described in the complaint and their loss by fire, but denied liability, because it alleged, said policy was obtained by fraud and misrepresentation and concealment of material facts, in this, that appellee, in his application for the insurance, which was, by the terms and conditions of the policy, a part of the contract of insurance, represented that there was no building nearer to his said store building than 30 feet, when, in fact, there was another building less than 20 feet therefrom, thereby largely increasing the risk assumed by appellant without its knowledge or consent, either at the time of issuing the policy, or at any time previous to the fire; and in this, that appellee was a United States postmaster and kept the post office in said building at the time of making his said application, which fact largely increased the risk, and was concealed from, and unknown by, appellant until after the fire.

In Freeland's Case, No. 5,904, the complaint alleged ownership by appellees of lot 7, in block H, together with household and kitchen furniture contained in said building. The policy was made part of the complaint. In its answer appellant denied that appellees were the owners of said lot and building. It admitted the issuance of the policy, but denied liability because it alleged that it was obtained by fraud and misrepresentation and concealment of material facts by appellees, in this, that in their application for insurance, which by the terms and conditions of the policy, was a part of the contract of insurance, the appellees represented that there was no building within 100 feet of the building to be insured, when in fact there was another building less than 10 feet therefrom, thereby largely increasing the risk assumed without the knowledge or consent of appellant, either at the time of issuing the policy or at any time previous to the fire; and, in this, that in said application appellees represented that the building was occupied as a private boarding house, when in fact it was occupied and used as a public hotel or tavern, by reason of which the risk assumed was largely increased without its knowledge or consent at any time; and in this, that in said application appellees represented that said building was occupied as a private boarding house, when in fact it was also used as a general store for the sale of merchandise, and at that time contained some \$1,500 worth of merchandise, and was also used as a barber shop, all under one roof and described in said application as one building, thereby increasing the risk assumed without the knowledge or consent of appellant at any time.

In each case, both in the pleadings and the proof, it was shown and admitted that, as soon as appellant ascertained the facts set out in its answers, it denied its liability, and returned the premiums received by it, which were refused by each of the appellees, and in its answers again tendered them. Goynes's title to the property insured was not put in

issue, but Bird's and Freeland & Bro.'s were. The proof showed that neither Bird nor Freeland & Bro. were the owners of the land or lots upon which the insured buildings were located. In Bird's Case the policy insured a building on lot 3, block 11, in the town of White, and certain goods while contained therein. The proof showed that all the land owned by Bird was lot 10, in block E, in the town of White. In Freeland & Bro.'s Case, the policy insured a private dwelling house and contents situate on lot 7, in block H, in the town of White. The proof showed that all the land they owned was an indefinitely described lot 9, in block G, and an indefinitely described lot 8, in block G, in Ashley county, Ark., and that the building thereon was a public hotel or tavern, and not a dwelling house, nor a private boarding house. These facts are not disputed anywhere in the record. In fact, each allegation of each answer in the three cases was clearly proved, and is not disputed, but appellees rely wholly upon the fact that appellant's agent was present, saw the property, examined the deeds, and made out the applications for insurance, and that therefore appellant is bound by his knowledge, or his means for having knowledge. They testified, with perfect uniformity, that this agent was an entire stranger to them, and that they did not read, nor hear read, nor ask to have read, either of the applications, but signed them upon this agent's assurance that they were all right, at the same time admitting that they knew that they could not get the insurance unless they signed the applications. H. J. Freeland said that he could not read nor write, but that his brother, who was his partner, could do both, and that he signed their application. This agent was only authorized to solicit and forward applications for insurance and collect the premiums therefor. He could not issue policies, nor did he make any pretense of being a general agent. The applications exhibited with the answers and introduced as evidence clearly state that the company shall not be held liable for any loss or damage, or for any insurance, until they were received and approved at the home office, in Little Rock, Ark. Appellees also testified that this agent asked them no questions, and that they made no answers, but simply trusted the whole matter to him, and did not even see him make out the applications.

The above and foregoing statement fairly presents the facts. In addition thereto it may be added that it was shown, without dispute that each matter relied upon as avoiding the policy was well known to the agent. In Goyne's Case the agent was shown the building nearest to the house where the property insured was located, was fully informed of the facts, and wrote the application containing the misstatement. The same was true in Bird's Case in regard to the location, and the agent knew

Bird was postmaster and kept the post office in his store, and he (the agent) received mail at it; the same facts as to location existed in Freeland's Case, and as to the representation of the building being used as a private boarding house, when in fact it was a hotel; the agent stopped at the house for several days, slept in the best room and on the only feather bed, and knew the facts concerning the character of the house as well as the owner. In regard to the description of the lots in Bird's and Freeland's Cases the property was all either of them owned in the place, was pointed out to the agent, and he was given the deeds to write in the proper description. It seems that this was a new town and a recent plat had been made, and descriptions were uncertain, probably not in conformity to the new plat. The agent wrote all the applications on information given him. No false answers were made to him. None of the insured read over the applications. They signed them without reading them. All had opportunity to read them.

The following clauses in the applications and policies are material to the issues presented: "This application shall be considered a part of the contract for insurance and a warranty by the applicant, and it is further understood and agreed that this association will not be bound by any representations of the applicant, or promise of the agent or solicitor not contained herein; and I further agree that the answers to all questions are my own, or by my express authority. I warrant the foregoing application to contain a full and true description and statement of the condition, situation, value, occupation, and title of the property proposed to be insured in the Peoples' Fire Insurance Association of Arkansas, and I warrant the answer to each of the foregoing questions to be true, full, complete, and correct, and the same shall be a part of my policy of insurance in said association." This application is signed by appellee. Across the face of the application, in red ink, is the following: "Notice to applicant: This association will not be bound or held liable for any insurance this application calls for until this application is received and approved by the association at its home office at Little Rock, Ark."

In the body of the policy are the following terms and conditions: "This entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the assured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

Below the numbered lines are the fol-

lowing terms and conditions: "Special reference is had to insured's application, which is his warranty, and is the basis upon which this policy is issued, and is made a part of this contract." This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto at the home office, and no officer, agent or other representative of this association shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject or agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Daniel W. Jones and J. H. Hamiter, for appellant. Geo. W. Norman, for appellee Bird. R. E. Craig and Pugh & Wiley, for other appellees.

HILL, C. J. (after stating the facts). These are the questions involved in these cases: May an insurance company be estopped by the conduct of its agent acting within the apparent scope of his authority from availing itself of a false answer to a material question or other breach of warranty or violation of the provisions of the application or policy notwithstanding clauses in the application or policy to the effect that the company shall not be bound by any such conduct or representation of its agent? And, if such estoppel is available, may it be proved by parol evidence in the face of clauses in the policy or application to the effect that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company?

The leading case for many years upon the subject was the case of *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, 20 L. Ed. 617. The opinion was delivered by Mr. Justice Miller, and concurred in by the entire court. Mr. Justice Miller said: "If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this state-

ment, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto. It is, in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood, and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country."

In *Insurance Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, this court followed *Insurance Company v. Wilkinson* and quoted largely from the opinion. After quoting from this opinion the court proceeded to review the authorities of other courts upon the subject, and concluded that the insurance company was estopped from taking advantage of the falsity of an answer where its agent knew it was false, and had notice of the falsity at the time it was made, and the court further said in that case, and cited to support it many authorities, that the waiver may be proved by either written or oral evidence notwithstanding the declaration in the policy to the contrary. If this case is followed, there would be no question but what the judgments in these cases should be affirmed, for in principle the answers are of exactly the same character as in the *Brodie* Case. The Supreme Court of the United States in *Northern Assurance Company v. Grand View Bldg. Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, has decided these questions otherwise. Mr. Justice Shiras delivered the opinion of the court, and the case of *Insurance Co. v. Wilkinson* and the other cases in the Supreme Court of the United States along the same line were "distinguished" in name, but in fact were overruled, and the *Wilkinson* Case was almost in terms overruled. Part of its language was disapproved without designating what part went under the ban. The fact that the Supreme Court of the United States has decided differently from this court upon a question of general law calls for a careful examination of the ques-



tion in order to see if error has been committed, and if possible to obtain uniformity of decision upon important questions constantly arising in both federal and state courts. After a review of the authorities, Mr. Justice Shiras stated the position of the court as follows: "They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot, by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed as a matter of law to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent." This position does not commend itself as sound in principle.

Insurance contracts are not as a rule made like other contracts. They are prepared by one party to the contract, and the other party thereto has no opportunity to deal with his contractor as to the terms, conditions, and limitations of the contract. The only option open to him is to contract or not to contract, and when he contracts it is upon terms prepared in advance by the other party, and reduced to printed form which is sought to be as unchangeable as the laws of the Medes and Persians. To procure these contracts of insurance agents are sent forth whose duties are limited to procuring insurance, and var-

ious clauses are inserted in policies and in the applications therefor disabling the agent from binding the company in any manner not stipulated in the policy. Can one party to a contract thus prevent himself being bound by the ordinary principles governing principal and agent? If a man sends forth an agent and clothes him with authority to do certain acts, his acts within the scope of that authority are binding upon the principal; and, moreover, if he clothes him with apparent authority to do certain acts and privately instructs him to the contrary, and the agent proceeds to do those acts within the apparent scope of his authority, but contrary to his private instructions, still the principal is bound. When an agent does anything within the real or apparent scope of his authority, it is much the act of the principal as if done by the principal himself. These are fundamental doctrines in the law of principal and agent and have been applied in every court where the common law prevails. When a person does an act or makes a representation which leads another person to a certain course of conduct which he would not otherwise have pursued, the party causing this action is estopped to take advantage of anything contrary in fact to his misleading conduct or representation. Courts of law as well as of equity apply the doctrine of equitable estoppel or estoppel in pais. As was stated by Mr. Justice Miller in the *Wilkinson Case*, and the cases cited in the footnote thereto, that principle prevails generally. The application of these familiar doctrines of agency and estoppel to insurance contracts and insurance agents necessarily sustains the decision in the *Wilkinson Case* and in the *Brodie Case*. It will not do to say that an agent can go forth clothed on the one hand with authority for insuring, and on the other hand is disabled from binding the company in regard to the insurance which he is procuring. The scope of his authority is to obtain that insurance, and for that purpose he is furnished with applications and usually with policies. His business is to have those applications filled out truthfully, to the end that an insurance contract or policy be obtained by the applicant. If the company clothes him with that power it is necessarily bound by his action in performing that power. If he has sufficient power to obtain benefits for his company in this particular matter he has power to impose liability upon the company in the very matter in which he is entrusted with the power. The power to act for the company in a particular case gives the power to bind in that selfsame instance. One cannot be disassociated from the other. In *Fidelity Mutual Life Ins. Co. v. Russell* (Ark.) 86 S. W. 814, it was pointed out that this court had always confined the waiver by an agent to an act within the scope of the authority conferred, and to a matter which could be waived, and the decisions in this court to that effect are therein cited. There-

fore these decisions each in its own way seems to sustain the principle of the Brodie Case and is antagonistic to this new doctrine in the Supreme Court of the United States.

Can such an estoppel or waiver be proved by parol? The courts excluding the estoppels and waivers do so upon the rule against varying and contradicting a written contract by parol as well as upon sustaining the contractual right to exclude such estoppels and waivers. No court has been found which holds the estoppel or waiver available which excludes parol evidence to prove it. Some rest the omission upon the theory of fraud or mistake to prove which parol evidence is always admissible; others rest it upon the theory that an estoppel against the contract or a waiver of its terms is not varying or contradicting the written instrument. In the one instance the writing cannot be asserted, and in the other it is no longer in force because abrogated by the waiver. The court is convinced that the reasoning in *Assurance Co. v. Bldg. Association* is not sound and should not be followed, and that the Brodie Case, following the *Wilkinson Case*, states the true rule in such matters. The court is reinforced in that opinion by the decisions of many other courts on the same subject since the decision of *Assurance Co. v. Building Ass'n*. In *Thompson v. Traders' Ins. Co.* the Supreme Court of Missouri said: "But the defendant relies upon the case of *Northern Assurance Co. v. Grand View Building Ass'n*, decided by the Supreme Court of the United States, on January 6, 1902, and reported in 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and upon a number of like cases in other jurisdictions, and upon the authority of those decisions contends that the Missouri rule is wrong, because every principal, insurance company as well as individual, has a right to limit the power and authority of his agent, and is not bound by any act of the agent in excess of his power.

With every possible respect for the courts whose decisions are cited, and, also for the learning of the able counsel for the defendant in this case, it is only necessary to say that the Missouri rule does not impair the power of a principal to limit the authority of his agent, nor does it bind the principal for the acts of the agent done in excess of the power conferred on the agent. On the contrary, it holds the principal liable just as far, and no further, as he has made himself responsible. It measures the responsibility of the principal for the acts of the agent, not alone by the terms of the original power conferred on the agent, but also by the subsequent power, written or parol, expressly conferred, or such as is necessarily implied from the conduct of the principal, and of his agent with his knowledge, and from their course of business with third persons, and which conduct and course of business estop

the principal from denying the power of the agent to do the particular act relied on, albeit the power to do that act was not conferred, but, on the contrary, was expressly denied to the agent by the original contract. In other words, the Missouri cases give full effect to the contractual power of the principal to limit the authority of his agent in the original appointment or at any other time, but those cases also give like effect to all subsequent powers conferred by the principal upon his agent, either expressly, or by implication, or by estoppel, notwithstanding such powers are in conflict with, in derogation of, or in enlargement of, the powers originally conferred. And this rests upon the doctrine that in each instance the principal binds himself, not that the agent binds the principal beyond his power to bind him. The act of the principal limiting the power of the agent is not irrevocable at the will of the principal. As the principal has the freedom to contract to impose the limitations upon the power and authority of the agent in the first place, so also the principal has the freedom to contract to remove, abolish, alter, diminish, or increase, the limitations originally imposed upon the power of the agent, and this the principal may do in any manner that in law will be binding upon him, but in every case it is the act of the principal, that the law simply enforces, and not the unauthorized act of an agent done in excess of the authority conferred. The cases relied on by defendant fail to compel conviction or to be accepted as authority in other jurisdictions, because they lose sight of these fundamental principles of law." 169 Mo. 24, 68 S. W. 891.

The Supreme Court of Appeals of Virginia in *Insurance Co. v. Richmond Mica Co.* (Va.) 46 S. E. 463, said: "Much reliance has been placed by counsel for the plaintiff in error upon the opinion of Mr. Justice Shiras in the case of *Northern Assurance Company v. Grand View Bldg. Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 214, reversing the judgment of the Circuit Court of Appeals of the Eighth Circuit. While the pronouncements of that great court must always command the highest respect, its judgment in the particular case is deprived of much value as a precedent by the circumstance that it is not in harmony with many former decisions of that court, and that the Chief Justice, Mr. Justice Harland and Mr. Justice Peckham did not concur in the opinion of the majority. Since that decision was rendered Mr. Justice Shiras has retired from the bench, and been succeeded by Mr. Justice Day, who presided in the Circuit Court of Appeals in the case of *Queen Ins. Co. v. Union Bank & Trust Co.*, 111 Fed. 699, 49 C. C. A. 555, where a different conclusion was reached. So there are now on that bench at least four justices who entertain

views opposed to those of the majority, as expressed in the case referred to. In this state of the law, this court can hardly be expected to abandon its own well-considered precedents to follow the questionable ruling of another tribunal."

The Court of Appeals of Kentucky in *German-American Ins. Co. v. Yellow Poplar Lumber Co. (Ky.)* 84 S. W. 551, said: "The fact that the contract provides that no subsequent agreement shall be valid unless in writing and endorsed on the policy does not change the rule, for this part of the contract stands like any other part of it, and may be changed by a subsequent parol agreement, just as any other provision of the contract may be subsequently modified. This rule is supported by the previous cases referred to, and by the decisions of a majority of the states. Appellant relies very strenuously upon an opinion of the Supreme Court of the United States, the case of *Northern Ins. Co. v. Grand View, etc., Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. Deference and great respect is always due this exalted tribunal, but in this case it should be borne in mind that the Supreme Court was not construing a provision of the Constitution of the United States, an Act of Congress a treaty, or giving an exposition of law upon which its judgment would be final and conclusive here and elsewhere. The court was dealing with a question of general jurisdiction, upon which it was privileged, as this court is privileged, to exercise an independent judgment. It is no new thing for this court and the honorable Supreme Court to be in disagreement upon questions of general law. To review the long line of authorities in Kentucky, and bring them in accord with the conclusion reached by the Supreme Court of the United States in the case quoted above, would be to confess previous inability of this court to make and declare the law governing the rights and responsibilities of insurance companies and their patrons in this state."

The Supreme Court of Illinois in *Orient Ins. Co. v. McKnight (Ill.)* 64 N. E. 339, said: "Counsel for appellant have referred to cases holding otherwise, including *Northern Assurance Co. v. Grand View Bldg. Ass'n*, decided by the Supreme Court of the United States, at its October term, 1901, by a divided court (183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213); but we have adopted a different rule in this state, and it must be applied in this case." The Appellate Division of the Supreme Court of New York pursued a like course in *Benjamin v. Insurance Co.*, 80 N. Y. Supp. 256, but that was not the court of last resort, and hence was not at liberty to change the rule, if desired. The same is true of the Court of Civil Appeals in Texas in *Insurance Co. v. Nichols*, 72 S. W. 440.

More notable than any of these cases is the case of *Grand View Bldg. Ass'n v. North-*

*ern Assurance Co.* in the Supreme Court of Nebraska (102 N. W. 246), being the same case decided by the Supreme Court of the United States, in 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, heretofore referred to, which was brought in the form of a chancery proceeding after the Supreme Court of the United States had decided in favor of the insurance company. The Nebraska court, in 102 N. W. 246, said: "From the final decision in the former action, 4 out of the 9 judges of the United States Supreme Court dissented. The opinion of the majority, being the adherence to the letter of an antiquated and worn-out technical formality, seems to us to be an ironical commentary upon the oft-repeated judicial boast that the law is a progressive science, and that the courts are continually adapting their processes and proceedings to changing social business needs and customs. Either so, or else, as we consider, the court fell into a still more grievous error. The familiar maxim that equity regards that as having been done which was agreed to be done and ought in good conscience to have been done, has not for a long time been a stranger in courts of law in cases in which equitable matters are properly in issue." Mr. Robert J. Brennan wrote a review of this Nebraska case in 60 Cent. Law J. 484.

The Supreme Court of Appeals of West Virginia in *Maupin v. Insurance Co.*, 53 W. Va. 557, 45 S. E. 1003, followed the *Northern Assurance Case*. Judge Poffenbarger filed a dissenting opinion, reviewing at great length the *Northern Assurance Case* and disagreeing with it. Fifteen months later the same question came before the court again in *Medley v. Insurance Co.*, 55 W. Va. 344, 47 S. E. 101. Judge Poffenbarger wrote the opinion this time and had secured two of his brethren to agree with him, and the former decision was overruled; two of the judges dissenting. A somewhat careful investigation fails to discover any decision following the *Northern Assurance Case* except the federal and territorial courts which are concluded by it, save only West Virginia, and as stated, it quickly receded from that position.

One of the best discussions of this question is to be found in *Sternaman v. Met. Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625, decided in the month following the decision in *Northern Assurance Case*, but evidently without having seen that decision. The majority of the court reached the same conclusion as did this court in the *Brodie Case*, the minority opinion was written by Chief Judge Alton B. Parker. The two theories are well presented in that case.

Mr. Ashley Cockrill in an interesting and instructive address before the Arkansas Bar Association at its 1905 session (page 62) reviewed the history of *Northern Assurance Co. v. Building Ass'n* and strongly supported it. His address furnishes a careful survey of

the decisions on this question before and after the rendition of this decision and his investigation has lightened the labor of this examination of the cases. In addition to the cases heretofore cited, which have not followed the decision of the Supreme Court of the United States, and which have been decided since that decision, are the following, all of which sustain the position here taken. Most of these cases are found in Mr. Cockrill's article, but some are more recent. *Fire Ass'n v. Yeagley* (Ind. App.) 72 N. E. 1035; *Vesey v. Com. Union Ass'n Co.* (S. D.) 101 N. W. 1074; *Fire Ass'n v. Masterson* (Tex. Civ. App.) 83 S. W. 49; *Nute v. Hartford Fire Ins. Co.* (Mo. App.) 83 S. W. 83; *Continental Ins. Co. v. Thomasson* (Ky.) 84 S. W. 546; *Madden v. Phoenix Ins. Co.*, 70 S. C. 295, 49 S. E. 855; *Foster v. Insurance Co.* (Wash.) 79 Pac. 798; *Ohlo Farmer Ins. Co. v. Vogel* (Ind. App.) 73 N. E. 612; *Johnson v. Aetna Fire Ins. Co.* (Ga.) 51 S. E. 339; *Reilly v. Empire Life Ins. Co.* (Sup.) 90 N. Y. Supp. p. 866; *German-American Ins. Co. v. Yeagley* (Ind. Sup.) 71 N. E. 897. In the cases of *Spalding v. New Hampshire Fire Ins. Co.* (N. H.) 52 Atl. 858, the authorities upon this subject are fully reviewed and it is there shown that the great weight of the American authority sustains the position taken by this court, and since that time many more decisions have been rendered upon the same side of the question.

It is unfortunate that the Supreme Court of the United States should take this departure. It puts in force a different rule on the same subject in federal courts than is in force in the great majority of the state courts, and such a condition is to be regretted. But to avoid this situation it cannot be expected that the state courts should abandon their own decisions which were frequently bottomed upon the doctrine announced from an undivided court in the opinion written by that great jurist, Mr. Justice Miller in the *Wilkinson Case*, and change because that court has changed. Especially reluctant should the state courts be to do so where as in this state the other doctrine has become woven into the jurisprudence of the state and should not be changed except for the weightiest reasons. The law must adjust itself to new conditions arising in the commercial and industrial growth of the country, and the flexibility of the common law has always been one of its sources of strength. It became the duty of the courts to adjust and adapt to these new questions arising from a new method of contracting and conducting affairs the elemental principles governing the subject-matter so as to effect justice and to prevent the rules of law becoming engines of oppression or injustice. The adaptation of the doctrine of estoppel and the usual rules applicable to principal and agent to these insurance contracts was meeting with elemental principles the exigencies of the case. To deny application to them after being so long

in force in both federal and state courts is a retrogression which this court declines to make.

The judgments are affirmed.

McCULLOCH, J., nonparticipating.

MARTIN, County Treasurer, v. STATE, to Use of SCOTT COUNTY.

(Supreme Court of Arkansas, June 4, 1906.)

1. COUNTIES—DEPOSIT OF COUNTY FUNDS—BIDS—FILING AND APPROVAL OF BOND.

In Acts 1905, p. 412, providing for the depositing of county funds in the bank offering to pay the highest rate of interest, the provision that the county court shall require a bond to be filed with each bid, which bond shall be approved by the court, is mandatory, so that an order of court directing the deposit of the funds in a bank which had filed no bond when it made its bid, and the bond of which when filed was approved by the judge in vacation, was void.

[Ed. Note.—For cases in point, see vol. 13. Cent. Dig. Counties, § 223.]

2. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—NECESSITY OF CONSTRUCTION.

The constitutionality of a statute will not be determined when the decision can be rested on some other ground.

[Ed. Note.—For cases in point, see vol. 10. Cent. Dig. Constitutional Law, § 43.]

Appeal from Circuit Court, Scott County; Styles T. Rowe, Judge.

Proceedings under Acts 1905, p. 412, to obtain bids for the deposit of the county funds of Scott county, in which an order was entered requiring John M. Martin, as county treasurer, to deposit the funds in a certain bank. On his failure to do so, suit was instituted by the state, to the use of Scott county, on the official bond of the treasurer, and judgment was rendered against him. From both the order and judgment, Martin appeals. Reversed and remanded, with directions to dismiss the action and vacate the order.

The General Assembly of 1905 passed an act (Acts 1905, p. 412) providing, in substance: That the treasurer and collector of Scott county deposit all county funds in their possession in the bank in Scott county which will pay the highest rate of interest on daily balances of the same; provided that the bank receiving said funds make a good and sufficient bond equal to 1½ times the amount of cash that is held at any time during any year, to be approved by the county court. That each stockholder of the bank receiving said funds be jointly and severally liable; that this liability shall not relieve the bondsmen of the treasurer or collector from liability for said funds, except in case of loss of funds deposited in a bank, as provided in the act. The county court shall annually make an order for the deposit of funds after advertising for bids. The section containing these provisions concludes as follows: "The court shall require a good and sufficient

bond to be filed with each bid; provided no order of deposit be made by the court for a longer period than the second Monday in July in each year, after notice has been given as provided in this act." It is also provided that the treasurer and collector shall, within five days after the order is made, deposit the public funds in the designated bank. Then follow provisions rendering the officers guilty of a misdemeanor in office for failure to comply with such order, and provides for fines and penalties against them and vacation of their offices. The county judge gave notice in conformity to the act and received a bid from the First National Bank of Waldron to pay 4 per cent. per annum on the county funds. T. G. Bates, a taxpayer, filed remonstrance. The court considered the bid and the remonstrance and made an order requiring the money deposited in the said bank, and Bates excepted to the order and filed affidavit and bond for appeal. Subsequently the treasurer Martin obtained an appeal and adopted Bates' remonstrance. The order is as follows: "In the Matter of Bids for the County Funds by the First National Bank of Waldron. Remonstrance by T. G. Bates. Now on this day, this cause coming on to be heard, comes M. C. Malone, cashier of the First National Bank of Waldron, in person, and offers 4 per cent. daily deposits or balances of county funds, and thereupon comes T. G. Bates, in person, and files his remonstrance against any order being made by the court with reference to the county funds. And upon hearing, and the court being well and sufficiently advised in the premises, the remonstrance of T. G. Bates is, after due consideration by the court, dismissed, and thereupon it is ordered by the court that all the county funds be deposited in the First National Bank of Waldron, Arkansas, upon said bank filing a good and sufficient bond therefor, conditioned as required by law, and in due form of law, given in the penal sum of \$25,000.00, which shall be approved by the judge of the county court, in vacation, to which rulings, orders and judgment of the court in this cause said T. G. Bates at the time excepted, and thereupon filed his affidavit and bond and prayer for appeal in this cause to the circuit court, and thereupon the matter of granting or rejecting the appeal to the circuit court in this cause is by the court continued until the second day of the next regular October term, 1905, of this court." The treasurer did not deposit the money within the time. He gave supersedeas bond with his appeal from the order, and contended that it superseded the order. Suit was brought by the state against him for penalties for failing to comply with the order depositing the money in the said depository. The circuit court held section 2 of the act, providing for liability upon the stockholders of the bank obtaining the deposit, to be un-

conditional, and sustained the remainder of the act as valid, and held the order properly made, and gave judgment against the treasurer for \$360, as interest on the money in his hands not deposited in said bank. The treasurer has appealed from both judgments, and the appeals have been submitted together.

Ira D. Oglesby (F. A. Youmans, of counsel), for appellant. J. H. Carmichael, for appellee.

HILL, C. J. (after stating the facts). The act (Acts 1905, p. 413, § 1) said: "The court shall require a good and sufficient bond to be filed with each bid." The bond was not filed with the bid, was not filed prior to the acceptance of the bid, and was not filed till after the order was made, and the court adjourned. The order as made, that upon a good bond in the sum of \$25,000, conditioned as required by law, being approved by the county court or judge in vacation, was that the funds be deposited with this bank. The order was made August 28, and the bond filed and approved September 4, 1905. The act makes it the duty of the treasurer and collector to make the deposits within five days after the order of the county court is made, under heavy penalties for a failure to do so. In this case no bond was presented and approved until more than five days after the order. The order was made subject to the approval by the court or judge in vacation of such bond, thereby substituting a vacation order as the point from which the five days should run, instead of having the whole matter settled in the county court as required by the act. The safety and security of the county funds were to be rested primarily upon the bond, whatever may be the other securities, and the act plainly required it to be filed with the bid, and that it should be a good and sufficient bond, and it should be approved by the county court, and not the judge in vacation. All of these provisions were disregarded here, and the question turns on whether these provisions are directory or mandatory. When directions in a statute reach to the very essence of the thing to be done, and where a failure to observe them prejudice rights sought to be preserved by these directions, then they are mandatory, and not merely directory. *Railway v. Gaster*, 20 Ark. 458; *Neal v. Burrows*, 34 Ark. 491; *Rector v. Board*, 50 Ark. 116, 6 S. W. 519; *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234; *Benjamin v. Birmingham*, 50 Ark. 439, 8 S. W. 183; *School District v. Bennett*, 52 Ark. 511, 13 S. W. 132; *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 49. Applying these principles to the case at bar, it is apparent that these directions as to presenting a good and sufficient bond with the bid and its approval by the court in term time, and as a condition precedent to the operation of the order depositing the

funds, reach to the essence of the thing to be done and are mandatory, and a failure to obey them should avoid the order in question.

The appellant assails the act as unconstitutional and invalid for many reasons stated in the brief, and the circuit court held one section of it unconstitutional. This court has long followed and approved this doctrine thus stated by Judge Cooley as to its duty to decide questions affecting the validity of acts of the General Assembly: "While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics."

\* \* \* It is both proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. \* \* \* In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a conclusion upon such question will be unavoidable." *Railway v. Smith*, 60 Ark. 240, 29 S. W. 752.

Finding a clear and positive ground for decision of this case under the act itself, the court has not considered the constitutional question raised against the act.

The judgments are reversed and remanded, with directions to dismiss the suit against the treasurer and vacate the order requiring the deposit of the funds.

### ST. LOUIS SOUTHWESTERN RY. CO. v. HUTCHISON.

(Supreme Court of Arkansas. June 4, 1906.)

#### 1. RAILROADS—INJURIES TO ANIMALS—ACTION—BURDEN OF PROOF.

Where plaintiff showed that his horse was killed by the operation of defendant railroad, the burden was on it to show that it was not the result of its negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1576, 1577.]

#### 2. WITNESSES—CREDIBILITY—INCONSISTENT TESTIMONY.

The jury are warranted in disbelieving a witness on account of inconsistencies and contradictions in his testimony.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1079.]

Appeal from Circuit Court, Monroe County; George M. Chapline, Judge.

Action by W. E. Hutchison against the St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Sam H. West and J. C. Hawthorne, for appellant. C. F. Greenlee, for appellee.

**BATTLE, J.** The plaintiff, W. E. Hutchison, proved that his horse was killed by the operation of the railway of the defendant, the St. Louis Southwestern Railway Company. This was sufficient to show that the killing was the result of the negligence of the defendant, unless evidence adduced proved the contrary. Plaintiff thereby cast upon the defendant the burden of excusing the killing. To do so it introduced two witnesses. But the testimony of each of these witnesses is inconsistent with and contradictory to itself. If the jury disbelieved their testimony on account of these inconsistencies and contradictions, the law warranted them in disregarding it, which they did, as shown by their verdict. *Railway Company v. Chambliss*, 54 Ark. 214, 15 S. W. 469. It will not be profitable, or serve any useful purpose, to set out the inconsistencies and contradictions.

Judgment affirmed.

### OZARK INS. CO. v. LEATHERWOOD.

(Supreme Court of Arkansas. June 4, 1906.)

#### 1. JUDGMENT—DEFAULT—FAILURE TO PLEAD.

Under Kirby's Dig. §§ 6111, 6188, providing that on the fourth day of the term the court shall render judgment by default in all actions wherein no defense has been filed within the time required, there is no duty upon a court to render judgment by default against a defendant on failure to answer, but it may grant further time.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 208-221.]

#### 2. SAME—AMOUNT.

In an action to recover \$400, defendant filed a demurrer and answer after the time limited, and upon being informed that the parties had compromised, and upon motion to strike the pleadings of defendant from the files, the court took testimony and ascertained that the parties had agreed that defendant should pay \$250, and upon the refusal of defendant to pay that sum, struck its pleadings from the files and rendered judgment against it for \$400. *Held*, that such action was error, as judgment should have been rendered in favor of plaintiff for \$250 and costs upon plaintiff remitting all of the sum sued for above that amount, and upon plaintiff's failing or refusing to do so the court should have granted defendant the privilege of pleading and maintaining its defense.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by Mrs. E. Leatherwood against the Ozark Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition that plaintiff remit a part of the judgment; otherwise, reversed.

Ira D. Oglesby, for appellant. Winchester & Martin, for appellee.

**BATTLE, J.** On the 20th day of May, 1904, Mrs. E. Leatherwood commenced an action in the Sebastian circuit court, for the Ft. Smith district in Sebastian county, in this state, against the Ozark Insurance Company, on a policy of fire insurance and the following sureties on its bond, E. H. Steven-

son, A. J. Ingle, G. W. Moss, Hilliard Bryan, and Houston J. Payne, for \$400, the amount agreed to be paid to plaintiff by the insurance company as indemnity for loss by fire. Summons for the defendant was issued, and was served on the 21st day of May, 1904. On the 6th day of June, 1904, the circuit court of Sebastian county for the Fort Smith district was begun and held. After the commencement of the term the defendants appeared in court and asked that the case go over until Monday following, which was the 13th day of June, 1904, and said that "the case would be settled." On the 13th of June the defendants, without the consent of plaintiff and in the recess of court, filed a demurrer and answer. On June 21, 1904, the plaintiff moved to strike these pleadings from the files of the court, first, because they were not filed in apt time as provided by law; and second, because the action was compromised by the plaintiff and the insurance company on the 8th day of June, 1904, the last day, when, under the law, the defendants could plead. Thereupon the court heard testimony adduced in support of and against the motion, and found from the evidence that the liabilities and obligations of the insurance company to plaintiff and plaintiff to insurance company, including a note for \$24, for premium, were adjusted on the 8th day of June, 1904, and it was agreed that the insurance company would pay \$250, in liquidation and discharge of all such liabilities and obligations; and notified the defendants that unless the sum of \$250 was paid into court by 9 o'clock a. m. of June 21, 1904, the motion of plaintiff would be sustained; and the defendants, announcing that it would not be paid, struck the demurrer and answer from the files, and, on the next day, rendered judgment by default for want of an answer, against the defendants in favor of the plaintiff for \$400 the amount sued for, and 6 per cent. per annum interest thereon from May 20, 1904, until paid, and costs. The defendants appealed.

The statutes of this state provide: "The defense to an action at law shall be filed on or before the third day of the term, \* \* \* when the summons has been served ten days before the commencement of the term in the county in which the action is brought" etc. "On the fourth day of the term the court shall render judgment by default in all actions at law wherein due service has been had as provided in section 6111, and no defense has been filed; provided, the court may, for good cause, allow further time for filing a defense." Kirby's Dig. §§ 6111, 6188.

Under these statutes there is no duty resting upon a court to render a judgment by default against a defendant on failure to answer. Such is within the discretion of the court. It may grant further time. Such power is manifestly given to the court to prevent unnecessary delays in pleading and

for the speedy enforcement of the administration of justice. The authority to give further time to plead is manifestly for the purpose of preventing injustice and oppression which might follow a judgment by default on a failure to plead in the time prescribed by the statute; and it should not be used to defeat the purpose for which it was given. Such an exercise of it would be an abuse of discretion.

Judgments by default upon a failure to answer are based upon an implied confession by the defendants of the allegations in the complaint. Hence such allegations must be sufficient to authorize and sustain it if true. But the court did not proceed upon that theory in this case. Upon being informed that the parties had compromised, and upon motion to strike the pleadings of defendants from the files of the court, it proceeded to take testimony and ascertained that the parties had adjusted their differences by an agreement that the insurance company should pay to appellee \$250; and willing that they should do so, offered to enforce it upon the payment of the \$250; and upon the refusal of the defendants to do so, struck their pleadings from file, and rendered judgment against them for \$400, interest, and costs, at least \$150 more than the amount the plaintiff had agreed to accept in full of all her demands.

The court ascertained that a valid settlement of differences had been made. This settlement was virtually an admission or confession that \$250 of the \$400 sued for was due and owing; and inasmuch as the defendants had lost the right to plead, except upon terms fixed by the court that are just and reasonable, judgment should have been rendered, as upon default, in favor of plaintiff for that amount and interest from the 8th of June, 1904, and costs, upon the plaintiff remitting all of the sum sued for above that amount; and upon her failing or refusing to do so the court should have granted to the defendants the privilege of pleading and maintaining their defenses.

Now, if appellee will, within two weeks from this day, remit all of the judgment in this action above the \$250 and interest thereon from the 8th of June, 1904, the date of the compromise, and costs, judgment will be rendered in her favor against the defendants by this court for that amount and interest, and costs in the circuit court; and the trial court having offered to accept \$250 in satisfaction of the amount sued for, judgment will also be rendered in her favor for all costs of appeal; and such judgment will be in bar of any action on the note for premium on insurance; otherwise, the judgment of the circuit court will be reversed, and the cause will be remanded, with directions to the court to allow the defendants the privilege of pleading and maintaining their defenses.

ST. LOUIS & S. F. RY. CO. v. WYATT.  
(Supreme Court of Arkansas. June 4, 1906.)

1. RAILROADS—INJURIES TO TRAVELERS—APPROACHING CROSSING—PRESUMPTION OF KNOWLEDGE.

A traveler approaching a railway crossing is presumed to have seen or heard what is plainly to be seen or heard, and if by looking he could have seen the engine by which he was struck approaching, he is charged with having seen it, and will not be heard to say that he did not see it.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1121, 1122.]

2. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action for injuries to a traveler in a collision at a railroad crossing, evidence held to require submission of plaintiff's contributory negligence to the jury.

Battle and McCulloch, JJ., dissenting.

Appeal from Circuit Court, Craighead County; Allen Hughes, Judge.

Action by W. P. Wyatt against the St. Louis & San Francisco Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. J. Orr, for appellant. F. G. Taylor, for appellee.

HILL, C. J. The instructions were more favorable to the appellant than it was entitled to, and the sole question in the case is the sufficiency of the evidence to sustain the verdict for the appellee. Culberhouse street, in the city of Jonesboro, runs north and south, and crosses at right angles the tracks of appellant railroad. The first track on the north is called the "belt line," and it is 41 feet from center to center of the next, or main line, track. There are 36 feet in the clear between these tracks. The street is somewhat downgrade from the belt line track to the main line. As one witness expressed it, "It is enough downhill for your wagon to run up on your team." Between these tracks, and on the east of the crossing is a coal chute, and west of the chute is a projection to it, built of heavy timbers. Coming from the north on Culberhouse street it is impossible to see an engine on the main track beyond the point of the coal chute until just about to the main line track; and this projection, or scaffolding, partially obstructed the view from where it begins. It is 52 steps (156 feet) from the main line crossing to the coal chute, and it is 37 steps (111 feet) from the same point to the projection to the chute. Mr. Wyatt, the plaintiff below, was an old man of 82 years at the time of his injury. He was driving a pair of mules to a wagon partially loaded with corn, and he was sitting on his load. He was going south on Culberhouse street, and as he approached the crossing he stopped before reaching the belt line track. He looked and listened there. He was afflicted with the "hard hearing" of old age. The belt line track was filled with box cars on either side

the street, and a space of about 20 feet left to pass through. It was impossible to see east on the main line from where Mr. Wyatt stopped. Seeing and hearing nothing of a train, he drove on rapidly, intending to rush on through the crossing, as he thought no train was then approaching and that it was best to get across the tracks quickly. A switch engine moving rapidly from the east struck the rear of his wagon, upsetting it and severely injuring him. The mules were on the main line track, or near to it, when he first saw the engine, which appeared to him to be only 10 or 12 steps away. He was uncertain whether it was safest to try to back his mules or run them across, and tried the latter, and got hit. Mr. Wyatt heard no bell ringing or whistle sounding, and several other witnesses testified that the signals were not given.

In regard to looking and continuing to look and to look both ways the testimony of Mr. Wyatt is not as clear as it might be and is contradictory. All of it, so far as relates to this point, is as follows: On direct examination he was asked, "Were you looking as you approached the track?" and answered, "I was looking." On cross-examination this is the statement: "You didn't stop any more until you were hit? No, sir. You didn't look to the right or left until you got on the track? No, sir." The following is the redirect and recross examination in full: Redirect examination: "Q. At the time you stopped to look and listen before you started across, could you hear any bell ringing or whistle sounding? A. No, sir. Q. Or engine puffing? A. I could not hear anything. Q. And when you saw that you could not see or hear any train you started across there. A. Yes, sir. Q. After you got past the box cars, could you see any train then? A. I saw the engine when I got past the box cars. Q. But at the time you saw it you think your mules were just about on the track? A. That is my idea; that they were on the track the engine was on. Q. And you could not back them? A. I could not back off or run across fast enough to keep from getting caught. Q. Now, as you approached this crossing, were you looking for a train? A. I was looking. I never crossed there but what I was looking. Q. And you could see part of the way on both sides of you? A. Yes, sir." Recross-examination: "Q. You say you were looking as you approached that crossing. That was before you stopped, was it? A. Yes, sir; I looked then, and afterward, too. Q. You could not see these for the box cars? A. I was looking to see whether or not there was any person to tell me whether or not there was any danger."

While Mr. Wyatt stated on cross-examination that he did not look, yet he stated positively in the same examination that he did look, and no point was then made that he had contradicted himself, and his attention was not called to it. The jury were instructed



ed, if he failed to look, to find against him, and their finding in his favor is a finding that he did look, and his testimony furnishes substantial basis for it. There is nothing in his testimony that reflects upon his candor in the least except this unreconciled contradiction on a material matter, and probably the jury concluded that his hard hearing had caused him to misunderstand the question. The questions he answers later to the effect he did look show he did understand them; for they are not answered in monosyllables, but the answers are responsive to the questions and show understanding of them. There is evidence to justify the jury in finding that he did comply with the requirement to continue to look in both directions until the danger was passed. But the traveler "is deemed to have seen or heard what is plainly to be seen or heard." *Railway v. Dillard*, 94 S. W. 617. If Mr. Wyatt could have seen the engine approaching by looking, he is charged with having seen it; for the courts will not hear a party say that he did not see what was plain to be seen. Therefore his conduct must be measured with his duty. He not only looked and listened before he crossed the belt line track, but he stopped to better see and hear. Then, seeing an opening for passage and failing to see or hear an approaching train, he attempted to make the crossing rapidly. There was only 36 feet between these tracks, and he was going rapidly on a downgrade. It was his duty to continue to look and listen as he approached the track. He could not see to the east until he cleared the cars on the belt line, and then he had an unobstructed view for only 111 feet east, and a possible view for only 156 feet east. He says he was looking, and the question narrows to whether he could have seen the approaching engine before he got on the main line track. It is apparent that it depends entirely upon how fast the engine was going as to whether it was in sight when he cleared the box cars and approached the main line. He was something like 30 feet from the main line before he could see at all, and his mules much nearer to it and going rapidly, and then if the engine was more than 111 feet east of the crossing it was not plainly to be seen, and if more than 156 feet not to be seen at all. And as the evidence shows it was going rapidly it is at once apparent that his testimony that he looked, but could not see, is not contradicted by the physical facts. Of course, he could have seen it at some time before it struck him. He puts that distance only 10 or 12 steps away. While he must continue to look, yet, as stated in the *Dillard* Case, that does not mean that he must be constantly turning from one direction to the other. It does mean a strict and sensible compliance with this requirement to be vigilant for his own safety—such vigilance as is expected of men

of reasonable prudence, care, and understanding.

One of appellant's witnesses, while contradicting Mr. Wyatt as to the signals being given, yet strongly strengthens his position that he was looking and yet unable to escape. These excerpts from their witnesses' testimony explain the situation better than Mr. Wyatt did: "Before he crossed the belt line he stopped and raised up like he was looking for something, and I saw the train would catch him, and I pulled off my cap and waived it to him, and he didn't pay me any attention, and when he got up beyond the box car where he could see the engine his horses were on the track and the engine was in 15 or 20 feet of him, and he commenced hollering at them." "When he ran onto the track the engine was in about 20 feet of him, and when he got to where he could see the engine the engine was in about four rail lengths of the crossing. And his mules were right on the crossing then, were they? No, sir; they were not, but with the force he was going he could not have stopped before got on the track to save his life." While the distances given vary from Mr. Wyatt's somewhat, yet both reach exactly the same explanation of the collision—that where and when Mr. Wyatt could first see the engine it was then too late to avoid the collision. Whether Mr. Wyatt exercised the care required of him in discharging the duty enjoined on him presented a question upon which the minds of prudent and reasonable men might draw different conclusions, and hence was proper to be determined by a jury. *Railway v. Robert Hitt*, 88 S. W. 908, 990.

The judgment is affirmed.

BATTLE and McCULLOCH, JJ. (dissenting). We think that the testimony of the plaintiff shows plainly that he did not look or listen for approaching trains after he crossed the belt track. He could not see up or down the track until after he passed the belt track, and it was his duty to look and listen at a point, before he went upon the track, where he could see and hear. Stopping to look and listen before he passed the belt track, where the view up and down the other track was so obstructed that he could not see, was not a performance of his safety. According to his own statement of the facts, he was guilty of negligence and should not recover.

CARTER et al. v. GRAY et al.

(Supreme Court of Arkansas. June 4, 1906.)

1. SPECIFIC PERFORMANCE—PARTIES.

In consideration of a transfer of a one-eighth interest in a placer mining claim, it was agreed that a certain portion of the claim covered also by a lode claim owned in part by the owner of the one-eighth interest, should, after patent, be retransferred to the owner of the one-eighth interest. It was also agreed by a separate contract that an interest in the same part

of the claim should be transferred to the owner of the remaining interest in the lode claim. *Held*, that the owners of the lode claim properly joined in an action for specific performance of the contracts.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 345.]

## 2. PRINCIPAL AND AGENT—LIABILITY AS TO THIRD PERSON—RATIFICATION—NOTICE—RECEIPT OF BENEFITS.

One holding title to seven-eighths of a placer mining claim, gave a power of attorney to an agent to procure a patent. The agent contracted with the owner of the other one-eighth interest in the placer claim, who also in connection with a third person owned a prior lode claim covering a portion of the same ground, that the one-eighth interest should be deeded to the principal, who after the patent was obtained, should transfer to the owners of the lode claim the ground covered thereby. *Held*, that by accepting the deed to the one-eighth interest the principal became charged with notice of the contract whereby it was obtained.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 679.]

## 3. SAME.

Where an agent holding title to an interest in a mining claim for his principals, for the purpose of securing a patent, becomes charged, by the receipt of its benefits, with notice of a contract entered into by a subagent by which title to an outstanding interest is secured, and an agreement made to retransfer after patent a certain portion of the claim, such notice is chargeable also to the principals.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 679.]

## 4. CORPORATIONS—INCORPORATION—ACTS OF CORPORATORS.

Where a corporation is formed for the purpose of receiving title to a mining claim from the incorporators for a nominal price, the corporation is bound to retransfer a portion of the claim to outside parties in accordance with a contract, with notice of which the incorporators were charged, whereby title to a corresponding portion of the claim was secured to the agent of the incorporators that he might obtain a patent to the whole claim.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1789.]

## 5. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—LEGALITY OF CONTRACT—FRAUD.

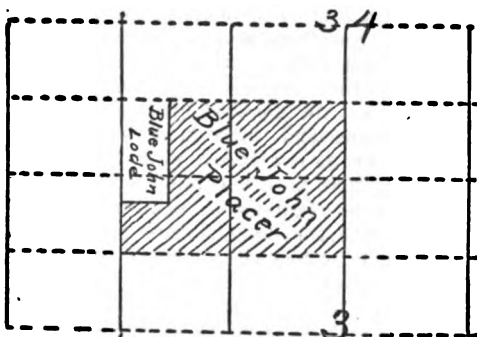
An owner of a one-eighth interest in a placer claim turned it over to the owners of the other interests for the purpose of securing a patent, and under an agreement that after patent a portion of the placer claim covered by a lode claim owned by himself and a third person, should be retransferred to them. *Held*, that since the patent excepted any lode then known to exist, and since an interest in a placer claim formed the consideration for the contract, specific performance might be enforced in equity, the United States not objecting, though a patent on a placer claim costs less than one on a lode claim.

Appeal from Circuit Court, Marion County; Edgar G. Mitchell, Judge.

Action for specific performance by John G. Gray and another against W. Frank Carter and others. From a decree in favor of plaintiffs, defendants appeal. *Affirmed*.

In 1890 John G. Gray and N. T. Bennett were the owners of a mining claim of 20 acres in Marion county, Ark., known as the Blue John lode claim. Afterwards, in December, 1891, John G. Gray, William E. V. M. Powell, J. C. Berry, C. W. Hequen-

burg, J. H. Bethune, C. B. Adams, and W. A. Dripps located a mining claim known as the Blue John placer claim. This placer claim contained 160 acres. It covered the 20 acres of the Blue John lode claim and 140 acres additional, the situation of these two to each other is shown by the following plat:



All of the parties who located this placer claim except Gray conveyed their interests to W. Frank Carter of St. Louis. Carter thus became the owner of this 160-acre mining claim with the exception of the one-eighth interest held by Gray. Carter was not the real owner, but held the title as the agent and trustee of other St. Louis parties. As Carter desired to secure a patent to this land and as he lived in St. Louis some distance away, he executed the following power of attorney to E. V. M. Powell: "Know all men by these presents, that I, W. Frank Carter, of the city of St. Louis, state of Missouri, a citizen of the United States, do hereby constitute and appoint E. V. M. Powell, county of Marion, state of Arkansas, my attorney in fact, for me and in my name to make application for patent of the United States in the proper land office upon any and all placer mining claims owned by me or in which I may be interested situated in Buffalo mining district, county of Marion, state of Arkansas, and to make or cause to be made, any and all surveys, relocations, affidavits, and all necessary papers which may be required in the prosecution of such application, or to perfect or protect the title thereto, and to do all acts and things in and about the premises which I, myself, if present, could do, until patent is finally delivered. Also in case of adverse claim, I authorize him to employ counsel and take all measures necessary to defend against said adverse claim or suit in support thereof, either in the land office or in judicial proceedings, and in such proceedings to execute any bonds or other papers, and verify all proceedings, to and including appeal or writ of error. Witness my hand and seal this 24th day of September, A. D. 1892. W. Frank Carter. [Seal.]" This power of attorney was duly acknowledged.

Afterwards Powell made a contract with Gray and Bennett, the owners of the lode

claim, that Gray should also convey to Carter his one-eighth interest in the Blue John placer claim, and that Carter so soon as the patent was procured should, upon the payment of their pro rata of the total expenses in procuring the patent, convey to Gray and Bennett such portion of the land as was covered by the Blue John lode claim. In pursuance of such agreement Powell executed, in the name of Carter, a bond to Gray as follows, to wit: "Know all men by these presents, that I, W. Frank Carter, of the city of St. Louis, state of Missouri, am firmly bound unto John G. Gray, of Webb City, state of Missouri in the sum of five thousand dollars (\$5,000) by these presents do firmly bind my heirs, executors and assigns to the full amount of the above stated five thousand dollars (\$5,000). The conditions of this bond are as follows: That, whereas the said John G. Gray did by deed dated October 1, 1892, convey all his right, title and interest in and to what is known as the Blue John placer claim, No. two thousand five hundred and thirty four (2,534) situated in the Buffalo mining district, to the end that I might make application for a patent for the same from the United States government: Now, when I shall have received a patent from the United States government, if I shall cause to be made or make unto the said John G. Gray, upon receipt from him his pro rata proportion of the total amount of expenses incurred by reason of obtaining a patent to the Blue John placer mining claim, a good and sufficient deed for such portions of the said Blue John placer mining claim as is covered by what is known as the Blue John lode claim, and so set forth in deed from William Kaler and E. V. M. Powell, to John G. Gray, conveying the Blue John lode claim, which is duly recorded in the office of the recorder of the Buffalo mining district, at Yellville, Arkansas, then the above bond shall be void and of no force, otherwise to remain in full force and effect. Witness whereof I have hereunto set my hand and seal, this the 19th day of October, 1892. W. Frank Carter, by E. V. M. Powell, Attorney in Fact." Powell also in the name of Carter executed a bond for title to Bennett, reciting that Bennett was the owner of a one-fourth interest in the Blue John lode claim, and obligating himself that upon a receipt of a patent from the United States to 160 acres of the Blue John placer claim that he would, upon the payment by Bennett of his pro rata of expenses, make a good and sufficient warranty deed to him for his interest in the Blue John lode claim.

After the patent was procured by Carter, he conveyed the land to the southwestern Zinc Company and this company refused to perform the contract made by Powell with Gray and Bennett. They brought this action for specific performance. The chancellor

gave a decree in favor of plaintiffs from which decree defendants appealed. The other facts are stated in the opinion.

J. M. & M. House, Jno. T. Hicks, and De Roose Bailey, for appellants. Woods Bros., for appellees.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment of the chancery court of Marion county ordering a specific performance of a contract to convey land. The facts briefly stated are that in 1902 the plaintiff, John G. Gray and N. L. Bennett were the owners of a mining claim in Marion county, Ark., known as the Blue John lode claim which covered 20 acres. This claim was located in 1887. In 1891 Gray and seven others located a mining claim known as the Blue John placer claim. This Blue John placer claim covered 160 acres of land and included the 20 acres of the Blue John lode claim, owned by Gray and Powell. Afterwards the appellant W. Frank Carter of St. Louis became the legal owner of of the Blue John placer claim with the exception of the one-eighth interest held by Gray. Although the legal title to this interest in the Blue John placer claim was held by Carter, he held it as trustee and agent for other parties. As Carter lived in St. Louis he and the parties for whom he acted had another agent, Powell, in Marion county, Ark., to look after and perfect the title to this and other mining claims. In order to carry out this purpose Carter, as the legal owner of a part of this claim, executed and delivered to Powell a power of attorney which is set out in the statement of facts and which authorized Powell to make applications for patents, sign papers, and make affidavits in the name of appellant Frank Carter, and do all things necessary to secure patents. He was also authorized in case of an adverse claim to employ counsel, and do whatever might be necessary to protect the interests of Carter. This agent Powell concluded that it would be to the interest of Carter and the others whom he represented to get a conveyance to Carter from Gray of Gray's interest in the Blue John placer claim. Powell thereupon, acting as the agent of Carter and those he represented, made a contract with Gray and Bennett that Gray should convey his interest in the placer claim to Carter and that Carter should procure a patent to the 160 acres as a placer mine, and that when the patent was procured he should reconvey to Gray and Bennett the portion of the 160 acres covered by their lode claim. This arrangement was carried into effect. Gray, under this agreement with Powell, conveyed his one-eighth interest in the placer claim to Carter, and Powell acting for Carter and in his name, executed bonds for title to Gray and Bennett by which he obligated himself, upon the receipt of a patent to the 160 acres of the Blue John placer claim, to convey to Gray and Bennett

that part of the tract which was covered by the Blue John lode claim. This 20-acre tract lay in the northwest portion of the 160 acres, the position of which can be better understood by reference to the plat accompanying the statement of facts. The statute of the United States under which mining claims of that kind were patented required that at least \$500 worth of improvement in the way of developing the mine, should be made on each claim before a patent therefor would be issued. Gray and Bennett, the owners of the lode claim referred to above, had done work on their claim and by procuring the co-operation of these parties Carter was enabled to use this improvement as a part of the improvement required to be made on his claim. By acting for them in this way he obviated any contest between himself and these owners of the lode claim and became in effect a trustee for them for their interest in this land. In this way Powell, acting for Carter, obtained the patent to the 160 acres in Carter's name. But although the patent was obtained in that way for Carter, it seems that Carter and the parties in St. Louis whom he represented had no actual notice of the agreement made by Powell in the name of Carter with Gray and Bennett. These parties in St. Louis, who were represented by Carter and Powell, organized in 1894 a corporation known as the Southwestern Zinc Company, for the purpose of having this property transferred to it when the title was obtained by Carter. Powell was agent of this company also. The patent to the 160 acres of land was obtained by Carter in 1895, and in 1896 Carter conveyed the land to the Southwestern Zinc Company by quitclaim deed for the nominal consideration of \$1, and the company issued stock to the parties interested in the mining claim for whom Carter had procured the patent to the extent of their interest in the land. The Zinc Company afterwards refused to convey to Gray and Bennett any interest in the land and they brought this action against Carter and the Zinc Company to compel the company to carry out the contract made by Powell, the agent, with Carter and Gray. The company denied that Powell had authority to make such a contract and alleged that it was a purchaser for value without notice of the claims of plaintiffs. The defendant also filed a motion to dismiss on the ground that the causes of action set up by Gray and Bennett were separate and distinct and could not be joined.

First, we are of the opinion that there was no misjoinder of actions. By reference to the bond for title executed by Powell in the name of Carter to Gray it will be seen that Powell agreed that Carter, so soon as he obtained the title to the placer claim, shall, upon payment by Carter of his part of the expenses, convey to Carter all of that portion of the placer claim covered by the Blue John lode claim. In other words he agreed

to convey to Gray the full 20 acres covered by the lode claim, notwithstanding Bennett was interested in the lode claim. It will be noticed that as Gray was the owner of a one-eighth interest in the 160-acre placer claim, amounting to 20 acres, he conveyed to Carter the same amount of land that Powell for Carter agreed to reconvey to him. But Powell acting for Carter also agreed to convey to Bennett a one-fourth interest in that part of the place land covered by the lode claim. In other words he agreed to convey to Bennett one-fourth of the same land he agreed to convey Gray. As the contracts made by Powell in the name of Carter with Gray and Bennett, though separate, covered the same land in part, it was proper for both of these parties to join in the action in equity so that the seeming conflict between these two contracts could be determined and the title cleared in one action. The omission of the name of Gray at one place in the deed from him to Carter is a matter of no moment as it is plain that it was a mere clerical omission that does not affect the validity of the deed in law much less in equity.

Coming down to the merits of the case, as Powell was the agent of Gray and also of the Zinc Company, these defendants must be held to have had notice of the means by which he obtained for them the interest of Gray in this placer claim. Gray was the owner of a one-eighth interest in the 160-acre placer claim. At the request of Powell, the agent of Carter, he conveyed this land to Carter under a written contract that Carter would reconvey to him. Carter accepted the deed, and now claims the right to hold the land on the ground that he had no notice of the contract made by Powell. But he had no reason to suppose that Gray was making a gift of this land to him, and before he accepted the deed he should have ascertained the consideration to be paid for it. If Carter authorized Powell to acquire title to the mining claims and accept deeds for the same in the name of Carter, then notice to Powell was notice to Carter. So we think that it is plain that he must be treated as having notice of this contract made by Powell with the plaintiffs. If he had notice then the parties whom he represented must be held to have had notice, and if they had notice, the Zinc Company, formed by them for the express purpose of having Carter convey these lands to it, had notice. Parties affected with notice of that kind cannot escape the consequences thereof by forming a corporation and having their agent convey the land to the corporation and then set up that the corporation is an innocent purchaser for value. These parties were the officers and agents of the corporation and notice to them was notice to the corporation. If the case turned solely on the authority of Powell to bind his principal by a contract of the kind

which plaintiffs seek to have performed in this case, we might hesitate to hold that he had such authority under the power of attorney executed by Carter to him. But the contract so far as plaintiffs are concerned has been executed, and defendants have accepted the benefits of it. Whether their agent had the authority to make the contract or not, equity will not permit these defendants to accept the benefits of this contract and at the same time escape its burdens. But for this agreement made with plaintiff Carter could never have procured the legal title to this claim formerly owned by plaintiffs. It was to the mutual benefit of these parties that the legal title of this land should be conveyed to Carter. But he held it in trust as well for Gray and Powell as for the other owners, and we see no reason why he and the Zinc Company should not be made to carry out the contracts made by Powell with Gray and Bennett.

The only question as to which we have felt some doubt is whether this contract which is asked to be enforced was not one in fraud of the rights of the government. The price required by law to be paid the United States for a patent to a lode claim is \$5 while the price for a patent to a placer claim is only half that amount. For this reason counsel for appellant say that if plaintiffs' statements are true, then this land was conveyed by Gray to Carter for purpose of having him procure a patent to it as a placer claim and thus cheat the United States out of \$2.50 per acre. But this contention cannot be sustained for the patent to Carter expressly excepts any lode or vein of valuable metal known to exist within the limits of the grant previous to November 2, 1902. As the Blue John lode claim was located in 1887 it does not seem that the rights of the United States to any lode or vein then known to exist within the bounds of the tract conveyed by this patent would be affected thereby. Again, Gray had an interest not only in the lode claim but in the placer claim also. If we disregard entirely the rights of Gray and Bennett that are founded on the lode claim, still, as Gray was a joint owner with Carter of this placer claim, there is certainly no reason why the defendants should not be compelled to perform their contract with Gray. But the contract with Gray calls for the full 20 acres claimed by plaintiff. If Gray is willing to turn over one-fourth of the 20 acres to Bennett defendants are not thereby injured, nor are the rights of the government in any way affected. In fact the government is not complaining, and, so far as the evidence shows, the motives of the parties in making this contract were legitimate and proper.

On the whole case we are of the opinion that the decree was in accordance with equity and right. It is therefore affirmed.

### TILLAR v. WILSON.

(Supreme Court of Arkansas. June 4, 1906.)

#### 1. REFORMATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY.

In a suit to reform an instrument, a mere preponderance of evidence that it did not show the agreement of the parties is insufficient.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 157-192.]

#### 2. SAME—GROUNDS FOR REFORMATION—MISTAKE.

In an action against a co-surety for contribution, the defense was that an agreement executed between the parties, which in terms constituted a settlement of litigation between them growing out of a dissolution of a partnership between them, and which made no reference to the note in suit, had been intended to include the note, and it appeared that defendant had read the agreement and caused his attorney to read it, and that it had been signed by defendant without any objection on the part of himself or his attorney. *Held*, that there was no ground for a reformation of the instrument.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 72.]

#### 3. EVIDENCE—PAROL EVIDENCE—CONTRADICTING WRITTEN INSTRUMENT.

Where the execution of a note, and the payment of the same by one of the sureties, had no connection with the affairs of a partnership between the two sureties, and in an action for contribution it appeared that an instrument had been executed between the sureties, which, in terms, constituted a settlement of partnership litigation and made no reference to the note, testimony tending to show that the agreement was intended to settle the liability on the note was inadmissible, as contradicting a written instrument.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Suit by T. F. Tillar against T. O. Wilson. From a decree in favor of defendant, plaintiff appeals. Reversed and rendered.

Appellant and appellee were co-sureties on notes executed by the Gravity Boiler Feeder Company, a corporation, to the Bank of Commerce. The notes were, respectively, for \$300 and \$500. Appellant paid the notes, and this suit was brought by him against appellee as co-surety for half the amount paid. Appellant alleging in his complaint that the maker and the two other indorsers were insolvent. Appellee by his original and amended answer set up a certain agreement which he alleges was understood to be and was a settlement of "all matters, claims, and differences of every kind existing between them," and he avers that if the claim sued on was not, in terms, included in the written agreement for settlement, it is because appellee through mistake or misapprehension did not fully understand the true meaning thereof. He says that the settlement of the claim sued on was a part of the consideration of the written agreement, and he prays, among other things, that if necessary the agreement be reformed, so as to express the intention and understanding of the parties thereto. In reply appellant denied that the written agreement was in-

tended to embrace the liability set up in the complaint, and denied that there was any mistake or misapprehension on the part of the appellee as to the meaning of the writing. The agreement set up in the answer is as follows: "This is to show that T. O. Wilson and T. F. Tillar have this day compromised the litigation between them growing out of the suit now pending in the Pulaski chancery court, for a dissolution of the firm of Tillar & Wilson, and the appeals taken therefrom. The terms of this compromise are as follows: Tillar takes all assets of the firm, and to that end Wilson hereby assigns to Tillar all his (Wilson's) interest in such assets, and Tillar also assumes and agrees to pay all the liabilities of the firm of Tillar & Wilson, together with all unpaid costs, including the receiver's fee, and Tillar shall be authorized to prosecute for his own benefit suit against the Cypress Lumber & Shingle Company now pending in the Supreme Court. In consideration of the foregoing, Tillar has this day paid Wilson \$1,750 in cash, and agrees to pay him an additional amount of \$1,500 within 30 days from this date. If the latter amount is not paid within the 30 days, then this compromise shall become null and void, and the cash paid herein is to be accounted for by Wilson in the settlements of the accounts of the partnership of Tillar & Wilson. In addition to the payment of the aggregate sum of \$3,250 by Tillar to Wilson, as hereinabove set out, Tillar agrees to hold Wilson harmless from any and all claims of the creditors of the firm of Tillar & Wilson. Tillar is to pay off the debts within the 30 days or give Wilson a satisfactory bond that they will be paid. Dated this January 23, 1904. [Signed] T. F. Tillar. T. O. Wilson."

Appellee, after testifying concerning a partnership that had existed between himself and appellant, and after showing that suit was brought by appellant to dissolve the partnership and that growing out of the affairs of the partnership and its dissolution a suit was pending in the Supreme Court involving differences between them which amounted to several thousand dollars, and out of which he expected to realize should the litigation terminate in his favor about \$6,000 as against appellant, further testifies as follows: "Tillar had at one time handed me a statement showing that he had paid out for the Gravity Boiler Feeder Company about \$1,600. So, on January 5, 1904, I wrote Tillar a letter asking him to advance me \$3,000 on account of the balance that would be due me on the final settlement of the Tillar & Wilson firm, and proposing that if he would make the advance I would assume and pay half the amount he had paid out for the Gravity Boiler Feeder Company, but denying that I was really liable for anything on the latter account. Tillar did not accept my proposition—not directly. Shortly afterwards he visited Little Rock and wanted

to know the least I would take to settle up everything between us, and I told him \$4,000. He said he would go home and think about it. In a few days I went over to the office of his attorney, W. S. McCain, and said to him that decisions by the Supreme Court in the Ferguson Lumber Case and in the Grady Shingle Case might not be reached in two or three years, and I asked his attorney to inform Tillar that I would compromise by accepting from him \$3,500, he to take all the assets and give me a receipt in full. Tillar came up on February 23d, and he proposed that we go over to the office of his attorney, W. S. McCain. We did so, and there we talked the matter over. He tried to get me to take less than \$3,500. He proposed \$3,000, but we finally agreed on \$3,250. The contract was drawn up by Judge McCain, as follows." Here appellee makes a part of his testimony the agreement set out, supra. He then continues: "We did not sign the agreement at McCain's office, but we came over to the office of my attorney, Judge Allen, and I told Judge Allen I would like for him to look over the agreement and see whether it needed any changes or corrections. Judge Allen took it and said: 'Is this in full? Is it a settlement of everything between you?' and I said, 'Yes,' and he asked Mr. Tillar the same question and he said 'Yes.' We then signed up the contract, and Tillar gave a check for the \$1,750. This contract was in settlement of everything between us individually as well as the partnership." All of the foregoing testimony was given over the objection of plaintiff as being irrelevant and incompetent.

Samuel R. Allen testified: "I was the attorney of T. O. Wilson in the litigation between him and Tillar in regard to the dissolution of the firm of Tillar & Wilson. Wilson had a desk in my back office. The two came into my room and Tillar said, 'Wilson and I have settled all our difficulties,' and Wilson said, 'Tillar has bought me out. We have been down to Judge McCain's office and have come to an agreement. I suppose some paper is necessary and we have had one prepared, which I would like to have you look over and see if it is sufficient.' They handed me a paper, and, before reading it, I asked them if they meant to say that they had settled all matters of every kind and nature between them, and they said 'Yes.' I then took the paper, the one copied above, prepared by McCain, and read it over carefully, and I then remarked to them 'that this paper in itself seems to refer solely to the affairs of Tillar & Wilson,' and they said it covers everything between us except an account Wilson owed the firm of Tillar & Co. for Knights of Honor dues they had paid for him, and I said, 'I will just make this remark, so there will be no afterclap: While this paper is not quite as explicit as I would have made it and while it does not cover the matter entire-

ly. I think it will do.' I knew at the time that Tillar was claiming something from Wilson on account of the notes paid the bank for the Gravity Boiler Company, and I had this in mind when they were talking to me." Appellant's counsel objected to all of the foregoing testimony of Allen, and filed a motion to suppress the depositions of Wilson and Allen, and particularly that part relating to conversations at and before the time of the signing of the written agreement and explaining the meaning of the contract. The court overruled the motion, to which ruling plaintiff excepted.

Appellant testified in his own behalf as follows: "I was a co-surety with Wilson on the notes of the Gravity Boiler Company to the bank, and I paid them. This business of the boiler company had nothing to do with the shingle and timber business of Tillar & Wilson. The court realized about \$15,000 on the sale of the Tillar & Wilson assets. At the time we made the agreement in Judge Allen's office there was no agreement except the written agreement, and that related entirely to the business of Tillar & Wilson. My attorney, W. S. McCain, wrote it up, and it was then referred to Judge Allen. We went to Judge Allen's office and signed it up there. Judge Allen, Wilson, and I only were present. There was no other agreement except that, which was in the writing signed. Judge Allen is mistaken in his recollection of what was said, and what he and Wilson testified to in their depositions is untrue, so far as relating to any other than the Tillar & Wilson matter."

The chancellor entered a decree for appellee, and this appeal was taken.

W. S. McCain, for appellant. Ratcliffe & Fletcher, for appellee.

WOOD, J. (after stating the facts). First. The chancellor found "that at the time the agreement as set forth in the answer was executed it was understood by and between the plaintiff and the defendant, and as part of the consideration for said agreement, that the claim sued upon herein as set forth in the complaint was to be fully settled and satisfied and was so settled and satisfied by said agreement." If this finding were correct the settlement of the amount due by appellee to appellant on account of the payment by the latter of the Gravity Boiler Feeder Company's notes was intended to be embraced in the written agreement, and its omission therefrom was a mistake common to both parties which would call for a reformation of the written agreement so as to effectuate their purpose. The decree of the court in favor of appellee was in effect tantamount to this. The testimony of appellee and Judge Allen tends to show that the parties to the agreement intended that it should settle all matters between them. But the testimony of appellant tends to show that it was intended to settle only differences growing

out of the partnership transactions. So there is a conflict, and with the view most favorable to appellee, it can only be said that there is a mere preponderance of the evidence in his favor. But this is not sufficient to entitle a party to reformation. The proof must be "clear, unequivocal, and decisive." *Goerke v. Rodgers*, 75 Ark. 72, 86 S. W. 837; *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52. We do not find it so in this case. The explicit language of the instrument shows that it has had reference solely to the compromise of the litigation then pending between appellant and appellee, and to the settlement of the affairs of their partnership and nothing else. Language could not more plainly set forth the purpose of this agreement, and the utmost stretch of construction could not make it include the settlement of appellee's liability on the notes mentioned, yet appellee read this agreement or had it read in his presence. He then had his attorney to read same, and notwithstanding its failure to compass the specific object of including the settlement of appellee's liability to appellant on account of the notes, as one of the purposes, which appellee contemplated and had in mind, at the time he, nevertheless, signed the agreement without mentioning this particular matter to appellant. So, likewise his attorney had this specific thing in mind, but failed to mention it specifically to appellant, and failed to suggest a modification of the agreement to cover it, although he says "it was not quite as explicit as I would have made it, and does not cover the matter entirely." This certainly tends to prove that if appellee had this matter in mind at the time of signing the agreement, he failed to mention it to appellant, and it does not at all contradict appellant's evidence that "there was no other agreement except that which was in the writing signed." There was no ground for reformation.

Second. The testimony of appellee and S. R. Allen, to the effect that the agreement was intended to settle the liability of appellee to appellant on account of the notes, was in contradiction, and not explanation of the terms of the written contract between the parties. It tended to vary those and thus contravened the rule which excludes parol evidence. 1 Gr. Ev. § 275 et seq., notes; *Colonial & U. S. Mortgage Co. v. Jeter*, 71 Ark. 185, 71 S. W. 945; *Moore v. Terry*, 66 Ark. 393, 50 S. W. 998, and cases cited; *West v. Waller*, 66 Ark. 445, 51 S. W. 320. In the subject-matter of the written agreement was the compromise of the lawsuit pending in the Supreme Court, and the settlement of the affairs of the partnership that had existed between them. The payment of the Gravity Boiler Feeder Company's notes and appellee's contributor's share thereof which was due appellant, had not even the remotest connection, under the proof, with the affairs of the partnership between Tillar and Wilson, much less with the lawsuit that was pending in the Supreme Court. Here the entire contract relating to the sub-

ject-matter about which the parties were contracting as indicated by the terms of the instrument were reduced to writing, and there is no ambiguity about them. The cases of *Weaver & Weaver v. Fletcher & Hotze*, 27 Ark. 510, and *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706, cited by appellee, are not applicable.

The decree is reversed, and judgment will be entered here in favor of appellant for the amount sued for in his complaint, with interest.

So ordered.

### FLETCHER v. VERSER.

(Supreme Court of Arkansas. June 4, 1906.)

#### 1. CONTRACTS — BREACH — ABANDONMENT BY OTHER PARTY — JUSTIFICATION.

Where defendant contracted with plaintiff, to keep cut a supply of logs sufficient to keep employed plaintiff's teams until defendant's timber was all hauled, his failure so to do was a violation of the contract, justifying the abandonment thereof by plaintiff.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1174, 1175.]

#### 2. SAME—ACTIONS—INSTRUCTIONS.

Where, in an action to recover for services performed by plaintiff under an agreement to haul defendant's logs, plaintiff alleged defendant's breach of his part of the contract to keep on hand a supply of logs sufficient to keep plaintiff's teams employed, by reason whereof plaintiff abandoned the contract, an instruction that if plaintiff abandoned his contract before completing the work, the jury must find for defendant, was misleading, in view of plaintiff's admission that he had abandoned his contract before completion, but setting up as a justification therefor, defendant's breach of his part of the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1829, 1830.]

#### 3. SAME.

The court having already told the jury that if defendant failed to keep a supply of logs on hand, as agreed, plaintiff had a right to abandon the contract on that ground, an instruction that if plaintiff "wrongfully" abandoned the contract, he could not recover, was not misleading.

Appeal from Circuit Court, Hot Spring County; Alexander M. Duffie, Judge.

Action by J. D. Verser against R. M. Fletcher. Judgment for plaintiff, and defendant appeals. Affirmed.

Mehaffey & Armstead, for appellant. E. H. Vance, Jr., for appellee.

RIDDICK, J. J. D. Verser brought this action against R. M. Fletcher before a justice of the peace in Hot Spring county to recover the sum of \$76.89 which he claimed was due him by the defendant for hauling logs to defendant's mill. The justice gave judgment in favor of Verser for the amount claimed by him, and, on another trial in the circuit court where the case was carried by appeal, judgment was rendered against the defendant for the sum of \$65.95.

The evidence showed that Verser had made an oral agreement with Fletcher to haul the logs from a certain tract of timber land. Verser hauled a portion of the logs, and defendant admitted that according to the contract price he would owe Verser \$65.95 for the logs hauled had he not abandoned his contract and refused to haul the remainder of the logs. But Verser testified that one of the conditions of the contract was that the defendant should keep a sufficient quantity of logs cut to keep the teams of plaintiff employed, and that plaintiff was compelled to quit because the defendant failed to perform this condition of the contract, and failed to keep a supply of logs for plaintiff to haul. There was some conflict in the evidence on this point, but it was sufficient to support the finding of the jury that Fletcher failed to carry out this provision of the contract and failed to have enough logs cut to keep the teams of Verser employed, and that for this reason Verser was justified in quitting the work. The court told the jury that if Fletcher, as part of his contract with Verser, agreed to keep a supply of logs cut, sufficient to keep the teams of Verser employed until the timber was all hauled and failed to do so, that this violation of the contract on the part of Fletcher gave Verser the right to abandon his part of the contract; and this was clearly right. The defendant then asked the court to give an instruction to the jury that if Verser abandoned his contract before completing the work they should find for defendant. This instruction as asked was clearly misleading, for Verser admitted that he had abandoned his contract before completing the hauling, but, as a justification therefor, he stated that the defendant Fletcher had failed to perform his part of the contract by not keeping logs cut for plaintiff to haul. The question for the jury was, then, not whether the plaintiff had abandoned his contract, he admitted that he had done so, but whether the defendant had agreed to keep plaintiff supplied with logs, and had failed to do so; for, if that was true, the plaintiff was justified in quitting the work. The circuit court, therefore, modified the instruction asked by defendant, so as to tell the jury that if plaintiff wrongfully abandoned his contract he could not recover.

Counsel for defendant say that the insertion of the word "wrongfully" in the instruction rendered it erroneous, for the reason that whether or not a contract was wrongfully abandoned is a question of law. That may be true in some cases but when all the instructions are read together there was nothing misleading in the instructions in this case. The court had already told the jury that if the defendant failed to perform a condition of the contract requiring him to keep a supply of logs on hand the plaintiff had a right to abandon his contract on that ground. And when the court told them that if plain-



tiff wrongfully abandoned his contract he could not recover, they must have understood from this that the plaintiff had no right to abandon his contract if the defendant had performed his part of the contract and kept a supply of logs on hand for that was the only question at issue.

Taken as a whole, we think the law of the case was clearly stated to the jury, and the evidence is amply sufficient to sustain the verdict.

Judgment affirmed.

## LITTLE ROCK TRACTION & ELECTRIC CO. et al. v. HICKS.

(Supreme Court of Arkansas. June 4, 1906.)

### 1. JUSTICES OF THE PEACE—APPEAL—BRINGING IN NEW DEFENDANTS—JURISDICTION.

After appeal from a justice to the circuit court in an action against a railroad for less than \$100, another corporation, which had agreed to assume the liabilities of the railroad, was made a defendant, by an amendment of the complaint, and answered. *Held* that, the amount sued for being less than \$100, the circuit court had no jurisdiction of such corporation and the judgment rendered against it was void.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 670.]

### 2. EVIDENCE—SUBJECTS OF OPINION EVIDENCE—OPERATION OF VEHICLES.

In an action against a street railroad for injuries to plaintiff's cow, it was proper to permit a witness to testify that he did not know how fast the car was running but that judging from the ordinary speed of cars, being 6 to 8 miles per hour, the car was running at a speed of about 20 miles.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2270.]

### 3. STREET RAILROADS—INJURIES TO ANIMALS—CONTRIBUTORY NEGLIGENCE.

Permitting a cow to run at large outside the "stock limit" was not contributory negligence, and hence did not preclude a recovery from a street railroad for injuries to the cow.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Mrs. H. L. Hicks against the Little Rock Traction & Electric Company and another. From a judgment in favor of plaintiff, defendants appeal. Judgment set aside as to the Little Rock Railway & Electric Company, and affirmed as to the other defendant.

Cantrell & Loughborough, for appellants. W. C. Adamson, for appellee.

**BATTLE, J.** Mrs. H. L. Hicks brought an action before a justice of the peace of Pulaski county against the Little Rock Traction & Electric Company, a street railway company, for damages caused by it negligently injuring a cow belonging to her. The amount sued for was \$75. In a trial before the justice of the peace the defendant recovered judgment. Plaintiff then appealed to the circuit court, and on the 1st of October, 1904, filed in that court an amendment to her complaint in which she made the Little Rock Railway &

Electric Company a party defendant, alleging that it had purchased the property of the Little Rock Traction & Electric Company, and had assumed the payment of its obligations, and asked for judgment against the former company for the \$75. The Little Rock Railway & Electric Company answered and admitted that it had purchased from the Little Rock Traction & Electric Company its property and assumed its liabilities, and adopted its answer, and asked for judgment against plaintiff.

On October 4, 1904, the issues in the case were tried by a jury which returned a verdict in favor of plaintiff in the sum of \$35; judgment was rendered for that amount against both defendants, and from this judgment they prosecute an appeal to this court.

The evidence adduced at the trial, which sustained the verdict of the jury, tended to prove the following facts:

On the night of the 31st of August, 1902, about the hour of 9:06 p. m., a cow of Mrs. H. L. Hicks was seriously injured and greatly damaged by a collision with a car on the street railway of the Little Rock Traction & Electric Company in the city of Little Rock. The night was fair and the stars were shining. In the locality in which the collision occurred, on that night, at the time of the collision, a cow lying down could have been seen 140 feet away. If standing on the track, she could have been seen by the motorman in his place 100 yards ahead of the car; if near the sidewalk on the street, she could have been seen by him 100 feet ahead of the car; and if 4 or 5 feet from the track of the railway, could have been seen about 100 yards away. No houses or trees cast a shadow in the street. The car was recklessly propelled at a great speed to the great danger of persons and property on the track. One witness testified over the objections of the appellants: "I have no means of telling how fast the car was running but judging from the ordinary speed of cars, being 6 or 8 miles an hour, this car was running at a speed of about 20 miles per hour." The car struck the cow with great force, making a loud noise, pushing her a distance of 30 feet, tearing up the ground; one witness testifying that "there was a great big ditch in the ground where she (the cow) had been dragged." The cow was severely mangled by the collision. A witness who found her immediately after the accident says: "Several of the cow's ribs were broken, and she was hurt internally. Blood was coming out of her eyes and nose and mouth. Her hip was mashed and she was skinned all over." In the locality in which this accident occurred stock were not prohibited from running at large. The car running at the rate of 8 miles an hour could have been stopped in 60 feet; the usual rate of speed of such cars being from 6 to 8 miles an hour.

The court instructed the jury, over the objection of the defendants, as follows: "The

court instructs the jury that if they find from the evidence that the cow was lying, standing or walking on the track, and that the motorman saw her, or could, by the use of ordinary care, have seen her, in time to have avoided striking her, by the use of ordinary care and failed to use such care, then you will find for the plaintiff."

First. It is first insisted that the circuit court had no jurisdiction as to the Little Rock Railway & Electric Company. This contention is correct. The basis of proceeding against that company is the contract it made with the Little Rock Traction & Electric Company to assume the liabilities of the latter company. It was not a party to the tort involved in this action, and the only means by which the appellee sought to make it liable therefor was the contract it made with the latter company. By an amendment to her complaint in the circuit court she attempted to enforce this contract by an action thereby instituted against it in that court. The amount involved being less than \$100 the circuit court acquired no jurisdiction; and the judgment rendered against it is void.

Second. It is contended that the court erred in allowing Trustin Hicks to testify as follows: "I have no means of telling how fast the car was running, but judging from the ordinary speed of cars, being 6 to 8 miles per hour, this car was running at a speed of about 20 miles per hour." The ground of the contention is Hicks did not show that he was an expert. The testimony was obviously introduced for the purpose of showing that the car was running at an unusual rate of speed. It did not require an expert to ascertain that fact, especially when the difference between the usual rate and the speed it was traveling at the time of the accident was very great. It was admissible to show that the car was running rapidly and at unusual rate of speed.

Third. Appellant's objection to instruction copied above is it ignored the negligence of appellee in allowing her cow to run at large. As the cow was running outside the "stock limit" the appellee was not guilty of contributory negligence in allowing her to run at large, and the objection was not well taken. *Little Rock Railway & Electric Company v. Newman* (Ark.) 92 S. W. 864.

Fourth. The evidence was sufficient to sustain the verdict.

The judgment as to the Little Rock Railway & Electric Company is set aside, and the action as to it is dismissed; and the judgment against Little Rock Traction & Electric Company is affirmed.

#### JOHNSON et al. v. SMOTHERS.

(Supreme Court of Arkansas. June 4, 1906.)

##### 1. PAYMENT—ASSIGNMENT—ELECTION.

Plaintiff resigned as president of an insurance society, which was in embarrassed circumstances and which owed plaintiff \$5,393.97

on general account, together with a \$200 note, on defendant's agreement to pay plaintiff \$1,000 as soon as the assets of the association permitted. Defendant claimed that, immediately after the contract was signed, he asked plaintiff what he would take therefor, and that plaintiff said \$500, which he (defendant) accepted, while plaintiff claimed that there was no such acceptance. Thereafter defendant wrote plaintiff that the society was in good financial condition and able to pay its indebtedness, and later did pay the \$200 note, after which defendant wrote another letter inclosing a draft for \$500, asking plaintiff to sign and return the inclosed "receipt," and stated that he would send plaintiff a new statement of the society's report soon. The inclosure was not a receipt, but an assignment of plaintiff's claim for \$1,000 against the society. *Held*, that such assignment was not responsive to the latter and did not require plaintiff to elect either to execute the release or return the \$500 but that plaintiff was entitled to keep such sum and credit it on his claim against the society.

##### 2. CONTRACTS—CONSTRUCTION—QUESTION FOR JURY.

Where extrinsic evidence is introduced to aid in the construction of a written contract, it is not error for the court to submit the construction thereof to the jury.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 767-770.]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by L. S. Smothers against M. H. Johnson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Smothers was president and Rowe was secretary of the Planters' Mutual Insurance Association. The association was in embarrassed circumstances and the president and secretary had only credit on the books for their salaries and commissions instead of the cash therefor. The amount of Smothers' credit was \$5,393.97. The association also owed him a \$200 note and some small amounts on personal account not included in the other account. Johnson was interested in the association, and, desirous of saving it from insolvency, brought about an arrangement for Cotnam to take Rowe's place as secretary and he to take Smothers' as president. The result of these negotiations were embodied in the following proposition, which was accepted by Smothers: "Little Rock, October 21, 1899. Mr. L. S. Smothers—Dear Sir: In consideration of your resignation as president of the Planters' Mutual Insurance Association of Arkansas, and the transfer of your credit therein, we hereby agree to pay you \$1,000.00 at such times as the assets of the association will permit. By this is meant and understood that when the losses and other obligations of the company have been met and paid, and the assets of the association remaining are sufficient to cover the re-insurance on a basis of 55 per cent. on the total premiums, that payment out of the surplus shall be made on this account until the whole amount is paid. (Signed) M. H. Johnson, T. T. Cotnam."

Johnson testifies that after this contract was signed that he asked Smothers what he would take for the above obligation, and Smothers said \$500; and that he (Johnson)

said: "All right; as soon as I can get the money I will send it to you." Smothers says that Johnson asked him if he wanted to sell, and he replied: "Well, I do not know. Do you want to buy it?" and that Johnson walked away without response. Smothers left the state the night this contract was dated, and the parties did not meet after this conversation, so differently stated, occurred.

The following correspondence explains itself:

"Little Rock, December 4, 1899.

"Mr. L. S. Smothers, Ashley, Ohio—Dear Sir: I am glad to tell you that the Planters Mutual Insurance Company is in good financial fix and able to pay all the indebtedness they owe. If you will send that \$200.00 note of yours to me, or to any bank in town, we will cash it promptly. In regard to the other money that is due you for your interest in the company, that will be attended to about January 1. With kindest regards, I am yours very truly, M. H. Johnson."

"Little Rock, December 11, 1899.

"Mr. L. S. Smothers, Ashley, Ohio—Dear Sir: I enclose herewith New York draft for \$228.00, the amount of your note and interest. The boys did not have time to day to check up your personal account, but they will do so at once, and I will then send you a draft for the amount due you. E. C. is still with us and seems to be doing very well. With kind regards, I am yours very truly, M. H. Johnson."

"Little Rock, Ark., February 13, 1900.

"Mr. L. S. Smothers, Care Davidson, Columbus, Ohio—My Dear Mr. Smothers: Your letter of the 3rd ult. has been received several days. When I received it I intended to answer it immediately, but I have been busy and put it off from day to day. I enclose you herewith, New York draft for \$500, and I will ask you to please sign the enclosed receipt and return to me promptly. I am glad to know you are enjoying yourself and having good health. I have nothing very new to report, but I am glad to say that the Planters is moving along smoothly and gaining every day. The auditors are now in the office checking up the business for the past year, and they will soon be able to report. When they do, I will be glad to send you the result of their investigation. Please let me know at once when you will be in Little Rock. Yours very truly, M. H. Johnson."

Accompanying this letter and inclosed with it was a blank transfer in these words:

"Little Rock, Ark., February 13, 1900.

"In consideration of one dollar and other valuable considerations, I hereby transfer and assign to M. H. Johnson all my right, title and interest in and to the account in my favor with Planters Mutual Insurance Association of Arkansas, and transfer to him all credits to which I was entitled as a director and officer during my term of office."

"February 22, 1900.

"Friend Johnson: I will be in L. R. about March 10, and will talk with you on business. \$500.00 payment received. Respectfully, L. S. Smothers."

The subsequent correspondence between the parties only fortified the respective positions assumed by each. On November —, 1900, the \$1,000 obligation to Smothers was paid to Johnson, and the Smothers account closed. This suit was brought by Smothers to recover the remaining \$500 of the obligation. Johnson claimed that Smothers had sold it to him for \$500; that he accepted the draft sent him in letter of February 13, 1900, in payment of the purchase. The case went to the jury under instructions telling them, in substance, that if there was a sale of the obligation to Johnson that Smothers could not recover, and submitting that issue to them for determination.

The court refused the following instructions requested by Johnson and Cotnam: "(1) When M. H. Johnson wrote the letter of February 13, 1900, inclosing the bank check and written instrument to be signed and returned, it was the duty of Smothers, when he received the letter with the check, to either sign and return the transfer which was enclosed with the letter, or to decline to accept or collect the check. And when he used the check, as he admits in his testimony he did do, he thereby became estopped from making any further claim on the instrument set out in the complaint. (2) When Smothers received a letter written to him by M. H. Johnson, March 19, 1900, it was his duty to make his election as to whether he would keep the \$500 sent to him by Johnson, or hold on to his claim against Johnson and Cotnam under the contract set out in the complaint; and if he elected to keep the \$500 and did not return it, then he lost his right to make any further claim on said contract, and he cannot recover in this suit."

From a verdict and judgment in favor of Smothers, Johnson and Cotnam appeal.

W. S. McCain, for appellants. Jno. M. Moore and W. B. Smith, for appellee.

HILL, C. J. (after stating the facts). Appellants contend that, when Johnson wrote the letter of February 13, 1900, to Smothers and inclosed the draft for \$500 and form of transfer to be signed, Smothers was put to his election to either decline or accept the offer, and the appropriation of the draft of itself was such election. This position is not tenable, because the letter upon its face does not show any proposition calling for such action. It shows it is a reply to one of Smothers', subject not disclosed; then it states the inclosure of draft and asks for receipt to be signed and returned. The inclosure is not a receipt, but is a transfer for a nominal consideration of Smothers' account against the association and all credits to which he was entitled as officer and director, and does not

refer to those matters being reduced to the \$1,000 obligation. The transfer was not responsive to the statements in the letter and without explanation did not call for the election sought to be made from it. The oral explanations of the transactions to which the letter referred were necessary in order to make the letter intelligible. No contract could be reached from it alone; and when the parol testimony is turned to to shed light on the meaning of the writing it is found to be in conflict. If Johnson's version be taken, then the acceptance of the money in consummation of the agreed sale of the obligation was the end of it; if Smothers' version is taken, there was no sale to be consummated, for he says he had never agreed to sell for \$500 or any other sum; and no estoppel can be invoked because the facts justifying an estoppel are only found in Johnson's oral explanation and they are denied by Smothers.

It cannot be said that this letter and inclosure carried on their face knowledge of Johnson's intention to purchase for this price, but rather to the contrary. The writer speaks of the prosperous condition of the association, and promises an early report of its affairs. Prior to that, December 4th, he had written of its prosperous condition, offered to pay the \$200 note it owed Smothers, and said the money due him for his interest in the company would be paid about January 1st. That was followed by payment of note, and promised payment of personal account due him. Following in the same tone was the letter of February 13th sending one-half the amount of the obligation, and promising early report on the financial condition of the association. There is not the least indication therein of this being in consummation of an oral purchase of the obligation on the 21st of the preceding October. The inclosed blank transfer, it is true, called for an assignment of all Smothers' account and credits, to Johnson; but it failed to show for the consideration Johnson claims; and in fact it is a transfer of the \$5,383.97 account and not of the \$1,000 obligation of Johnson and Cotnam made on behalf of the company in lieu of said account. Smothers, finding that it was no receipt at all, and something not responsive to the statements in the letter, was authorized to disregard it and accept the money as a payment on his obligation and receipt accordingly. It follows from this view of the transaction that the court was right in refusing appellants' instructions which stated their position in this matter in the form of peremptory instructions.

Appellants appeal to the elementary doctrine that a written instrument must be construed by the court; but the difficulty in that doctrine helping appellants is that the writings here require extrinsic evidence to explain them, and are not complete of themselves. When the extrinsic evidence comes in, it shows one construction of the writings if one story is believed, and another if the other

story be accepted. The draft was to be a payment on the obligation, and the transfer a bad form of receipt; or, pursuant to a prior oral agreement, the obligation was sold for this sum, and the draft was in consummation thereof and the transfer the written evidence of it. The jury settled the construction of the contract, not by construing it, but determining in which light it should be read.

Judgment affirmed.

#### WADE v. GOZA et al.

(Supreme Court of Arkansas. Feb. 17, 1906.  
Rehearing Denied April 7, 1906.)

##### 1. PLEADING—ANSWER—DENIAL.

Where a complaint alleged that the land in controversy had been granted to the state of Arkansas by the United States as swamp and overflowed lands, an answer alleging that defendants are not advised that the lands were granted to the state as swamp and overflowed lands, and that defendants have no information that the lands were patented to the state as swamp and overflowed lands, was not a sufficient denial of the allegation in the complaint.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 244, 245.]

##### 2. SAME—ISSUES AND PROOF.

Where, in an action involving title to certain land, the allegation in the complaint that the land had been granted to the state as swamp and overflowed lands was not denied in the answer, it was not error for the court to admit the certificate of the state land commissioner showing a sale by the state without proof that the land had been confirmed to the state by the United States as swamp and overflowed land.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1228-1234.]

##### 3. APPEAL—OBJECTIONS AT TRIAL.

Where defendant did not object at the trial to the introduction of certain state land certificates, instead of the patents called for, on the ground that the certificates were not the best evidence, he could not object to such certificates on that ground on appeal.

##### 4. NEW TRIAL—OBJECTIONS TO INSTRUCTIONS.

Where one of the grounds of a motion for a new trial was that the court erred in giving five instructions, referred to by number, the objection was in gross, and was unsustainable if any of the instructions were correct.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 259.]

##### 5. APPEAL—RECORD—TRANSCRIPT.

Where the bill of exceptions in another suit was not embodied in the transcript of the record in the suit at bar, it could not be considered on appeal.

##### 6. SAME—CROSS-APPEAL.

A cross-appeal only brings up for review questions decided in favor of appellant or any co-appellee against the appellee praying the cross-appeal, as provided by Kirby's Dig. § 1225.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3574-3576, 4413.]

##### 7. ADVERSE POSSESSION—COLOR OF TITLE.

Where W. was in possession of the land in controversy under a donation deed valid on its face, based on a sale of forfeited lands to the state on October 25, 1882, he was entitled to hold the land, in the absence of anything in the record of a suit to determine the title to the land, to impeach such donation deed.

# 8. BANKRUPTCY—RESIDUE OF PROPERTY—REVERSION.

Where a surplus remains in the hands of a trustee in bankruptcy after the termination of the proceeding, and the debts proved have been paid, such surplus reverts to the bankrupt in equity.

# 9. LIMITATION OF ACTIONS—TIME.

Where, in trespass to try title, limitations are relied on as a defense, the running of the statute should be reckoned from the date of the deeds under which the parties in possession claim title until the beginning of the suit against them to recover possession.

Appeal from Circuit Court, Chicot County; Z. T. Wood, Judge.

Action by James M. Goza and another against J. W. Wade. From a judgment in favor of plaintiffs, defendant appeals. Reversed and remanded.

Baldy Vinson, for appellant. B. F. Merritt, for appellee.

WOOD, J. 1. The issue as made by the complaint and answer, and the proof that had been taken at the time the motion to transfer to the law court was made, presented a cause for the law court. Moreover, appellant did not except to the ruling of the court transferring the cause to the law court, and as this court had jurisdiction under the issues presented, no error is shown in this respect. The answer and proof showed, when the motion to transfer was passed on, that appellants were in possession of the lands in suit. Appellant did not insist on the demurrer nor motion to dismiss in the court below. They answered and went to trial on the merits, and appellant cannot complain here. There is no error presented in the first and second grounds of the motion for new trial.

2. The complaint with sufficient definiteness set up that the land in controversy "had been granted to the state of Arkansas by the United States as swamp and overflowed lands." A duplicate of the patents is proffered with the complaint, and filed as Exhibits D and E. The answer, in response to these allegations, says that defendants "are not advised that they (the lands) were granted to the state as swamp and overflowed lands" and that defendants have no information "that the lands were patented to the state as swamp and overflowed lands." This presented no denial of the allegations of the complaint that these lands were duly granted to the state by the United States government as swamp and overflowed lands. *Haggart v. Ranney*, 73 Ark. 344, 74 S. W. 703. The third ground of the motion for new trial assigns as error the admission of the certificate of the state land commissioner of the sale by the state to Craig and Clopton of the land in controversy without proof that the land had been confirmed to the state by the United States as swamp and overflowed land. The allegations of the complaint as to this being sufficient and not denied must be taken as true, and there was no error presented by this assignment. True, appellant called for

the patents to Craig and Clopton in the answer, but he went to trial without insisting upon a ruling on his motion to produce them, and when the certificate of the land commissioner was offered as evidence. Appellant did not object to same, nor move afterwards to exclude it on the ground that it was not the best evidence, and not competent as secondary evidence until the proper foundation had been laid for its introduction, by a showing that the patents to Craig and Clopton were lost, destroyed, or otherwise beyond the power of appellees to produce them. It thus appears that appellant in the court below did not avail himself of the rule applicable in such cases as declared by this court in *Driver v. Evans*, 47 Ark. 297, 1 S. W. 518, *Boynton v. Ashabranner* (Ark.) 88 S. W. 566, and *Carpenter v. Smith* (Ark.) 88 S. W. 976.

3. Nothing is presented for our consideration in the fourth ground of the motion for new trial, which is as follows: "That the court erred in giving the following instructions for appellees over objection of this appellant: Instructions for plaintiff numbered 3, 5, 7, 8, and 10 above set out." The bill of exceptions recites that "the court gave, over the objections of defendant, the following instructions"—setting them out, and numbering them consecutively 3, 5, 7, 8 and 10. The objection to the instructions given was in gross, and at least one of the instructions was correct.

4. The fifth ground of the motion for new trial is "that the court erred in refusing to give instructions numbered 4 and 5 asked by appellant." No. 5 is as follows: "(5) The jury are instructed that under no circumstances presented in this case can they find a verdict for plaintiffs for possession of the land involved in this suit." Request for instruction No. 5 should have been granted. It appeared that appellant, Wade, was in possession of the land claimed by him under a donation deed, good on its face, based on a sale of forfeited lands to the state October 25, 1832. It is contended by appellees that this sale was void for the reason that the decree of the Chicot chancery court rendered at an adjourned term thereof beginning on the 25th day of September, 1832, ordering the lands reassessed and sold, was void. But this contention is not established by the proof. We have searched the records in vain to find when this land was forfeited and how it was sold. If sold under a decree of the Chicot chancery court, at an adjourned term beginning September 25, 1832, which was void because rendered by a special judge, when the regular judge of the circuit was at the same time holding court elsewhere, the record nowhere shows it. True, we find among the papers what purports to be an original bill of exceptions in the case of *James M. Goza et al. v. H. S. Caldwell et al.*, pending in the Chicot circuit court in which it appears that *James M. Goza et al.*, the plaintiffs, appealed from a judgment in favor of certain defendants in

that suit, to wit, Asbury Moses, Jane Jones, S. B. Brown, James Brown, and Henry Love, and that the bill of exceptions sets forth the decree of the Chicot chancery court at the adjourned term beginning September 25, 1882, which appellee contends renders the sale and donation deed, under which appellant claims title herein, void. But that bill of exceptions, even if it disclosed what appellee claims for it, was never embodied in the transcript of this record.

The appeal by appellees here against the parties named in that bill of exceptions, and in whose favor judgment was rendered in the court below, was never perfected by the filing of the transcript in this court as the law requires. Appellee prayed a cross-appeal in this case December 9, 1905. But this cross-appeal only brings up questions decided in favor of appellant or any co-appellee against the appellee praying cross-appeal. Section 1225, Kirby's Dig. And we can only look to the transcript of the record in this court to determine what those questions are. Now, the parties who were joined with Wade as defendants in the court below, and in whose favor judgment was rendered have not appealed, and Wade's appeal brings up no question against them. They are not co-appellees with the appellees Goza and Kimberlin. They are therefore not parties to this record. So, we find nothing in this record to impeach the donation deed of Wade. The court erred therefore in not granting appellant's request for instruction No. 5. The giving of this would have rendered the granting of other requests asked by him unnecessary. But in view of a new trial in which the same questions may be raised, it is proper to say that we find no error in the refusal of the court to grant appellant's requests for instructions 2 and 6. The court properly submitted the questions embraced in these instructions in those numbered 2 and 6 which were given. It was a question for the jury under the evidence, as to whether or not the title to the land in controversy had passed out of Aaron Goza by the proceedings in bankruptcy. If the lands for any reason were not disposed of by the referee in bankruptcy, such title as Goza had at the beginning of such proceedings, reverted to him, upon their termination. Where a surplus remains in the hands of the assignee or trustee, after the proceeding has terminated, and the debts proved, if any, have all been paid, such surplus reverts to the bankrupt. In equity he would be the owner of such real estate as might remain even if a decree were necessary to revest title in him. 16 A. and Eng. Enc. Law, 699, 700, notes.

The court did not err in adding the clause "or that the lands were not disposed of by the referee in the administration of the bankrupt's estate," to appellant's request for instruction 2, and giving it as thus modified. Likewise, the court properly modified appel-

lant's request for instruction No. 6, by making it show the statute of limitations would be reckoned from the date of the deeds, where the parties were then in possession claiming under them, till the beginning of the suit against them, for possession. If they had not acquired title under their donation deed by the two-year statute of limitations, prior to the institution of the suit for possession, they could not acquire it after that time, and while such suits were pending. Of request numbered 4 by appellant, and refused, it suffices to say that it is impossible to forecast what would be a proper instruction upon the question of taxes, interest, improvements, and rents. For we cannot anticipate what the proof on another trial may develop as to these. But nearly all questions that can arise concerning these matters have already been passed upon by this court, and in some recent cases. See *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241, *McCann v. Smith*, 65 Ark. 305, 45 S. W. 1057, *Cowley v. Spradlin* (Ark.) 91 S. W. 550, and *Cowley v. Thompson* (Ark.) 91 S. W. 552.

For the error of the court in refusing to grant request of appellant for instruction No. 5, the judgment is reversed, and the cause is remanded for new trial.

#### BRADBURY et al. v. DUMOND.

(Supreme Court of Arkansas. July 23, 1906.)

##### 1. ADVERSE POSSESSION—COLOR OF TITLE—NECESSITY FOR COLOR OF TITLE.

Color of title is not necessary to give title by adverse possession, but is necessary to extend the title acquired beyond the limits of actual possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 65, 387-393.]

##### 2. SAME—CONTINUITY OF POSSESSION.

The grantee in a deed constituting color of title went into possession, cleared and cultivated the land, but during one year it was unoccupied by the grantee and not occupied by any tenant under him, but, though the fences were broken down in places, clear fields and houses remained. Held, that there was no such abandonment as broke the continuity of possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 266-270.]

##### 3. SAME—WHAT CONSTITUTES COLOR OR TITLE—TAX DEED.

A deed based on a void tax sale, which describes on its face the land and purports to convey it, constitutes color of title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 459-462.

##### 4. VENDOR AND PURCHASER—ACTION TO FORECLOSE LIEN—EVIDENCE.

Where, in an action to foreclose vendor's lien notes, defendant set up a failure of title and prayed for rescission, plaintiff was entitled to show title by adverse possession, though he had not pleaded it.

##### 5. JUDGMENT—PERSONS CONCLUDED—VENDOR AND PURCHASER.

In an action to foreclose vendor's lien notes, wherein defendant pleaded failure of title, the fact that a judgment by default had been rendered against defendant for the possession of

the land by a third person did not affect the rights of plaintiff, who was not a party to that action.

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Action by Lou Bradbury and another against S. L. Dumond. From a judgment in favor of plaintiffs, granting insufficient relief, they appeal. Reversed and remanded, with directions to enter judgments in accordance with the opinion.

H. A. Parker and W. N. Carpenter, for appellants. John F. Park, for appellee.

HILL, C. J. Appellants sold appellee two tracts of adjacent land, one a 40 and the other an 80, gave him bond for title, and he executed notes for purchase price. This was a suit on the notes and for enforcement of vendor's lien. Appellee answered, setting up a misrepresentation and failure of title as to the 80 and praying rescission as to it. The chancellor gave judgment against him for balance of purchase money due on the 40, and rescinded the contract as to the 80, and the vendors bring the case here.

The extent of the fraudulent or false representation was that the appellants' father had a tax title and owned the land. The bond for title stipulated that they were to convey the 40-acre tract "by a good and sufficient deed, \* \* \* conveying a good and clear title to the same free from incumbrances"; but as to the 80-acre tract it was "to be conveyed by quitclaim deed," without any of the assurances of title given as to the 40-acre tract. The father of appellants acquired a clerk's deed to the land under the act of 1879 for the redemption of delinquent lands, which was duly executed on 20th of May, 1882. Under the terms of the act, if the owner of the delinquent land failed to redeem within a year, then during the next year any one who would pay the tax, penalty, and costs required to redeem should receive from the clerk "a proper deed of conveyance." Bradbury received such deed, aptly describing the land redeemed, and purporting, for the consideration received, to "grant, bargain, and sell it" unto him and his heirs and assigns, with all appurtenances thereto belonging. Under it Bradbury went into possession in the winter of 1886, and commenced clearing and cultivating, and he and his heirs continued in unbroken possession until December, 1894, when his heirs, Bradbury having died, sold the land to appellee. Appellee was in possession as tenant during the year 1894. During 1893 the land lay out and was not cultivated, the fences became broken and dilapidated; but appellee rented it, notwithstanding it was in sorry condition, went onto it, and cultivated it in 1894. Each tract was fenced, there being a line fence between the tracts, houses on both, and considerable part of each in cultivation every year except 1893. The continuity of the possession was not broken by a failure to have

tenants for a year. The property was not abandoned. It only fell into a sorry state of repair, which was necessarily incident to its tenantless condition. The cleared fields, the houses, the fences, even if broken down at places, kept the flag of possession flying. It had not gone so far into decay but that appellee moved on it the first of the succeeding year and paid rent for the privilege of being on it and cultivating it. The evidence fails to show such abandonment as would break the continuity of possession.

The act under which Bradbury received his deed was declared unconstitutional in *Bagley v. Castle*, 42 Ark. 77. After holding the act in contravention of the Constitution, the court further held that purchasers, like Bradbury, under the act, and their vendees, had a lien on the land for the burden of taxes discharged, both in the purchase and for subsequent taxes paid. The question is squarely presented as to the effect of seven years' possession of part of a tract under such a deed. Color of title is not necessary to give title by adverse possession, but it is necessary to extend the title acquired beyond the limits of the actual possession. Actual possession of part of a tract, with color of title for the whole tract, carries the possession to the limits of the land described in the deed giving color. This is the general rule, and the court in this case is not concerned with any of its exceptions. 1 Cyc. p. 1084. There is a conflict of authority as to whether a deed, void on its face, will give color of title. See the authorities on each side of that question cited in 1 Cyc. p. 1087, and notes. This court has adopted the view that a deed based on a void tax sale, on its face describing the land and purporting to convey it, is color of title within the statute of limitations. See the cases recently reviewed on that subject in *Ross v. Royal* (Ark.) 91 S. W. 178.

It is contended that the deed in question is not one of the kind protected by the two-year statute of limitation. Section 5061, Kirby's Digest. The court recently, in *Dickinson v. Hardie*, 96 S. W. 353, applied the two-year statute to a void tax sale; and, if this deed falls within those described in said statute, that case and *Ross v. Royal*, supra, are conclusive. But concede that the deed does not fall within that statute and it does not help appellee, the evidence sustains seven years' possession under color of title, and of course that statute would apply. Appellee says that the seven-year statute cannot be invoked, because not pleaded; but that position is not tenable. The suit was on the notes and to foreclose a vendor's lien. Appellee answered to it, setting up failure of title and praying rescission of contract, thus forming the issue whether or not appellants had title when they conveyed to him. They did have title. The seven years' possession under the deed giving color to the 80-acre tract ripened and perfected their

title thereto. Appellee permitted a judgment by default to be rendered against him for the possession of the land by one Allen; but that is his misfortune, and cannot affect the rights of appellants, who were not parties to that suit.

Decree reversed, and cause remanded, with directions to give judgment against appellee on the notes and for foreclosure of vendor's lien.

### McKEWEN v. ALLEN et al.

(Supreme Court of Arkansas. July 23, 1906.)

#### ADVERSE POSSESSION — PLEADING — SUFFICIENCY.

A plea of limitations, reciting that defendant states that the cause of action in ejectment, if cause of action it be, did not accrue within seven years next before the commencement of the suit, and that defendant "here sets up and pleads and asks that he receive the benefit of the two-year statute of limitations applicable to tax sales," was sufficient to raise the issue that defendant relied on seven years' adverse possession as a defense under the general statute of limitations.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 638.]

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Action by J. W. Allen and others against Sarah I. McKewen. From a judgment for plaintiffs, defendant appeals. Reversed.

H. A. Parker and W. N. Carpenter, for appellant. John F. Park, for appellees.

McCULLOCH, J. Appellants occupied the land in controversy, a quarter section, under a deed of conveyance executed by the county clerk pursuant to the provisions of the act of March 14, 1879, authorizing the conveyance of lands returned delinquent and forfeited for nonpayment of taxes. Appellants claimed to have occupied the land adversely for more than seven years before the commencement of this suit, instituted against

them by appellees to cancel said deed as a cloud upon the title. It is contended by appellees (1) that the clerk's deed, being void on its face, was not effective as color of title under either the two-year or seven-year statute of limitation; (2) that the seven-year statute of limitation was not pleaded; and (3) that the proof is not sufficient to sustain a plea of adverse possession for seven years.

The first two questions stated above are disposed of in the case of *Bradbury v. Dumond* (this day decided) 96 S. W. 390, and need not be again discussed in this opinion. Appellant's plea of limitations is in the following form, in the separate answer filed by both of them: "Defendant states that this cause of action, if cause of action it be, did not accrue within seven years next before the commencement of this suit; and defendant here sets up and pleads and asks that he receive the benefit of the two-year statute of limitations applicable to tax sales." No objection was made to the form of the plea; no request or motion presented that it be made more definite and certain. The statute of limitation, to be available as a defense, must be pleaded in some form in cases in equity as well as at law. *Strayhorn v. McCall*, 95 S. W. 455, and cases cited. We think the plea in this case was sufficient to apprise the plaintiff that seven years' adverse possession was relied upon as a defense under the general statute of limitations. The form of the plea was not questioned, and the proof was directed specially to that issue. The proof was sufficient to sustain the plea of continuous adverse possession for seven years. The clerk's deed was executed to John W. White, appellant's grantor, August 5, 1882, and he testified that he went into possession the next year and occupied it continuously.

The chancellor erred in rendering a decree for the plaintiffs, and the same is reversed, and the cause remanded, with directions to enter a decree dismissing the complaint for want of equity.



**HARTFORD FIRE INS. CO. v. ENOCH.**

(Supreme Court of Arkansas. July 2, 1906.)

**1. APPEAL—REVERSAL—REMAND—NEW TRIAL.**

Where, on appeal or writ of error, a cause is reversed and remanded for a new trial, the case stands as if no action had been taken by the trial court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4710-4713.]

**2. SAME—LAW OF THE CASE.**

The rule of the law of the case has no application to questions of fact, so that nothing said on a former appeal as to the facts can bind the trial court or be conclusive on a second appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4361, 4665.]

**3. SAME.**

Where, in an action on a policy, the Supreme Court reversed a judgment in favor of plaintiff and remanded the cause for new trial, holding that the policy was void for breach of a condition, and that the facts proved did not establish a waiver thereof, such judgment was not res judicata of the issue of waiver on the retrial at which the evidence was materially different.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4361, 4665.]

**4. INSURANCE—POLICY—CONDITIONS—WAIVER.**

Where, notwithstanding a policy, provided that it should be void if the insured's interest in the property was other than unconditional and sole ownership, insured informed the insurer's agent, who issued the policy, at the time it was issued, that the title to the property insured was not in him, and that insurer, after loss, knowing that insurer did not have the unconditional and absolute title to the property, demanded further proofs of loss, such facts were sufficient to justify a finding that such condition of the policy had been waived.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 968-974, 1071-1075.]

**5. SAME—PROOFS OF LOSS—GOOD FAITH—OBJECTIONS.**

Where insured, in good faith and within the stipulated time, does what he intends as a compliance with the requirements of his policy in respect to furnishing proofs of loss, it is the duty of the insurer to promptly notify him of objections thereto so as to afford a reasonable opportunity to obviate them.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1358, 1393-1397.]

**6. SAME—ACTION ON POLICY—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

Where insured, though not the absolute owner of the property, had an insurable interest therein, an instruction that he could not, in any event, recover for insurance on property which he did not own, was properly refused.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 601-605, 1771.]

**7. SAME—INVALIDITY OF POLICY—WAIVER—INSTRUCTIONS.**

In an action on a fire policy, an instruction that a requirement of additional proofs of loss by defendant insurance company or its agents authorized to represent it, in adjusting losses, would not preclude the company from relying on the invalidity of the policy by reason of a requirement therein, that the property belonged to assured as the sole and unconditional owner, was erroneous and properly refused.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1071-1075.]

**8. SAME—MODIFICATION.**

An instruction that, where a policy provides that it shall be void if insured is not the

sole and unconditional owner of the property, such sole ownership in assured is a condition precedent to a right of recovery, was properly modified by adding a clause that such was the law, unless the jury believed by a preponderance of the evidence that the condition was waived.

**9. SAME—AMOUNT OF RECOVERY—INTEREST.**

In an action on a fire policy, interest was allowed only from the date the policy was made payable, not from the date of the fire.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1494, 1791.]

Hill, C. J., dissenting.

Appeal from Circuit Court, Howard County; James S. Steel, Judge.

Action by S. Enoch against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The sixth instruction given by the court and the sixth, eleventh, and twelfth instructions refused which are referred to in the opinion were as follows:

No. 6. If the jury find for the plaintiff, they will assess his damages for his loss on the building at the sum of \$200, the amount for which said building was insured; and on the personal property insured they will assess his damages at three-fourths the value of the property destroyed, not exceeding, however, the amount for which said policy was issued, together with 6 per cent. interest per annum on said loss from January 3, 1901.

No. 6. (refused except as modified) Where a policy of insurance provides that it shall be void in the event the insurer is not the sole and unconditional owner of the property covered thereby, such sole and unconditional ownership in the assured is a condition precedent to a right of recovery. The court refused to give instruction No. 6, but added the following words: "And unless you believe by a preponderance of the evidence that same was waived by defendant, you should find for defendant." This amendment was properly excepted to.

No. 11. The jury are instructed that a requirement of amended proofs of loss by the defendant insurance company, or its agents authorized to represent it in adjusting losses, will not preclude the company from relying on the invalidity of the policy sued on, by reason of any requirement therein that the property mentioned in the policy belonged to the assured as the sole and unconditional owner. (Refused.)

No. 12. The jury are instructed that the plaintiff could not, in any event, recover for insurance on property which he did not own. (Refused.)

This is a suit by appellees on a standard policy of fire insurance. The complaint alleged the issuance of the policy, the loss, a compliance by appellees with the requirements of the policy as to notice and proof of loss, and prayed for judgment in the sum of \$1,250, the amount of the policy with interest. Appellants answered denying all material allegations, and set up "that the policy in suit, provides, inter alia, that the entire

policy shall be void and of no force if the interest of the insured be other than unconditional and sole ownership, and that the interest of said S. Enoch, to whom said policy was issued at the time of the alleged fire, was not an unconditional and sole ownership; that the policy also provided that if the building should be located on ground not owned by assured in fee simple, the policy should be void, and that plaintiff was not the owner in fee simple of the land upon which the building was located." Appellants also set up a plea of *res judicata* alleging "that by the judgment and determination of the Supreme Court, the policy of insurance was declared and adjudged void, and that the requirements to furnish proof of loss had not been waived." Appellants, to support the plea of *res judicata*, introduced the opinion and mandate of this court on the former appeal. 72 Ark. 47, 77 S. W. 899. In that opinion, among other things, we said, page 50 of 72 Ark., page 900 of 77 S. W.: "It was shown that appellee purchased a large portion of the property insured conditionally; that the vendor retained title to the same until the purchase money was fully paid, and that it had not been paid. The evidence tended to prove that these facts as to the ownership of the property were discovered by appellant after the fire." We further said: "Appellee was not the absolute and unconditional owner of a part of the property insured, and the policy, according to its own terms, is void. But appellee contends that this condition was waived. The burden was upon him to prove such waiver, knew or had notice that the policy unless appellant, at the time of the alleged waiver, knew or had notice that the policy was forfeited on account of the failure of the condition. The evidence adduced for the purpose of showing a waiver was to the effect that appellant was informed that there was a lien on the property for unpaid purchase money, and thereafter demanded additional proof of loss, which was furnished. That was not sufficient. The lien might have existed, and appellee might, nevertheless, have been the absolute and unconditional owner of the property. The evidence wholly fails to show a waiver. Reversed and remanded for new trial." The court overruled the plea of *res adjudicata*.

W. C. Rodgers, for appellant. Sain & Hatley, for appellee.

WOOD J. (after stating the facts). Appellant contends:

First. That this court decided on a former appeal that the policy in suit was void, and that its invalidity had not been waived, and that therefore its plea of *res judicata* should have been sustained. In *Robinson v. Thornton* (Cal.) 46 Pac. 79, it is held that (quoting syllabus) "where a judgment is reversed on appeal, and remanded for new trial, the holding of the appellate court on a question of fact, based on the evidence in the

record, is not conclusive as to such question on a subsequent trial on new evidence." "The rule of the law of the case has no application to questions of fact, and nothing said on a former appeal as to the facts can bind the trial court upon a second trial or be conclusive upon a second appeal. Where the facts appearing upon a second appeal are the same as those upon a former appeal, the legal effect of the facts is determined by the decision on the former appeal (77 S. W. 899) which is the law of the case for the second appeal." *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Wallace v. Sisson* (Cal.) 45 Pac. 1000; *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441. When, on appeal or writ of error, a cause is reversed and remanded for new trial, the case stands as if no action had been taken by the lower court. *Harrison v. Trader*, 29 Ark. 85; *Heard v. Ewan*, 73 Ark. 513, 85 S. W. 240. If the facts developed on second trial remain the same as they were on the first trial, the lower court must be governed, in applying the law to the facts, by the principle announced by this court in that case as controlling. If the facts are different, then the lower court may apply a different rule of law. It follows that the trial court did not err in overruling the plea of *res adjudicata*, and in refusing requests by appellant for instructions covering same proposition as set up in plea. The proof as to the title to the property in the present case was the same as on the former trial, and therefore what we said on the former appeal as to the policy being void on account of the false warranty by appellee that he was the sole and unconditional owner of the property insured was and is the law on that subject. But on the question of whether or not this condition that avoided the policy and worked a forfeiture was waived by appellants, the proof was different. On the first trial, the proof as to the waiver showed that appellant was informed that there was a lien on the property for unpaid purchase money, and that thereafter, appellant demanded additional proof of loss. We said that was not sufficient because the lien might have existed and appellee still have been the sole and unconditional owner of the property insured. But in the present case there was testimony that appellant was informed and knew, after the loss occurred, that appellee did not have the absolute and unconditional title to the property, and, after acquiring such knowledge, that it demanded "further proofs" of loss.

There was testimony in this case, also, to show that appellee informed the agent of the insurance company, who issued the policy, and at the time it was issued, that the title to the vehicles insured, was not in him. There was no such testimony as this in the former trial. Therefore what we said on the first appeal about there being no waiver of the forfeiture, is not applicable. *Love-well v. Bowen*, 75 Ark. 452, 88 S. W. 570.

The case of *Hill v. Draper*, 63 Ark. 141, 37 S. W. 574, which learned counsel for appellants relies upon, does not support him and is not in conflict with the rule here announced. That was a chancery proceeding. On the first appeal a pure question of law was passed upon, the judgment of the lower court was "reversed and the cause remanded with directions to overrule the demurrer." Upon the second appeal the merits were passed upon and the cause was "remanded for further proceedings consistent with the opinion delivered" on the first appeal, and on the third appeal, this court simply held that the proceedings of the last trial were not consistent with the decree of this court on the first appeal, and with its decree and directions on the second appeal. The cause was never "reversed and remanded for new trial," and the question had been previously adjudicated by this court upon its merits, and the last reversal was because the proceedings of the lower court were inconsistent with such adjudication.

Second. The evidence as to "proofs of loss" being furnished is that appellee made out his proof of loss, swore to it, and registered it to the company at Hartford, on January 26, 1901 (the fire occurred January 3, 1901), and received a receipt therefor. Afterwards when the adjuster told appellee's attorney that the proof of loss was insufficient, he made out another, had appellee to swear to it, and likewise registered it to the company. The last "proof of loss" bears date February 13, 1901. Appellee also obtained registered receipt for this. So far as the record discloses no objection was ever made to the form of this proof of loss, and appellee was never advised or informed that the company did not accept same as a full compliance with the requirements of the policy. No defects in it were pointed out to appellee. Appellants contend that the proofs of loss do not comply with the requirements of the policy because in one of them appellee does not state whom the property belongs to, and in the other he swears "that no one has any interest in said property except as follows: J. W. Cottingham holds a note for \$75 for balance of purchase money of lot and I have deed to same. A. L. Skillern has my promissory note for \$420 and interest for balance of the purchase money due on surreys, hacks, and buggies." These objections to the proofs of loss cannot avail appellants. Appellee had his attorney to prepare proofs of loss, and forwarded same to the company. He did this evidently because he desired and intended to comply with the terms of the policy in this respect. The company, some time after receiving the first proof of loss, notified appellee through his attorney that it was insufficient in that it "included property not included in the policy." Appellee thereupon had his attorney to prepare and register another proof of loss which the reg-

istry receipt shows that appellant received, and it is not shown that any objection was made to this, presumably for the reason that appellee in his last proof of loss had overcome the only objection made to the first, to the entire satisfaction of the company. In *Gould v. Dwelling House Insurance Co.*, 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717, it is held that if the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy in respect to proofs of loss, good faith requires that the insurer shall promptly notify him of objections thereto so as to give him the opportunity to obviate them, and mere silence may so mislead him to his disadvantage as to be of itself sufficient evidence of waiver by estoppel." See notes to this case in 19 Am. St. Rep. 722; *Whitmore v. Dwelling House Ins. Co.*, 148 Pa. 406, 23 Atl. 1131, 33 Am. St. Rep. 838 and notes; *Welsh v. London Assurance Corporation*, 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786. See, also, *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196, on a question somewhat analogous. In other cases it is held that "an insurance company waives objections to proofs of loss by retaining them without pointing out specific objections to them." *Ins. Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Weed v. Hamburg, etc., Ins. Co.*, 133 N. Y. 394, 81 N. E. 231; *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. 73, 20 Atl. 838, 21 Am. St. Rep. 904, note; *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29, and note.

The court did not err in refusing appellant's request for instruction No. 12 (Reporter set forth in note). As an abstract proposition of law it was correct, but it had no application here, for appellee, although not the absolute owner, had an insurable interest in the property covered by this policy. *Holbrook v. Ins. Co.*, 25 Minn. 229; *Reed v. Williamsburg City Fire Ins. Co.*, 74 Me. 537. See *Tyler v. Aetna Ins. Co.*, 12 Wend. (N. Y.) 507; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 23 Am. St. Rep. 548; *Strong v. Manfs. Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507, note, pages 570-611; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 13; *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377-379, 9 Am. Rep. 41; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499, note.

Request for instruction No. 11 (Reporter set out in note) was in conflict with the doctrine announced by this court in *German Insurance Company v. Gibson*, 53 Ark. 494, 14 S. W. 672. See, also, *Planter's Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44; *Peoples Fire Ins. Co. v. Goyne* (Ark.) 96 S. W. 360.

The court did not err in refusing request for instruction No. 6, for appellants, and in giving it with the added words (Reporter set forth in note).

The instruction as amended by the court and given was based upon the evidence and is in conformity with the doctrine announced by the court in *Insurance Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458; *Sprott v. Insurance Co.*, 53 Ark. 215, 13 S. W. 799; *German Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 423, 54 Am. St. Rep. 297; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; *Peoples Fire Ins. Co. v. Goyne* (Ark.) 96 S. W. 365; *Security Mutual Ins. Co. v. Woodson* (Ark.) 95 S. W. 481.

We find no reversible error in the granting or refusing requests for instructions, except the sixth mentioned below. The sixth instruction given on behalf of the appellee, directing the jury to calculate the interest from the date of the fire, is erroneous. Interest should have been computed from the date the policy is made payable which, in the present case, is 60 days after the proof of loss. *Insurance Co. v. White*, 58 Ark. 277, 24 S. W. 425. The proof of loss as shown by the registry receipt, was given to the company on the 13th of February, 1901. Interest therefore should have been calculated from April 13, 1901.

Appellee offers to remit the excess of interest over the proper amount. The clerk will therefore enter the proper remittitur, and the judgment for the residue will be affirmed.

**HILL, C. J.** (dissenting). The appellee's testimony showed that an adjuster of appellant company came to Nashville after the fire to investigate and adjust the loss; that he was informed of the condition of the title to the surreys, buggies, etc.; and that, in a subsequent conversation, the adjuster told appellee's representative that the first proof of loss which had been sent in was not sufficient as it included property that was not included in the policy and that further proofs would have to be furnished. The appellee did furnish thereafter correct proofs. This statement of the adjuster should not be sufficient to work an estoppel against the company proving the contract of insurance had been violated by appellee. The adjuster was on an investigating tour gathering all the facts necessary and proper to pass on the claim, and most likely the course of the company would not be determined till his report was in. He volunteered to point out an insufficiency in the proof of loss in order that it might be corrected and the claim not defeated on any ground connected with a defect in the proofs. An estoppel should be invoked covering any other defect in the proofs of loss than the one mentioned by the adjuster, but I do not think the estoppel should, from this mere statement, be invoked against defending the action on its merits.

This is the view I took of the case on the hearing, but I did not formally dissent; but

on the rehearing my impressions have been deepened and I have concluded to file this dissent.

## RICE v. PALMER.

(Supreme Court of Arkansas. April 23, 1906.)

1. CONSTITUTIONAL LAW—CONSTITUTIONAL AMENDMENT—ADOPTION—POPULAR VOTE—DETERMINATION OF RESULT—REVIEW BY COURTS.

Kirby's Dig. § 716, provides that county election commissioners shall certify the vote on constitutional amendments to the Secretary of State, who shall transmit the sealed returns to the speaker of the House of Representatives, in the same manner that the returns for Governor and other executive officers are transmitted. Section 2852 requires the speaker, in the presence of both houses of the General Assembly, to open and publish the votes cast for Governor, etc., and the person receiving the highest number of votes shall be declared elected. Section 717 provides that the returns shall be opened and counted in the presence of the General Assembly in joint convention assembled, and section 718 provides that if it appears that a majority of the electors voting at such election adopt such an amendment, the speaker shall declare it duly adopted. *Held*, that the canvassing of the returns on a constitutional amendment under such provisions did not constitute a determination of the question whether it had been adopted by a specially constituted tribunal, but that such determination was a judicial question reviewable by the courts.

2. SAME—ELECTION—MAJORITY OF VOTE.

Kirby's Dig. § 718, with reference to the adoption of a constitutional amendment, declares that if it shall appear that a majority of the electors voting at the election at which the amendment is submitted adopt such amendment, then the speaker of the House of Representatives, on canvassing the returns, shall declare such proposed amendment duly adopted, etc. *Held*, that such section required the affirmative vote of a majority of the electors voting at the election in order that a constitutional amendment should be adopted, and not merely a majority of the electors voting on the proposition.

Riddick and McCullough, JJ., dissenting.

Appeal from Circuit Court, Lincoln County; Antonio B. Grace, Judge.

Proceeding by R. R. Rice against H. D. Palmer to recover possession of the office of circuit clerk of Lincoln county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Cantrell & Loughborough, Rose, Hemingway & Rose, and R. R. Rice, for appellant. Taylor & Jones, for appellee.

**HILL, C. J.** This is a contest over the office of circuit clerk of Lincoln county, and calls for a decision as to whether amendment No. 3, authorizing the Governor to fill vacancies by appointment, was legally adopted as part of the Constitution. Rice holds under an appointment made by the Governor, and against his claim to the office thereunder Palmer asserts, first, that amendment No. 3 was not legally adopted, and second, that there was no vacancy in the office within the meaning of the law. The view the court

takes of the first question renders unnecessary a decision of the second.

The clause of the Constitution under question is section 22, art. 19, as follows: "Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all the members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the state for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution; but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately." The county election commissioners are required to certify the vote on the amendment to the Secretary of State, and the Secretary of State is required to transmit these sealed returns to the speaker of the House of Representatives at the time and in the same manner that the returns for Governor and other executive officers are required to be transmitted to the speaker. Kirby's Dig. § 716. The speaker is required, during the first week of the session, in the presence of both houses of the General Assembly, to open and publish the votes cast for Governor, Secretary of State, Treasurer, Auditor, and Attorney General, and the person having the highest number of votes for each respective office shall be declared duly elected thereto, and the president of the Senate and speaker of the House shall file a certificate with the Secretary of State declaring what persons have been elected to the offices named. Section 2852, Kirby's Dig. On the occasion of the ascertainment and declaration of the vote for Governor and said other executive officers, the returns on the amendment "shall be opened and counted in the presence of the General Assembly in joint convention assembled." Kirby's Dig. § 717. Then follows this provision: "If it shall appear that a majority of the electors voting at such election adopt such amendment, then the speaker shall declare such proposed amendment duly adopted by the people of Arkansas." Then follow provisions for certificate to be filed with the Secretary of State and for the Governor to make proclamation of the adoption of this amendment. Section 718, Kirby's Dig. The declaration of the speaker as to the result of the vote for Governor, Secretary of State, Treasurer, Auditor, and Attorney General is not necessarily the final conclusion, for a contest may be had thereafter and it shall be settled by the joint vote of both houses, in which joint meeting the president of the Senate shall preside. Section

2877, Kirby's Dig. There is no statutory provision for any tribunal to determine a contest over the result of the election on an amendment, and the section above quoted, requiring the speaker to declare the result from the votes then before him, is the only method of ascertainment of the result prescribed by statute.

In the general election of 1899, amendment No. 3 received 43,446 votes, and there were 40,207 votes against it, and there were 126,986 votes cast for Governor. The speaker, in joint session of the General Assembly of 1895, upon the votes aforesaid then before him, declared the amendment adopted. It was duly certified by the president of the Senate and speaker, and proclamation made by the Governor. Two questions are involved: First, is the action of the speaker, followed by the executive proclamation, the ultimate decision of this question which the courts cannot review because committed to the other departments of state to determine, or is it a judicial question not to be settled until settled right in a judicial court? Second, does an amendment require a majority of all the votes cast in the election or a majority voting on the question? First. It is strongly pressed upon the court that the General Assembly has delegated to the speaker, as the servant and the mouthpiece of the joint session, the power to determine as to whether a constitutional amendment has been adopted; and that question is a political one, determined by a co-ordinate department of government, and the judiciary is precluded from entertaining it. This argument has often been made in similar cases to the courts, and it is found in many dissenting opinions, but with possibly a few exceptions it is not found in the prevailing opinion of any court of last resort. The authorities are practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of the existing Constitution is a judicial question, and it is a paramount duty of the courts to pass upon it. An examination of some of the leading cases may be both interesting and profitable.

This exact question came before the New Jersey Court of Errors and Appeals on writ of error from the Supreme Court. The law of New Jersey provided that the Governor should summon four or more members of the Senate to sit with him, and they should constitute a board of canvassers to canvass and estimate the vote given for and against Constitutional amendment which had been voted on, and the board was empowered to "determine and declare" which amendments were adopted and to certify the same, and its certificate would make the amendment part of the organic law. After the board had decided an amendment relating to lotteries and one relating to appointments to office were adopted and one on woman's suffrage was rejected, citizens and taxpayers caused the question to get into courts, and the final

court said: "The question naturally arising first in this case concerns the legitimate scope of our inquiry: Have we authority to consider and decide whether the determination of the board of state canvassers, that the proposed amendment had been adopted, was lawful, or did that determination, followed by the proclamation of the Governor, preclude judicial cognizance of the subject?" After stating the exact questions involved in regard to the amendments and how the case arose in the Supreme Court (there a court of general and original jurisdiction), the court continues: "It thus becomes manifest that there was present in the Supreme Court, and is now present in this court, every element tending to maintain jurisdiction over the subject-matter, unless it be true, as insisted, that the judicial department of the government has not the right to consider whether the legislative department and its agencies have observed constitutional injunctions in attempting to amend the Constitution, and to annul their acts in case they have not done so. That such a proposition is not true seems to be indicated by the whole history of jurisprudence in this country." The court then goes into an interesting review of the authorities, and then says: "The examination made supports the assertion of Chief Justice Day [of Iowa] that the decisions, so far as they deal with the existence of the principle, are not in conflict. The only case found in which the jurisdiction of the court was denied is *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716." The court then discusses this case, which will be referred to later. *Bott v. Wurts* (N. J. Err. & App.) 43 Atl. 744, 45 L. R. A. 251.

In Mississippi a case arose as to the adoption of a constitutional amendment, and the first question which arrested the attention of the court was whether it was a judicial or a political question. Chief Justice Whitfield, in a clear and positive decision, puts at rest any doubts on the question. He reviews the decided cases on the subject and says it is settled by an overwhelming weight of authority that this is a judicial question, and then he continues: "The true view is that the Constitution, the organic law of the land, is paramount and supreme over Governor, Legislature, and courts. When it prescribes the exact method in which an amendment shall be submitted, and prescribes positively the majority necessary to its adoption, these are constitutional directions mandatory on all the departments of government, and without strict compliance with which no amendment can be validly adopted. Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or noncompliance with the constitutional directions as to how such amendment shall be submitted and adopted, and whether such compliance has in fact been had must, in the nature of the case, be a ju-

dicial question." *State v. Powell*, 77 Miss. 545, 27 South. 927, 48 L. R. A. 652.

In the case of *Koehler v. Hill*, 60 Iowa, 545, 14 N. W. 738, 15 N. W. 609, a very exhaustive examination of this question was had. There was a majority and minority opinion, and then on motion for rehearing this question was threshed over. Chief Justice Day delivered a vigorous opinion overruling the motion for rehearing. He reviewed the adjudged cases fully, and concluded his opinion on this branch of the case as follows: "We have then seven states, Alabama, Missouri, Kansas, Michigan, North Carolina, Mississippi, and Indiana, in which the jurisdiction of the courts over the adoption of the amendment to the Constitution has been recognized and asserted. In no decision, either state or federal, has this jurisdiction been denied. We may securely rest our jurisdiction upon the authority of these cases. He would be a bold jurist, indeed, who would ride rough shod over such an unbroken current of judicial authority, so fortified in principle, sustained by reason, and so necessary to the peaceful administration of the government."

The Alabama court said: "The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It is said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required or their requisitions enjoined, if the Legislature or any other department of the government can dispense with them? To do so would be to violate the instrument they are sworn to support; and every principle of public law and sound constitutional policy requires the court to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." *Collier v. Frierson*, 24 Ala. 108.

The following states in the following cases have entertained jurisdiction of suits to determine the validity of the adoption of constitutional amendments, and treated such question as a judicial question: Missouri, *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636; North Carolina, *University of N. C. v. McIver*, 72 N. C. 76; Michigan, *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641; Indiana, *State v. Swift*, 69 Ind. 505; Wisconsin, *State v. Timme*, 54 Wis. 318, 11 N. W. 785; California, *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; Kansas, *Prohibitory Amendment Cases*, 24 Kan. 700; Minnesota, *Secombe v. Kittleson*, 29 Minn. 555, 12 N. W. 519; New Jersey, *Bott v. Wurts* (N. J. Err. & App.) 43 Atl. 744, 45 L. R. A. 251; Alabama, *Collier v. Frierson*, 24 Ala. 108; Iowa, *Koehler v. Hill*, 60 Iowa, 545, 14 N. W. 738, 15 N. W. 609; Mississippi, *State v. Powell*,

77 Miss. 545, 27 South. 927. And against this array of authorities is only the Maryland court in *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716.

The strength of appellant's contention is in the argument that the General Assembly delegated to the speaker, as the presiding officer of the joint session, the determination of this question. Chief Justice Whitfield said, in *State v. Powell*, supra: "It may be that when the Constitution creates a special tribunal, and confides to that tribunal the exclusive power to canvass votes and declare the result, and make the amendment part of the Constitution, as a result of such declaration, by a proclamation, or otherwise prescribed method fixed for such tribunal by the Constitution, then the action of the special tribunal would be final and conclusive, whether its action be judicial or not. This is so because it was competent for the sovereign people, speaking through their Constitution, so to provide." It will be noticed that Chief Justice Whitfield limits the exception to constitutionally created tribunals, but other courts recognize statutory tribunals as possessing the same power of ultimate conclusion where the Legislature expressly provided. Judge Cooley thus expressed it in an analogous proposition: "As the election officers perform for the most part ministerial functions only, their returns and certificate of election which are issued upon them are not conclusive in favor of the officers who would thereby appear to be chosen, but the final decision must rest with the courts. This is the general rule, and the exceptions are those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established with power of final decision." Cooley, *Con. Lim.* p. 937.

In view of this exception to the rule of judicial review, which has in a few instances been applied to adoption of constitutional amendments, it is important to consider whether section 718, Kirby's Dig., can be construed as creating the speaker, either individually or as the representative of the joint session, a tribunal to determine the result of the election on amendments. It is true that he must make declaration of the apparent result from the votes before him, just as he makes declaration of the election of Governor and other officers from the votes before him. In the event of contest over one of the executive offices, it is expressly provided that the joint session, at a meeting presided over by the president of the Senate, shall determine it, thereby showing clearly that there is no finality to this declaration from the face of the returns. Must it be taken, because there is no express provision for the joint session or other tribunal to determine a contest over an election on the amendment, that the only determination of it shall be the *prima facie* one from the face

of the returns before the speaker? Suppose a few votes determine the fate of an amendment, and the returns from one county are known to be indubitably stained with fraud and the proof is at hand. The speaker is powerless to do more than declare the result as it appears from these returns sent him by the Secretary of State, who hands them to him as received from the county boards. Is it to be thought for a moment that it was ever intended that this perfunctory duty of the speaker, limited to the face of the returns, should preclude inquiry and permit the organic law to be changed contrary to the expressed wishes of a majority of the people? Can it be possible that the lawmakers intended the organic law to be changed on the face of the returns and yet no office from Governor to constable is necessarily concluded by the face of the returns? The statement of the position carries its own refutation. Certainly no such intention can be imported into the legislation which imposed this formal duty on the speaker, as the words of the act negative the thought of a final decision of the question by the speaker. "If it shall appear that a majority," etc., is the language employed. The *Century Dictionary* gives six definitions of the word "appear," comprehending all shades of meaning attached to it, and none of them conveys the idea of judicial or final determination or decision, but all convey the thought of the surface, the apparent, the obvious, that which is to be seen at first sight. The use of this word in defining the duties of the speaker in this regard was quite apt, and properly imposed the formal and ministerial function of casting up and declaring in open session, what would appear to be the result. The votes on the principal state offices were then before him, and from these he could reach, at least approximately, the votes in the election, and the votes on the amendment would give the other necessary data to a *prima facie* decision from the face of the returns, and, in the language of Judge Cooley, "the final decision must rest with the courts."

The strongest case cited by appellant is *Bott v. Wurts* (N. J. Sup.) 40 Atl. 740, but this was not the final decision of that case, and, while the judgment was affirmed, the ultimate conclusion on this question was different in the court of last resort, the gist of which has been given. *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716, seems to support the appellant, although Chief Justice Whitfield, in *State v. Powell*, supra, treats this case as one where a constitutionally created special tribunal took it out of the general rule, and does not regard it as antagonistic in principle with the other cases; while it is possible for that distinction to be made and save it from being an exception, yet the Maryland court itself did

not make that distinction, and this appears to be merely a case of out of plumb.

*Luther v. Borden*, 7 How. (U. S.) 1, 12 L. Ed. 581, is relied upon by counsel here as it has been by counsel on the losing side in most of the other cases. There is a statement in the body of the opinion to this effect: That in forming the Constitutions of the various states and in the various changes and alterations which have since been made, that the political department has always determined whether the proposed Constitution or amendment was ratified or not by the people, and the judicial power has followed the decision. This was not a point decided in the case, and the statement was made merely in the course of the argument leading to the points decided. The case grew out of "Dorr's Rebellion" in Rhode Island. The question was not as to an amendment of the Constitution, nor as to the adoption of the "Dorr Constitution," but was when there were two opposing governments in a state, that the determination of which was the legitimate government was a political and not a judicial question, and where the courts of the state decide which was the proper government under its own laws, the federal courts must follow the state decision. That this case, notwithstanding some general language, is not an authority for appellant is obvious, but if any doubt remains on the subject the analysis of the case by Chief Justice Day in *Koehler v. Hill*, supra, will remove it. There can be little doubt that the consensus of judicial opinion is that it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the exact and precise manner required by the Constitution, unless perchance a special tribunal has been erected to determine this question, and even then many of the authorities hold that this tribunal cannot be permitted to illegally amend the organic law. Therefore it is the duty of the court to decide the question on its merits.

Second. This brings us to a consideration of the question whether in fact the amendment was adopted as required by the Constitution. The Constitution provides how amendments shall be passed through the General Assembly for submission to the people, and for publication for at least six months "immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the state for approval or rejection; and if a majority of the electors voting in such election adopt such amendments the same shall become a part of the Constitution." Art. 19, § 22. "Such elections" evidently refers to the general election for Senators and Representatives. Any other construction would be straining the natural meaning of clear and proper English. The majority necessary to adopt it must be the majority of electors voting at the general election for Senators and Represen-

tatives, and not a mere majority voting on the subject of the amendment. The framers of the Constitution of 1874 used plain and simple English. They knew what they wanted and what they did not want, and more than any Constitution of the state, it is full of details and explicit limitations. The time in which it was framed begot positiveness and strong convictions. This method of amending the Constitution by direct vote of the people is an adaptation to the American Constitutional system of the initiative and referendum of the Swiss Republic. For a change there to be made in the organic law it must secure a majority not only of all the citizens of the Republic, but of all the cantons of the Republic. This system is common to many states, and the prevailing rule is to require a majority of all the voters in the election, and not a mere majority of those voting on the question. Of course the framers of the Constitution could have provided for either method; there were precedents for either when that clause was written, but, having deliberately and clearly adopted the rule that it must be a majority of the electors voting in the election instead of a majority voting on this question, it is only for the court to bow to the express terms of the Constitution. This language needs no extrinsic aid to discover its meaning, but the court is not without authority for this construction. Similar or almost similar language has been before the courts many times, and while there is some conflict in the decisions, still the conflict is more apparent than real, and arises more from difference in language employed than in principles of construction. The authorities on this subject are reviewed at length by Judge Trieber in *Knight v. Shelton* (C. C.) 134 Fed. 423, and by Chief Justice Whitfield in *State v. Powell*, 77 Miss. 545, 27 South. 927. The case law is carefully gone over in these opinions, and it would be an idle task to repeat what has been so well done. These two decisions demonstrate that the great weight of authority sustains the construction reached by the court as above stated.

In view of the foregoing opinion, it necessarily follows that the conclusion is that amendment No. 8 was not adopted, and therefore the Governor did not have authority to appoint Rice circuit clerk. This was the judgment of the circuit court, and it is affirmed.

BATTLE and WOOD, JJ., concur. RIDDICK, J., concurs in the judgment, and his reasons will be stated in an individual opinion.

RIDDICK, J. (dissenting). The facts in this case are as follows: H. D. Palmer was at the general election in September, 1902, elected to the office of circuit clerk of Lincoln county. On the 21st day of October, 1902, he duly qualified and entered upon the



duties of the office, and has continued to discharge the duties thereof up to this time. At the general election in September, 1904, B. A. Meroney was elected to the same office, but he died on the 26th day of October, 1904, before he had received his commission, and before he had qualified or entered upon the duties of the office. Afterwards, on the 31st day of October, 1904, the Governor of the state appointed R. R. Rice to the office, and issued a commission to him as circuit clerk of Lincoln county. Palmer, who had possession of the office, claimed that he had the right to continue in office until his successor was elected and qualified, and refused to surrender it to the appointee of the Governor, and Rice brought this action in the circuit court to recover possession. The circuit court decided against his claim, and he appealed.

There are two questions presented by this appeal. (1) Whether amendment No. 3 to the state Constitution which authorizes the Governor to fill vacancies by appointment was legally adopted. (2). If this amendment has been adopted and is a part of the Constitution whether there was any vacancy in the office of circuit clerk of Lincoln county that the Governor could fill by appointment.

As to the first question: The amendment was duly submitted at a general election. The returns on the election were sent to the Secretary of State in sealed envelopes who presented them to the speaker of the House of Representatives by whom they were opened and counted in the presence of the General Assembly in joint convention assembled, and the result declared that the amendment had been duly adopted by the people of the state. This was a decision of the question by the duly constituted and proper tribunal, and I do not think we can go behind or question the correctness of that decision in this proceeding. But as that matter has been fully discussed by Mr. Justice McCulloch I shall not do more than say that I fully concur in his opinion, and in the conclusion that he has reached on that point. If, however, as the majority of the judges have concluded, we are free to review this decision of the speaker and the General Assembly it seems to me that it was correct. There were polled 43,446 votes for the amendment to 40,207 against it. It thus received a clear majority of over 3,000 votes cast on that question.

The section of the Constitution which directs how amendments shall be adopted provides that the proposed amendment shall be published "for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the state for approval or rejection; and if a majority of the electors voting at such election adopt such amendment the same shall become a part of this Constitution." Const. 1874, art. 19, § 22. Now the words "if a majority of the electors voting at such

election" may mean either a majority of the electors voting for Senators and Representatives, or they may mean a majority of all electors voting at that general election whether for the amendment or for any of the candidates voted for at that election, or they may mean a majority only of the electors voting on the question of the adoption of the amendment. As we have stated, the amendment received a majority of over 3,000 of the votes cast on that question. It is not shown how many votes were cast for Senators and Representatives. The only thing shown against the amendment is that the amendment did not receive a majority of the votes cast for Governor at that election. So, to hold this amendment invalid under the facts of this case, we must conclude that to adopt an amendment the Constitution requires that it shall receive the votes of a majority of all the electors voting at that election whether for the amendment, or for Senators and Representatives or for any of the numerous officers voted for at a general election. And this is what a majority of the court holds, and as the number of those voting for the amendment is not equal to a majority of those voting for Governor the court holds that the amendment was not legally adopted. I dissent from this conclusion.

If the framers of the Constitution intended that in order to adopt an amendment a majority not only of those voting for the amendment but of all who voted at the election whether for Senators, Representatives or other officers, it seems to me, they would have used language which would have put the matter beyond question. The usual rule when an officer is to be elected or a question is to be settled by a majority vote is to consider only those votes cast for that office or on the particular question to be decided. All voters who absent themselves, or who, being present, do not vote on the question are presumed to assent that the matter may be decided by the majority of those voting, unless the law, under which the election is held, clearly shows to the contrary. *Vance v. Austell*, 45 Ark. 400; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, 15 Cyc. 388; 10 Am. & Eng. Ency. Law. (2d Ed.) 754. This principle, it seems to me, applies not only when the question is submitted at a special election, but also where the law requires it to be decided by a majority vote at a general election. The object in requiring the submission to be made at a general election is that at such an election more of the electors will attend the election and vote, and thus a fuller expression of the opinion of the electors will be secured. But if, after attending, any of them choose to vote for certain candidates, and not to vote for or against the amendment it should be presumed that they assented to the decision of the majority who

did not vote thereon. Their failure to vote should not be allowed to defeat the will of those who do vote unless the meaning of the Constitution to that effect is clear. *Vance v. Austell*, 45 Ark. 400; *Rex v. Foxcraft*, 2 Burrows (Eng.) 1017; *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711; *Montgomery County Court v. Trimble*, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738; *Gillespie v. Palmer*, 20 Wis. 572. It is said in *McClurg v. Powell*, 77 Miss. 583, 27 South. 927, 48 L. R. A. 652, that *Gillespie v. Palmer* had been overruled, but this seems to be an error. It was criticised in *Bound v. Railroad Co.*, 45 Wis. 579, but the judge who did so was writing a dissenting opinion, and did not speak for the court.

In discussing a question of this kind in a recent case the Court of Appeals of Kentucky said: "It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed; and to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. \* \* \* Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent, and expresses no opinion on a public question to be counted the same as the one who takes an interest, in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose. *Montgomery Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738. The court in that case held that a majority of those voting on the question was sufficient without regard to how many votes were cast for the various candidates voted for at that election. In doing so, it overruled one or two earlier cases that had held to the contrary.

The simplest and the most common way to submit a question for determination by popular vote is to count only those who vote on that particular question. To require that a question submitted to a popular vote at a general election should be determined by the majority of votes cast not only for it but for all of the various candidates voted for at that election is such an inconvenient, awkward, and unusual way of deciding questions by popular vote that we should not expect such a conception from the framers of our Constitution; much less should we expect

that, having that idea, they would give not even a hint as to how the majority of all the electors, voting at a general election for so many different offices, township, county, district, and state, should be determined. Certainly, no such construction should be adopted unless the language clearly shows that such was the intention. But it does not do so. If, leaving out all other considerations, we stick alone to a close technical meaning of the words used they may be said to require a majority of all electors voting for Senators and Representatives. There would be something definite and tangible about such a rule, much more in consonance with the character of the framers of the Constitution, whom the majority of the court speak of as men of "positive and strong convictions," fond of detail and "explicit limitations," and users of "plain and simple English," than what the court holds that they intended. For the court, after having complimented those men in that way, proceeds to hold that they did a thing the very opposite of what one should expect from men of that kind. We should expect of such men that they would require that the adoption of the amendment should be determined by the votes on that measure alone, either by a simple majority or by a two-thirds majority if thought necessary, for that would be definite and certain, and would exclude any possibility of mistake. It is possible that men of that kind might make a majority of those voting for Senators and Representatives or for some other office the test, but it seems to me inconceivable that they should make the test a majority of all the votes cast for the numerous offices voted for at a general election without giving any rule by which such majority could be determined. For that would be so general, inexplicit, and impracticable that the Legislature would be compelled to provide some method by which such majority could be approximately determined. Surely, men of "strong convictions" fond of "detail" and "explicit limitations" would not have left their work, on such a vital point, in a condition that it must be at once retouched by the legislative hand. Either the majority of the court are mistaken in the character of those framers of the Constitution, or they are mistaken in the meaning of their language. I think they are mistaken in the meaning intended to be conveyed. As before stated, the simplest, most direct, and the most common way to determine a question by popular vote is to consider only those who vote on that question. If there are others who do not vote they (to quote the language of an old case by a great judge) should be held "to acquiesce in the election made by those who do." Lord Mansfield in *Rex v. Foxcraft*, 2 Burrows, 1017.

The natural presumption where there is any doubt should be that the makers of the Constitution intended to follow the usual

rule, and to require for the adoption of an amendment a majority of those voting on that question. In my opinion, the words "if a majority of the electors voting at such election adopt the amendment," refers to a majority voting on the question of the adoption of the Constitution. This language has been so construed by the speaker and the General Assembly not only when the returns on this amendment were before them, but as to the several other amendments that have been declared adopted. These amendments have for years been treated as valid parts of the state Constitution. Appointments made by the Governor by virtue of this amendment have been received by the people of the state as valid, and have been recognized as such by this court. *Childers v. Duvall*, 69 Ark. 336, 63 S. W. 802. Whether the decisions of the speaker and the General Assembly on the adoption of these amendments is conclusive or not they are certainly persuasive, and every reasonable doubt should now be resolved in their favor. When this rule is applied it seems clear to me that this amendment should be sustained. I cite cases the reasoning of which tends more or less to support this view, though this being a question concerning the meaning of our own Constitution, I attach no great weight to decisions from other states, for the language construed is seldom the same in all respects as that before us. *Vance v. Austell*, 45 Ark. 400; *Childers v. Duvall*, 69 Ark. 336, 63 S. W. 802; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711; *Montgomery County Board v. Trimble*, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738; *Gillespie v. Palmer*, 20 Wis. 572; *State v. Langle*, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723; *State v. Grace*, 20 Or. 154, 25 Pac. 382; *Smith v. Proctor*, 130 N. Y. 819, 29 N. E. 312, 14 L. R. A. 403; *Metcalfe v. Seattle*, 1 Wash. St. 303, 25 Pac. 1010. There are other cases to the same effect as these, and as many probably more cases to the contrary. One of the best-considered and ablest being the decision in *Knight v. Shelton*, 184 Fed. 423, delivered by the U. S. Circuit Court for the Eastern District of this state. But for the reasons stated, I am unable to concur in the conclusion reached in that case and by the court in this case for in my opinion only a majority of those voting on that question is necessary to adopt an amendment to our Constitution.

As I think that this amendment is now a valid part of our state Constitution it follows that in my opinion the Governor has power to fill a vacancy in a county office by appointment, and I shall proceed to consider the question as to whether there was a vacancy in the office of circuit clerk of Lincoln county to be filled. A vacancy in an office may be caused by the death, resignation, or removal of the official holding the

office, or by the creation of a new office. *Smith v. Askew*, 48 Ark. 89, 2 S. W. 349. "As a general rule there is a vacancy in office whenever there is no incumbent to discharge the duties of the office, that is whenever the office is empty or unfilled, but as long as there is any one authorized to discharge the duties of the office the office is not to be deemed vacant so as to authorize the exercise of the power to fill vacancies in office." 23 Am. & Eng. Ency Law (2d Ed.) 348, 349; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663; *People v. Edwards*, 93 Cal. 157, 28 Pac. 831; *Baxter v. Latimer*, 116 Mich. 356, 74 N. W. 726.

Now, our Constitution provides that "all officers shall continue in office after the expiration of their official terms until their successors are elected and qualified." Article 19, § 5, Const. 1874. Meroney who was elected to fill the office of circuit clerk as successor to Palmer, having died before the expiration of Palmer's term of office and before he had taken the oath of office, and qualified as such official, his death created no vacancy for Palmer has under the Constitution the right to continue in office until his successor is both elected and qualified. If Meroney had been commissioned, and had qualified and entered upon the duties of the office, and then died, his death would have caused a vacancy in office. But he died before this. He had not been commissioned, and had not qualified, and held no office when he died, and, as before stated, his death created no vacancy. Palmer's right to the office until his successor is elected and qualified is as clear as that of any clerk in the state. As there was no vacancy in the office the Governor had no right to appoint, and his appointment conferred nothing upon his appointee Rice.

The judgment of the circuit court in favor of Palmer was correct and for the reasons stated I concur in the judgment of affirmance. Mr. Justice WOOD authorizes me to say that he also is of the opinion that there was no vacancy to be filled, and concurs in this opinion to that extent.

McCULLOCH, J. (dissenting). I do not agree with the majority of the court in the conclusion reached in this case. I will not discuss the question as to the number of votes required by the Constitution to adopt an amendment, as it seems plain to me that the ascertainment of the result of the election made by the joint session of the Legislature and its declaration, made through the speaker of the House, of the adoption of the proposed amendment, is conclusive of that fact, and must be accepted by the courts as final. I fully concur, however, in all that is said by Mr. Justice RIDDICK in his separate opinion, to the effect that the framers of the Constitution meant to require, for the adoption of an amendment, only the affirmative vote of a majority of all the electors voting upon that question at the election.

The Constitution provides how amendments thereto may be originated and submitted to the people for adoption, but it is silent as to the method by which the result of elections upon the question of adoption or rejection shall be ascertained and declared. At least there is no express provision of that instrument upon the subject, except that they shall, at the next succeeding general election for Senators and Representatives "be submitted to the electors of the state for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution." The nearest approach to an express provision of the Constitution on the subject is found in a section of the same article (section 24, art. 19) as follows: "The General Assembly shall provide by law the mode of contesting elections in cases not specifically provided for in this Constitution." But whether this be held to be authority for the Legislature to provide a method of ascertaining, declaring, and contesting the result of an election upon the adoption or rejection of a proposed amendment to the Constitution, certainly nothing is found anywhere in that instrument restricting the power of the Legislature in this regard. According to the American system of government the Constitution of a state is not a grant or enumeration of powers vested in the legislative department, but is a mere limitation upon the exercise of such powers. The Legislature can exercise all the powers not expressly or by fair implication prohibited by the Constitution. "The Legislature," said Mr. Justice Lacy in delivering the opinion of this court in *State v. Ashley*, 1 Ark. 513, "then can exercise all the power that is not expressly or impliedly prohibited by the Constitution; for whatever powers are not limited or restricted, they inherently possess as a portion of the sovereignty of the state." The same doctrine has been so often announced that it has become elemental. I am not aware of it ever having been controverted. *State v. Fairchild*, 15 Ark. 619; *Eason v. State*, 11 Ark. 481; *Baxter v. Brooks*, 29 Ark. 173; *Ruddell v. Childress*, 31 Ark. 511; *Dabbs v. State*, 39 Ark. 353, 43 Am. Rep. 275; *Cooley*, Const. Lim. § 205. Then, if it be held that the Legislature possesses the power to provide a method for ascertaining and declaring the result of an election upon the submission of a proposed amendment to the Constitution, it seems equally clear that the Legislature of the state has done so.

The statutes on the subject, after providing for the method of publication of the proposed amendments, the form of the ballots and duties of the judges of election with respect to certifying the returns, are as follows:

"Sec 716. County election commissioners, at the same time and in the same manner that they are required to send the abstracts

of election of Senators and Representatives in the General Assembly, shall send to the Secretary of State copies of the abstracts filed in their office of the returns of the vote on said amendment, plainly marked on the envelope thereof the words: 'Returns of vote on amendment No. \_\_\_\_\_. From the county of \_\_\_\_\_. And in case of a failure to receive any returns of such vote at the seat of government for ten mails after the same is due, the Secretary of State shall dispatch a messenger to the county from which returns have not been received, with directions to bring up such returns or copies thereof.

"Sec. 717. When all the returns have been received by the Secretary of State said secretary shall keep such returns in the original envelopes with the seals unbroken until the General Assembly shall convene, when he shall send such returns to the speaker of the House of Representatives at the same time and in the same manner as is now provided by law for sending in the election returns for Governor and other state officers, and said returns shall be opened and counted in the presence of the General Assembly in joint convention assembled.

"Sec. 718. If it shall appear that a majority of the electors voting at such election adopt such amendment, then the speaker shall declare such proposed amendment duly adopted by the people of Arkansas. And when so declared adopted, the speaker of the House of Representatives shall cause a true copy of such amendment to the Constitution of the state of Arkansas, signed by the president and the speaker of the House of Representatives, and attested by the secretary of the Senate and the clerk of the House of Representatives, to be filed in the office of the Secretary of State, and the same shall be and remain a record of said office. The Governor shall, thereupon, publish his proclamation in some newspaper of general circulation, announcing the ratification and adoption of said proposed amendment, and it shall have all the force and effect of any other part of the present Constitution, and shall be recognized by the legislative, executive and judicial departments of the state of Arkansas, from the filing of such certified copy in the office of the Secretary of State as a part of the organic law of the state."

It appears that the provisions of the statute were complied with as to canvassing the returns and declaring the adoption of the amendment in question. The record of the joint session of the two houses of the Legislature recites the following proceedings: "The joint assembly then proceeded to open and canvass and publish the returns of the election held September 3, 1894, for amendment No. 4, and against amendment No. 4. The speaker of the House declared the result of said election as appears from the returns so opened and published to be as follows:

For amendment No. 4, 42,426. Against amendment No. 4, 40,207. And it appearing from the said returns that the majority of the electors voting at said election voted for said amendment, the speaker of the House of Representatives declared the amendment adopted by the people of Arkansas." That the statutes in question contemplate a final and conclusive determination of the result of the election and the adoption of the amendment, there can scarcely be a doubt. They provide that when the speaker declares the adoption of the amendment, and a duly attested copy thereof is filed in the office of the Secretary of State, the "Governor shall, thereupon, publish his proclamation in some newspaper of general circulation announcing the ratification and adoption of said proposed amendment, and it shall have all the force and effect of any other part of the present Constitution, and shall be recognized by the legislative, executive and judicial departments of the state of Arkansas, from the filing of such certified copy in the office of the Secretary of State as a part of the organic law of the state."

It is contended by those who deny the legal adoption of the amendment that the speaker of the House of Representatives, in complying with the terms of the statute, only performs a ministerial duty in announcing the result of the election, and that no determination of the result is thereby recorded. The majority of the court are pleased to refer to the ascertainment and declaration of the result of the election as the act of the speaker alone. I think this is entirely too narrow a scope to give to the statute. It is inconceivable to my mind that if the framers of the statute intended to give no more force and effect to it than that, they would not have provided for the useless ceremony of having both houses of the General Assembly convene in joint session in order to sit idly by and witness the performance of so perfunctory a duty. If the members of the two houses, representing, as they do, the sovereignty of the people, were to do no more than stand as silent witnesses to the ceremony, without power to protest against or correct a false or erroneous declaration of the result of the election, as well might the result be declared to bare walls instead of in the presence of the Assembly. As well might the returns be left with the Secretary of State to open them and declare the result, the same as he does with the returns of the election of certain state officers which are not required to be certified to the speaker of the House of Representatives. The speaker is the mouthpiece, the creature and servant of the House, not its master in any sense or in the performance of any duty. He merely does the bidding of the House. And, according to all settled rules of statutory construction and of parliamentary law, if he should, in the performance of the duty

imposed upon him by this statute, announce a result differing from the will of the majority of the members of the joint session, that body would undoubtedly have the power to revise or reverse the ruling and correctly declare the result of the election. The joint session of the two houses also, in my opinion, has the power to hear and determine a contest as to the result of the election. It is not essential that the word "contest" should have been used, if it may be fairly implied from the terms of the act that it was meant to give the joint session the power to ascertain and declare the correct result of the election. The power to hear and determine a contest for the purpose of ascertaining the correct result of the election would necessarily follow.

This court, in *Baxter v. Brooks*, 29 Ark. 173, in dealing with the power of the Legislature to hear contest for the office of Governor, said: "The mere failure on the part of the Legislature to provide a mode of conducting the trial would no more oust the jurisdiction than a failure to establish laws governing actions before justices of the peace or probate courts would destroy their constitutional jurisdiction and give the power to bestow it somewhere else, by a simple enactment." In other words, the framers of the Constitution, by failing to expressly provide for a method of ascertaining and declaring the result of elections for the adoption of amendments, or for contesting the result by proceeding in the courts, have left it to the legislative branch of government for treatment as a political question, the same as the election of certain officers and contests thereof, and the same as the enactment of laws for the welfare of the people. Viewing the question in that light, the courts have nothing to do with it further than to decide whether or not amendments have been properly proposed and submitted to the people and the result of elections thereon determined and proclaimed by the proper legislative authority. It is noteworthy, as indicative of the legislative intention in framing the statute in question, that the returns of an election upon the adoption or rejection of an amendment are required to be certified and delivered to the speaker of the House of Representatives, the same as returns of the election of those state officers (Governor, Secretary of State, Treasurer, Auditor, and Attorney General), contests of which the Constitution provides shall be before the General Assembly. This indicates an intention to provide a tribunal not only for the ascertainment and declaration of the result, but also for a contest over a disputed result.

Much may be said, in support of this contention, of the expediency of a speedy and definite ascertainment of the result of such an election so that the people at large, and

especially those who are charged with enforcement of the law, may be informed as to changes in the organic law and, knowing them, may obey its mandate. I can conceive of no more intolerable condition of public affairs than that of having the result of an election for the adoption or rejection of an amendment to the Constitution left in doubt until such time as the adjudication in the courts of personal rights shall demand a decision of the question. It is chaotic. For so long as the question of fact, whether or not a proposed amendment has received the approval of a majority of the voters remains unascertained by some final arbiter of that question, no man may with certainty know the law. In the very nature of things, the courts can only adjudicate the validity of an amendment to the Constitution when it is drawn in question in suits involving private rights, and can then base a judgment only upon the facts proved and presented in the record of that particular case. No decision of the question in one case can ever become binding upon the court or parties in another case where the proof is different as to number of votes cast at the general election at which the proposed amendment has been submitted; therefore the question can never be regarded as definitely settled, if its settlement is a judicial question to be adjudicated by the courts. To illustrate: Amendment No. 5, known as the "Road Tax Amendment," received only a small majority of all the votes cast at the general election of September, 1898, at which it was submitted for adoption or rejection, if the total number of votes cast for the several candidates for Governor be taken as the test. According to the decision of the court, however, the vote for Governor does not necessarily afford the test and it is always open to question the actual number of votes cast. Now, suppose that in a suit by one taxpayer to restrain the collection of the road tax assessed against his property, he should prove to the satisfaction of the court, by proper certificates of the total number of votes cast for the various candidates for county officers, that the vote for Governor did not represent the total vote cast at the election, and that the amendment did not receive a majority of all the votes cast at the election. The trial court would then declare that the amendment was not adopted and that the assessment of road tax was void, and this court on appeal would, of course, affirm the decision. Let us suppose, also, that another taxpayer should bring suit for the same purpose but should be less diligent than the other successful litigant in getting proof of the total number of votes cast at the election and content himself with the proof of the number of votes cast for candidates for Governor. The trial court would in that case declare the amendment to have been legally adopted and enforce the payment

of the tax, and this court would, of course, affirm the decision. We would then have presented the novel spectacle of this court declaring, in one case, the amendment legally adopted as a part of the organic law of the State, and in another case declaring it to have been rejected. Who, then, could know the law?

But it is said that this is necessarily a judicial question, to be settled by the courts. Why so? Haven't the people, in framing the Constitution of the state, the right to leave with the Legislature, as a political question, the power to provide a method of ascertaining and declaring the result of an election upon an amendment? It seems plain to me that in framing the Constitution of 1874 they have done so, and that the Legislature has provided a method of definitely and finally ascertaining the result of such election. I can see no reason, either as a matter of expediency or of law, why this could not be done or, with due deference to the opinions of my Brothers, how a conclusion can be reached that it has not been done. Other questions of like import and equal importance have been left with the legislative branch of government for final decision, and this court has recognized the binding effect of the provision. The Constitution of 1868 provided that the General Assembly should canvass the returns of the election of Governor, Secretary of State, Treasurer, Auditor, and Attorney General, and declare the result, and hear contests for said officers, and this court has held that it was a valid provision or the final settlement of the result of such election as a political question. No suggestion has ever been made that that is a judicial question, which must be settled by the courts. On the contrary, this court has held that the courts cannot review the decision of the Legislature. *Baxter v. Brooks*, 29 Ark. 173. This decision is sustained by the great weight of authority. *Taylor v. Beckham*, 108 Ky. 278, 56 S. W. 177, 49 L. R. A. 258, 94 Am. St. Rep. 357; *Batman v. Megowan*, 1 Metc. (Ky.) 533; *State v. Marlow*, 15 Ohio St. 144; *People v. Goodwin*, 22 Mich. 496. The Constitution provides that no local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated, but this court has repeatedly held that the question whether the notice has been given is one exclusively for the Legislature, and that the courts will not treat it as a judicial question and review the action of the Legislature. *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Waterman v. Hawkins* (Ark.) 86 S. W. 844. The Constitution also provides that "in all cases where a general law can be made applicable no special law shall be enacted" by the General Assembly, but this court has often held that the question whether the desired result can be accomplished by a general act must be determined by the General Assembly and

that its determination is conclusive. *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Davis v. Gaines*, supra; *Carson v. Levee District*, 59 Ark. 513, 27 S. W. 590; *St. L. S. W. Ry. Co. v. Grayson*, 72 Ark. 119, 78 S. W. 777; *Waterman v. Hawkins*, supra. The court, in the case last cited, quoted with approval the following language of Judge Cooley; "The moment a court ventures to substitute its own judgment for that of the Legislature in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference." *Cooley's Const. Lim.* (7th Ed.) p. 236. The Constitution provides that no appropriation of money shall be made, except for defraying the necessary expenses of government, and for certain other purposes named, without the concurrence of a majority of two-thirds of the General Assembly, yet this court held that the General Assembly must be the judge whether the object of an appropriation is for "necessary expenses of government," and that its determination is binding upon the courts. *State v. Sloan*, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 106; *State v. Moore* (Ark.) 88 S. W. 881, 70 L. R. A. 671.

If these are not judicial questions to be determined by the courts alone, how can it properly be said that the result of an election upon the adoption or rejection of a proposed amendment to the Constitution is essentially a judicial question which must be determined by the court, even though the framers of the Constitution have seen fit not to restrict the power of the Legislature to provide a method of finally and conclusively ascertaining the result of such election? It is not material whether the Constitution itself provides that the Legislature shall determine the result of the election, or whether, by silence upon the subject, and by failing to restrict the power of the Legislature in that respect it has left that branch of government free to provide a method of ascertainment. The effect is the same, for, as we have already seen, the Legislature is vested with sovereign power except as is expressly or by fair implication restricted by the Constitution. I think the views I have expressed are fully sustained by authority. The following cases sustain the doctrine that where the Legislature, by authority of the Constitution, has erected a tribunal for the purpose of determining the result of an election upon any subject, the decision of such tribunal is conclusive, and cannot be reviewed by the courts. *Govan v. Jackson*, 32 Ark. 533; *Batman v. Megowan*, 1 Metc. (Ky.) 533; *Taylor v. Beckham*, 108 Ky. 278, 56 S. W. 177, 49 L. R. A. 258, 94 Am. St. Rep. 357; *Luther v. Borden*, 7 How. (U. S.) 1, 12 L. Ed. 581; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. Ed. 1187; *State v. Harmon*, 31 Ohio St. 250; *Corbitt v. McDaniel*, 77 Ga. 544, 2 S.

El. 692; *Simpson v. Mecklenburg Com'rs*, 84 N. C. 158; *Miles v. Bradford*, 22 Md. 170, 85 Am. Dec. 643; *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716. The case of *Worman v. Hagan*, supra, is precisely in point, except that the Maryland Constitution provided that the returns of election should be made to the Governor, and that he should ascertain and declare the result. The court said: "It will be seen that the Constitution confides to the Governor exclusively the power and duty of ascertaining the result of the vote from an examination of the returns made to him. And on his proclamation that a proposed amendment has received a majority of the votes cast, it becomes so instant a part of the Constitution. There is no reference of the question to any other officer, or any other department. It is committed to the Governor without qualification or reserve, and without appeal to any other authority. Most certainly no jurisdiction is conferred on this court to revise his decision. It may be asked what is to be done in case the Governor should violate his duty, and wrongfully proclaim an amendment as adopted which in point of fact had been rejected. It would not be becoming in this court to suppose that such a contingency would ever happen. The courtesy due to the executive department forbids us to entertain such a conjecture. But if, unhappily, in future times it should ever occur, assuredly a sufficient remedy will be found. The resources of a free government are ample, and will always be found adequate to punish and repress offenses against its sovereignty."

I do not think that the conclusion of the majority of the court upon this question is by any means sustained by the array of authorities cited in the opinion. Few, if any of them, are decisive of the precise point presented. The case of *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609, which seems to be relied upon with much confidence in the opinion of the majority, decides a totally different proposition. The Constitution of Iowa provided that constitutional amendments might be proposed by one session of the General Assembly and "entered on the journals with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election," and the same published for three months before such election, and, if agreed to by a majority of the members elected to each house of the next session, it should then be submitted to the people for adoption. The question arose whether or not the amendment had been properly proposed at the first (eighteenth) session of the General Assembly; the journals of that session disclosing the fact that the amendment as proposed at that session was materially different in phraseology from the one agreed to at the next session and voted upon by the people.

It was contended on behalf of those who maintained the validity of the amendment that the joint resolution adopted at the next session agreeing to the proposed amendment was a conclusive determination of the fact that it had been legally proposed at the previous session, but the court (quoting the syllabus) said: "When the Eighteenth General Assembly proposed an amendment to the Constitution, a recital of such proposed amendment by the Nineteenth General Assembly, in a joint resolution agreeing to the same, is not conclusive upon the court as to the form of such amendment as originally proposed, nor as to whether the Eighteenth General Assembly actually agreed to the same in the manner required by the Constitution; and such recital does not preclude and estop the courts, in a proper case, from examining the journals of the Eighteenth General Assembly, to ascertain whether or not the amendment, as originally proposed, was in fact the same as that recited and agreed to by the Nineteenth General Assembly and whether or not it was legally and constitutionally agreed to by the Eighteenth General Assembly." The several opinions of the court took a very wide range in discussing the question stated above, but nowhere was the question involved in the case at bar raised or discussed. It is therefore not an authority on this question. No question was involved there of the conclusiveness of the findings of a tribunal especially created to determine the result of an election upon a proposed amendment. On the contrary, the opinion in that case expressly recognized the force of former decisions of that court (*Ryan v. Varga*, 37 Iowa, 78; *West v. Whitaker*, 37 Iowa, 598) holding that, under a statute authorizing township trustees, upon presentation of the petition of one-third of the resident taxpayers, to order an election to vote a tax in aid of railroads, the decision by the trustees of the question whether or not the petition contained the requisite number was judicial and could not be reviewed collaterally by the court. The same court had previously held, in the case of *Baker v. Board*, etc., 40 Iowa, 226, Chief Justice Day, who delivered the opinion of the court in *Koehler v. Hill*, also delivering the opinion in this case, that (quoting the syllabus) "the decision of the board of supervisors that a petition asking for a submission of the question of relocating a county seat is signed by a majority of the legal voters in the county is judicial and is conclusive until set aside or reversed upon appeal, writ of error, certiorari, or other method provided for direct review."

None of the decisions of the courts of Missouri, North Carolina, Indiana, Michigan, Wisconsin, California, Kansas, Minnesota, or Alabama, in the cases cited by the majority, are upon the questions presented in the case

at bar. At most they only decide that the courts may declare proposed amendments to the Constitution not legally adopted, where it is shown that they have not been made in accordance with the requirements of the Constitution, but in none of them is the question raised or decided as to the powers of the legislative branch of government to create a tribunal for the final and conclusive determination of the result of an election. The North Carolina court in the case cited by the majority decided that a certain amendment had been legally adopted; and subsequently, in *Simpson v. Commissioners*, 84 N. C. 158, and *Cain v. Commissioners*, 86 N. C. 8, the same court held that the decision of the commissioners to the effect that a majority of the voters favoring the adoption of the provisions of a fence law was final, and could not be reviewed by the courts. The Michigan court, in the case cited by the majority, merely held that an amendment had been submitted to the people at a general election as authorized by the Constitution and had been legally adopted. The same court, in a later case (*Hipp v. Board*, etc., 62 Mich. 456, 29 N. W. 77), held that the decision of a board of commissioners announcing the result of an election for removal of a county seat was conclusive, and could not be reviewed. The Minnesota Case cited by the majority, instead of sustaining their views, held valid an amendment to the Constitution of that state upon grounds which would uphold the amendment we are now considering. That court held, in the case cited, that acquiescence by the officials and people in the terms of an amendment amounted to a ratification thereof. The court, speaking through Judge Mitchell, said: "As ultimate sovereignty is in the people, from whom all legitimate civil authority springs, and inasmuch as in the inception of all political organizations, it is this original and supreme will of the people which organizes civil government, a court has no right to inquire too technically into any mere irregularity in the manner of proposing and submitting to the people that which they have solemnly adopted and subsequently recognized and acted upon, as part of the fundamental law of the state. We doubt whether a precedent can be found in the books for the right of a court to declare void a Constitution, or amendment to a Constitution, upon such grounds. But, however this may be, there are, in our opinion, two conclusive reasons why the right to inquire into any irregularities in the mode and means by which this constitutional amendment was proposed and adopted must be now forever closed. First: Such irregularities, if any, must be regarded as healed by the subsequent act of Congress admitting Minnesota into the Union. Second: They must be deemed cured by the recognition



and ratification of this amendment, as a part of the Constitution, by the state after its admission into the Union. This was done by the issue of the state railroad bonds, and accepting the security for the protection of the state under its provisions," etc.

Amendment No. 3, as well as several other amendments to the Constitution which are by this decision declared not to have been legally adopted, have for many years been acquiesced in and treated as a part of the organic law of the state by the people and by all the departments of government alike. Judges have sat upon the bench holding commissions from the Governor pursuant to the authority of this amendment. Officers of all departments of government have been appointed by the Governor to fill vacancies, and no one has heretofore questioned his power to do so. In fact, this court has upheld the validity of such appointments. For more than 12 years amendment No. 2, which falls by this decision, has limited the right of every citizen to vote at elections to the payment of a poll tax, and no one has questioned its validity. For several years a road tax has been regularly levied and paid, without objection, in most of the counties of the state pursuant to amendment No. 5, and its validity is yet to be adjudicated. I do not mean to express the view that this amounts to a legal ratification of the amendments, but I mention the matter in order to call attention to the fact that the Minnesota decision cited by the majority in support of their views, instead of doing so, the application of doctrines therein declared would uphold, instead of rendering invalid, the amendment we are now passing upon. The two decisions of the Mississippi and New Jersey courts are the only cases cited in the opinion of the majority which in any degree tend to support their views on this question. The Mississippi Case (*State v. Powell*, 77 *Miss.* 545, 27 *South.* 927, 48 *L. R. A.* 652) is not precisely in point, because it does not appear that either the Constitution or statutes of that state provide that the returns of the election shall be made to the Legislature or that that body shall ascertain and declare the result. Some of the reasons stated in the opinion in that case sustain the majority view, but, though it expresses the views of a court of great learning and ability and was delivered by a learned judge for whose opinions on any subject I entertain the utmost respect, I am unwilling to follow its lead, believing, as I do, that it is based upon unsound reasoning. The New Jersey court bases its conclusions upon the fact that the proceedings in which the question of the adoption or rejection of the amendment was a direct and not a collateral attack upon the findings of the state board of canvassers, and that it was in that way subject to review. The court reached a conclusion upon the facts

in accord with the findings of the state board and approved the findings to the effect that the amendment had received the necessary majority and had been legally adopted.

I am therefore firmly convinced that the majority have reached the wrong conclusion in this case, and on account of the importance of the question feel constrained to record my dissent therefrom.

I am authorized to say that Mr. Justice RIDDICK concurs in the views I have herein expressed.

# ST. LOUIS SOUTHWESTERN RY. CO. v. KAVANAUGH et al.

(Supreme Court of Arkansas. July 9, 1906.)  
CONSTITUTIONAL LAW—AMENDMENT OF CONSTITUTION.

While Kirby's Dig. §§ 716-718, confines the evidence as to whether an amendment to the Constitution has been adopted by "a majority of the electors voting at such (general) election," as required by Const. art. 19, § 22, to the returns for the Governor and other state executive officers sent to the Speaker of the House of Representatives, it in so doing is reasonable, and therefore constitutional.

[Ed. Note.—For cases in point, see vol. 10, *Cent. Dig. Constitutional Law*, § 7.]

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action between the St. Louis Southwestern Railway Company and Kavanaugh, ex-officio collector, and others. From an adverse judgment, the railway company appeals. Affirmed.

S. H. West and Bridges & Wooldridge, for appellant. Jas. P. Clarke, J. O. Marshall, Gray & Gracie, Fulk, Fulk & Fulk, for appellees.

HILL, C. J. This appeal questions the validity of amendment No. 5 to the Constitution, commonly called the "Road Tax Amendment," which was declared adopted by the Speaker of the House of Representatives on the 18th day of January, 1890, and duly certified and proclaimed as part of the organic law. Const. art. 6, § 3, requires the returns for the election for Governor, Secretary of State, Auditor, Treasurer, and Attorney General to be sealed up separately and transmitted to the Speaker of the House of Representatives, who, during the first week of the session, shall open and publish the vote cast for each of the candidates for said offices in the presence of both Houses of the General Assembly. The act of March 1, 1883 (*Laws* 1883, p. 70), as modified by the general election law of 1891 (now sections 716-718, Kirby's Dig.), requires the vote on amendments to be separately sealed and delivered to the Speaker and opened, and the result, as it appears from the returns then before him, ascertained and declared at the same time the vote on said offices is opened and published. When this was

done in regard to the amendment in question, it was found that there were 57,209 votes for the amendment and 24,071 votes against it, and the highest vote cast for the candidates for any one of the five offices then before the Speaker was for the office of Governor; the total vote cast for the four candidates for that office being 111,897. A simple calculation demonstrated that the amendment received a large majority voting on that question, and received 1,260 more votes than a majority of electors voting for any of the said state offices and the Speaker declared, on these returns, the amendment to have been adopted. To overcome this result the appellant shows from the returns on file with the Secretary of State that if the highest vote cast in each county for any office voted for is taken as a basis, and these highest votes aggregated, that it shows 116,378 electors voted for some office at said election, and that, therefore, the amendment lacked 970 votes of receiving "a majority of the electors voting at such election." The Speaker had none of these county returns before him, showing that there were more votes cast than appeared from the returns before him on the said state officers.

This court recently said, in regard to the Speaker's duty in this matter: "The votes on the principal state officers were then before him, and from these he could reach, at least approximately, the votes in the election, and the votes on the amendment would give the other necessary data to a prima facie decision from the face of the returns, and in the language of Judge Cooley 'the final decisions must rest with the courts.'" *Rice v. Palmer* (Ark.) 96 S. W. 396. In the *Rice Palmer* Case the Speaker had declared amendment No. 3 adopted, although the votes before him showed that it did not receive a majority of the electors voting for any of said state officers; the Speaker was acting upon the erroneous theory that the vote on the question of the amendment alone controlled. The court held that the decision of the Speaker was not a finality, and where it was shown to be wrong, as in that case, the courts must declare the true result. Now this is a case where the Speaker acted correctly on the returns before him, and as the integrity of the returns were not and are not questioned, the only point for decision is whether the Speaker and the courts will be bound to confine the evidence of the "majority of the electors voting at such election" to the votes cast for said five officers, or shall the courts receive evidence that more electors voted in the said election on other offices or questions than upon the offices whose votes were before the Speaker?

It was the evident purpose of the act of 1883 to confine the evidence to the votes sent to the Speaker. The act does not in terms so declare, but when read in the light of the history of the legislation in this subject all doubt as to this fact is removed. The clause

of the Constitution providing for the submission of constitutional amendments (article 19, § 22) was not self-executing, and the required legislation to effectuate its purpose. The General Assembly of 1879 (Laws 1879, p. 128) provided the machinery for amending the Constitution and the same Assembly submitted to the electors amendment No. 1, commonly called the "Fishback Amendment." This act required the election judges to count the votes for the amendment separately from the offices, but to return the same with the other returns to the county clerk, and the clerk was required to separately abstract the vote, but to make return of it to the Secretary of State in like manner as the returns on the candidates voted for. It was then provided that when all the returns were in the office of the Secretary that the Governor, Secretary of State, and Attorney General should canvass the vote; "and if it be found that a majority of the votes (voters) of the state voting at such election have voted for any such amendment, the officers herein directed to canvass the same shall certify the fact," etc. In the general election of 1880 the Fishback amendment received a large majority of the votes cast on the subject, and a clear majority of the votes cast on the state office receiving the highest vote. But the count was not based on any of these votes. It was thus explained by the Secretary of State: "As no provision was made by law for ascertaining the actual number of votes cast at the election of September 6th, as contemplated by the Constitution, in order to ascertain the same I addressed a circular letter to all the county clerks in the state, in which they were required to certify to this office the actual number of votes cast at each and all the precincts in the several counties, as shown by the poll books of each and every precinct in each county." See *Public Documents of Arkansas* 1880, 1881, pp. 17, 18. The aggregate vote made up in this way demonstrated that the amendment had not received "a majority of all the electors voting at such election, and was declared defeated." See *Public Documents* Id., pp. 34-38; *Hempstead's History of Arkansas*, pp. 281-283. This result was very unsatisfactory to the supporters of the Fishback amendment and its adoption, and a different method of ascertaining the vote upon amendments became public questions of moment. The General Assembly of 1883 resubmitted the amendment to the electors, and the same Assembly repealed this act of 1879, and substituted the present system therefor, which, briefly stated, segregates the vote on the amendments from all the other returns except said five offices which are the only returns going before the General Assembly, and required the Speaker from the votes then before him to declare the result of the election on the amendment. This bit of history explains this legislation and points its evident purpose.

While the Speaker's duty is perfunctory and confined to narrow lines, yet it is contemplated that he shall have the true basis to ascertain the result which he must declare, and this basis must be accepted by the court, as well as the Speaker, if it was competent for the Legislature to create this basis as the only evidence of the number of electors voting in the election for the purpose of deciding whether or not an amendment has been adopted. The court has held that it was a judicial, as contradistinguished from political, question, whether the Constitution has been amended in the manner prescribed by the Constitution itself. In other words, that it is the paramount duty of the court to see that the constitutional requirements have been fulfilled. But this holding is far from deciding that the Legislature cannot prescribe rules of evidence for reaching the question at issue. The case then resolves itself into an inquiry whether the rule of evidence furnished is a reasonable compliance with the Constitution or whether it is an evasion of it. Appellant's counsel frankly meets the issue and the force of their argument in brief and at bar is in the contention that the act of 1883 is unconstitutional. They contend that holding the question to be a judicial one lets in any competent evidence to establish the fact that more electors voted in the general election than appeared from the votes given on the amendment and on the five offices whose vote goes to the General Assembly. The evidence they offer is practically of the same kind which the canvassing board received when it declared the Fishback amendment defeated in 1880, and to avoid which the act of 1883 was passed. Recognizing this act as an obstacle in the way of their position, they say it must be stricken down as unconstitutional. If in truth it is unconstitutional, the court must so declare, and then any competent evidence to prove the fact in issue would be admissible. Passing, then, to the clause of the Constitution invoked, it is found that it cannot be literally construed. It describes the election as the "general election for senators and representatives." The vote on senators and representatives cannot be taken, because only one-half of the state votes on senators in each biennial election, and many counties, like Pulaski and Sebastian, have more than one representative, and it is practically impossible to tell the number of voters participating in such contest. But the Constitution did not mean to be taken literally, the term was intended to be descriptive, not definitive of the election, and meant the general election at which senators and representatives were elected. It is a matter of great difficulty to obtain the evidence of the number of electors voting in a general election. No basis can be obtained which will yield the exact truth in such a

matter. The appellant says that if the Legislature required the election judges of each precinct to return to the county commissioners, the total number of votes cast as shown by the poll books and the county commissioners then required to return the total number of votes in each county to the Secretary of State or the Speaker, together with the vote on the amendment, that this would give the total number of electors voting in the state, and with such returns it could be easily and accurately determined whether or not the amendment received the required majority. This method could have been adopted by the Legislature, and it looks like the natural method to adopt to comply literally with the Constitution; but even this method is only an approximation. It is common knowledge that many electors vote a blank ticket, and others vote defective tickets, and they are not counted as voting in the election, but would be counted as voting on the amendment, under this plan, as this number would increase the majority required to be reached to adopt the amendment. An examination of the returns of any general election discloses this fact, also. Many electors vote on the subject of license who do not vote for any office; they are only interested in the sale or prohibition of the sale of whisky. This is not voting in the "general election" within the meaning of this clause, and yet, if the method proposed was adopted, their votes would swell the total number of electors voting, and increase the majority required to be reached to adopt an amendment. The same may be true when one or more amendments are submitted, an elector may vote for or against one or more, and not vote otherwise in the election. Sometimes a hot contest for justice of the peace or constable will cause the electors to vote on those offices, and not touch the state or county ticket, and then electors frequently go to the polls to vote for a single individual. In a sense in all of these instances the electors participated in the election; but in a broader sense they were no more participants in the general election for state and county officers than the electors who passed by the polls without stopping to cast their ballots. In its final analysis no basis is exactly accurate in these matters.

The Constitution of Kansas contains this clause: "No county seat shall be changed without the consent of a majority of the electors of the county." The Legislature enacted a statute making the number of votes cast the evidence of the number of electors in the county. Manifestly, this was no nearer the true yard stick than the one furnished in the case at bar. The Supreme Court of Kansas, speaking through that eminent jurist Mr. Justice Brewer, then an Associate Justice of that court, said: "Doubtless the Legislature might make other

things evidence of this fact. It might require, as preliminary to every election, a registration, and make that registration the evidence. We do not mean that it may, by the mere machinery of rules of evidence, override or set at naught the restrictions of the Constitution, or that it could arbitrarily make conclusive evidence of the number of voters, any list, or roll, which in the nature of things has no connection with that fact, and does not reasonably tend to prove it. But when it adopts as conclusive evidence of the fact anything which, according to the rules of human experience, reasonably tends to prove the fact, the courts are not at liberty to ignore or go behind such evidence." County-seat of Linn County, 15 Kan. 500. The Constitution of 1874 provides, that: "For every two hundred electors there shall be elected one justice of the peace, but every township, however small, shall have two justices of the peace." Article 7, § 39. The General Assembly in 1893 passed a statute (Acts 1893, p. 40, No. 24), declaring that in ascertaining the number of justices of the peace to be voted for and commissioned, that the number of votes cast in the preceding general election should be taken as conclusive evidence of the number of electors in the township. It was found that according to the vote at the election in question that there were 1,800 electors, but at the preceding election only 1,346; and it was contended that the Legislature could not make the number of votes at a preceding election control when the last vote furnished evidence that the township was entitled to two more justices.

This court speaking through Chief Justice Bunn, said: "It was the duty and within the province of the Legislature to adopt some method of determining the number of electors in a township, in order to determine therefrom the number of justices of the peace to which it is entitled; for, without the establishment of such a method, there would be no election of certain validity. The plan adopted by the act of 1893 is certainly not accurate, for changes in the number of electors are at least liable to take place within two years; but the question really addressed to the Legislature was, not to adopt a perfect method, but the most perfect available under the circumstances. In its final conclusion on the subject it doubtless reasoned that the harm that might be done by the adoption of the best available, but inaccurate, method, would be by no means equal and commensurate with the evil arising from the absence of all method, or from the expense and inconvenience of endeavoring to make everything subservient to mere accuracy. \* \* \* In other words, the act in question was doubtless the embodiment of the very best methods the Legislature could conceive under the circumstances. This being the case, we do not

feel at liberty to declare the enactment unconstitutional." *Alford v. State*, 69 Ark. 436, 64 S. W. 217.

Applying these principles to the act under review, it seemed to the Legislature that this was the best available method, even if inaccurate, because the other method had been tried and found unsatisfactory and uncertain in these particulars: First. It left the evidence of adoption to depend upon the vote for so many offices, largely local, that it was difficult of ascertainment; and when ascertained liable to be unsettled by a local contest or a series of local contests. It was certainly an unstable basis for a part of the organic law to rest upon. Second. While the Constitution requires the affirmative vote of a majority of electors voting in the general election to adopt an amendment, yet it contemplated a majority of those really participating in the "general election for senators and representatives," but the method pursued enabled those who voted merely on license the amendment, or some one county or township candidate to so swell the total vote that an amendment supported by a good majority of electors voting for state officers was defeated.

This system having worked unsatisfactorily, the General Assembly of 1893 sought to remedy what it conceived to be a mischief in the act of 1879, and presented this rule of evidence to govern the ascertainment of the number of electors voting in the election. Can this be said to be "mere machinery of rules of evidence" to "override or set at naught the restrictions of the Constitution?" If it is, the court must annul it, but if it "has a connection with the fact, and does reasonably tend to prove it," it must be sustained. Instead of taking one vote on one office as is done in some states, this act takes the vote on the five principal executive offices as the test. This guards against unpopular candidates for any one office reducing the vote below a fair average. The vote on these offices would naturally excite the greatest interest, and, therefore, call for the largest vote. The evident purpose is not to evade the highest vote, but to secure the highest vote by taking the offices when such vote is to be expected. The various county returns could be used, but would not their uncertainty in involving so many more factors and their liability to be upset in contests over which the Legislature had no jurisdiction or cognizance or information render this unwise? Would not the reasoning in *Alford v. State*, supra, apply to this? "In its [the Legislature's] final conclusion on the subject it doubtless reasoned that the harm that might be done by the adoption of the best available, but inaccurate, method, would be by no means equal and commensurate with the evil arising from the absence of all methods, or from the expense or inconvenience of endeavoring to make everything

subservient to mere accuracy." The inaccuracy may or may not be great under the act of 1883. If there are a large number of voters on single candidates on the township or county ticket or the questions on the ballot, who do not vote the state ticket, it may be large; on the other hand, it is susceptible of being absolutely accurate; and as the inaccuracy can only be made great by those who do not fully participate in the general election, their exclusion from the count cannot offend the spirit of the Constitution.

In the election at bar the inaccuracy was not great, and there is no special circumstance to mark this election as one out of the ordinary. The certificate in the transcript shows that in one-third of the state the greatest vote was cast for one or another of those five offices; and an examination of the full returns shows no great differences between the office receiving the highest vote and some one of those state offices; in some instances the difference is less than a half dozen. Taking it "by large and by small" there is no reason why the vote on these offices should not be a fairly accurate method of reaching the number of electors voting in the general election. Certainly its inaccuracy is not so great that it shows a purpose of defeating, instead of effectuating, the object of the Constitution. The language of Mr. Justice Brewer is applicable: "When it [the Legislature] adopts as conclusive evidence of the fact, anything which, according to the rules of human experience, reasonably tends to prove the fact, the courts are not at liberty to ignore or go behind such evidence." It also has merits which would justify the Legislature in sacrificing a small degree of accuracy to safeguard this gravely important matter. This method offers a certain and fixed standard; the evidence is in highest form, and, submitted and inspected in the forum of the people — a joint session of the General Assembly. On the whole this act is considered a fair and substantial fulfillment of the Constitution, and seems to make the constitutional requirement as to the number of electors voting in the election more stable; and thereby the will of the framers of the Constitution is the better effectuated.

The judgment is affirmed.

RIDDICK, J., concurs in the judgment.

#### WALNUT RIDGE MERCANTILE CO. v. COHN.

(Supreme Court of Arkansas. June 11, 1906.  
On Rehearing, July 23, 1906.)

##### 1. TRIAL—INSTRUCTIONS—EXCEPTIONS.

An exception in gross to several instructions is not available where any of them is good.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 694.]

##### 2. EVIDENCE—RES GESTÆ—SALES.

A letter dictated by defendant's general manager, through whom the negotiations be-

tween plaintiff and defendant, resulting in the contract for sale by defendant, were carried on by defendant, which letter was part of the negotiations leading up to the contract, being in answer to a letter from defendant to such manager in reference to buying cotton, and asking defendant to make an offer for from 50 to 100 bales, is admissible as part of the res gestæ of the transactions, showing how the negotiations for the sale commenced, though signed in a name other than that of defendant or such manager.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 310, 321, 348.]

##### 3. FRAUDS, STATUTE OF—SALES OF GOODS—ACCEPTANCE OF PART OF GOODS SOLD.

Kirby's Dig. § 3656, providing that no contract for the sale of goods for \$30 or over shall be binding unless in writing, or unless the purchaser shall accept a part of the goods so sold, and actually receive the same, or shall give something in part payment, delivery, and acceptance of part of cotton sold, in pursuance of the contract of sale and payment therefor, takes the contract out of the statute of frauds, though no express reference is made to the contract at the time of such delivery and acceptance.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 174-179.]

##### 4. SALES—REFUSAL TO DELIVER—DAMAGES.

The measure of damages where one who has contracted to sell cotton refuses to perform, and the purchaser, as soon as he ascertains definitely that the seller does not intend to perform, buys cotton in the market, is the difference between the contract price and the market price on the day the buyer ascertained that the seller would not perform.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1188.]

##### 5. SAME—EVIDENCE OF VALUE—SUFFICIENCY IN VIEW OF PLEADINGS.

Where, in an action by the buyer for breach of contract to sell middling cotton, the complaint alleges that plaintiff on ascertaining that defendant would not perform, in order to protect himself in the purchase made from defendant, bought in for the account of defendant 66 bales of middling cotton at a certain price, and the answer "denies that plaintiff bought for the account of defendant 66 bales of cotton at any price," there is a mere denial that the cotton was bought for the account of defendant, so that plaintiff's testimony that the 66 bales of cotton he bought was worth in the market when he bought it 11½ cents a pound will be treated as evidence that middling cotton was then worth that amount.

##### 6. CORPORATIONS—AUTHORITY OF OFFICERS—PRESUMPTION.

In the absence of evidence as to authority of the general manager of defendant corporation, who made for it the contract, breach of which is sued for, it will not be presumed that he made it without authority.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1726-1729.]

##### On Rehearing.

##### 7. EVIDENCE—RECEIPTS EXECUTED BY THIRD PERSON.

A receipt executed by a person not a party to the action, though an admission against interest, is not admissible against a party, unless the person who executed it be shown to be dead or beyond the jurisdiction of the court.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1105-1107, 1110, 1120.]

##### 8. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission in evidence, in an action by the buyer for breach of contract to sell and deliver 66 bales of cotton at 9½ cents per pound,

of a receipted bill signed by a third person, of whom plaintiff bought 66 bales, on refusal of defendant to deliver, reciting sale and payment at 11½ cents per pound, is harmless; its only effect being to show the price paid, which was shown by the undisputed testimony of plaintiff.

Riddick and Wood, JJ., dissenting.

Appeal from Circuit Court, Lawrence County, Eastern District; Frederick D. Fulkerson, Judge.

Action by R. Cohn, doing business as R. Cohn & Co., against the Walnut Ridge Mercantile Company. Judgment for plaintiff. Defendant appeals. Affirmed.

1. Less was the vice president and general manager of the Walnut Ridge Mercantile Company, a corporation doing business in Walnut Ridge, Ark. In 1903, acting for the mercantile company, he made a contract for the sale of a certain quantity of middling cotton to R. Cohn, of Memphis, Tenn., at 9½ cents per pound. The mercantile company afterwards delivered to Cohn 34 bales of cotton, but refused to deliver more. Cohn brought this action against the mercantile company to recover damages for breach of contract. He alleged that his contract with the defendant company was for 100 bales of cotton of the grade middling, at price of 9½ cents per pound; that the defendant delivered on the contract 34 bales of cotton and refused to deliver more; that plaintiff thereupon purchased 66 bales of middling cotton for the account of defendant at 11½ cents per pound; that plaintiff, by reason of the failure of defendant to deliver the cotton, was damaged in the sum of \$3,917.13, for which he asked judgment. The defendant filed an answer denying most of the allegations of the complaint. On the trial the court gave certain instructions and refused other instructions asked by defendant. The language of the bill of exceptions noting exceptions of defendant to these instructions is as follows: "Court instructions: The following given upon behalf of the plaintiff, numbered 1, 2, 3, and 4, which were excepted to by defendant. The court upon its own motion gave instructions 5, 6, 7, and 8, which were excepted to by defendant. The defendant asked instructions numbered 1, 2, 3, and 4, which were refused by the court, and the refusal to give same were excepted to by the defendant." After this statement in the bill of exceptions the instructions are copied in full, without any further reference to exceptions. There was a verdict in favor of plaintiff for the amount of his claim, and defendant appealed.

W. E. Beloate, for appellant. H. L. Ponder and Jno. W. & Jos. M. Stayton, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal by the Walnut Ridge Mercantile Company from a judgment rendered

against it for the sum of \$631.62 in favor of R. Cohn for failure to carry out a contract for the sale of 100 bales of cotton. The defendant reserved exceptions to a number of instructions given by the presiding judge to the jury on the trial, but these exceptions were in gross, and not to any specific instruction, as will be seen by reference to the statement of facts where the exceptions are copied. Such a general exception is only available where the charge is erroneous in its whole scope and meaning, or where none of the instructions given by the court are correct. We do not find that the charge of the court is in this case so radically wrong, and therefore, if there be any special defect, it is not presented by the general exception made. *Quotermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1086; *Dunnington v. Frick*, 60 Ark. 250, 30 S. W. 212; *Young v. Stevenson* (Ark.) 86 S. W. 1000; *Dowell v. Schisler* (Ark.) 88 S. W. 966; 8 Ency. Plead. & Prac. 258, 259.

The next question relates to the admission of evidence on the part of plaintiff. It seems that the negotiations between the company and the plaintiff, which resulted in this contract for the sale of the cotton, were carried on by the defendant through Mr. Less, the vice president and general manager of the company. The plaintiff testified that he first wrote Mr. Less in reference to the purchase of cotton, and received a reply from him saying, "We turn out 30 to 40 bales per day," and asking plaintiff to make "an offer on 50 to 100 bales F. O. B. Walnut Ridge." This letter was signed: "Walnut Ridge Gin Co. per R." Defendant contends that, as this letter was from the Walnut Ridge Gin Company, it was not competent evidence against the Walnut Ridge Mercantile Company. But the testimony of Less, the general manager and vice president of the mercantile company, shows that this letter from the gin company was dictated by him, and written by Redwine, the bookkeeper of the mercantile company. It was a part of the negotiations between plaintiff and Less, the general manager of the defendant, which led up to the sale of the cotton, and was, we think, competent as a part of the *res gestæ* of the transaction, showing how the negotiations for the sale of the cotton commenced.

Again counsel contends that the court erred in permitting the plaintiff to read to the jury the receipted bill of the cotton factors from whom the plaintiff purchased the 66 bales of cotton after defendant had refused to deliver the remaining 66 bales due on its contract. The plaintiff testified that he went into the open market and purchased this cotton from these factors at 11½ cents a pound, and read their receipted bill for the same in connection with his evidence. Now, it is customary for cotton factors to give such bills to purchasers

of cotton, and this receipt was a part of the *res gestæ* of the sale. Being an admission against the interest of the factor making it and made in the ordinary course of his business, it was, we think, competent evidence of the fact of the sale and price that was paid even in an action between third parties. *Sherman v. Crosby*, 11 Johns. (N. Y.) 70; 1 Greenleaf on Ev. § 120, and note to section 147. It may not have been competent evidence of the market value of cotton, but only evidence that plaintiff had paid the cotton factor 11½ cents for cotton on that day. But where evidence is admissible for any purpose, an exception to the admission of the evidence cannot be sustained. The court should have been asked to tell the jury that they could not consider such evidence in deciding the question of the market value of the cotton.

The other questions relate to the sufficiency of the evidence. But, without going into a discussion of it, we will say that we think the evidence sufficient to support the finding of the jury that there was a contract for 100 bales of cotton. Mr. Less, the general manager of defendant, was positive that he only agreed to sell 50 bales, but the finding of the jury where the evidence is conflicting settles the question so far as this court is concerned. The delivery and acceptance of part of the cotton on the contract and payment therefor takes the case out of the statute of frauds. The evidence makes it clear to us that the 34 bales of cotton delivered by the defendant to the plaintiff and paid for by him were delivered on this contract. According to the testimony of Less, the manager of the defendant, these were delivered on a contract to sell 50 bales. It is conceded that there was only one contract, though whether it was a contract for the purpose of 50 or 100 bales was a disputed question. But a part of the cotton bought having been delivered and accepted on the contract and paid for, the whole contract was taken out of the statute without regard to whether it was a contract for 50 or 100 bales. *Swigart v. McGee*, 19 Ark. 473.

The contention that there must have been some reference to the contract at the time the 34 bales of cotton were delivered and accepted on the contract is not a sound argument under our statute. It is sufficient under our statute if "the purchaser shall accept a part of the goods so sold and actually receive the same or shall give something in earnest to bind the bargain or in part payment thereof." *Kirby's Dig.* § 3656. The delivery and acceptance of part of the goods must, of course, be done in pursuance of the contract. A delivery and acceptance of cotton on another contract would not be sufficient to take this contract out of the statute, but, if the 34 bales of cotton were

in fact delivered on this contract, it is immaterial that no express reference was made to the contract at the time. That is required under the statute of New York and perhaps other states, but not where the language of the statute is the same as our statute. Under our statute, and statutes similar thereto, it is sufficient if the circumstances surrounding the contract of purchase and the subsequent delivery of the goods show that they were delivered in part performance of the contract. 29 Am. & Eng. Ency. Law. 969. The evidence shows that the plaintiff purchased the cotton in the market as soon as he ascertained definitely that the defendant did not intend to perform its contract. He was therefore entitled to recover the difference between the contract price and the market price of cotton of same grade called for in the contract on the day he ascertained that defendant would not perform its contract. The evidence tending to show the market value of the cotton at that time is not very satisfactory. Plaintiff testifies that the cotton he bought from the factors was worth 11½ cents per pound. The evidence does not show what the grade of that cotton was; but plaintiff alleged in his complaint "that on November 9, 1903, in order to protect himself in the purchase made from defendants, he bought in for the account of the defendants 66 bales of middling cotton at and for the price of 11½ cents per pound, amounting to the sum of \$3,917.13."

The answer of the defendant to this allegation of the complaint is as follows: "Defendant further denies that plaintiff bought for the account of defendant 66 bales of cotton at any price whatever." It will be noticed that this is not a denial that the defendant bought 66 bales of middling cotton on the day and at the price alleged in the complaint, but is only a denial that the cotton was bought for the account of defendant. As there was no question raised by the pleadings as to the grade of this cotton which plaintiff alleged that he purchased after default of defendant, so neither party asked the plaintiff while he was on the witness stand any question in reference to the grade of this cotton. It seems to have been assumed by both parties, as they had the right to do under the pleadings, that the cotton purchased by plaintiff was middling cotton. As he alleged in his pleadings that he bought middling cotton and testified on the stand that this cotton was worth in the market on that day 11½ cents per pound, we must take it that he meant to say that middling cotton was worth on that day 11½ cents per pound and that the parties so understood. While, as before stated, the evidence on that point is not quite satisfactory, it is sufficient to sustain the verdict of the jury.

The contention that the charter of the defendant does not permit it to sell cotton

for future delivery is not sustained by the proof. That was a matter peculiarly within the knowledge of the defendant, but it introduced no evidence to sustain this allegation in its answer. In the absence of any evidence, it will not be presumed that the general manager of the defendant made this contract without authority.

Judgment affirmed.

#### On Rehearing.

There is only one point on which we feel doubtful as to the correctness of our former decision in this case; and that is whether it was competent for the plaintiff to introduce the receipted bill of Stuart Guynne & Co. as evidence of the fact that plaintiff had paid 11½ cents per pound for the 66 bales of cotton purchased by him from that firm. In holding as we did in the former opinion that this receipted bill was competent evidence of the fact of payment, we followed the law as stated in *Greenleaf on Evidence* and as decided in the following cases referred to in the opinion; *Sherman v. Crosby*, 11 Johns. (N. Y.) 70; *Reed v. Rice*, 25 Vt. 171; *Greenleaf on Evidence* (12 Redfield's Ed.) § 120 and note to section 147.<sup>1</sup> These authorities seem to uphold the admission of such evidence as a part of the *res gestæ* of the payment. But on further consideration of the question we are of the opinion that the weight of authority, as well as reason, is against the admission of receipts executed by persons not parties to the action unless it be shown that the person executing the receipt is dead or beyond the jurisdiction of the court; and this was not shown on the trial of this case. The law on this point is thus stated in a late work on evidence: "The written receipt of a third person acknowledging the payment of money is undoubtedly a statement of a fact against in-

terest, but it cannot be received \* \* \* unless the receiptor is deceased or otherwise unavailable." 2 *Wigmore on Evidence*, § 1456; *Silverstein v. O'Brien*, 165 Mass. 512, 43 N. E. 496; *Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592; *Cutbush v. Gilbert*, 4 Serg. & R. (Pa.) 551. But, although we have concluded that the admission of the receipt executed by a person not a party to the action was improper, a majority of the court are of the opinion that no prejudice resulted for the reason that in their opinion its only effect was to show the price paid by the plaintiff for the cotton in Memphis, which fact was shown by the undisputed testimony of the plaintiff himself. As other undisputed evidence shows the same fact shown by the receipt, a majority of the court are of the opinion that the admission of the receipt was harmless error.

But Judge WOOD and myself are not able to concur in this ruling, for in our opinion there is nothing to show that the market price of middling cotton on the day Cohn purchased the 66 bales was as high as 11½ cents per pound, except the testimony of Cohn and this receipt. There is other evidence that tends to show that the price of middling cotton about that time was less than the price named. Under such circumstances we are not able to say that the introduction of this receipt was harmless error. It was read to the jury as evidence of the facts stated therein, and it seems to us that the natural inference is that it had some weight with the jury in deciding the question as to what the market value of the cotton was at that time. *Silverstein v. O'Brien*, 165 Mass. 512, 43 N. E. 496. For these reasons, we think that the judgment should be reversed and a new trial ordered, unless a remittitur be entered.

But as before stated, the majority of the court think otherwise, and on the whole case they are of the opinion that the motion should be overruled. It is so ordered.

<sup>1</sup>These sections have been omitted from text 18th Edition of *Greenleaf on Evidence* and transferred to the appendix and to notes.



## GRANT v. HATHAWAY.

(Kansas City Court of Appeals. Missouri.  
June 4, 1906.)

## 1. TROVER AND CONVERSION—OWNERSHIP OF GOODS—SUFFICIENCY OF ALLEGATION.

In an action by an administrator for the conversion of goods claimed to have been owned by intestate, an allegation that intestate, at the time of his death, was "seised and possessed" of the property, was sufficient as an allegation of ownership.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 197.]

## 2. EVIDENCE—VALUE OF PROPERTY—TROVER AND CONVERSION.

In an action for the conversion of mules, evidence of what was paid for the mules eleven months before they were converted was no evidence of their value at the time of the conversion.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 280½, 293.]

## 3. ADMINISTRATORS—ACTIONS—ISSUES AND PROOF.

In an action by an administrator for the conversion of property belonging to his decedent, failure to prove an allegation that decedent left a will was not fatal, since plaintiff did not derive his title from the will.

Appeal from Circuit Court, Callaway County; A. H. Waller, Judge.

Action by E. W. Grant, as administrator, against Charles A. Hathaway. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

N. D. Thurmond and J. W. Tincher, for appellant. David H. Harris and Robert McPheeters, for respondent.

**BROADDUS, P. J.** The plaintiff, as administrator of the estate of D. S. W. Hathaway, instituted suit against the defendant on two counts. The first is in the nature of a replevin for certain personal property, and the second for the conversion of the same property. Before the case was finally submitted to the jury, the plaintiff took a nonsuit as to the first count, and the cause was submitted on the second count. The finding and judgment were for the plaintiff, from which defendant appealed.

The defendant has renewed in this court the contest he waged in the trial court as to the inconsistency of the two counts, but, as the first is no longer in the case, his argument has no longer any force. The second count of the petition alleges that the deceased, D. S. W. Hathaway, at the time of his death, was seised and possessed of six mules, two sets of harness, one buggy, a lot of farming utensils, and hay and corn, all of the value of \$1,502. Following this allegation the petition states that: "The defendant, being in possession of said goods, chattels and personal property, disposed of the following portions of the same, to wit, two mules of the value of \$280, and corn and hay of the value of \$600," etc. The defendant also contends that the allegation in said count that the deceased, at the time of his death, "was seised and possessed," of the property is not a

sufficient statement of ownership. The word "possessed," in the sense in which it was used, means "owned"; that is, that the deceased was the owner of the goods at the time. Words & Phrases Defined, vol. 6, p. 5463. "Seised" means possession and ownership in the sense used. Id., vol. 7, p. 6396. We do not think the point well taken, as the words used are sufficient to constitute an averment of ownership. The undisputed facts are that, in the latter part of the year 1903, or the beginning of the next year, D. S. W. Hathaway, an old man, came from the state of Iowa and bought a tract of land known as the "Heary Tyler land," containing 120 acres, and it was conveyed to him. Soon thereafter, he bought another tract adjoining the Tyler land containing 160 acres, which he caused to be conveyed to the defendant, and he then had defendant to convey 40 acres of the last-named tract to David S. W. Hathaway; that being not only the name of deceased, but also of a little son of the defendant. There was evidence to the effect that deceased always signed his name "D. S. W. Hathaway" and went by the name of Stanley among his old friends, and was never called David, while his grandson was called by deceased and others David. But there was direct testimony to the effect that D. S. W. Hathaway, Sr., was intended as the grantee. There was a balance of \$1,600 of the purchase price unpaid on the residue of the 160-acre tract, to secure which defendant executed a deed of trust. The deceased placed defendant in the house on the Tyler farm and employed a man by the name of Hughes to work on the farm and board defendant and his son; the defendant being a widower. At the same time, deceased bought four work mules, for which he paid \$550, and sent them to the farm by said Hughes. About the same time, defendant bought two mules, for which his father paid \$282.50. There was no house on defendant's land, nor on the 40-acre tract mentioned. The defendant took possession of the mules and all the land mentioned, and cultivated 10 or 12 acres in corn on the 40 acres and from 30 to 40 acres in corn on the Tyler tract, and cut hay from both the latter and the 40-acre tract. Deceased sent some farm machinery from his home in Bloomfield, Iowa, to the farm, and during the summer he gave defendant several checks for money, and paid said Hughes for his work, except one payment of \$99 paid by defendant out of the proceeds of a sale of one of said mules made by him. In the sale of this mule, defendant represented that he was acting by the authority of the deceased. On August 21, 1903, defendant sold another one of the mules, as he claimed, by authority of deceased. D. S. W. Hathaway died August 25, 1903. In a short time after his death, a Mr. McConnell, who had been appointed administrator of his estate, went to Callaway county for the purpose of looking after decedent's property. He

took an inventory of decedent's property, in which was included only two mules, but he did not designate which. At that time, defendant claimed the mules, the corn and hay grown on the 40 acres deeded to David S. W. Hathaway, and half of the hay and corn grown on the Tyler tract. In December, one of the mules died. In February, plaintiff was appointed by the Callaway county probate court administrator of the estate. Whereupon he proceeded to take an inventory of the property, at which time defendant claims he delivered to plaintiff his share consisting of the crops, 320 bushels of corn being one-third of the crop grown, and one-half of the hay, which plaintiff received and sold. The evidence did not show which two of the six mules were sold by defendant during the lifetime of his father. One died afterwards, leaving three, one of which was conceded to belong to the defendant. The plaintiff recovered for the value of two, but there is nothing to show which two. There was no evidence as to the value of the mules at the date of their alleged conversion in February, 1904. And the only evidence of value that could have been considered by the jury was the price paid for them in March, 1903, eleven months previously.

The defendant objects to the fourth instruction given on behalf of the plaintiff, for the reason that there was no proof of the value of the mules. The objection is well taken. Whereas, proof of value of converted property ought not, it is said, be confined to the very time of the conversion, but evidence tending to prove its value within a reasonable time before or after its conversion is competent evidence of value. *Deane v. Houser*, 83 Mo. App. 609. It seems to us, proof of the purchase eleven months prior to the date of conversion would not, standing alone, be any evidence whatever upon the issue. The other objection to the instruction is that the petition shows on its face that the suit is for the value of two mules that had been sold during the lifetime of the senior Hathaway. If it does, we have been unable to detect it, but we are of the opinion that it does not. The petition claims that defendant converted five mules bought from two different parties. All the six mules were bought from these two parties, and how the defendant can, under the statement, make his contention good is beyond our comprehension.

The plaintiff alleges that Hathaway, Sr., died testate, but he offered no proof of the fact. Whether the provisions of the will would have anything to do with this contest, we cannot, of course, tell; but, if it was a necessary allegation, it was necessary to prove it. However, as the plaintiff did not derive his authority by will, but by the order of the probate court, the failure of proof in that respect was not fatal to plaintiff's case.

We find no other error in the case, and, as it will have to be reversed for the error in refus-

ing plaintiff's fourth instruction, we suggest that, if there is to be a retrial, plaintiff should amend his petition and include all the necessary averments in one count, without referring to the abandoned count.

Reversed and remanded. All concur.

#### WALKER v. WALKER.

(St. Louis Court of Appeals. Missouri.  
May 22, 1906.)

#### APPEAL—ORDER REMANDING CAUSE TO JUSTICE'S COURT—APPEALABILITY.

Under Rev. St. 1899, § 806, authorizing appeals from any final judgment, an order of the circuit court remanding a cause transferred to it by a justice of the peace, entered under the authority of section 3951, authorizing the circuit court to remand to the justice a cause which has been transferred as involving title to land, where the court is of the opinion that the statement filed does not show that title is in issue, is not a final judgment, and is not appealable.

Appeal from Circuit Court, Madison County; Jas. E. Hazell, Judge.

Action by David Walker against John A. Walker. From an order overruling a motion for a rehearing of an order remanding a cause to a justice of the peace, defendant appeals. Appeal dismissed.

B. B. Cahoon and D. N. Tessereau, for appellant. R. A. Anthony and H. Clay Marsh, for respondent.

GOODE, J. Plaintiff instituted this replevin action to obtain possession of six and one-half stacks of timothy hay, alleged to be standing in two fields on plaintiff's farm on the St. Francis river, in Polk township, Madison county. The locations of the different stacks were more definitely indicated by statements in the complaint. A replevin bond in due form accompanied the complaint, and on the filing of the two documents the justice of the peace issued an order for the delivery of the property and a summons, both of which were served, the hay being taken from the possession of defendant pursuant to the order of delivery, and turned over to plaintiff. Defendant filed a paper styled "Answer, Plea of Title, and Counterclaim" before the justice. This pleading admitted the hay to be of the value alleged in the petition, denied every other allegation therein, averred that defendant had been damaged by the taking and detention of the hay in the sum of \$200, for which, with costs, he asked judgment against plaintiff and the sureties on the latter's replevin bond. After pleading those matters, the answer set up facts going to show that the equitable estate in the farm where the hay was grown and harvested was vested in the defendant. The substance of the facts alleged regarding the ownership of the farm are that in February, 1891, plaintiff gave to defendant, who is plaintiff's son, the entire right, title, and in-

terest in the farm which plaintiff held, put defendant in full and complete possession in consideration of love and affection, and in further consideration of past valuable service rendered by defendant, and agreed if defendant would go into possession of the real estate, clear, fence, cultivate, live on, and improve the same, that defendant should have and own the said farm, and that it would be conveyed to defendant as soon as plaintiff secured a pension from the United States Government and paid certain debts he owed; that plaintiff afterwards, and prior to the institution of this action, secured the pension, and with defendant's assistance paid off his debts. It is averred that, pursuant to this agreement, defendant took possession of the farm, cleared a portion of it, and erected improvements on it, which are stated, and the cost of each; the total expense being considerable. It is averred further that thereby defendant became entitled to have the farm conveyed to him, but plaintiff had refused to convey it. The paragraph concluded with a prayer that the cause be transferred by the justice of the peace to the circuit court for hearing and final determination, and that the latter court compel plaintiff to specifically perform his agreement regarding the farm, and convey to defendant all plaintiff's right, title, interest, and estate therein, and besides render judgment against plaintiff and his sureties for the value of the hay. Another paragraph of the answer filed with the justice described the farm on which the hay was raised, stated the extent of interest in the estate plaintiff originally acquired from his grantor, set up that plaintiff still claims some title, estate, and interest in the farm, the nature of which is unknown to defendant, except that the claim is adverse to defendant's title, and prayed the court to ascertain, determine, and adjudge the extent of the respective interests of plaintiff and defendant. The answer was verified by defendant's affidavit. When the answer and plea of title was filed, the justice made an order transferring the cause to the circuit court, for the reason that the title to real estate was involved in it. Afterwards plaintiff filed a motion in the circuit court to quash "the answer filed by defendant, and remand the cause to the justice of the peace for trial." This motion alleged that the circuit court had no jurisdiction of the cause, which had been improperly certified to it by the justice of the peace; that, as the cause was one in replevin to try the titles of the parties, it could not be converted by defendant's answer into an equitable action looking to a decree of title to real estate, and that in an action of replevin originating in a justice's court the question of title to real estate cannot be raised by answer or otherwise. On the hearing of the motion the circuit court sustained it, and ordered the cause remanded to the justice of the peace. An ex-

ception was saved to this order, a motion for rehearing filed and overruled, and defendant appealed to this court.

Plaintiff insists that the order of the circuit court remanding the cause to the justice of the peace for trial was not appealable, and, if this proposition is correct, we have no jurisdiction to determine any other question presented in the briefs. One section of the statutes regulating the practice before justices of the peace provides that, if the title to real estate shall be put in issue by a verified pleading, or if it appears to the satisfaction of the justice to be an issue, he shall make an entry of the fact in his docket, and certify the cause and transmit all papers therein to the clerk of the circuit court of the county, which court shall be possessed of the cause, and proceed therewith without regard to the amount in controversy or any error in certifying it. Certain cases are excepted from the operation of the statute, but a replevin action is not one of them. The section contains a proviso that on five days' notice the judge of the circuit court may remand to the justice a cause which has been transferred as involving the title to land, if in the judge's opinion the statement filed as provided in the section does not show the title to real estate to be in issue. Rev. St. 1899, § 3951. By the "statement" mentioned in the last clause of the section we understand the verified pleading attempting to put in issue the title to real estate. This statement in the present case consisted of defendant's pleading styled "Answer, Plea of Title, and Counterclaim." The motion to remand was seasonably filed, and the remanding order was entered on an inspection of defendant's answer. It is to be presumed that this ruling was made because, in the opinion of the circuit judge, the answer did not show the title to real estate to be an issue. In our opinion the order of remand was not appealable. The extent of the right of appeal from an order or judgment of the circuit court is defined in section 806 of the Statutes. The statutory ground on which the right of appeal in this instance is claimed is that the order to remand was a final judgment. We think it was interlocutory, for the issues were not determined or the rights of the parties settled by it. The most analogous precedents we have found are the decisions of the federal courts regarding the right of appeal from an order of a circuit court of the United States remanding to a state court a cause which had been removed from the state tribunal to the national one. There have been some fluctuations in the legislation by Congress on this subject, but, prior to the enactment of any statute regulating the right of appeal from such an order, it was determined by the Supreme Court of the United States that the order was not a final judgment, and hence no appeal would lie. *Railroad Co. v. Wiswall*, 90 U. S. (23

Wall.) 507, 23 L. Ed. 103; Black's Dillon, Removal of Causes (1898 Ed.) § 223.

The appeal is dismissed. All concur.

### EWART et al. v. YOUNG.

(St. Louis Court of Appeals. Missouri.  
May 22, 1908.)

#### 1. NEW TRIAL—OBJECTIONS TO PETITION—SUFFICIENCY.

Where, in an action founded on a written memorandum, the petition contained a copy of the memorandum and there was no demurrer filed thereto, an objection that the writing was insufficient to take the contract out of the statute of frauds, first raised on the motion for new trial, came too late to be available as a defense.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 37, 38.]

#### 2. BROKERS—COMMISSIONS—CONSTRUCTION OF CONTRACT.

An owner employed a broker to procure a purchaser for a tract of land. The broker, with the owner's consent, employed a third person to assist in procuring a purchaser. The owner thereon executed an agreement reciting that the broker and the third person were to receive any amount above \$17,000 for the whole tract. A purchaser agreed to take a part of the tract at \$20,000. The owner paid the broker his commission, receiving a receipt in full. *Held*, that the third person was entitled to a half of the land remaining unsold, but not to any part released to the owner by the broker by his receipt in full.

Appeal from Circuit Court, Wayne County; E. M. Dearing, Judge.

Action by E. P. Ewart and others against John W. Young. From a judgment for plaintiffs, defendant appeals. Modified and affirmed.

S. R. Durham, for appellant. M. R. Smith, for respondents.

BLAND, P. J. In 1903 the defendant owned an 1,800-acre tract of land, in Wayne county, Mo., about 800 acres of which was in cultivation, and 840 acres, or thereabout, lie in the hills and are unsuitable for cultivation. Being desirous of selling the tract, defendant appointed Mrs. H. O'Brien, of Ironton, Mo., his agent to sell the land on an agreed commission. Afterwards Mrs. O'Brien, with defendant's consent, engaged the services of plaintiff Ewart to assist her in finding a purchaser, agreeing to divide the commission evenly with him. Without the knowledge of Mrs. O'Brien or defendant, Ewart called on S. E. Newhouse, a land agent having an office in the city of St. Louis, and engaged his services to assist in the sale of the land. Newhouse found a purchaser in the person of Francis Baldwin, of the state of Iowa, whom he turned over to Ewart. Ewart and Baldwin went to Williamsville, where the land is situated, and, after making an examination of the land, Baldwin agreed to take 840 acres of the tract at \$20,000. On September 17, 1903, Young and wife gave Baldwin their written obligation to convey the 840 acres on the pay-

ment of the purchase price. At this time and before the signing of the contract to convey, as confirmatory of his verbal contract to pay a commission for the sale of the land, defendant signed and delivered to Ewart the following memorandum, to wit: "Williamsville, Mo., Sept. 17, 1903. I hereby confirm my agreement made with E. P. Ewart and Mrs. H. O'Brien, which was to sell and deed to them or to any party designated by them my farm of eighteen hundred acres adjoining the town of Williamsville, Wayne county, Missouri, for the sum of seventeen thousand dollars, any amount above seventeen thousand dollars to go to them and their agents as commission for making the sale. You to pay any interest that may accrue on present deed of trust \$7,000 before March 10, 1904, when land is to be deeded. [Signed] John W. Young." After the sale of the 840 acres to Baldwin, it seems some disagreement arose between Ewart and Mrs. O'Brien in respect to a division of the commission. Ewart claimed that Newhouse was entitled to one-third of the commission. Mrs. O'Brien objected to sharing the commission with Newhouse and, on June 17, 1904, received from Young \$1,200 and receipted him in full for her share of the commission. Ewart paid the interest on the \$7,000 mortgage, as he agreed to do, and there is no dispute about the amount of money due as commission on the sale. Ewart contends that under the contract defendant was bound to convey to him, or to any person he might designate, not only the land sold to Baldwin, but also the balance of the tract, and demanded of defendant a deed to the land not conveyed to Baldwin. Defendant refused to comply with this request and the suit is to recover the value of the unsold land, shown by the evidence to be worth from \$1 to \$3 per acre. Defendant testified that it was expressly agreed and understood between himself and Ewart at the time the sale was made to Baldwin, and after he had given Ewart the written memorandum of the contract, that he was to retain the land not included in the sale to Baldwin. Ewart denied that any such agreement was made. The issues were submitted to the court by agreement of the parties. The court found the issues against Mrs. O'Brien, but in favor of the plaintiff and assessed his damages at \$840. No declarations of law were asked or given.

1. Defendant contends that as the suit is on a contract for the sale and conveyance of lands, the written memorandum of the contract is insufficient to take it out of the statute of frauds, and for this reason plaintiff cannot recover. The petition contained a copy of the memorandum agreement. There was no demurrer filed, nor was the writing objected to as evidence when offered on the trial. The point that the writing is insufficient to take the contract out of the statute of frauds was not raised on the trial. It was raised for the first time after judgment, in

the motion for new trial. The office of a motion for new trial is to call the attention of the court to errors that intervened on the trial, not to raise new points or to inject objections and exceptions that should have been made and saved on the trial of the case. The objection to the sufficiency of the writing, therefore, came too late to be available as a defense, and the defendant will be held bound by the conduct he adopted on the trial of the case. *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. 193, 70 L. R. A. 94; *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354, 78 S. W. 579; *Dice v. Hamilton*, 178 Mo. 81, 77 S. W. 299; *Gayle v. Missouri Car & Foundry Co.*, 177 Mo. 427, 76 S. W. 987; *MacDonald v. Tittmann*, 96 Mo. App. 536, 70 S. W. 502; *Heman v. Larkin*, 108 Mo. App. 392, 83 S. W. 1019.

2. The court made a special finding that the land was worth \$840; also that Mrs. O'Brien had been paid her commission in full. The evidence is, that the commission was to be equally divided between Mrs. O'Brien and Ewart. Mrs. O'Brien had the right to relinquish her claim or interest in the land to the defendant, and she did this as effectually by the receipt she gave him as if she had given him a formal release. Her interest in the land was not transferred to Ewart, but was surrendered to the defendant, and there is no reason or justice in awarding plaintiff the full value of the land as damages. He is only entitled, under the evidence, to one-half of its value.

Therefore it is considered that, unless within 10 days from the date of the filing of this opinion the plaintiff remit in writing \$420 of his judgment, the judgment will be reversed and the cause remanded; if a timely remittitur is filed, the judgment will be affirmed for \$420. All concur.

## FECHLEY v. SPRINGFIELD TRACTION CO.

(St. Louis Court of Appeals, Missouri.  
May 8, 1906.)

### 1. STREET RAILROADS—COLLISION WITH VEHICLE—NEGLIGENCE OF DRIVER—FAILURE TO LOOK AND LISTEN.

Where, in an action for injuries to a vehicle passenger in collision with a street car, the driver of the vehicle testified that he did not look for a car until his horse was in the very act of stepping over the nearest rail of the track in which the car that struck the vehicle ran, when it was too late to avoid a collision by stopping his horse, he was guilty of negligence in failing to look and listen before attempting to cross the track.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 214, 215.]

### 2. NEGLIGENCE—IMPUTED NEGLIGENCE—DRIVER OF VEHICLE—INJURIES TO PASSENGER.

Where plaintiff, who was injured in a collision between a buggy and a street car, was riding in the buggy at the driver's invitation, the negligence of the driver was not imputable to plaintiff, though the driver was not in the

employ of a common carrier engaged in conveying plaintiff as a passenger.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 147-150.]

### 3. STREET RAILROADS—COLLISION WITH VEHICLE—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Plaintiff was invited by P. to ride with him in a covered vehicle, and was injured by a collision between the vehicle and a street car as P. was driving across the tracks. P. took no precaution which could be effective to prevent a collision with the car as he drove on the track, and plaintiff, though aware of this, did nothing to ascertain either the proximity of the tracks or the danger of a collision from the approaching car. *Held*, that plaintiff was guilty of contributory negligence in doing nothing personally to insure his safety.

### 4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PLEADING—ISSUES AND PROOF.

Where, in an action for negligence, the only answer remaining in the record after the issues were made up consisted of a general denial, plaintiff's contributory negligence was no defense unless the testimony he introduced so clearly showed that he was negligent in a manner contributing to the accident that the court would have been warranted in denying him relief.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 201, 202.]

### 5. PLEADING—ISSUES AND PROOF.

Where an action for injuries was based on common-law negligence, and no violation of a city ordinance was alleged, the court did not err in excluding an ordinance, offered by plaintiff, which he claimed defendant had violated.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by Joseph Fechley against the Springfield Traction Company. Judgment for defendant. Plaintiff appeals. Affirmed.

A. H. Wear and White & McCammon, for appellant. Delaney & Delaney, for respondent.

GOODE, J. Appellant was injured by the collision of a street car operated by respondent's employes with a buggy in which he was riding, and instituted this action to recover damages. The petition charges that the casualty was caused by the negligent operation of the car without specifying particularly the acts of negligence. The accident occurred in the city of Springfield, Mo., on Commercial street, an east and west thoroughfare, at a point in the block between Boonville and Campbell streets, two north and south thoroughfares. We shall state the facts according to the testimony for the appellant. Fechley was riding in a one-horse buggy belonging to a man named Pierce, and driven by the latter. The day was rainy and the curtains of the buggy were down. An election was in progress and Pierce had voted early in the morning at a polling place on the south side of town. He was interested in a candidate for the office of sheriff, and endeavored to induce appellant to vote for that candidate. Appellant was not acquainted with the man and alleged this fact as a reason for not voting for him. Pierce offered to take appel-

lant to the north side of the city and make him acquainted with the candidate, inviting Fechley to ride over in his buggy. Fechley accepted the invitation, got into the buggy, and the two proceeded northward on Boonville street. Pierce, who was driving, was seated on the left side of the buggy, and Fechley on the right side. When they reached the intersection of Boonville and Commercial streets, they turned west along the south side of the latter street. Parallel car tracks ran along Commercial street covering a space in the center of about 14 feet. The driveway between the curbs was about 52 feet wide and it was 20 feet from the south rail of the south track to the south curbstone. When appellant and Pierce drove on Commercial street from Boonville, they noticed a street car standing at the intersection of the two streets on the north track on Commercial street and headed west on that street. Pierce and Fechley drove west on the south side of Commercial in a trot until they reached a point nearly opposite a polling place which stood on a lot on the north side of the street. Pierce then turned diagonally across the track toward the polling place, and when the buggy had crossed the south track and the horse the north track, a car coming along the latter track from the east struck the buggy on its rear wheels and seriously injured appellant, who was seated on the right side. The horse was driven across the tracks in a walk. Pierce swore that, after crossing the south track and while his horse was over the north rail of that track and ready to put his forefeet down on the south rail of the north track, he (Pierce) looked out of the buggy to see if a car was coming and saw none; that he did not rise from his seat but could see eastwardly along the track 30 or 40 feet; that the curtains of the buggy were on and fastened; not loose and open; that there was a small glass lookout in the back curtain of the buggy about five inches long and two inches wide, but he did not look through it to see if a car was approaching. Pierce swore that his best judgment about when he looked for a car was that he did so when the horse was crossing the north rail of the south track, with his forefeet about striking the south rail of the north track. The tracks were 4 feet and 8 inches apart. Pierce said he looked out at the northeast corner of the buggy, leaning forward and looking around Fechley eastwardly along the street; that he did not tell Fechley, who was leaning back in the buggy at the time, what he was looking for; that after he looked for a car the buggy had proceeded from 6 to 12 feet when the collision occurred. Fechley swore he did not look for cars at all; that when Pierce started to drive across the tracks he (Pierce) put his hand up and looked over like this (witness putting his hand up and indicating) and that was the last he (Fechley) knew; that he had lived in Springfield about 23 years; did not

know there were double tracks on Commercial street, but knew cars were operated by electricity east and west on that street; that he did not see the car tracks as they approached them, was not looking for tracks and did not have anything to do with "the looking out"; that he knew a track was there and that they were going to cross it, and could easily have put his hand along the curtain and looked down the street; that he could have done so without getting out of his seat, that Pierce had his hand like this (indicating) and looked around just like that (indicating); that he (Fechley) guessed Pierce raised up with his head clear around the curtain; that Pierce put his head around his (Fechley's) body when looking eastward; that Pierce was a tall man and raised up out of the seat when he looked. Other witnesses testified regarding the accident, some of whom said they did not hear the gong sounded or see the motorman make any attempt to stop the car prior to the collision. There was strong testimony to the contrary on both those issues and going to show the gong was sounded continually from the time the car left Boonville street; that the buggy turned on the track too near the car for a collision to be averted, and that the motorman did all he could to stop. One witness, an ex-motorman, who qualified as an expert on the operation of cars run by electricity, gave testimony going to show the distance in which an electric car running at the speed the one in question was, could be stopped, and tending to prove it might have been stopped before reaching the buggy after the danger of a collision should have been apparent to the motorman, if, when the horse stepped on the north track, the car was the extreme distance from the buggy testified to by some witnesses. Under the instructions given a verdict was returned in favor of the company, from which judgment this appeal was taken, appellant contending that the rulings on the instructions were erroneous.

The testimony conclusively proves Pierce was guilty of negligence and if this were an action by him, there would be no difficulty in holding his negligence would prevent a recovery because it proximately contributed to the accident, unless the motorman, by ordinary care, could have stopped the car in time to prevent a collision after the danger to the buggy ought to have been visible. Pierce's own statement shows he did not look for a car bound west on the north track until his horse was in the very act of stepping over the south rail of that track, when plainly it was too late to avoid a collision by stopping the buggy. Unless the conditions are exceptional, the law requires a person about to drive on a car track to look and listen for cars before doing so. *Sanitary Dairy v. Transit Co.*, 98 Mo. App. 20, 71 S. W. 726; *Killian v. Railroad*, 86 Mo. App. 473; *Damrill v. Railroad*, 27 Mo. App. 202; *Payne v. Railroad*, 136 Mo. 562, 38 S. W. 308; *Kelsay v. Railroad*, 129 Mo. 362, 30 S. W. 339; *Butts v. Railroad*, 98

Mo. 272, 11 S. W. 754. The precaution is required in order that the person approaching the track may refrain from proceeding if there is danger, which purpose is not achieved by looking for a car or train after getting on the track. Neither did the omission to sound the gong excuse Pierce from the consequences of his own omitted or imperfectly performed duty. *Asphalt, etc., Co. v. Transit Co.*, 102 Mo. App. 469, 80 S. W. 741. But *Fechley* was riding with *Pierce* in the latter's buggy, at his invitation and while he was driving, and cannot be denied redress if the motorman's negligence was the proximate cause of the injury received, on the ground that *Pierce's* negligence was also a proximate cause. Respondent's counsel insists that this rule of law ought not to be applied except when the negligent driver was in the employ of a common carrier engaged in conveying the injured party as a passenger, and that as *Pierce* was merely a casual and private carrier, appellant ought to be precluded from recovering because of *Pierce's* negligence. The precedents do not enforce the distinction invoked by respondent, but hold that under facts similar to those before us, the negligence of a driver who is not the servant or under the control of the injured party will not prevent said party from recovering from a third party the damages inflicted by a collision which was contributed to by the negligence of the latter or his servant. *Robinson v. Railroad*, 66 N. Y. 11, 23 Am. Rep. 1; *Borough of Carlisle v. Brisbane*, 113 Pa. 552, 6 Atl. 372, 57 Am. Rep. 483; *Dickson v. Railroad*, 104 Mo. 491, 16 S. W. 381. In our opinion counsel have attached undue importance to the question of imputing *Pierce's* negligence to appellant and thereby defeating this action; for the law of the point is clear beyond controversy.

Appellant himself must have been free from negligence proximately contributing to his injury, or he is entitled to no damages, granting that *Pierce's* fault does not preclude a recovery and that the motorman's fault was a factor in bringing about the casualty. Few, if any, courts have held that an occupant of a vehicle may entrust his safety absolutely to the driver of a vehicle, regardless of the imminence of danger or the visible lack of ordinary caution on the part of the driver to avoid harm. The law in this state, and in most jurisdictions is that if a passenger is aware of the danger and that the driver is remiss in guarding against it, and takes no care himself to avoid injury, he cannot recover for one he receives. This is the law not because the driver's negligence is imputable to the passenger, but because the latter's own negligence proximately contributed to his damage. *Marsh v. Railroad*, 104 Mo. App. 577, 78 S. W. 284; *Dean v. Railroad*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367; *Koehler*

*v. Railroad*, 66 Hun, 566, 21 N. Y. Supp. 844; *Hoag v. Railroad*, 111 N. Y. 199, 18 N. E. 648; *Brickell v. Railroad*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; 2 *Thompson, Negligence*, § 1621; *Beach, Con. Neg.* § 115; 3 *Elliott, Railroads*, § 1174.

It is insisted that the issue of appellant's contributive negligence is not in the case, because not pleaded in the answer. Besides a general denial, the answer, as originally filed, set up a special plea in bar averring that the accident was occasioned solely and entirely by the negligence of appellant and of *Pierce*, and not by any negligence on the part of the company. A demurrer was sustained to that paragraph of the answer; improperly, we think. A charge of contributive negligence against *Pierce* would have stated no defense; but the answer averred not that *Pierce's* negligence contributed to cause the accident, but that it was the sole cause, and if this was true, the company is not liable. However, the general issue would have let in evidence on that question, and it might not have been error to strike out as immaterial an averment that the injury was due to *Pierce's* negligence. The plea in bar contained more. If the casualty was caused in whole or in part by appellant's negligence, that fact was a good defense and the averment of it in the second paragraph of the answer was a good plea in bar. The plea, having been stricken out, the answer consisted of a general denial, which put in issue only the averments of the petition. With the pleading in that form, appellant's contributory negligence was no defense according to cases in this state, unless the testimony he introduced so clearly showed he was negligent in a manner which contributed to cause the accident, that the court would have been warranted in denying him a recovery. *McCormick v. Monroe City*, 64 Mo. App. 197; *Keitel v. Cable Co.*, 28 Mo. App. 663. Therefore the question occurs whether on the testimony for appellant the court would have been justified in holding him guilty of contributory negligence; and we hold that such a ruling would have been proper. Appellant swore he knew cars were operated east and west on Commercial street, but did not know there were double tracks on it. The two tracks were right before his eyes as he drove down Commercial street and as *Pierce* turned the horse to cross them. He said he could have looked out of the buggy by merely pushing the curtain back with his hand. He was not bound to do this if *Pierce's* conduct was of such a character as to induce a reasonably prudent man to think there was no danger in driving across the tracks. But *Fechley* did not have the right to rely on the precaution taken by *Pierce*, unless, under the circumstances, a man of ordinary prudence would have relied on it. As we have pointed out, the testimony shows *Pierce* took no precaution which could be effective. He did not stop at all; nor did he look for a car until

the horse was stepping over the south rail of the north track. The two tracks were less than five feet apart and the buggy moved but a few feet after Pierce looked before the car struck it near the front of the rear wheels. Meanwhile Fechley was leaning back in the buggy, though he must have seen they had crossed the south track, and were advancing diagonally on the north one, and if he was paying any attention to the situation, must have known that a car was likely to come along on that track from the east. Pierce's behavior was so grossly careless that Fechley was imprudent in doing nothing personally to insure his safety. The essential fact is that Pierce did not look in time as Fechley knew, or, in reason, ought to have known. Therefore Fechley should have stopped Pierce or told him to look for a car, or have looked himself, before they had advanced so far into danger. It is palpable from appellant's own testimony that he was giving no heed to his safety, but either was relying blindly on Pierce, or, for some reason, was not aware of the proximity of the tracks.

In *Hoag v. Railroad*, 111 N. Y. 100, 18 N. E. 648, it appeared that a husband and wife were sitting on the same seat in a vehicle driven by the husband, and both were killed in a collision at a crossing. The court said that the wife had no right, because her husband was driving, to omit any reasonable precaution required to see for herself that the crossing was safe. Our ruling is that a passenger under those circumstances, has a right to rely on the precaution taken by a driver, provided that precaution would strike a reasonable mind as adequate. In *Dean v. Railroad*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733, the facts were that Dean was struck by a locomotive at a crossing, the negligence complained of being that no warning was given of the approach of the locomotive by bell or whistle, though the train was running at a high speed. Another man owned the team and wagon and was driving. The driver had failed to look for trains before going on the track, which negligence was not imputed to Dean. But as Dean was familiar with the locality, had crossed the tracks frequently, knew a train was due about the time they reached the crossing, saw the driver was approaching the track at a trot, without looking for a train, and, under these circumstances did nothing to insure his own safety, he was denied a recovery. In *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 378, 60 Am. Rep. 367, Mrs. Anderson was in a spring wagon driven by her father. She was seated on the rear seat and her father on the front one. She had two children in her arms and a third one at her breast. Her father drove across a bridge that was plainly dangerous and, in ascending the bank, the seat on which Mrs. Anderson was sitting was jostled so that it threw her and the children into a ravine. It was held that

the danger which was obvious to her father, was obvious also to her, and as she made no request that another route be taken or objected to going over the bridge, she was negligent herself and responsible for the consequences. Other authorities of the same tenor and in point are: *Griffith v. Railroad* (C. C.) 44 Fed. 574; *Aurelius v. Railroad*, 19 Ind. App. 584, 49 N. E. 857; *Miller v. Railroad*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; *Lake Shore R. R. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812.

On the testimony for appellant the case strikes us as one of concurrent negligence; for the buggy had not gone more than from 6 to 12 feet after Pierce looked for a car, until the collision occurred. There is an inconsistency in appellant's theory. He would have it that there was an appearance of danger of a collision which should have warned the motorman, as soon as the buggy was turned to go over the tracks and before Pierce looked for a car, but that appellant himself was not negligent in failing to guard against this apparent danger. That argument for appellant emphasizes and makes clear his own carelessness. The counsel in the case give several close calculations in support of their respective theories, and appellant's attorneys endeavor to demonstrate that the motorman could have stopped the car before it reached the buggy if he had begun to get control of it when the horse turned to go over the south track. They insist that appellant, though he may have been guilty of contributive negligence, was entitled to a finding by the jury, under proper instructions, on the issue of whether or not the motorman could have prevented the accident after the turn, it being assumed that the danger of a collision then became apparent. The court submitted that issue by a charge which was extremely favorable to appellant. The jury were told that it was the duty of the motorman to keep a constant lookout for persons approaching the track; and, on the approach of a person or vehicle near the track with the apparent purpose of crossing, to use every means in his power, consistent with the safety of his passengers, to stop the car and avoid a collision; that if the injury was caused by the failure of the motorman to keep such constant lookout, or to use the means within his power to stop the car, the company was liable for the injury to appellant. No complaint is made of that charge, the assignments of error relating to other matters; chiefly to the submission of the issue of appellant's contributory negligence and to an instruction which required extraordinary care of a person about to go on a railway track. If erroneous rulings were made on those issues, the errors become immaterial in view of our decision that the court would have been justified in holding, as a legal conclusion from the evidence for appellant, that he was guilty of contributory negligence. The one ground on which a verdict in appellant's favor might be



upheld, and the only ground of recovery submitted, was negligence on the part of the motorman in handling the car after the danger of a collision was apparent. As said, this issue was well submitted.

Complaint is made of the refusal of the court to instruct regarding the right of appellant to use the street, and that the degree of care the car men were bound to exercise was to be determined with reference to the presence of a crowd of men around the election booth in the street. Suffice to say as to this instruction, that the election booth was not in the street, but north of it; that there was no proof a crowd of persons was in the street, and if there had been, appellant was not one of the crowd. Men were around the polling place outside of the street. Neither was there any contest regarding the right of appellant and Pierce to drive along the street and on or across the car tracks. Those instructions were abstract; whereas the charge given on the only material issue, presented the matter to the jury in a practical way.

The action was for common-law negligence, no violation of a city ordinance being alleged. Hence the court committed no error in excluding an ordinance offered by appellant. The verdict was fully supported by the evidence, the case was left to the jury on the only possible ground of recovery by a sound instruction, and the judgment will be affirmed. All concur.

**COSTELLO v. ST. LOUIS TRANSIT CO.**  
(St. Louis Court of Appeals. Missouri. May 8, 1906.)

**1. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.**

A passenger, injured by the starting of a street car while boarding it, was not guilty of contributory negligence in boarding by the side away from the curb, where the car was an open one with a running board on either side.

**2. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.**

In an action by a married woman for injuries, an instruction that plaintiff was entitled to damages for physical inconvenience was not erroneous, as authorizing an allowance for time lost from household duties.

**3. SAME.**

In an action for injuries to plaintiff's hand and for a sprained ankle, an instruction authorizing damages for physical inconvenience was proper.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Mary Costello against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehman and E. P. Walsh, for appellant. A. R. Taylor, for respondent.

GOODE, J. This plaintiff got hurt while attempting to board a trolley car at the intersection of Easton and Taylor avenues in the city of St. Louis. She, with her hus-

band and a friend, had been to West End Heights, a pleasure resort west of the city, and were returning. The accident happened July 5th, a legal holiday; July 4th having fallen on the preceding Sunday. The party came back to the city on a car which they had taken at the intersection of Taylor and Chouteau avenues, intending to transfer to the Easton Avenue line when that thoroughfare was reached. Taylor avenue runs north and south, and Easton avenue east and west. Plaintiff and her party left the Taylor Avenue car at the north crossing of Taylor and Easton avenues. At that instant the car to which they wished to transfer was standing on Easton avenue at the east crossing of the street. It was a car of the summer pattern, with running boards along both sides, so that persons could get on and off at either side. As plaintiff was on the north crossing of Taylor avenue, the north side of the Easton Avenue car was nearest her. Therefore she hastened across the street and attempted to board the car on that side. Just as she put her foot on the step of the car it started. The motion threw her off the step, but she was caught by her husband, and prevented from falling to the ground. The injury was to her hand and ankle. The conductor of the Easton Avenue car was on the rear platform at the time, and it seems several passengers had left the car, one on the north side and some on the south. The conductor was watching the exit of the passengers, and did not observe plaintiff. He gave the signal to the motorman to start before she had obtained a secure footing. The above is the account of the occurrence given by the plaintiff and her witnesses. For the defendant the testimony of two witnesses tended to show plaintiff hurried across from the Taylor Avenue car to the Easton Avenue one, and just as she was stepping on the latter car the conductor gave the signal to go. The conductor himself swore that before ringing the bell for the motorman to go ahead he looked along both sides of the car and saw no persons waiting to board it. He must have been mistaken as to no one being about to get aboard, unless all the other witnesses were mistaken; for plaintiff was in the act of stepping on the car when he rang the bell.

The case was very well instructed, and we think the points raised on the appeal, excepting the one respecting the measure of damages, are frivolous. The main contention is that plaintiff attempted to board the car at the wrong side. But there was no testimony to prove an exclusive custom for passengers to get on such cars on the side nearest the curbstone. It is true passengers enter closed cars from the side nearest the sidewalk; but the car in question was an open one, provided with a running board on either side, and with nothing to prevent a person from entering and leaving it on either

side. In fact, the conductor had just let one passenger off on the north side. If the intention was that persons should take passage on the side of the car nearest the sidewalk, some means to prevent their entrance on the other side should have been used. It was as much the duty of the conductor to see that no person was in the act of taking passage on the north as on the south side. He knew this, and swore he looked along both sides before signaling to start. The court left it to the jury to say whether reasonable time was afforded plaintiff to get on before starting the car; and this was the correct way to treat the question.

The instruction on the measure of damages allowed a recovery for such pain of body and mind and physical inconvenience as the jury might believe plaintiff had, or would, suffer from her injury. It is argued that as plaintiff is a married woman, in permitting her to recover for physical inconvenience she was permitted to recover for time lost from her household duties; and, therefore, the charge was erroneous. There is no intimation in the instruction that plaintiff was entitled to recover for loss of time, and it would be strained reasoning to say that because she was allowed damages for physical inconvenience, this was tantamount to an allowance for earnings or loss of time. Likely it would have been proper to instruct the jury that plaintiff could not recover for time lost from household work, had defendant asked that charge, but it did not. It follows that no error occurred in advising the jury concerning the assessment of damages, unless allowing damages to be assessed for any physical inconvenience plaintiff may have suffered was wrong. In *Jenson v. Railroad*, 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680, a charge permitting the jury to allow damages for inconvenience endured as the result of a personal injury was condemned. But that ruling was itself condemned as obiter in the later case of *Boehme v. Railroad*, 91 Wis. 592, 65 N. W. 506, an action based on a tortious ejection of the plaintiff from one of the defendant's trains. Damages for the inconvenience and annoyance of being forced to walk to stations have been indorsed as proper in such cases by the several courts. *Hobbs v. Railroad*, L. R. 10 Q. B. 111; *McMahon v. Field*, 7 Q. B. Div. 591; *Cincinnati, etc., Ry. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Baltimore, etc., Ry. Co. v. Carr*, 71 Md. 135, 144, 17 Atl. 1052. Those were actions wherein the contracts for the carriage of several plaintiffs had been broken. In *Root v. Railroad* (Iowa) 83 N. W. 904, making the inconvenience of the injured plaintiff an element of damage was criticised on the ground of vagueness. In *Miller v. Steamship Co.*, 6 N. Y. St. Rep. 664, it was approved, and inconvenience held not to be equivalent to loss of time or earnings. Charging the jury to consider the

plaintiff's inconvenience in consequence of the injury was approved in *Smith v. Borough of East Mauch Chunk*, 3 Pa. Super. Ct. 495; *Scott Twp. v. Montgomery*, 95 Pa. 444; and *Goodhart v. Railroad*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705. Sedgwick says inconvenience amounting to physical discomfort is a subject of compensation. 1 Sedgwick, *Damages* (8th Ed.) § 42. A sprained ankle could subject a person to much annoyance when no pain was suffered—annoyance from controlling the movements of the limb in order to avoid pain. We see no reason why this suffering should not be compensated, and, as the instruction in this case authorized damages for plaintiff's physical inconvenience, it was directed aptly to the very annoyance she endured.

The judgment is affirmed. All concur.

#### PARKS v. ST. LOUIS TRANSIT CO.

(St. Louis Court of Appeals. Missouri. May 8, 1906.)

##### 1. CARRIERS—INJURY TO PASSENGER—SETTING DOWN PASSENGERS.

Where a street car stopped at a place where it was customary for it to discharge passengers it was the duty of the conductor, who saw that a passenger was alighting, to detain the car until she had alighted, irrespective of the reason for the stop.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228, 1228½.]

##### 2. SAME—ACTION—INSTRUCTIONS.

Where, in an action for injuries to a passenger owing to the starting of a street car while she was alighting, the conductor testified that he saw her alighting at a point where the usage was to let off passengers, an instruction as to the facts authorizing a recovery was not erroneous for not requiring a finding that the operatives of the car knew of plaintiff's attempt to alight.

##### 3. SAME—SETTING DOWN PASSENGER.

Though a city ordinance required street cars to stop on a certain side of a street to receive and discharge passengers, the company being accustomed to stop elsewhere, it was liable for injuries to a passenger from the negligent starting of the car while she was alighting at that place.

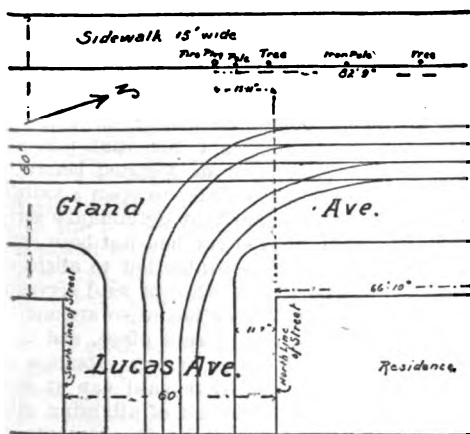
[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228, 1228½.]

Appeal from St. Louis Circuit Court; Dan'l D. Fisher, Judge.

Action by Nancy L. Parks against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action was instituted to recover damages for a personal injury sustained by plaintiff while a passenger on one of defendant's trolley cars of the open or summer pattern, with running boards along the sides. The accident occurred at the intersection of Grand and Lucas avenues in the city of St. Louis, about 8 o'clock in the evening of June 8, 1904. Plaintiff was at that time more than 50 years old and of stout figure, weighing nearly 190 pounds. She and her husband

resided in East St. Louis, Ill. A son of theirs resides on Easton avenue, in the city of St. Louis, and they had been to visit him on the evening of the accident. Not finding him at home, they started to return to their home, taking passage on a south-bound Grand Avenue car at Easton avenue. Mr. Parks paid the fare for himself and wife, and was given transfers to the east-bound car line which left Grand avenue at Lucas avenue. Double car tracks turn from Grand into Lucas at the intersection of the two streets, and the points of the switch by which cars are diverted into Lucas lie on Grand a few feet north of the north line of Lucas. Owing to this fact, when a south-bound Grand Avenue car draws near the switch, it slackens speed, or pauses, until the switch point is adjusted so that it can proceed on its way along Grand avenue, instead of being diverted on Lucas. Sometimes it is necessary to come to a full stop in order to adjust the switch, and at other times the motorman is able to adjust it while the car is moving at slow speed. This diagram will illustrate the position of the several car tracks at the point in question:



According to the ordinances of the city and the general custom of the defendant company, passengers who wish to get off at Lucas avenue leave the car, in most instances, not when the car slows down or pauses at the switch, but on Grand avenue, where the south line of Lucas would cross it if extended. There was some testimony that occasionally cars stopped to discharge passengers in what would be the driveway of Lucas avenue if it was extended across Grand. This would be in accordance with the known fact that street cars are not always stopped at exactly the usual place for letting off and taking on passengers. Now and then they come to a stop several yards before the usual point is reached, and again not until it has been run past that far. There was evidence going to show that passengers were discharged, now and then, at or near the north line of Lucas avenue. This occurred

when a south-bound car on Grand avenue stopped at the switch points, and the usage was so far recognized by the defendant company that, when a car actually stopped there to await the throwing of the switch, it was the custom not to move forward again until the conductor gave a starting signal, so that, if a passenger happened to be getting off, the car would not be started while he was in the act. The conductor of the car on which plaintiff was riding gave testimony to that effect, as did other witnesses. The evidence leaves a great uncertainty as to whether the particular car with which we are concerned stopped still at the apex of the switch, or only reduced speed until it was moving slowly, and whether it was standing still or moving when plaintiff endeavored to alight. Several witnesses, including plaintiff, testified that it had stopped; others, that it never ceased to move, but that its speed became quite slow, and it was in slow motion when she tried to alight. Plaintiff testified that, when she and her husband started to leave the car, it was standing at the south line of Lucas avenue, which defendant contends was the usual stopping place. Another witness gave testimony going to show plaintiff's attempt to leave the car was made when its rear end was about the middle of Lucas avenue; and still another, that they did so when its rear end was at the switch point and its front end in the middle of Lucas avenue. Plaintiff's husband got off the car, and plaintiff attempted to follow him. He held up his hands to assist her, and just as she stepped on the running board the car either suddenly started from a motionless state, or took on an accelerated speed, and she was thrown on the street and injured. Plaintiff testified that when the car stopped at the switch the conductor cried out, "Downtown transfers!" thereby signifying that passengers who wished to transfer to a Lucas Avenue car should get off at that point. The conductor admitted making the exclamation, but said he did so, not at the switch, but north of it, and that he always gave a similar notice immediately after passing the next cross-street to the north. The testimony of plaintiff's physician goes to show that she sustained a severe shock, which resulted in neurasthenia and hysteria of a permanent type; whereas the physicians who testified in behalf of defendant give the impression that whatever nervousness she was suffering from was due largely to her general state of health and excessive stoutness. We need not particularize about the injuries, because the errors assigned do not go to the amount of damages awarded.

The instructions given and refused which bear on the points to be decided will be copied. For the plaintiff the court instructed as follows: "(1) The court instructs the jury that if you believe and find from the evidence in this case that on the 8th day of June,

1904, the defendant was a carrier of passengers for hire by street railway in the city of St. Louis, Missouri, and used the car mentioned in the evidence for said purpose; and if you further find from the evidence that on said day the defendant's employes in charge of the south-bound car on its Grand avenue line, mentioned in the evidence, received plaintiff as a passenger upon said car at or near Easton avenue in said city, and that the conductor in charge of said car collected plaintiff's car fare from her husband and gave him a transfer for plaintiff to be used on defendant's Washington avenue line; and if you further believe and find from the evidence that when said south-bound Grand avenue car arrived at or near Lucas avenue, it stopped; and if you further find from the evidence that the place where said car stopped on said occasion was a usual and customary place for defendant's south-bound Grand avenue cars to stop and discharge passengers, and that it was a usual and customary transfer point for passengers on south-bound cars on said Grand avenue line to transfer from said line to defendant's Washington avenue line; and if you further find from the evidence that while said car was so stopped at said place, the plaintiff undertook to alight from said car, and that while she was proceeding to alight therefrom and before she had safely reached the ground, and before she had reasonable time and opportunity to alight safely, defendant's said employes in charge of said south-bound Grand avenue car negligently caused, or suffered said car to be suddenly started forward with a jerk and that thereby plaintiff was thrown upon the street and injured; and if the jury further find from the evidence that defendant's said servants in charge of its said car could, by the exercise of a high degree of care, such as would have been used by careful and skillful men under like circumstances, have prevented such starting of said car at such time, and the alleged injury to plaintiff, and failed to do so; and if the jury further find from the evidence that the plaintiff, prior to and at the time of attempting to alight from said car was exercising ordinary care for her own safety in doing so, under all circumstances shown in the evidence, then plaintiff is entitled to recover. (2) The court instructs the jury that if you find from the evidence in this case that, while the plaintiff was a passenger on the south-bound Grand avenue car referred to in the evidence, said car stopped at or near Lucas avenue, whether for the purpose of enabling the motorman in charge of said car to throw a switch, or for any other purpose, and that while said car was so stopped and standing still, the plaintiff undertook to alight therefrom, then it was the duty of the defendant not to start said car while the plaintiff was in the act of getting off the car, if the fact that the plaintiff was in the act of alighting was known to the conductor hav-

ing charge of the same; and, as a common carrier of passengers, it was defendant's duty to give plaintiff a reasonable opportunity to alight from its car before starting the same, if the fact that the plaintiff was attempting to alight was known to the conductor in charge of the car. And if you believe and find from the evidence that while said car was so stopped, the plaintiff was in the act of getting off said car with the knowledge of the conductor of said car, and while in the exercise of ordinary care on her part, and that said car was carelessly and suddenly started forward with a jerk while plaintiff was so getting off, and before she had a reasonable time to do so, and that she was thereby thrown down upon the street and was injured, then the defendant is liable, and your verdict should be for the plaintiff."

For the defendant the court gave this instruction: "(A) The court instructs the jury that if you find and believe from the evidence that plaintiff attempted to alight from defendant's car before the same had stopped to receive or discharge passengers, and while the same was in motion, and that such action on her part directly caused or contributed to bring about the injuries complained of, then the plaintiff cannot recover, and your verdict must be for defendant. (B) The court instructs the jury that if you find from the evidence that defendant's car was not stopped at the usual place for taking on and discharging passengers, nor for that purpose, but was slowed down or stopped before it reached such point in order to open a switch, and shall further find that defendant's servants in charge of said car had not been notified by plaintiff of her intention to alight at said point, and that neither of said servants knew of plaintiff's intention to so attempt to alight from said car at said place, and that plaintiff, without notice of her intention so to do, attempted to leave said car at said place, and, while in the act of alighting, said car was moved forward by the servants in charge of defendant's car without any notice or knowledge upon the part of either of them that plaintiff was making or about to make such attempt, then plaintiff cannot recover in this action, and your verdict must be for defendant. (C) If you find and believe from the evidence that plaintiff attempted to alight from defendant's car while the same was in motion, then plaintiff cannot recover, and your verdict must be for defendant."

The court gave certain instructions of its own motion defining the meaning of ordinary care and the burden of proof.

The following instructions were requested by defendant and refused: "(3) The court instructs the jury that the mere fact, if it be a fact, that plaintiff was injured while attempting to alight from one of defendant's cars does not entitle plaintiff to recover. Before you can find a verdict in favor of plaintiff and against defendant you must find and believe from the evidence that the car

mentioned in the evidence came to a stop for the purpose of discharging passengers, and while so stopped, and while plaintiff was in the act of alighting from the same, it was negligently caused and suffered by defendant's agents in charge of the same to start forward with a lurch or jerk, thereby causing plaintiff to fall and receive the injuries complained of. (4) The court instructs you that by the terms of the city ordinance read in evidence by defendant St. Louis Transit Company, said company was required to stop its cars on the south side of Lucas avenue for the reception and discharge of passengers, and had a right to rely upon the observation of that ordinance by the persons taking passage on its cars, and the mere fact, if it be a fact, that the car in question was slowed down or stopped on or near the north side of Lucas avenue before crossing, is of itself no evidence whatever of an invitation for plaintiff to alight at that place, nor is it any evidence of negligence on the part of said St. Louis Transit Company. (5) The court instructs the jury that if you find from the evidence that defendant's car, upon which plaintiff was a passenger, had not yet reached the usual stopping place at the southwest corner of Grand and Lucas avenues for receiving and discharging passengers, but was slowed down or brought to a stop before reaching the said usual stopping place in order for the motorman to throw a switch, and was not stopped or slowed down at said point in order to receive or discharge passengers, and that while the car was so stopped or slowed down plaintiff attempted to leave the same, and while so in the act of leaving said car, said car was moved forward and plaintiff was thrown and injured, then plaintiff cannot recover in this action, and your verdict will be for defendant. (6) Although you may believe from the evidence that at and before the time of the accident, and since that time, many persons have gotten on and off south-bound cars while said cars were stopping at or near the switch on the north side of Lucas avenue, still the court declares to you, as a matter of law, that this fact, if it be a fact, does not establish or tend to establish the existence of a custom that is binding upon defendant, St. Louis Transit Company, in the absence of evidence that such conduct of passengers was known to some officer or agent of said transit company having authority on behalf of said company to approve or permit it."

The cause of action declared on is thus stated in the petition: "Plaintiff further states that at or near the intersection of Grand and Lucas avenues, said Grand avenue car was caused by the agents and servants of defendant in charge thereof to stop, and plaintiff was invited by defendant to alight from said car. Plaintiff further states that while said car was standing still and motionless at said time and place plaintiff undertook to alight from said car upon the

street. But plaintiff states that at said time and place the defendant, through its agents and servants in charge of said car, unmindful of its duty and agreement, negligently failed to allow the plaintiff reasonable time and opportunity to alight from said car, but did so negligently, carelessly, and unskillfully operate said car that while plaintiff was proceeding to alight therefrom, said car was by said servants negligently caused and suffered to be suddenly started forward with a jerk, and plaintiff was thereby thrown down upon the street and seriously and painfully injured." The petition then states the extent of the injuries received by the fall.

Boyle, Priest & Lehman and Crawley & Jamison, for appellant. Wm. R. Gentry, for respondent.

GOODE, J. (after stating the facts). The witnesses disagreed on the issues of whether the car was standing still or moving when the plaintiff attempted to leave it, and, if standing still, where it stood with reference to the intersection of Grand and Lucas avenues. But there was no disagreement regarding the fact that passengers were let off cars at any of the three points where it may have been standing, namely, at the apex of the switch, which was just north of the north line of Lucas avenue, at the south crossing, or in the driveway where the two streets crossed. As we have stated, there was testimony that sometimes, after a car proceeding southward on Grand avenue had passed over the switch points and stopped to the south of them to let off and take on passengers, it would not succeed in stopping with its rear platform immediately over the south crossing, which it was the intention to do, but would come to a stop before the rear steps or platform had reached the crossing, and then passengers were received and discharged where the car stood. This custom obtains in some measure at all crossings, because cars cannot be stopped always at the exact line where it is most convenient to get on and off. The weight of the testimony for plaintiff goes to prove the car stopped on the south crossing, when, of course, plaintiff and other passengers were to be expected to alight, and the conductor should have looked after their safety. Defendant's witnesses swore the car was north of the switch points where the accident happened, and most of them swore it was in motion. The conductor of the car was an eyewitness of the accident, and he swore no stop was made; that the motorman threw the switch while the car was in motion; and that when plaintiff fell the front of the car was 15 feet south of the switch. If this statement was true, the car was moving over the switch at the time. Defendant proved a custom to hold stationary cars which had stopped at the apex of the switch for the switch to be thrown until any passenger who might try to get off at that point had time to do so. On this issue the

conductor said: "The only time it was stopped was when some motorman, when he pulled up to the switch, came to a full stop. That is not necessary; but, when they do come to a full stop there, they stop until they receive two bells, so, if any passenger is getting off, you couldn't go ahead until they get off. Q. Do I understand you to say there are times when it is necessary for the motorman to bring the car to a full stop? A. If the switch is working hard, he might. Q. Except when the switch is working hard, and you make the stop under the circumstances you have mentioned, tell the jury whether or not the car stops there at any other time? A. I can't understand that question. Q. Did the car stop there to receive or discharge passengers there at all? A. Well, the car is not supposed to stop there to discharge or let on passengers, unless under those circumstances that they had to stop to stop the switch or close it. Q. Tell the jury whether or not you had, in fact, stopped there to throw the switch? A. We hadn't stopped. The switch was out of order. The electric switch was out of order. It had been used for some time with a hand switch bar, and it worked easily, and they kept it in good repair for a hand switch bar, and he threw it on the fly, made the switch, and went on." The conductor said, too, that he saw plaintiff in the attempt to alight, and was about five feet from her. He swore in this connection as follows: "Q. When you saw Mr. Parks about to get down was the time you warned them? A. It was he that was getting down. Q. He got out ahead of Mrs. Parks? A. Yes, sir; she was standing up in the aisle. Q. You were about five feet away from them? A. Yes, sir. Q. North of them? A. South of them—no, sir; north of them, toward the rear end of the car. Q. North of them? A. Yes, sir. Q. You saw Mr. Parks get down, did you? A. Yes, sir. Q. You were looking right at Mrs. Parks when she got up out of her seat and went to the edge of the car and started to get down? A. Yes, sir. Q. You saw her as plainly as you see me? A. Yes, sir. Q. There is no doubt but you did see her in the act of getting down off this car; isn't that true? A. Yes, sir." In view of the foregoing facts it is clear that the question which chiefly bore on plaintiff's right to a verdict was whether or not the car was still or in motion when she tried to leave it. If it was standing still, as the conductor was in a few feet of her and looking at her, beyond doubt it was his duty to detain it, if possible, until she had an opportunity to get off in safety; and this is especially true in view of the fact that, wherever the car may have been at the time, the place was one where the company was in the habit of discharging passengers. In the given instructions for both parties, the court forbade a recovery if the car was moving when plaintiff attempted to leave it. There might be a doubt about her right to dam-

ages, if it was moving very slowly and the speed was suddenly accelerated, but that question is not before us. Defendant was given the full benefit of its contention against her right if the car was moving.

Complaint is preferred against the second instruction for plaintiff, wherein the jury were told that if the car had stopped for any purpose, either to throw the switch, or some other, and plaintiff was hurt by a sudden start while attempting, with the knowledge of the conductor, to alight, she might recover. The doctrine of that instruction is sound and, as said, it was particularly applicable to the facts of the present case, because the car had stopped at a point where passengers were habitually discharged. In a cause very similar to this one, but lacking the important fact just mentioned, an instruction like the one under review was approved. In discussing the matter the court said: "If as a matter of fact the car had come to a full stop 65 feet south of the Ninth street crossing, and the passengers were alighting from it, with the knowledge of the conductor, certainly it would have been negligence for the servants of the company to have started the car suddenly forward without warning to the passengers, or giving them an opportunity to alight, when they were in the very act of leaving the car, which was an open summer car; for in the very nature of such cars, it would require but a moment to afford the opportunity of alighting." *Jackson v. Railroad*, 118 Mo. 199, 224, 24 S. W. 192, 199. The second instruction is criticised for allowing plaintiff to recover without proving that she was invited by defendant's servants to alight from the car. As all the evidence, defendant's as well as plaintiff's, shows that if the car had stopped at all, it was at a point where passengers were habitually discharged, there was enough of an implied invitation to plaintiff, or any other passenger, who wished to alight, to do so, and to put the car men on the alert and charge them with the duty of holding the car until passengers had a reasonable time to leave it. The essence of the case pleaded was that they failed to do this, and, instead, negligently started the car from a motionless state while plaintiff was in the act of leaving it.

The first instruction given at plaintiff's request is attacked as erroneous in that it omitted to require a finding, not only that the car had stopped at the usual and customary place to discharge passengers when plaintiff attempted to alight, but that defendant's servants knew of her attempt. The instruction, as given, is said to make defendant liable for nonperformance of a duty which it owed passengers getting off at a regular stopping place, whereas the facts of the accident show the stop was not at the regular place of stopping, which was on the south side of Lucas avenue, some 40 feet or more away from the point where plaintiff fell. As the conductor himself swore he saw plain-

tiff alighting and at a point where the usage was to let off passengers, these criticisms must be regarded as immaterial.

The third instruction requested by defendant was properly refused, because it was not essential to plaintiff's recovery that the car should have stopped for the purpose of discharging passengers. If it stopped to throw the switch and plaintiff, while getting off before the conductor's eyes, was hurt in consequence of his carelessness, she had a case, unless carelessness of her own contributed to the accident.

What we have said answers the assignment of error for the refusal to give defendant's fourth instruction. It is true that the city ordinance required defendant to stop its cars on the south side of Lucas avenue to receive and discharge passengers, but the ordinance did not prohibit defendant from stopping elsewhere for those purposes, and if it was accustomed to do so, it is responsible for an accident due to careless starting while a passenger was alighting.

For similar reasons, and because of the conductor's admission that he saw plaintiff getting off the car, the fifth and sixth instructions asked by defendant were incorrect. The fifth denied her redress if the car had stopped for the motorman to throw the switch, and the sixth one ignored the effect of the conductor's statement, that the custom of letting passengers off at the switch point, was so well established that cars were detained until any one getting off had time to reach the ground in safety.

This cause was tried without reversible error, and, as there was ample evidence on the several issues of fact for the consideration of the jury, the judgment will be affirmed. All concur.

## GOOCH et al. v. J. I. CASE THRESHING MACH. CO.

(St. Louis Court of Appeals. Missouri. May 8, 1906. Rehearing Denied May 22, 1906.)

### 1. PRINCIPAL AND AGENT—CONTRACT—CONSTRUCTION—RIGHT TO COMPENSATION.

In a contract between a threshing machine company and their local agents at a certain town, a provision that the agents should receive no commission on the sale of second-hand goods referred to second-hand machines taken in part payment for new machines sold by the agents in their territory, and did not preclude them from recovering a commission for selling, at the special request of the company, a second-hand machine taken by it in trade in another locality.

### 2. SAME—ACTION FOR COMPENSATION—INSTRUCTIONS.

Where, in an action by agents for commissions for the sale of a machine, it appeared that the contract of sale concluded by the agents had been altered by the principal in some immaterial respects, and a new contract executed for the purpose of depriving the agents of their commissions, an instruction to find for defendant if it did not accept the sale made by plaintiffs was sufficiently favorable to defendant.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by M. B. Gooch and others against the J. I. Case Threshing Machine Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Tapley & Fitzgerald, for appellant. Pearson & Pearson, for respondents.

GOODE, J. Plaintiffs sued for a commission alleged to be due them for selling a second-hand threshing machine taken by the defendant in part payment for a new machine. G. H. Ackley, a traveling salesman for the defendant company, had an opportunity to sell a threshing machine to a man who lived at Warrenton, in Warren county. The defendant's local agents at Warrenton were a firm styled Walker & Hintz. Plaintiffs are the local agents at Eolia in Pike county. Walker & Hintz found this customer at Warrenton, and Ackley took hold of the negotiation with him. The conditions on which the customer would buy were that defendant would accept an old thresher in part payment. The old machine was to be taken at the price of \$750. Ackley went to Eolia, where plaintiffs were in business, informed them of the opportunity to sell a machine at Warrenton, said the sale could be made if a buyer could be found for the old machine, and requested plaintiffs to help him find a buyer. Plaintiffs asked what there would be in it for them if they found a buyer. Ackley told them the company wanted to realize \$750 for the second-hand machine, and, if plaintiffs could sell it for \$850, they could have the surplus \$100 for their commission. Plaintiffs said they could sell it for \$900 as easily as for \$850. The old machine was sold to Bibb & Son, near Eolia, for \$900. This sale was accomplished with the assistance of plaintiffs, who introduced Ackley to the buyers. Bibb & Son were to give two notes of \$450 each, one due October 1, 1904, and the other due October 1, 1905, to be secured by a chattel mortgage. The transaction was subject to the approval of the defendant company. About a week later Ackley visited plaintiffs again, and told them the agents at Warrenton had sold the new machine for \$1,300 instead of \$1,400, which was the price, and therefore there would be no commission paid to plaintiffs for the sale of the old machine. At this interview Ackley produced a letter from defendant addressed to plaintiffs, in which it was stated that defendant's agents at Warrenton had taken an order for the new machine at \$1,300 instead of \$1,400, which the company expected to receive, and hence the company would find difficulty in handling the old machine if they had to pay a commission on the sale of it. The letter further stated that Ackley would try to make an arrangement with plaintiffs. The arrangement Ackley endeavored to make was to in-

duce plaintiffs to guaranty the notes given by Bibb & Son for the old machine, offering, if plaintiffs would indorse the notes, to pay them a commission of \$200. Plaintiffs refused to guaranty the notes, whereupon Ackley said he would rewrite the order for the sale of the old machine to Bibb & Son. Ackley asserted that the company had rejected the sale to Bibb & Son which had been made through the intervention of plaintiffs, and therefore plaintiffs were not entitled to a commission. Plaintiffs insisted they were, and would demand it if the machine was sold to Bibb & Son. Ackley subsequently rewrote the terms of the sale, making the first note payable September 1, 1904, instead of October 1st, and dividing the second note of \$450 into two notes of \$225 each, one due October 1, 1905, and the other due October 10th. These notes were secured by a chattel mortgage, as the others were to be. There was no substantial change in the terms of the sale, and Bibb & Son, whom plaintiffs had interested in the old machine, purchased it. There was testimony going to show that, after the negotiation of the sale to Bibb & Son had been set on foot, Ackley induced the plaintiffs to accept \$65 for their commission by representing to them that a commission would have to be paid to the agents at Warrenton. For this reason the verdict and judgment were for \$65 instead of \$100.

1. It is contended by the company that plaintiffs were not entitled to a commission on the sale of the old machine, because the written contract between them and defendant company contained a stipulation providing that plaintiffs, as the company's agents at Eolia, should receive no commission on second-hand goods of any kind. That stipulation had reference to second-hand machines taken in part payment for new machines sold by plaintiffs in the territory in which they were agents—in their territory around Eolia. The second-hand machine plaintiffs sold to Bibb & Son was taken in part payment for a new machine sold, not in plaintiffs' territory, or by them, but in Warren county, and by other agents of defendant. Ackley engaged the assistance of plaintiffs to find a customer in their territory for an old machine for the purpose of enabling a sale to be made

in another county. This transaction was outside the scope of plaintiffs' employment as regular agents of defendant, and not controlled by the written contract.

2. It is insisted that Ackley had no authority to employ plaintiffs to sell the second-hand machine, and in support of this contention the contract of agency between plaintiffs and defendant is again invoked. One clause of that document provided, in effect, that no contract for the sale of a machine should be valid until approved by the company, and another clause provided that no person had any authority to waive, alter, or enlarge the terms of the instrument. This stipulation has no bearing on the immediate transaction. Ackley had direct authority from the company to arrange with plaintiffs about the sale of the old machine. This fact distinctly appears from the company's letter addressed to plaintiffs, and from the further fact that, after defendant knew of the sale by plaintiffs' efforts to Bibb & Son, it chose to abide by the transaction. However, the question of Ackley's authority to employ plaintiffs was submitted to the jury by an appropriate instruction, and it cannot be contended seriously that the evidence was insufficient to warrant the submission.

3. The further contention is made that the sale to Bibb & Son was not plaintiffs' work, because the contract of sale concluded by plaintiffs was rejected by the company, and a new contract entered into afterwards between Ackley and Bibb & Son. Suffice to say as to this point that the court left it to the jury to determine whether or not the company accepted the sale made by plaintiffs, with the direction that, if the jury found it did not, a verdict should be returned in defendant's favor. Certainly this was as much as defendant had the right to ask, for the contract for the purchase of the old machine, which plaintiffs had been instrumental in inducing Bibb & Son to make, was only nominally changed by Ackley, and changed for no other purpose than to cut plaintiffs out of a commission.

The verdict in this case was for the right party, and the case was tried without error; therefore the judgment will be affirmed. All concur.



**NATIONAL BANK OF LANCASTER v.  
JOHNSON'S ADM'R.**

(Court of Appeals of Kentucky. Sept. 20,  
1906.)

**APPEAL—SUPERSEDEAS—EFFECT—CREDITOR'S  
SUIT.**

Plaintiff, as administrator, had money belonging to his estate on deposit in defendant bank, when one of his personal creditors instituted an equitable action, as authorized by Civ. Code Prac. § 439, to subject plaintiff's statutory allowance out of such sum to payment of his claim. The creditor's bill was dismissed, but the order was superseded, and reversed on appeal; the court of appeals holding that the claim of the administrator against the estate was subject to the payment of his debts. *Held*, that such determination was conclusive on plaintiff, and that the bank was therefore not liable for refusal pending such appeal to pay plaintiff the entire amount of his deposits.

Appeal from Circuit Court, Garrard County.

"Not to be officially reported."

Action by William Herndon, administrator of M. W. Johnson, deceased, against the National Bank of Lancaster, Ky. From a judgment for plaintiff, defendant appeals. Reversed.

W. I. Williams, for appellant. Wm. Herndon, J. Mort Rothwell, R. H. Tomlinson, G. B. Swinebroad, and M. C. Sausley, for appellee.

**BARKER, J.** This action constitutes a sequel to that of Sanders v. Herndon, the opinion in which is to be found in 93 S. W. 14, 29 Ky. Law Rep. 822. It is not necessary here to reiterate all of the facts of that litigation, so fully recited in the opinion referred to. We shall therefore only briefly outline the proceedings of the former case, in order that the issues involved in this may be clearly comprehended.

Sanders and Walker instituted an equitable action in the Garrard circuit court under section 439 of the Civil Code of Practice for the purpose of discovering and attaching property belonging to their judgment debtor, William Herndon. Herndon, at the time, was administrator of the estate of M. W. Johnson, deceased, and in his fiduciary capacity had on deposit in the National Bank of Lancaster, Ky., a large sum of money. William Herndon, as administrator aforesaid, and the appellant bank were made defendants, and it was alleged in the petition that the former had on deposit in the bank the sum of \$35,000, and was entitled under the statute to receive for his services \$1,750, which latter sum was sought to be attached and subjected to the payment of the claim of the plaintiffs. A general demurrer to the petition was sustained by the court, and, upon the refusal of the plaintiffs to amend, it was dismissed, the attachment discharged, and a judgment for costs awarded. An appeal was taken, and the judgment superseded, after which William Herndon, as administrator of the estate of M. W. Johnson, drew his check for the whole amount then due him

in his fiduciary capacity by the appellant bank, presented it, and demanded payment. The amount on deposit at this time was something less than \$12,000, and included the sum of \$1,750 involved in the attachment proceedings. The officers of the bank, while refusing to honor the check as presented, offered, if appellee would so draw it, to pay over to him all money he had on deposit, except the sum of \$1,750 involved in the attachment. This proposition was declined, and thereupon appellee instituted this action to recover judgment for the whole of the sum on deposit belonging to the estate of his decedent Johnson. The bank filed an answer, reciting the history of the litigation substantially as above given, and filed as exhibits copies of the petition of Sanders and Walker, the attachment sued out, the judgment of the court, and the order of supersedeas, and reciting its offer, before the suit was instituted, to pay over to the appellee all funds belonging to the estate of the deceased Johnson, except the amount involved in the action of Sanders and Walker v. Herndon. A general demurrer was interposed to the answer, and sustained by the court; whereupon appellant declined to plead further, and judgment was rendered for the full amount of the deposit, from which this appeal is prosecuted.

The question presented for adjudication is whether appellee was entitled to demand of the bank the payment of the whole deposit, including the attached sum of \$1,750, or whether, on the other hand, he was bound by the order of supersedeas, and required to await the determination of the appeal in Sanders v. Herndon. Section 752 of the Civil Code of Practice is as follows: "The supersedeas is a written order, signed by the clerk, commanding the appellee and all others to stay proceedings on the judgment or order." Section 489 of the Civil Code of Practice provides: "After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions persons indebted to the defendant or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants." In the case of Sanders v. Herndon, the judgment of the circuit court dismissing the petition and discharging the attachment was reversed, and we there held that the claim of William Herndon, as administrator of the estate of Johnson, for remuneration for his services, constituted a chose in ac-

tion which his personal creditors could subject to the payment of their debts, that the petition stated a cause of action in favor of the defendant Herndon against the estate of M. W. Johnson, and that under the provisions of section 439 of the Civil Code of Practice debtors of the principal debtor may be made defendants; a cause of action against them in his behalf being set forth in the petition. This is conclusive on appellee in the case at bar, and therefore Sanders and Walker, by describing in their petition the interest of defendant Herndon sought to be attached, acquired a lien to the extent of the amount due him on the fund on deposit. *Wilkerson v. Phillips*, 81 S. W. 691, 26 Ky. Law Rep. 440. This lien the bank could not ignore by paying the funds over to the administrator, except at its peril, and although the circuit court, by its judgment, discharged the attachment, and thus vacated the lien, the effect of this judgment was suspended by the order of supersedeas, and the bank could not rightfully pay over the fund until the final determination of the validity of the lien by this court. *Puff v. Huchter*, 78 Ky. 146.

We conclude that the answer of the appellant sets forth a valid defense to appellee's cause of action, that the order of supersedeas in *Sanders and Walker v. Herndon* is binding upon all of the parties to that record, and that the merits of all the issues therein involved must be adjudicated in that case.

It follows, therefore, that the court erred in sustaining the demurrer to the answer, and the judgment is reversed for proceedings consistent herewith.

#### CINCINNATI, N. O. & T. P. RY. CO. v. PENDLETON & HUDSON.

(Court of Appeals of Kentucky. Sept. 19, 1906.)

##### 1. ACTIONS—LEGAL DEFENSES.

Where a carrier, sued at law for injuries to a shipment of live stock, relied on a written contract of shipment binding it to carry the stock to the end of its line, and there deliver it to a connecting carrier, and pleaded that the stock was in good condition at the end of its line, the shipper was entitled to show that the contract did not set up the real agreement, in that it erroneously designated the connecting carrier, the issue being only as to what the contract was and cognizable at law.

##### 2. CARRIERS—INJURY TO LIVE STOCK—CONTRACT OF SHIPMENT—QUESTION FOR JURY.

In an action against a carrier for injury to a shipment of live stock, the carrier relied on the written contract of shipment binding it to turn it over to a particular connecting carrier. The shipper pleaded that there was a mistake in the contract, in that it did not designate the connecting carrier agreed on. The written contract contained blanks headed "Consignee, destination, and route." The blanks were filled with the name of the consignee and the destination, but the route was omitted. *Held*, that there was sufficient evidence of a mistake in the filling out of the contract to submit the question to the jury.

##### 3. SAME—TERMINATION OF LIABILITY.

Where the initial carrier failed to deliver the shipment to the connecting carrier agreed on, but delivered the same to another carrier, the

initial carrier continued liable as though the shipment remained in its possession, and it was responsible for the act of the connecting carrier selected by it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 747-765, 950.]

##### 4. SAME—MEASURE OF DAMAGES.

Where the initial carrier failed to deliver the shipment to the connecting carrier agreed on, but delivered the same to another connecting carrier, the measure of damages for which the initial carrier was liable was the difference in the value of the shipment in the condition in which it was delivered at the point of destination, and its value in the condition it would have been in if it had been transported to that point with due diligence, and handled with proper care.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 790.]

##### 5. SAME.

When a carrier failed to carry a shipment of live stock within a reasonable time and failed to give the same reasonable care, the shipper was entitled to recover the damages resulting from the delay and from the negligent care.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 923.]

Appeal from Circuit Court, Boyle County. "Not to be officially reported."

Action by Pendleton & Hudson against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Chas. H. Rodes and John Galvin, for appellant. E. V. Puryear, Robt. Harding, and Greene & Van Winkle, for appellees.

HOBSON, C. J. Pendleton & Hudson who were dealers in mules at Atlanta, Ga., bought 27 mules at Danville, Ky., on December 3, 1903, and had them shipped over the Cincinnati, New Orleans & Texas Pacific Railway consigned to themselves at Atlanta, Ga. The mules left Danville on the afternoon of December 3d. They reached Somerset about 8:50 that night. They did not leave Somerset until about 2 o'clock the next morning. They reached Chattanooga about 9:40 p. m. on the 4th. They were unloaded there. They were reloaded about 3 p. m. on the 5th. They left Chattanooga about 3:15 a. m. on the 6th, and reached Atlanta at 12:40 p. m. that day. So far as the proof shows they were fed and watered only once on the journey. When they reached Atlanta they all were gaunted up. One had a broken shoulder, and six others had received injuries more or less serious. This action was filed to recover damages of the railroad company in the sum of \$1,072 for the injury to the stock by reason of the delay and neglect in its shipment. The jury found for the plaintiff in the sum of \$800, and the railroad company appeals.

The railroad relied upon a clause in the written contract of shipment to the effect that it should take the stock to Chattanooga, the end of its line, and there turn it over to a connecting line pleading that the stock was in good condition when it left its hands at

Chattanooga. In avoidance of this, the plaintiffs pleaded that there was a mistake in the written contract; that the contract was that the stock was to be carried to Chattanooga by the defendant and from Chattanooga to Atlanta by the Southern Railway and that this was by mistake left out of the contract. The defendant then moved the court to transfer the action to equity on the ground that a mistake in the writing could only be corrected in equity. The court properly overruled the motion. The action was properly brought at common law to recover damages of the carrier for its failure to safely carry the stock, and deliver it in a reasonable time. The carrier relied upon a clause of the special contract exonerating it from part of the liability. The plaintiff might show at common law that the special contract so relied on was not properly reduced to writing, and that the writing set up did not contain the real agreement. This was held in *L. & N. R. Co. v. Carter*, 66 S. W. 508, 23 Ky. Law Rep. 2017 where fraud was relied upon to avoid a contract. Where a contract within the statute of frauds is sought to be reformed and where no relief can be had until the contract is reformed, a different principle applies. *Hunt v. Nance*, 92 S. W. 6, 28 Ky. Law Rep. 1188. The question here is simply what was the contract between the parties, a question of common-law cognizance. The writing is the best evidence of the contract until fraud or mistake is shown, but when fraud or mistake is established the question is for the jury on all the evidence to determine what the contract was. The written contract itself has a blank in it headed "consignee, destination, and route." The blank was filled with the name of the consignee and the destination, but in the filling out the blank the route was omitted. There was sufficient evidence of a mistake in the filling out of the contract to submit the question to the jury.

The defendant did not ship the mules from Chattanooga to Atlanta by the Southern Railway, but turned them over at that point to the Western & Atlantic Railroad Company in violation of the contract as claimed by the shippers. The court gave the jury this instruction: "If you believe from the evidence in this case that the 27 mules delivered to the defendant on December 3, 1903, when received by the defendant were in good order and perfect condition, and that the defendant failed to carry them to Chattanooga within a reasonable time after receiving them in Danville, Ky., and because of such failure to carry them within a reasonable time, or because of a failure to give them reasonable care and attention while in the defendant's possession or under defendant's control, said mules were damaged or injured, you should find for the plaintiff; or if you believe from the evidence that defendant agreed to deliver said mules to the Southern Railway for transportation from Chattanooga to Atlanta,

and by mistake of the defendant said agreement was left out of said contract, and defendant failed to deliver said mules to the Southern Railway, then you should find for the plaintiff for any damage and injury to said mules, if any, you believe from the evidence were sustained by said mules, if any, while being carried from Chattanooga to Atlanta and before delivering same to the plaintiffs. If you find for plaintiffs in either or both of the above states of case you should find such sum as you believe from the evidence will reasonably compensate them for any loss in value of said mules, if any, and the decrease, if any, in the market price of said mules when received and when they could have been sold and the necessary expense, if any, in keeping and caring for said mules, caused by the damage and injury, if any, to said mules, not, however, to exceed the sum of \$1,068.20, and if you do not so believe you should find for the defendant."

When the defendant did not deliver the stock to the Southern Railway as it had agreed to do, if the plaintiffs' evidence is true, it made itself responsible for the carriage of the mules from Danville to Atlanta. In other words, when it failed to deliver the mules to the connecting carrier which had been agreed upon between the parties, its liability under the contract did not cease, but it continued liable as though the mules had remained in its possession. But it was not liable for any injury to the mules due to the ordinary depreciation from such a trip, and not due to any negligence in their carriage. The measure of damages, if the jury should find for the plaintiff under the first clause of the instruction, is entirely different from that if they find for the plaintiff under the second clause of the instruction. The instruction makes the defendant liable for the same thing in both cases. If the jury find for the plaintiff under the second clause of the instruction the proper measure of recovery of the difference, if any, in the value of the mules in the condition in which they were delivered at Atlanta and their value in the condition they would have been in if they had been transported to Atlanta with due diligence, and handled with proper care. If the jury do not find for the plaintiffs under the second clause of the instruction but find for them under the first clause of it the measure of recovery in that event is such part of the loss above referred to, if any, as was due to the delay of the mules or their not being properly cared for before reaching Chattanooga. To show the difference in the value of the mules as above indicated the plaintiffs may give in evidence to the jury the decrease in the market price, the necessary expenses they were at before selling the mules and every other fact necessary to enable the jury to judge intelligently of the question.

Some complaint is made as to the refusal of the court to admit certain testimony of-

ferred by the defendant in an affidavit for a continuance as to the cause of the delay of the mules, but as this may not occur on another trial we deem it unnecessary to pass upon the question.

Judgment reversed, and cause remanded for a new trial.

### HESS v. HINKSON'S ADM'R.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

#### LANDLORD AND TENANT—CONDITION AND USE OF PREMISES—LIABILITY FOR INJURIES.

Where the child of a tenant occupying a flat was killed by reason of the dangerous condition of a water closet in connection therewith, the landlord was liable if, under an express or implied contract with the tenant, the water closet was for the common use of the tenants of the flat, and not for the exclusive use of one tenant; but in the absence of such contract, the landlord is not liable, though the closet was used by other tenants than the one entitled thereto, with the landlord's knowledge or approval.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 629-641.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by Eva L. Hinkson's administrator against Henry O. Hess. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Lane & Harrison, for appellant. W. A. Spindle, B. H. Young, and J. T. Bashaw, for appellee.

HOBSON, C. J. Henry C. Hess owns an apartment house in Market street in Louisville. The front of the house is three stories high; the rear part two stories. The second story of the front part is something like six feet higher than the second story of the rear part. The front part of the second story is divided by a hall, and on each side of the hall are three rooms, a bathroom and closet, which are rented as flats. The rear part is divided by a similar hall on each side of which are two rooms, rented as flats. A man named Petty rented the east flat in the front. A man named Christ, the west flat. Tinsley rented the east flat in the rear part, and Smith the rear western flat. When Petty rented, the key to the closet on the east side of the hall was given to him, and it was understood that he had rented the closet as part of his flat. Petty lost the key in a week or so after he got it, and from this time on the closet was open. Tinsley came in after this. Mrs. Tinsley, who looked at the rooms, says nothing was said to her about the closet and that she assumed that she had a right to use either of the closets on the second floor. On the other hand the proof for the appellee is that she was told and understood that she must use a closet 60 feet back at the rear of the lot and that she had nothing to do with the closet used by Petty. She,

in fact, used this closet, however, from the time she entered. By the side of the closet was an air shaft and over this air shaft, to protect the rooms below, was a skylight which was on a level with the floor of the closet. There was a hole in the side of the closet about two feet wide and one foot high through which a person could crawl out on the skylight and clean it. This hole was left when the house was constructed, and had no covering. The skylight was not made of the glass usually used in skylights, but of double strength window glass, and when it was cleaned the person cleaning it put a board across it to rest upon. After Tinsley had been in the house some weeks, his little stepchild, four years old, who was playing around the hall, went into this closet, crawled through the hold out onto the skylight, and the glass not being sufficient to hold its weight, it fell through to the room below and was killed. This action was filed by its personal representative to recover damages for its death. The jury found for the plaintiff, fixing the damages at \$1,000, and the defendant appeals.

It is insisted that the court should have instructed the jury peremptorily to find for the defendant under the evidence, and that the court misinstructed the jury. The action is based upon the ground that Tinsley, as tenant of one of the flats in the building, had use, in common with the other tenants of the building, of the closet referred to, and that, as the closet was for the use of all the tenants, it was under the control of the landlord; that he negligently permitted the hole to be left open at the floor by which a little child would be attracted out on the skylight which was not of sufficient strength to sustain the weight of the child; that he knew of the danger, and the tenants did not, as they did not know of the insufficiency of the glass, and that he was negligent in suffering the place to be unguarded. The general rule is that the tenant takes the premises as he finds them, and that the principle of caveat emptor applies. 1 Thompson on Negligence, § 129. Where, however, the landlord retains control of part of the premises, as where he rents flats or offices, he must use reasonable care to keep the parts of the premises in repair which are for the common use of all the tenants. 1 Taylor on Landlord & Tenant, § 175a; 2 Shearman & Redfield on Negligence, § 710; 1 Thompson on Negligence, § 138; Mills v. Cavanaugh (Ky.) 94 S. W. 651. In addition to this, the owner of land is held liable to children for dangerous things suffered to remain on his premises attractive to children, where they are accustomed to come. 1 Thompson on Negligence, §§ 1030, 1037. While the evidence was very conflicting, we cannot say there was no evidence that the closet referred to was not for the common use of the tenants in these flats. The open hole

leading out upon the skylight just at the floor would attract a little child, and its life would be imperilled as soon as it passed through the hole. The landlord should not have maintained upon the premises a thing so dangerous to a little child if the closet was for the common use of the tenants, and was under his control. On the other hand, if the closet was rented only to Petty, if Petty had the control of it, and it was for his private use, and not for the common use of the other tenants, then Hess would not be responsible if Petty left the door open, or suffered it to be open, and the child got into the closet, and thus was injured. Under the evidence these were questions for the jury.

The court, among other things, instructed the jury as follows: "If you believe from the evidence that the hallway, in the side of which was the water closet used by Coleman Petty, was with the knowledge, acquiescence, permission, or approval of the defendant, H. C. Hess, used as a common hallway for the persons occupying the flats, front and rear of the second story of the Hall building, or for the flat occupied by the mother of the deceased, Eva Love Hinkson, and if you further believe that with the knowledge, acquiescence, permission, or approval of the defendant, H. C. Hess, the water closet of the eastern flat on the second floor was used by other tenants in said building than Coleman Petty, or was used by the mother of said infant, Eva Love Hinkson, and that said water closet was negligently permitted to be open and accessible to small children, with the knowledge, permission or consent of the defendant, Hess, and that the said water closet and the opening in the wall thereof, and the skylight adjacent thereto, were by the said Hess negligently permitted to be and remain in a dangerous and unsafe condition, and such dangerous and unsafe condition, if any, was known to the said Hess, or could have been known to him by the exercise of ordinary care, and said dangerous and unsafe condition, if any, was not known to Mrs. Clemmy Tinsley, and could not have been known to her by the exercise of ordinary care, and the deceased, Eva Love Hinkson was killed by reason thereof, then the law is for the plaintiff and the jury should so find. (3) If you believe from the evidence that the said water closet was in the exclusive possession of one Coleman Petty, under and by the terms of his renting from the defendant, Hess, and you believe from the evidence that said water closet was left open and unguarded by the said Petty, and was not so open and unguarded with the knowledge, permission, or consent of the defendant, Hess, then the law is for the defendant, Hess, and you should so find." Hess was not responsible, though the closet was used by the other tenants with his knowledge, acquiescence, or approval. In lieu of instruction 1, the court

should have told the jury that if, under the contract, express or implied, between Hess and Tinsley, or his wife, the water closet was for the common use of the tenants of the flats on the east side of the second floor of the building, and the water closet, the wall thereof and the skylight adjacent thereto, were negligently permitted to be open and accessible to small children and to remain in a dangerous condition; and such dangerous condition was known to Hess, or could have been known to him by the exercise of ordinary care, and was not known and could not have been known by Mrs. Tinsley by the exercise of ordinary care; and the deceased was killed by reason thereof, they should find for the plaintiff.

An Implied contract exists where the matter is not expressed in words; but a person of ordinary discretion under the circumstances would understand that such is the contract. In lieu of instruction 3, the court should have told the jury that if they believed from the evidence that the water closet was not for the common use of the tenants under the contract, express or implied, between Hess and Tinsley, or his wife, but was for the exclusive use of Coleman Petty, and was left open by Petty, or those using it under him, they should find for the defendant.

Judgment reversed, and cause remanded for a new trial.

#### COHANKUS MFG. CO. v. ROGERS' GUARDIAN et al.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

##### 1. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTION—WARNING.

Where an inexperienced youth is employed to undertake the operation of an admittedly dangerous machine, it is the duty of the master to cause him to be fully informed by a person competent to instruct in such matters as to the nature and extent of his duties, as to the risks to be incurred, and to instruct him how to avoid the danger.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 314-316.]

##### 2. APPEAL—CONFLICTING EVIDENCE—FINDINGS.

A verdict based on conflicting evidence is not reviewable on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3935-3937.]

##### 3. TRIAL—VIEW BY JURY—DISCRETION.

In an action for injuries to a minor servant while operating a dangerous machine, whether the court should permit the jury to view the machine, as authorized by Civ. Code Prac. § 318, was within the discretion of the trial judge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 77-79.]

##### 4. SAME—INSTRUCTIONS—THEORY OF CAUSE.

Where, in an action for injuries to a servant, the instructions as a whole fairly gave to the jury the law of the case, it was not prejudicial error to omit to charge the converse of the propositions contained in one of the instructions to the effect that if the facts hy-

pothesized therein were not established by the evidence, plaintiff could not recover.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Albert Rogers' Guardian, and others against Cohankus Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. Mocquot, for appellant. Orice & Ross, for appellees.

**SETTLE, J.** This is an appeal from a judgment for \$500 damages recovered by appellees of appellant in the McCracken circuit court for personal injuries received by the appellee, Albert Rogers, an infant, while in appellant's service as operator of a machine used in making "cotton laps." According to the evidence appearing in the record, Rogers was 19 years of age at the time of receiving his injuries. The machine he was employed to operate contains many cog-wheels, pulleys, and belts, and he being a raw, inexperienced hand, was unacquainted with its mechanism and unskilled in operating it, which facts were confessedly known to appellant when it employed him, and at the time he was injured. The belts connected with the machine would frequently fall from or run off the pulleys, and had to be replaced by the person operating the machine. The complex character of the machine and the work of operating it made the place filled by Rogers one of great danger to a person of his youth and inexperience. This was recognized by appellant, for in assigning him to the machine in question, its foreman, and perhaps another of its employes, undertook to explain to him its operation, his duties as operator, and, in some measure, the dangers attending their performance. As to the scope of this instruction there was, as we shall presently indicate, a contrariety of evidence. After some days' service at the machine, Rogers, in attempting to replace or adjust a belt which had come off its pulleys, got his right hand caught between the belt and a pulley, or cog chain, thereby crushing and breaking the first two fingers thereof, resulting in the maiming of the fingers and permanent impairment of the use of the hand.

It is conceded by the parties that it was the duty of the operator of the machine to replace the belt when thrown from the pulleys, but averred by appellant that Rogers did not at the time of receiving his injuries, perform that duty in a proper way, but in such a negligent manner as to cause his injuries, and that but for such negligence they would not have resulted. This, the reply denies. In employing one of the youth and inexperience of Rogers to undertake so hazardous a work, as the running of an admittedly dangerous machine like that he was required to operate, it was the duty of

appellant to cause him to be fully informed, by a person competent to instruct in such matters, as to the nature and extent of his duties as operator, warn him of the risks to be incurred, and advise him how to avoid the danger attending the service required of him. It is admitted by Rogers, and was proved upon the trial by appellant, that its foreman pointed out to Rogers different dangerous parts of the machine, showed him how to put the cotton in the hopper, how to take it out at the end of the machine in the form of rolls, and warned him to be careful in the discharge of these duties. But Rogers himself testified, and his entire proof was to the effect, that he was not advised by appellant's foreman, or other employe, how to adjust or replace the belts when off the pulleys, nor was he warned of any of the dangers incident to the rebelting of the pulleys. It does not appear from the record that Rogers' testimony in this particular is positively contradicted by any of appellant's witnesses. It is also contended by appellant that Rogers was not adjusting the belt when hurt, but that he was neglecting his duties and unnecessarily picking cotton from a cog-wheel. On this point the testimony was conflicting; that of appellant conducing to prove that Rogers was so engaged when injured, and that of appellees that he was not, but was performing the duty of rebelting. This question of fact, the question of whether Rogers had been instructed by appellant's foreman in the matter of rebelting the pulleys, and also the question of whether Rogers was guilty of contributory negligence was properly submitted by the instructions to the jury, and their decision being favorable to appellee, appellant's contention, urged on the motion for a new trial, that the verdict was contrary to and without support from the evidence, was properly rejected by the lower court. It is further insisted for appellant that the lower court erred in overruling appellant's motion that the jury be permitted to view the machine by which Rogers was injured, as provided by section 318, Civ. Code Prac. The section, *supra*, does not compel the court to grant such view. As said by this court in *Henderson & Corydon Gravel-Road Co. v. Cosby*, 103 Ky. 184, 44 S. W. 639; "As to whether the jury should have been sent to view the place, was a matter in the discretion of the court. The court must always determine from the peculiar facts in each case as to whether it is necessary for the jury to view the premises to enable them to get a proper understanding of the case." *Green's Adm'r v. M. & B. R. R. Co.*, 78 S. W. 439, 25 Ky. Law Rep. 1623. The record in the case at bar does not justify a departure from the above construction of section 318, Civ. Code Prac.

Appellant complains that the court only instructed the jury upon appellee's theory of

the case. This complaint is not well founded.

The instructions are in these words:

"(1) Gentlemen of the jury: If you shall believe from the evidence in this case that plaintiff Albert Rogers received the injuries complained of by him in the petition, while engaged in rebelling a machine in defendant's factory, at which he had been placed to work by defendant, and shall further believe from the evidence that said injuries were caused to him by reason of the failure of defendant, and its agents under whom he worked, to warn or instruct plaintiff as to the dangers of rebelling, or adjusting the belt complained of, if it was dangerous to rebel same, then the law is for plaintiff, and you will find for him such sum in damages as you may believe from the evidence will fairly compensate him for any physical or mental suffering, or for any permanent injury, or either, he sustained, but not exceeding the amount in the petition. (2) Although you may believe from the evidence in this case that defendant was guilty of negligence at the time and place complained of by plaintiff, as defined in instruction No. 1 herein, yet if you shall further believe from the evidence that plaintiff was of sufficient age, discretion and intelligence to know or appreciate the dangers, if any, in adjusting the belt complained of by him, in defendant's factory, and shall further believe from the evidence that plaintiff in adjusting said belt was himself guilty of negligence, which contributed to bring about the injuries complained of, and but for which negligence he would not have been injured, then the law is for defendant, and you will so find. (3) Negligence, as used in these instructions, means a want of that degree of care which a majority of careful and prudent persons of the age, intelligence and discretion of plaintiff are accustomed to exercise for their own protection under like or similar circumstances of this case." The court might properly have given the jury in another instruction the converse of the propositions contained in instruction No. 1, but the failure to do so was not prejudicial to appellant, as it followed if the facts predicated in instruction No. 1 were not, in their opinion, established by the evidence, their verdict would necessarily have been in favor of appellant.

Being of the opinion that the instructions as a whole fairly gave to the jury the law of the case, and the errors assigned being insufficient to justify a reversal, the judgment is affirmed.

#### GROVES v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Sept. 20, 1906.)

#### MASTER AND SERVANT—INJURIES TO SERVANT —DANGEROUS PLACES—RAILROAD CARS.

The mere fact that a freight train stopped suddenly, whereby a brakeman in the caboose was thrown against the front end thereof and

injured, was insufficient to warrant a recovery from the master, as such recovery could only be had on proof of gross negligence.

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by O. A. Groves against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Proctor & Herdman and Greene & Van Winkle, for appellant. Benjamin D. Warfield and J. A. Mitchell, for appellee.

CARROLL, C. The appellant was a brakeman on one of appellee's freight trains, and, to recover damages for injuries received as alleged by the gross negligence of the agents and servants of appellee, he brought this action.

Upon the conclusion of the evidence of appellant, the court peremptorily instructed the jury to find a verdict for appellee, and the only question on this appeal is the correctness of that ruling.

The evidence for the appellant tended to establish the following facts: The train upon which appellant was head brakeman consisted of about 45 cars, 25 of which nearest to the engine were equipped with airbrakes, and the others with handbrakes. The train was in or near the yards of Bowling Green, and was running about 12 miles an hour when the appellant got off of the front end of the train, and waited until the caboose came to where he was standing, when he jumped on it, and went inside to get his lunch basket. When he was about the middle of the caboose and in the act of stooping to get his basket, the train suddenly stopped, and appellant was thrown with much force against the front end of the car, and severely injured. No member of the train crew except appellant testified nor was any evidence introduced to show why the train stopped, except that in a written statement made by appellant to the company a few days after the accident, he said: "I suppose the accident was caused from a small rise or grade in track, together with the slack in the train and the sudden stoppage of the cars." Appellant introduced as evidence the rules of the company directing engineers to use great care in handling trains, and to avoid all unnecessary jerks. Two railroad engineers also testified as experts in his behalf. Their evidence, in substance, was that an engineer should have his train under good control in entering a yard and should stop gradually and gently and not suddenly or abruptly, and in stopping should use his air brake in "service stops" and not apply the emergency brake, and that if a freight train such as appellant was injured on was stopped suddenly or by the use of the emergency brake, there would be danger of injuring the men on the train by the sudden jar, and to apply the emergency brake to a train would be bad judgment and im-

proper handling of the air brakes by the engineer; that when the air is applied in "service stops," the slack of the train is taken up gradually and gently, and there is no severe jar to any part of the train. They also testified that in handling freight trains there was generally more or less jar, and that it was often necessary to make a quick stop and for that purpose to apply the emergency brake.

To authorize a recovery in cases like this there must be some evidence, however slight, that the persons in charge of the train or controlling its movements were guilty of gross negligence. An employé cannot recover on a showing that his superior was guilty of ordinary neglect, as the employé when he enters the service assumes the ordinary risks incident to the employment. *Williams v. L. & N. R. R. Co.*, 103 Ky. 298, 45 S. W. 71; *L. & N. R. R. Co. v. Bocock*, 107 Ky. 223, 53 S. W. 262. It is also well settled that negligence cannot be assumed; it must be proven. *Hughes v. Cincinnati R. Co.*, 91 Ky. 527, 16 S. W. 275; *L. & N. R. R. Co. v. McGary's Adm'r*, 104 Ky. 509, 47 S. W. 440; *Louisville Gas Co. v. Kauffman, Strauss Co.*, 105 Ky. 131, 47 S. W. 440; *Hurt v. L. & N. R. R. Co.*, 76 S. W. 502, 25 Ky. Law Rep. 755. Whenever, however, there is evidence of negligence, the question of whether it is gross or ordinary is for the jury; but, if there is no evidence of negligence it is the duty of the court to take the case from the jury. The mere fact that the train stopped suddenly does not furnish any evidence of or create a presumption of negligence on the part of the engineer or any other agent or servant of appellant, as it may have been the imperative duty of the persons in charge of the train or controlling its movements to stop it when and as it was stopped. In *Hurt v. L. & N. R. R. Co.*, 76 S. W. 502, 25 Ky. Law Rep. 755, this court said: "Before the injured servant can recover damages from his master, he must show that his injury was caused by some neglect of his master or by some other servant of the master which is imputed to him. It is not enough to show that the plaintiff sustained his injury while in the service of the master. Where the circumstances attending the injury show nothing as to the real cause but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant or an unaccountable accident, there is a failure of proof. The cause of the injury must be proved. Unless it is shown affirmatively, there can be no recovery."

In *Yates v. Miller's Creek Construction Co.*, 89 S. W. 241, 28 Ky. Law Rep. 331, the court, on a state of facts similar in many respects to the facts established in this case, held there could be no recovery as there was a total failure to prove that the injuries received by Yates were due to the negligence of the agents or servants of the

construction company. In *L. & N. R. R. Co. v. Fox's Adm'r*, 42 S. W. 922, 20 Ky. Law Rep. 81, it is said: "The fact that there was a 'pretty hard jerk' or a 'hard jerk' at the time deceased fell, does not establish the fact that it was caused by the negligent conduct of those in control of the train. Such jerks may result from the usual movement of the trains." Negligence is never presumed. It is a fact that must be proven.

Counsel for appellant relies with apparent confidence on the case of *L. & N. R. R. Co. v. Gordon*, 72 S. W. 311, 24 Ky. Law Rep. 1819, in support of his contention that the case should have been submitted to the jury. In that case, Gordon, who was a brakeman, was thrown from the top of the freight car on which he was riding by the sudden jumping forward of the train. It appears from the opinion that the particular negligence complained of was the failure of the engineer to give the warning of two blasts of his whistle after the display of the white light by the station agent, which was a signal to him not to stop. The rules of the company introduced as evidence in that case required the engineer when he approached an order station to slow up and have his engine under control, and to ask for orders by four sharp blasts from his whistle; if the station agent had orders for the train, he would answer the signal by displaying a red light, which was notice that the train must stop; if he had no orders, he displayed a white light. It was then the duty of the engineer, as a warning to other employes upon the train, to give two sharp blasts of the whistle before increasing his speed. The engineer in that case, without giving the two blasts as a warning to the employes that the speed of the train would be at once increased, suddenly and with a tremendous jerk increased the speed of the train, and this court held the company liable because of this negligent conduct on the part of the engineer. In that case, there was evidence of gross negligence on the part of persons in charge of the train. In this case, there is no evidence of any negligence on the part of any servant or employé of the appellee.

The judgment of the lower court is affirmed.

#### TAYLOR v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 20, 1906.)  
EXTRADITION — INTERSTATE — RIGHTS OF ACCUSED AFTER EXTRADITION.

A person arrested in a sister state and brought into Kentucky under a requisition for trial for a specified crime, may be tried for another offense for which he may be arrested, without being given an opportunity to return to the state from which he was extradited.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, § 52.]

Appeal from Circuit Court, Clinton County.  
"Not to be officially reported."



Thomas Taylor was convicted of violating the local option law, and he appeals. Affirmed.

E. Bertram, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

HOBSON, C. J. Appellant, a citizen of Tennessee, was arrested there under a requisition and brought to Clinton county, Ky., for trial on a charge of violating the local option law by selling whisky in that county. He was tried on the charge for which he had been arrested, found guilty, and fined. He was then arrested under a bench warrant issued on the indictment in this case charging him with another and distinct violation of the local option law. He moved the court to quash the warrant of arrest on the ground that he had been tried for the offense for which he had been arrested in Tennessee, and that he had been arrested in Kentucky on the second charge after he had been brought here on the first and before he had opportunity to return to his home. The court overruled his motion to quash the warrant of arrest. He was tried, and, being convicted, appeals. He relies on *Com. v. Hawes*, 13 Bush, 697, 28 Am. Rep. 242, but that was a case where the defendant was extradited under a treaty and returned on its terms. The defendant there was not convicted of the offense for which he was extradited. The effort was in effect to use it as a pretext to get him in custody for an offense for which he could not be extradited. Here the proceeding is based on the Constitution and laws of the United States, and the same rule does not apply under them as when the defendant is extradited under a treaty between the United States and some foreign government; for any fugitive from justice may be arrested in one state and returned to another under a requisition. The precise question raised was determined adversely to appellant by the United States Supreme Court in *Lascelles v. Georgia*, 148 U. S. 535, 13 Sup. Ct. 687, 37 L. Ed. 549. The circuit court properly followed the rule disclosed in that case.

Judgment affirmed.

#### FORD v. PADUCAH CITY RY.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

#### CARRIERS—PASSENGER ALIGHTING FROM MOVING STREET CAR—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a passenger alighting from a moving street car, after having signaled it to stop, and it has slowed up as if about to stop, is guilty of contributory negligence, is for the jury. [Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1391–1393, 1402.]

Appeal from Circuit Court. McCracken County.

"Not to be officially reported."

Action by Daisy Ford an infant, by next friend, against the Paducah City Railway.

From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. M. Worten, for appellant. Wheeler, Hughes & Berry, for appellee.

O'REAR, J. Appellant, aged 12 years, a passenger on appellee's electric street car, was thrown while attempting to alight from it and was injured. In this action to recover damages for her injuries so sustained, the verdict of the jury was adverse to her. Her evidence was that she had signaled to the motorman in charge of the car by ringing the bell that she wanted to get off at the next corner; that instead of stopping there he ran the car some distance beyond, where, as the car slowed up, she attempted to alight, when the motorman suddenly applied the current, giving the car a sudden impetus throwing her to the ground. When she attempted to alight the car was moving very slowly, and she thought was about to stop. The correctness of the court's instruction under which the verdict was returned, must be measured by the facts constituting the plaintiff's case, as well as the facts showing the defense, which was a denial of negligence on its part, and plea of contributory negligence on the part of plaintiff. On the latter defense the court gave the following instruction: "Although you may believe from the evidence that defendant, and its agents were guilty of negligence as defined by instruction No. 1, yet if you shall further believe from the evidence that plaintiff was of sufficient age, intelligence, and discretion to know and appreciate the danger of stepping from a moving car, or before same was stopped, and shall further believe from the evidence that plaintiff did step off said car while same was moving, or before the same was stopped, and by reason of so doing, and as the direct and proximate cause thereof, received the injuries complained of, then plaintiff was guilty of such contributory negligence as will prevent her from recovering in this case, and if you shall so believe you will find for the defendant."

This instruction assumes as a matter of law that to attempt to get off a moving street car is negligence per se. Such is not the rule recognized in this state, and applied generally. On the contrary the rule is, that the question of negligence in such case is one of fact for the jury. *Central Passenger Ry. Co. v. Rose*, 14 Ky. Law Rep. 204; *Central Passenger Ry. Co. v. Rose*, 22 S. W. 945, 15 Ky. Law Rep. 210; *L. & N. R. Co. v. Eakin*, 103 Ky. 465, 45 S. W. 429, 46 S. W. 496, 47 S. W. 872; *Illinois Central R. Co. v. Whitacker*, 57 S. W. 465, 22 Ky. Law Rep. 395; *Bishop v. Illinois Central R. Co.*, 77 S. W. 1099, 25 Ky. Law Rep. 1363. The court should have submitted the question for the jury to decide whether, considering the age and discretion of the plaintiff, and the surrounding circumstances, it was negli-

gence, or the lack of ordinary care, on her part to try to get off the car as was done.

For the error indicated the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

### CAMPBELL v. RICH OIL CO. et al.

(Court of Appeals of Kentucky. Sept. 19, 1906.)

#### 1. PARTNERSHIP — ACTIONS BETWEEN PARTNERS — MISAPPROPRIATION OF FUNDS — PETITION — SUFFICIENCY.

A petition by a partner in a firm organized for the purpose of engaging in business, which alleges that a third person authorized by the partnership to act as manager paid, without authority, dividends to the members of the partnership out of money which should have been devoted to the development of the business, and that the members received the dividends, and which fails to aver that plaintiff objected to the payment of dividends, does not state a cause of action against the firm or copartners, for the acts of the manager could not be deemed a misappropriation of the firm funds, though it might constitute a diversion from the purposes to which they were intended to be devoted by the articles of copartnership.

#### 2. SAME — MISMANAGEMENT OF FIRM BUSINESS BY EMPLOYÉ — RELIEF — PETITION — SUFFICIENCY.

A partnership engaged in the petroleum oil business employed a manager. The contract of employment was not for a definite time, but the partnership could discharge him at its pleasure. A partner alleged that the manager's neglect caused the producing wells to decrease in output, and that he failed to drill certain of the wells to a depth to test their productiveness. It was not shown that the partnership objected to the manager's management of the business, or that the members of the partnership ever directed the manager to do the acts complained of. *Held*, that the partner complaining had no cause of action against his copartners or the partnership.

#### 3. SAME — RECEIVER — GROUNDS.

A petition by a partner in a firm organized for the purpose of engaging in the petroleum oil business, alleged incompetency and mismanagement of the firm's general manager. The contract of employment was not for a definite time, and the partnership could at any time discharge the manager. The petition alleged no disagreement among the partners, no fraud or wrongdoing on the part of any of them. It was not alleged that the partnership or any of its members were insolvent. *Held*, not to justify the appointment of a receiver, since Civ. Code Prac. § 298, authorizes only the appointment of a receiver during the pendency of an action where property or a fund is in danger of being lost.

Appeal from Circuit Court, Cumberland County.

"Not to be officially reported."

Action by L. J. Campbell against the Rich Oil Company and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

E. A. Williams, for appellant. Allen Sandidge and Sandidge & Sandidge, for appellees.

SETTLE, J. The appellant, L. J. Campbell, and appellees, George P. Taylor, J. A. Warriner, M. C. Alford, Kentucky Petroleum Company, incorporated T. J. Kerwin and Ransom

Rich, compose a partnership known as the "Rich Oil Company," engaged in the operation and development of certain oil and gas wells, on a 50-acre tract of land leased by the company from Ransom Rich and situated in Salt Lick Bend of Cumberland river, in Cumberland county. The following writing signed by all the partners manifests the partnership organization, the nature of its business and the manner in which it is to be conducted: "That whereas, we, the undersigned, Geo. P. Taylor, L. G. Campbell, H. L. Sturm, general manager and agent for the Kentucky Petroleum Company, T. J. Warriner and M. C. Alford are joint owners of a certain oil and gas lease, together with five producing oil wells, tanks, tubing, petroleum oil and machinery, on a certain tract of land in Cumberland county, Ky., known as the 'Ransom Rich Farm in Salt Lick Bend,' containing 50 acres. For the purpose of placing said oil lease, wells, etc., under one management, and for its development, we hereby agree to and do constitute said business into what shall be known as the 'Rich Oil Company,' the same to be under the control and management of H. L. Sturm, who shall be styled 'General Manager' of said company. Our general manager is authorized to purchase such machinery as tanks, tubing, casing, and machinery, employ the necessary work hands and teams to remove and handle machinery on said lease, and to employ competent person or persons, to pump the wells on said lease, to gauge the oil produced from said lease, and to do all things necessary to the development and management of said lease, to sign all sale orders for oil, approve bills, and orders for payment against said company, to receive and receipt for any moneys from the sale of oil sold from said lease and to deposit same to the credit of said company in the bank of Cumberland, at Burksville, Ky. Our said general manager is authorized to draw and issue checks to the bank of Cumberland against said company, to defray and pay bills and expenses of the management and development of said lease as shall be necessary. That our general manager is allowed a reasonable compensation per month for his work named above. This the 22d day of July, 1904." May 19, 1905, appellant instituted a suit in the Cumberland circuit court against the other members of the partnership, for the purpose of having the court decree the above contract of partnership a binding obligation between the plaintiff and defendants, for a construction of the contract, a specific performance of the same, the removal of H. L. Sturm as general manager of the company, the appointment of a receiver to take charge of the books and property of the company and control of its business. The grounds presented by the petition for the relief asked, are, in substance, that the manager, Sturm, without authority so to do, has distributed to the members of the partnership \$8,282.87 in dividends

realized by him from the sale of more than 10,000 barrels of crude oil from the company's wells, and which should have been, and was intended to be, devoted to the development of the leased premises; that the manager neglected the producing wells upon the lease by suffering the casing to leak which decreased their productiveness, and failed to drill four of the wells to a depth sufficient to test their producing capacity; that the manager is negligent, unscientific, and, by reason thereof, incompetent to have charge of the business of the company; and his continued control of its affairs will result in irreparable loss to it. Appellees filed a general demurrer to the petition, which the court sustained, and appellant having declined to amend, the action was dismissed at his cost. This appeal is prosecuted from that judgment.

As the averments of the petition are admitted by the demurrer, the only question presented by the record for our consideration is as to the sufficiency of the petition. Does it state a cause of action? Obviously judicial construction of the written articles of co-partnership is unnecessary. There is nothing ambiguous or indefinite in its terms; its meaning is manifest. It is not alleged in the petition that there is any misunderstanding of its language or meaning among the members of the partnership, or disagreement between them as to its provisions. It is equally clear that no reason exists for decreeing a specific performance of the contract. The petition does not charge that any member of the partnership has failed to comply with any of its provisions. The only breach of its terms alleged is the act of the general manager, Sturm, in paying in dividends to the members of the partnership moneys, which it is claimed, should have been devoted to the development of the leased premises, and that he neglected the producing wells upon the lease by suffering the casing to leak, which decreased their productiveness, and also that he failed to drill four of the wells to a depth sufficient to fully test their capacity. While it is charged that the distribution of dividends among the members of the partnership was without authority, this form of averment is a mere conclusion of the pleader, and does not amount to a statement that such appropriation of the partnership funds was not assented to by the partners, or that after the payment of such dividends there was not left sufficient money to successfully carry on the business of the partnership; on the contrary, the pleader himself shows that such disposition of the partnership funds was approved by the partners, because it is charged in the petition that they received the dividends thus distributed, and no complaint is made of a lack of means for conducting the company's business.

It does not even appear from the petition that appellant objected to the payment of dividends to the members of the partnership,

for it is nowhere alleged that he did not consent to such application of the company's funds, or that he did not receive his share thereof. It is patent, therefore, that the acts of the general manager in thus applying the funds of the company cannot be deemed a misappropriation of such funds, as it was done with the consent of the partners, though it may have constituted a diversion of the funds from the purposes to which they were intended to be devoted by the articles of co-partnership. If, as alleged in the petition, the neglect of the manager caused the producing wells to decrease in output or value, or if his failure to drill certain of the wells to a depth sufficient to fully test their productiveness, or the manager has otherwise been so negligent or unscientific in the discharge of his duties as to prove him incompetent to have charge of the business of the company, and his continued control of its affairs will result in irreparable loss to it, it was and is the fault of the company, which could have prevented the evils complained of by discharging the manager and securing a more efficient one in his place. The contract between the Rich Oil Company and the manager, Sturm, does not employ him for a definite time. The company might have discharged him at any time, and can yet do so at its pleasure. It is not, however, alleged that his management of the wells, complained of by appellant, was objected to by the Rich Oil Company, or was not directed by it. It is nowhere alleged in the petition that the members of the partnership, or any of them—not even appellant himself—ever demanded of the manager, or directed him, to drill a well or wells to a greater depth than those already drilled. At most the drilling of wells to a depth of 2,000 or 3,000 feet would be a mere experiment, entailing great cost, which should not be attempted without the approval of all, or a majority of the members of the partnership.

In this case a dissolution of the partnership is not sought, no disagreement among the partners is alleged, no fraud or wrongdoing on the part of any of them is charged, nor is it averred that the company or any of its members is insolvent. The only complaint is the alleged incompetency and mismanagement of an employé of appellees whose removal from the position of manager they may effect by discharging him at any time. Civ. Code Prac. § 298, provides: "On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, or that the property or fund is in danger of being lost, removed, or materially injured, the court, or the judge thereof during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him." In the case at bar the relief sought is not the ap-

pointment of a receiver to take charge of the property and assets of the Rich Oil Company "during the pendency of the action." but the appointment of a receiver to take charge of its property and continue its business. In other words, the appointment of the receiver is the final and practically only relief sought. In *High on Receivers*, § 480, it is said: "It is important to bear in mind, in considering the subject of receivers in partnership cases, that it is not the province of a court of equity to conduct the business of a copartnership, and while a receiver may be directed to continue the business a sufficient length of time to enable the court to determine the rights of the parties litigant, it is not the province of the court to become the superintendent and manager of the private business of parties. Indeed, this necessarily follows from the very object and purpose contemplated by the court in appointing a receiver upon a bill for the dissolution of a partnership, such purpose being the preservation of the firm property until the cause can be determined, the court through its officer, the receiver, having charge of the firm assets, not in behalf of either party, but for the common benefit of all." All that is sought in this case may be accomplished by the partners themselves without the intervention of the court, and it does not appear from the statements of the petition that there has been any effort on appellant's part to obtain the relief asked through his copartners, or that they have refused such relief. The facts alleged in the petition do not authorize the appointment of a receiver, or the granting of any other relief. Consequently the court did not err in sustaining the demurrer to the petition.

Wherefore the judgment is affirmed.

#### PINSON v. SANDERS.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

##### 1. EXECUTORS AND ADMINISTRATORS—ASSETS—EXEMPT PROPERTY—ACCRUED PENSION.

Under the pension laws of the United States, providing that accrued pensions shall inure to the exclusive benefit of the widow, or children if there be no widow, the infant children of a deceased widow of a pensioner are entitled to the accrued pension due to her at her death, and their guardian, on being paid the same, cannot be compelled to pay it to the administrator for the purpose of paying the debts of the widow.

##### 2. SAME.

In the absence of any showing to the contrary, the infant children of a decedent are entitled to the proceeds of the sale of personality of the decedent amounting to \$40 as exempt, as

against the administrator seeking to recover the same to pay off the debts of the decedent.

Appeal from Circuit Court, Pike County.  
"Not to be officially reported."

Action by George Pinson, Jr., administrator of Nancy Ratcliffe, deceased, against Andy Sanders. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

J. S. Cline, Jr., for appellant. J. F. Butler, for appellee.

CARROL, C. The appellant was granted letters of administration on the estate of Nancy Ratcliffe, and brought this action against appellee as guardian of the infant children of Nancy Ratcliffe, alleging that his intestate was the widow of a pensioner, and that at the time of her death there was an accrued pension amounting to \$381.87 due to her, which amount was paid by the government to appellee as guardian. It is further averred that there was paid to the guardian \$40, the proceeds of the sale of the personal property of his intestate; that there were debts due by her at the time of her death; and that it was necessary to apply this money for which the suit was brought to pay the debts. The guardian refused to surrender to him the funds mentioned, and he asked judgment against him for the amounts. A demurrer to the petition was entered and sustained, and, the plaintiff declining to amend or plead further, his petition was dismissed, and he prosecutes this appeal.

No brief has been filed for appellee, nor does the record disclose the ground upon which the circuit court sustained the demurrer. The pension laws of the United States provide that accrued pensions shall not be considered a part of the estate of a deceased person, nor be liable for the payment of his debts in any case whatsoever, but shall inure to the sole and exclusive benefit of the widow, or children if there be no widow. This statute controls absolutely the disposition of the pension money sought to be recovered by appellant. The infant children of Nancy Ratcliffe were entitled to it, it was not subject to the payment of her debts, and the guardian of the infants was rightfully in possession of it.

In respect to the \$40, it is sufficient to say that, in the absence of any showing to the contrary, the infants were entitled to it under the exemption laws of the state.

The action of the lower court in sustaining the demurrer to the petition was proper, and the judgment is affirmed.

## PRYOR v. MURPHY.

(Supreme Court of Arkansas. July 23, 1906.)

## 1. EMINENT DOMAIN — COMPENSATION FOR PROPERTY TAKEN—COURTS—COURT HOUSES AND ACCOMMODATIONS.

Acts 1905, p. 596, divides Union county into two judicial districts, the Eastern and Western, and section 4 (page 597) provides that courts shall be held in the Eastern district in the town of F. in the public hall in the bank building in that town, and the records kept in the vault of the bank, for the next five years. *Held*, that the section is not unconstitutional on the ground that the provision in relation to the building and vault are violative of the constitutional provision prohibiting the taking of private property for public use without just compensation therefor, since, if the owner should refuse to allow the use of the hall and vault, the county court could provide a temporary courthouse.

## 2. STATUTES—EFFECT OF PARTIAL INVALIDITY.

Such provision could not invalidate the statute as it might be stricken from the statute without impairing its validity.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

## 3. VENUE—RESIDENCE OF PARTIES—CODEFENDANTS.

Acts 1905, p. 597, § 4, dividing Union county into two judicial districts, the Eastern and the Western, provides that no citizen or resident of the Western district shall be liable to be sued in the Eastern district, or any citizen of the Eastern district liable to be sued in the Western district; and section 6 (page 598) provides that, in order to ascertain in which of the respective districts in the county actions of which the circuit and chancery courts have jurisdiction shall be returnable and tried, the districts shall be construed as separate and distinct counties. *Held*, that section 4 must be construed in connection with section 6, and has reference to actions wherein all the defendants are residents of the same district.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 35.]

## 4. STATUTES—EFFECT OF PARTIAL INVALIDITY —COURTS—JUDICIAL DISTRICTS.

Acts 1905, p. 596, divides Union county into two judicial districts, and a proviso of section 6 (page 598) declares that no process, except subpoenas for witnesses, criminal process, and execution, issued by the circuit court and chancery court of the Eastern district, shall be served on any citizen or resident of the Western district. *Held*, that the proviso does not render the statute unconstitutional, as the section may be stricken out without impairing the validity of the act.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

## 5. CLERKS OF COURTS—CREATION OF OFFICE —JUDICIAL DISTRICTS—STATUTES.

Acts 1905, p. 596, dividing Union county into two judicial districts, provides in section 16 (page 601) that the clerk of the county shall keep an office in the town of F. in the Eastern district, at which place the clerk or his deputy shall reside, in addition to the office required by law to be kept at the county seat, and that it shall be the duty of the clerk to provide a seal for the circuit and chancery courts of the county for the Eastern district, which shall be the seal of the probate court of the Eastern district. *Held*, that Union county being constitutionally entitled to two clerks, one of them a separate county clerk and ex officio clerk of the probate court, the statute was not unconstitutional on the ground that it undertook

to deprive citizens of the Eastern district of the benefit of a separate county clerk, since, notwithstanding the Legislature was in error as to the clerks of the county, it is still entitled to a clerk of the circuit court and a county clerk, and they are clerks in both districts, required to perform their respective duties therein in the manner required by law and at the places appointed for the performance of the same.

Appeal from Marion Chancery Court; A. Curl, Chancellor.

Action by C. H. Murphy against W. J. Pinson and W. G. Pendleton. G. A. Pryor and others intervened. Judgment for plaintiff, and Pryor and others appeal. Reversed, and complaint dismissed.

Marsh & Flenniken and Gaughan & Siford, for appellants. R. L. Floyd and Smead & Powell, for appellee.

BATTLE, J. "The purpose of this action," as stated in the decree of the court therein, "is to restrain the defendant W. J. Pinson, as clerk of the circuit court, from purchasing the necessary records for the use of the circuit, chancery, and probate courts, and recorder, at the proposed new seat of justice at Felsenthal, in the Eastern district of Union county, and from establishing a separate clerk's and recorder's office in said district, and to restrain the defendant W. G. Pendleton, as sheriff, from opening a separate sheriff's office in said district."

The ground upon which the injunction was sought and granted is the alleged unconstitutionality of the act of the General Assembly of the state of Arkansas, entitled "An act to establish two separate judicial districts in the county of Union, state of Arkansas," passed over the veto of the Governor on the 26th day of April, 1905. Acts 1905, p. 596.

The act provides (section 1, p. 597): "That the county of Union shall be divided into two judicial districts, to be called the El Dorado district and the Eastern district."

The chancery court held that the act is unconstitutional. In so holding it says:

"We first meet with difficulty when we come to consider the fourth section of the act. This section provides, among other things, for the holding of circuit, chancery, and probate courts in the Eastern district, and that such courts shall be held in the town of Felsenthal, in the public hall in the bank building in said town, and that the records shall be kept in the vaults of the bank for the next five years, and afterwards at a place to be provided by the citizens of said district, free and without cost to the county. The particular bank building is not named. There is nothing to designate the particular bank building referred to, except the assumption, which may or may not be true, that there is but one such building at Felsenthal. But, if we assume this to be the case, it does not remove the difficulty. It is proposed here, by simple legislative enactment, to condemn

for public use private property (whether of an individual or corporation does not appear) without process of law and without any provisions for compensation to the owner. Further than this, it is proposed by mere legislative enactment to open the doors of the vault of a banking establishment, where the funds of the bank and other valuables are kept, to a public officer, not connected with the bank or its concerns, with necessarily the power and privilege of ingress and egress at all hours, without consulting the owners or managers of the bank, without process of law, and without any provision for compensation to the owner for the use of the same.

"This provision is clearly in contravention of article 2, § 22, of the state Constitution, which provides: 'The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or condemned for public use without compensation therefor.' And this arrangement is to continue for five years, with no provision, under any circumstances, for holding a session of any of the courts named anywhere else in the Eastern district, and no provision under any circumstances for storing the records or keeping them at any other place than in the vault of this bank.

"Now, if it were to so happen that the owners of this bank building should refuse to permit the hall to be used, or should refuse to permit the officers to use the vault of the bank as a receptacle or repository for the records, or should refuse to give the clerk access to the records deposited in the vault, except at certain hours which the bank officials might denominate 'business hours,' or suppose this particular hall should be destroyed by fire or otherwise, or would become untenable, or unfit for a courtroom, or that the vault named should be destroyed, or prove an unfit place for the keeping of the records; where would the courts be held, and where the officers store their records? There is no provision whatever for the county court or other officer to provide a place. The only authority for holding a court in this particular part of the county is the act in question; and that takes away from the county court and other county authorities, not only for a period of five years, but for all the time to come. This provision of the act is emphatic—that the courts shall be held in the town of Felsenthal and in this particular hall for the time named, and after that not at a place to be designated by the county authorities, but at whatever place that may be provided in the Eastern district, by the citizens of that district, free and without cost to the county, evincing clearly the purpose of the Legislature that at least the courthouse and vault for this Eastern district should cost the county nothing, which could not be, if the county court or other officer acting in an official

capacity, were to make the provision necessary. But, suppose there should be no difficulty about holding the courts at the place designated in the act for the term of five years, and that at the end of that time the citizens of the Eastern district should fail to provide a place for the holding of courts, or a suitable receptacle for the records; there is nothing to indicate that they have agreed to do so; and, if they had so agreed, the agreement would be void. Besides, the citizenship of a particular locality undergoes changes, and much of the present citizenship will likely be changed for others in the next five years."

We do not think that section 4 of the act is unconstitutional, because it provides that the circuit, chancery, and probate courts for the Eastern district shall be held in the public hall in the bank building in the town of Felsenthal, and that records shall be kept in the vault of the bank for the next five years. It does not authorize the use of the hall and vault by the courts without the consent of the owner, because the Constitution of the state, which is higher than the statute, provides that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." If the owner should refuse to allow the courts to use the hall and vault, the county court of the county could provide a temporary courthouse for the use of courts and records. *Hudspeth v. State*, 55 Ark. 323, 18 S. W. 183; *Lee v. State*, 56 Ark. 4, 19 S. W. 16. This part of the section could be stricken out without impairing the validity of the act. It is unnecessary to consider that portion of the section which provides that after the expiration of the five years the courts shall be held and the records kept in the Eastern district "at a place to be provided by the citizens of said district, free and without cost to the county." We cannot anticipate what the citizens will do. When they refuse to provide the place free of cost to the county it will be time to consider the effect of the refusal.

The court further says:

"But there is a provision in this section yet to be considered. It is provided that no citizen or resident of the Western district (I presume that by this is meant the El Dorado district) shall be liable to be sued in the Eastern district, nor any citizen of said Eastern district shall be liable to be sued in the Western district, in any action whatever. Now, if this provision is valid, it follows that if any person residing in Union county, or elsewhere in the state, or even a non-resident of the state, has a cause of action against two or more persons residing in different districts of Union county, as in this act defined, whether such cause of action be legal or equitable, and whether it grows out of contract or tort, whether it be on a bond, bill, promissory note, mortgage, express or implied trust, or open account, even

an action on the defaulting officer's bond, he could not couple such defendants in a single action and send his process across the district line to summon a defendant to answer. His only course would be to institute suits in both districts, or to give up his cause as against all except such as might happen to reside in one district. This, too, in real actions, when the general law of the state and universal custom provides that such actions shall be brought in the forum in whose territorial jurisdiction the real estate lies; and that, too, without regard to whether any of the defendants reside in such territory."

This part of the section has reference to actions wherein all the defendants are residents of the same district, and the place of their residence determines where the action shall be brought, and must be construed in connection with section 6 (page 598) of the act, which says: "That in order to ascertain in which of the respective districts in said county actions cognizable in the circuit and chancery courts shall be returnable and tried, the said districts, for all the purposes of this act shall be considered as separate and distinct counties, and the mode and place for trying suits shall be determined by the general law applicable to different counties."

The words "criminal court," are used in section 6. This is a clerical error. "Circuit court" is meant. The proviso in this section is objected to by the chancery court, but it is unnecessary to notice it in this opinion. It may be stricken out without impairing the validity of the act.

The next objection to the act is to section 16 (page 601). Of this the court says:

"The sixteenth section of the act provides, *inter alia*, that the clerk of the circuit court of Union county shall keep an office in the town of Felsenthal in the Eastern district, at which place said clerk or his deputy shall reside, in addition to the office now required by law to be kept at the county seat of said county, and that it shall be the duty of said clerk to provide a seal for the circuit and chancery courts of the county of Union for the Eastern district, which shall be the seal of the probate court of the Eastern district, and also the seal of the new recorder (whatever that may mean), and said seal to be in all respects and in like manner as the seal of the circuit court is now used in this state, and that he (said clerk) shall furnish all necessary books and records now by law required to be kept in the office of the circuit and probate courts and recorders' offices in this state.

"It is contended, and I think correctly, that it is intended by this provision to make or have the circuit clerk to act as the clerk of the probate court of Union county for this Eastern district. This is manifest, if from nothing else, from the provision that the seal of the circuit court shall be the seal of the probate court. \* \* \* It is manifest that the idea of the Legislature was to provide

for but one clerk for all the courts in the Eastern district, and that the clerk of the circuit court should be the clerk of all the courts in said district. The idea that Union county has, or is entitled to, a separate county clerk, is entirely ignored. This may have grown out of the fact that whoever drafted the bill for the act in question was ignorant of the fact that Union county has, and is constitutionally entitled to, two clerks. But, however it came about, the fact remains that the county is entitled to two clerks, and in fact that the act in question undertakes to deprive a part of the citizens of the county of the benefit of a separate county clerk, who is *ex officio* clerk of the probate court, is an infringement on the constitutional rights of Union county's citizens residing in this Eastern district. It follows that section 16 of the act is void."

The above construction of section 16 of the act is not correct. Such is not its legal effect. In assuming that Union county was entitled to only one clerk, the Legislature did not deprive it of one. It did not "alter the law by betraying an erroneous opinion of it so as to make it accord with the misconception," and did not undertake to carry its mistake into effect by making it a law. As said by Chief Justice Marshall, in *Postmaster General v. Early*, 12 Wheat. (U. S.) 148, 6 L. Ed. 577: "A mistaken opinion of the Legislature concerning the law does not make law." *Wood v. Wood*, 59 Ark. 451, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42; *Endlich on the Interpretation of Statutes*, § 372. Notwithstanding the Legislature was in error as to the clerks of Union county, it is still entitled to a clerk of the circuit court and a county clerk, and they are clerks in both districts, and are required to perform their respective duties therein in the manner required by law, and at the places appointed for the performance of the same.

The act is defective, and can be much improved; but the defects to which our attention has been called do not affect its constitutionality.

The decree of the court is reversed, and the complaint of appellees is dismissed for want of equity.

#### MARLER et al. v. WEAR.

(Supreme Court of Tennessee. Sept. 12, 1906.)

#### 1. JURY—RIGHT TO JURY TRIAL—CONSTITUTIONAL PROVISIONS.

Const. art. 1, § 6, declaring that the right of trial by jury shall remain inviolate, only protects the right to trial by jury as it existed at common law.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 16.]

#### 2. SAME—MANDAMUS PROCEEDINGS.

Under Shannon's Code, § 5336, providing that if the answer to an application for mandamus denies any material fact stated in the petition, the court may determine the issues on evidence, or cause the issues to be submitted to

a jury, whether the trial shall be by jury is within the discretion of the trial judge.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, § 106.]

Appeal from Circuit Court, James County; George L. Burke, Judge.

Mandamus on petition of Carrie Wear to compel A. J. Marler and others, as school directors, to issue a warrant to her for salary as a school teacher. From a judgment awarding a peremptory writ, the directors appeal. Reversed.

T. E. Thatch, for appellants. Traynor & Smith, for appellee.

NEIL, J. The petition for mandamus in this case was filed in the circuit court of James county, to compel the directors of a school district to issue a warrant to the petitioner Carrie Wear, a school teacher, for salary claimed to have been earned during the scholastic year terminating June 30, 1905. An alternative writ was awarded, and issued in due course, to which the directors filed an answer or return, in which they denied the leading facts alleged, and demanded a jury for the trial of the cause. This demand was refused. After hearing the evidence, his Honor rendered a judgment in favor of the petitioner, awarding a peremptory writ. The directors thereupon appealed and assigned errors.

The first assignment is upon the refusal of

the circuit judge to comply with the demand for a jury.

There was no error in this action of the court. Section 5336 of Shannon's Code, appearing in the chapter treating of mandamus, contains the following provision: "If the answer deny any material facts stated in the petition, the court may determine the issues upon evidence, or cause them to be submitted to a jury." This leaves the matter in the discretion of the trial judge, and no constitutional objection can be interposed. While our Constitution declares that "the right of trial by jury shall remain inviolate" (article 1, § 6), yet it has been held too often to need citation of authorities here, that the purpose of this provision was to protect the right as it existed at common law. But at common law no jury was impaneled in mandamus cases, since the return was treated as conclusive. *Castle v. Lawlor*, 47 Conn. 340; *Chumasero v. Potts*, 2 Mont. 242; *State v. Suwannee County Com'rs*, 21 Fla. 19; *Dutton v. Village of Hanover*, 42 Ohio St. 215; *People v. Judge*, 9 Cal. 19.

The first assignment must, therefore, be overruled. There are other assignments, however, pointing out errors for which the judgment must be reversed. These assignments have been passed upon in a memorandum opinion filed which will go down to the trial court with the procedendo. They need not be discussed in the present opinion.



**EASY PAYMENT PROPERTY CO. et al. v.  
VONDERHEIDE et al.**

(Court of Appeals of Kentucky. Sept. 26, 1906.)

**1. TRUSTS—SALE OF TRUST PROPERTY—CONSENT OF BENEFICIARIES.**

The children of a deceased father conveyed to the widow real estate in fee, and at the same time she executed a deed to a trustee in trust for her for life, and at her death to her children. The deed stipulated that the property should not be sold unless the same was agreed to in writing by the widow and all the children. One of the children died intestate without issue, leaving a widow. *Held* that, as the veto power on a sale by the trustee was made to enable each party interested to protect himself from an unauthorized sale, the right to veto a sale was limited to the beneficial owners of the property at the time of a contemplated sale, and a conveyance by the parties then in interest, including the widow of the deceased child, passed a good title.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 245.]

**2. SAME—DURATION.**

A widow executed a deed to a trustee in trust for her for life, and at her death to her children. The deed stipulated that the property should not be sold unless the widow and all the children agreed thereto, and if the widow and the children agreed to any sale the trustee was authorized to make it. One of the children died intestate without issue, leaving a widow. *Held*, that the power of sale remained in the survivors; the power being coupled with an interest.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by Elizabeth Vonderheide and others against the Easy Payment Property Company and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

See 93 S. W. 911.

Kohn, Baird & Spindle, Greene & Van Winkle, W. Rumsey Kinney and E. L. McDonald, for appellants. O'Neal & O'Neal and Isaac T. Woodson, for appellees.

**BARKER, J.** This action involves the title to a lot on the southeast corner of Shelby and Madison streets in Louisville, Ky. Originally, it was owned by Henry Vonderheide (now deceased), who left a widow, Elizabeth Vonderheide, and three children, George Vonderheide, Joseph Vonderheide, and Minnie Vonderheide, now the wife of John F. Berger. In this property the widow had a dower interest subject to which her children were tenants in coparcenary. After the death of their father, the children, desiring to make a more effectual provision for their mother than the law gave her, conveyed to her the property in fee simple, and at the same time took from her a deed to George Vonderheide in trust for the benefit of his mother for life, and at her death to her three children. Subsequently one of the children, Joseph Vonderheide, died intestate and without issue, leaving a widow, Mary Vonderheide. After this all of the parties in interest entered into a contract in writing whereby they agreed and undertook

to sell the property to the appellant for the sum of \$8,000 cash; in pursuance of which a proper deed was prepared by the appellees, which the appellant refused to accept, not because it did not desire to carry out its contract for the purchase, but because it was advised that the appellees could not convey a merchantable title to the property. Thereupon this action was instituted for the specific enforcement of the contract, and a judgment for the agreed purchase price of the land in question, with the result that the chancellor sustained the prayer of the plaintiffs' (appellees') petition, and rendered judgment in accordance therewith, of which the appellant now complains.

No technical questions of procedure are presented; the one point for adjudication being whether or not the appellees, under the trust deed after the death of Joseph Vonderheide, had the power to sell the property. So much of the deed as we need consider for the elucidation of the problem is as follows: "But this conveyance is made upon the following express trust, that the said property shall not be sold, mortgaged, or incumbered by the trustee except as herein provided, until after the death of the party of the first part, for any amount whatever, unless the same is agreed to in writing by the party of the first part and by all three of the children of the party of the first part. But in the event the party of the first part and the three children of the party of the first part agree to any such sale or incumbrance before the death of the party of the first part, the party of the second part is authorized to make such conveyance, the said children uniting therein to evidence their consent. The entire income of said trust estate after payment of taxes and necessary repairs shall be paid by the party of the second part to the party of the first part, his mother, to be used by her for her comfortable support and maintenance during her entire and natural life. After the death of the party of the first part the said property or the proceeds of the sale of any property that may be sold and which has been reinvested shall be equally divided between the three children of the party of the first part, to wit: Joe Vonderheide, George Vonderheide and Minnie Berger. Or in the event of the death of any of said children leaving lawful issue, such issue shall take the share the parent would take if living."

While appellant concedes that the foregoing language invests the trustee with the power of sale, provided consent thereto was given by the tenant for life and all of the children who owned the remainder, it insists that, after the death of Joseph, the power of sale did not survive to the trustee and the three remaining beneficiaries, but became void and nonenforceable. It is evident that it was the intention of the children to convey to their mother a life estate in the land, and thus make a more ample provision for her than she already possessed; but it

is inconceivable that they intended to diminish their interest in the property any further than was necessary to effectuate this filial duty which they felt they owed their mother, and we therefore do not feel authorized, taking into consideration both deeds which were made at the same time and were evidently a part of one plan, to conclude that they intended to do more than to convey her the life estate in the whole property, with remainder to themselves. They evidently intended taking the same interest in the entire property that they had in that part which was subject to their mother's dower. This being true, when Joseph Vonderhelde died intestate and without issue, all his interest, subject to his wife's right of dower, if any, descended to his mother and brothers as his heirs at law. As his wife joined in the deed to appellant, we need not consider whether or not she was entitled to dower in her husband's estate in the land. Clearly, then, the appellees, who are proposing to sell and convey the property in question to appellant, together own it in fee simple. The veto power on the sale by the trustee provided for in the deed was given for the purpose of enabling each party interested to protect himself from an unauthorized sale by the trustee, and this intention ought not to be frustrated, as is insisted on by appellant, by the refined subtlety of the common law in regard to the survival of powers, for after all the rule in such cases is to effectuate the manifest intention of the parties in interest; and this we think is clearly done by holding that the right to veto a sale, given by the trust deed, is limited to the beneficial owners of the property at the time. The children of the living tenants in remainder have no interest under the trust deed until the death of their parents, and this interest will not prevent the parents effectually consenting to a sale by the trustee.

But if we were less certain of the soundness of our position on this point, we would still uphold the chancellor's judgment, for, if we consider the trustee and the four beneficiaries as joint donees of the power of sale under the trust deed, still, after the death of Joseph Vonderhelde, the power of sale survived to the remaining donees. Undoubtedly at common law there was no survivorship among donees of a mere naked power, not coupled with an interest, or the execution of a trust; but, where donees are beneficially interested in the subject of the power, the rule is exactly reversed, and then the power survives to the remaining donees upon the death of one or more of them. In the case of *Peter v. Beverly*, 10 Pet. 564. 9 L. Ed. 522, the Supreme Court of the United States said on the subject in hand: "The general principle of the common law, as laid down by Lord Coke (Co. Lit. 112, b), and sanctioned by many judicial decisions, is that, when the power given to several per-

sons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. *Franklin v. Osgood*, 14 Johns. (N. Y.) 553; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 19." The same rule was recognized and declared in the case of *Muldrow's Heirs v. Fox's Heirs*, 2 Dana, 74, and approved in *Ross v. Clore*. Executor, 3 Dana, 189. In 2 *Pomeroy's Equity Jurisprudence*, § 835, it is said: "The general rule that equity refuses to aid the nonexecution of powers, and only corrects their defective execution, relates only to bare, naked, or mere powers; it does not apply to powers coupled with a trust." In *Perry on Trusts*, § 505, the rule is thus stated: "And it is well settled that, even in trusts reposed in trustees by name, the survivor, if he takes the estate with a duty annexed to it, can execute the power; and the rule of survivorship now applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are intended to form an integral part of it." In 22 *Am. & Eng. Encycl. of Law*, p. 1101, it is said: "At common law, where a naked power is given to joint donees, it does not survive upon the death of one, and cannot be exercised by the survivor or survivors; and this is especially true where such powers are conferred upon donees jointly as matters of personal trust or confidence. Where, however, the power is coupled with an interest, both the interest and the power survive, and the power may be executed by the survivor or survivors."

The judgment of the chancellor is affirmed.

#### MT. EDEN BANK v. OCEAN ACCIDENT & GUARANTEE CO.

(Court of Appeals of Kentucky. Sept. 26, 1906.)  
INSURANCE—BURGLARY—LIABILITY ON POLICY.

Where some one entered a bank building and started a fire on the floor, whereby the vault door was injured and the furniture destroyed, but there was nothing to show that any attempt had been made to get into the vault, there was no liability under a policy whereby the bank had been insured against damage to the vault or to the premises or fixtures caused by any person making an attempt to enter the vault.

Appeal from Circuit Court, Shelby County.  
"Not to be officially reported."

Action by the Mt. Eden Bank against the Ocean Accident & Guarantee Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Gilbert & Gilbert and R. F. Peak, for appellant. Willis & Todd, Bennett H. Young, and M. W. Ripy, for appellee.

CARROLL, C. The appellee issued to appellant bank a policy of insurance obligating

itself to indemnify the appellant against "all loss of money [currency or coin] bullion and securities in consequence of felonious abstraction of the same during the day or night from the safe or safes described in the said statement and located in the banking room also described in said statement hereinafter called the premises, by any person or persons who shall have made an entry into the safe or safes by the use of tools or explosive thereupon; for direct loss by damage to said safe or safes, or to the vault containing said safe or safes, or to the premises or to the office furniture and fixtures therein caused by such person or persons while making or attempting to make such entry into the vault, safe or safes." While this insurance was in force, some person in the nighttime entered the bank through a window and started a fire on the floor about four feet from the vault door that burned and injured the building, furniture, and fixtures therein, thereby damaging the bank in the sum of \$400, to recover which it instituted this action against the insurance company. The trial judge peremptorily instructed the jury to find for the defendant, and the propriety of this ruling is the only question we are called upon to consider.

The vice president and cashier of the bank were the only witnesses introduced for appellant. Their testimony, in substance, was that the bank occupied one large room, divided by a partition, and contained a large brick vault in which the safe was located, as well as chairs, tables, and other useful furniture; that there had been no fire about the premises for some time; that their attention was called to the fact early in the morning that the bank building was on fire, and it was discovered that some person had entered the building through a window. The fire had burned a large hole in the floor, the heat broke the window glass out of the window, blistering the vault door, and heating it to such an extent as to make it difficult to open, in addition to destroying the furniture in the room. No implements or tools of any kind were found in the room or about the building except an ordinary hatchet that was presumably used by the person who entered the room for the purpose of opening the window. No money or property of any kind was taken from the building, nor was there any evidence whatever that any attempt had been made to get into the vault. The appellee insists that under the policy of insurance no liability attaches unless damage is caused by some person or persons while making or attempting to make an entry into the vault or safe. The appellant's contention is that the mere fact that the bank building was entered by the person who set fire to the building was of itself sufficient to authorize a submission of the question to the jury, although there may not be any evidence that the building was broken into by some person in an attempt to enter the vault or safe.

Following the ruling adopted by this court in numbers of cases, the policy should be liberally construed in the interest of the insured, and it is too well settled to need citation of authority that, if there is any evidence in support of the plaintiff's contention, the case must be submitted to the jury. There is, however, in this case no evidence whatever that any attempt of any kind was made to break into either the vault or safe. The mere fact that the building in which the vault or safe was located was broken into, although it may have been broken into with the felonious intent of taking therefrom goods or property in the building, is not sufficient to fix liability on the insurance company, in the absence of some evidence that an attempt was made to enter the vault or safe. There is no fact or circumstance proven from which it can be reasonably inferred that the person who entered the building intended or attempted to enter the vault or safe. No tools or implements of any kind were used except a hatchet for the purpose of getting through the window. There were no marks or bruises on the vault or door thereof, indicating that any attempt whatever had been made to open or enter it. The fire appears to have been built several feet from the vault door, and not so near to it as to leave the impression that an attempt was made by the aid of the fire to enter the door.

Upon the evidence as it appears in the record, the trial court properly instructed the jury to find for the defendant, and the judgment is affirmed.

#### WHEELER v. DAVIS.

(Court of Appeals of Kentucky. Sept. 20, 1906.)

#### PLEADING—NECESSITY OF REPLY.

Civ. Code Prac. § 126, provides that every material allegation of a pleading must, for the purpose of an action, be taken as true unless specifically traversed. *Held*, that where in trespass plaintiff alleged that he was the owner of the land, and defendant in his answer claimed that he was the owner of it, and entitled to its use, such allegation was an affirmative denial, no reply was necessary, and defendant was not entitled to judgment on the pleadings.

Appeal from Circuit Court, Wolfe County.  
"Not to be officially reported."

Action by John B. Davis against George W. Wheeler. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. G. Williams, for appellant. A. F. Byrd, for appellee.

CARROLL, C. The appellee brought this suit for damages against the appellant, charging appellant with having wrongfully entered upon his land, and cut and removed fencing therefrom. The appellant in his answer, after denying that appellee was the owner of, or in the possession of the land upon which the fence was cut, further set up "that the plaintiff is not the owner of, or in the posses-

sion of, the land claimed in the petition; that the said land was sold and dedicated to the public use for a street in the sale of some lots in the town of Hazel Green, Wolfe county, Ky., and was so stated in a contract between this defendant and W. P. Trimble, who was the owner of said land, and which contract was in the deed made to defendant by Trimble for the lots purchased by him. He says that the said land, to the extent of keeping same open and to his use as a street, belongs to this defendant until the same is opened up as a public street. Defendant further says that plaintiff wrongfully, unlawfully, and forcibly entered upon the said land, and built a fence across said street against defendant's will or consent, and obstructed same to such an extent as to prevent this defendant from getting along said street from his dwelling house to the streets of Hazel Green." To this answer no reply was filed, and appellant insists that he was entitled to a judgment on the pleadings. Section 128 of the Civil Code of Practice provides that "every material allegation of a pleading must for the purposes of an action be taken as true, unless specifically traversed," subject however to some exceptions that are not necessary to mention.

In *Cravens v. Despain*, 79 S. W. 276, 25 Ky. Law Rep. 2018, in an action for trespass, the defendant denied that the plaintiff was the owner of the land, and further pleaded that he was the owner. There was no reply to this answer, and upon appeal by the defendant he insisted that he was entitled to a judgment, because of the failure to controvert the affirmative allegations of his answer; but this court held that no reply was necessary, that when the plaintiff alleged that he was the owner, and defendant denied this and alleged that he was the owner, the last-named affirmation was but an affirmative denial, and did not require a reply to put the matter in issue. To the same effect is *Ellis' Adm'r v. Blackerby*, 78 S. W. 181, 25 Ky. Law Rep. 1557; *Scaggs v. Poteet*, 58 S. W. 822, 22 Ky. Law Rep. 775. In this case, the appellee, Davis, alleged that he was the owner of the land, and the appellant in his answer claimed that he (appellant) was the owner of it and entitled to its use, by virtue of the conveyance under which he obtained his lot. Under the authority of the cases, no reply was necessary, as the issue was directly and sharply made by the petition and the answer, which presented the only question in controversy, namely, the ownership of the land. The evidence is quite conflicting, but a careful reading of it convinces us that the conveyance by Trimble to appellant did not vest him with either title to or the use of the street. After appellant purchased his lot, the appellee, Davis, purchased a lot from the same vendor, and the lines of the deed to Davis run with the line of the lot purchased by appellant; and there was conveyed to Davis the strips

of land adjoining the lot of appellant and claimed by him as a street; and, under this deed, Davis had the right to build a fence at the place where he erected it; and, in cutting down and removing this fence, appellant was guilty of the trespass complained of in the petition. Appellant contends that unless he is allowed the use of the land, across which Davis built his fence, for a street, that his ingress and egress to and from the public highway will be obstructed; but the evidence discloses that for many years there has been a traveled passway from appellant's premises to the public road.

The judgment of the lower court is affirmed.

#### CAMPBELL v. MIRACLE.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

FORCIBLE ENTRY AND DETAINER—RIGHT TO POSSESSION—TENDER OF PAYMENT.

Where a purchaser of land gave the vendor a lease containing a provision that the vendor should surrender possession on a certain date, when the purchaser should pay the balance due on the land, and at the date named the purchaser tendered the principal of the balance due, but not the accrued interest, the vendor was not guilty of forcible detainer in refusing to surrender possession, though he gave another and invalid reason for his refusal.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, §§ 23-28.]

Appeal from Circuit Court, Bell County.  
"Not to be officially reported."

Action by A. B. Miracle against Millburn Campbell. From a judgment in favor of plaintiff, defendant appeals. Reversed, with directions to dismiss.

Logan & Jefferies, for appellant. A. G. Patterson, for appellee.

NUNN, J. This is an appeal from a judgment of the Bell circuit court in a case of forcible detainer. The record shows that the appellant sold to appellee on January 26, 1904, a certain boundary of land in Bell county, Ky., for the consideration of \$6,700, \$4,000 thereof being paid in cash, the remainder, to wit, \$2,700, was due the 1st of January, 1905. The appellant executed to the appellee a bond for title. There is a recital in this title bond to the effect that there was a lawsuit then pending with reference to appellant's interest in a portion of the land sold to appellee, and \$1,200 of the unpaid purchase price was not to be paid to the appellant until that lawsuit was settled in appellant's favor. The balance of the sum, to wit, \$1,500, with interest, was to be paid to appellant the 1st of January, 1905. The parties agreed to this construction of the contract. At the time this bond for title was executed, the appellant turned over the possession to appellee all the land sold him, except the dwelling house and garden and three fields. About a month after this the appel-

lee prepared a written lease, the effect of which was to constitute the appellant the tenant of appellee as to the house, garden, and fields. This writing closes with the following words: "And that on the 1st day of January, 1905, he will peaceably deliver to the first party the possession of said land." When this writing was presented to appellant, he refused to sign it unless he was permitted to add the following words: "When second party pays balance due on said land." The appellant agrees that this clause had no reference to the \$1,200 referred to, but did apply to the \$1,500, with interest. The proof shows that appellee paid the \$1,500, but did not pay the interest, amounting to over \$80. This was the status of affairs when the writ of forcible detainer was issued. The proof shows, however, that he (appellee) offered to pay this interest during the pendency of this litigation. But the question to be determined is whether or not the appellant was forcibly and unlawfully detaining appellee's property at the time of the issuing of the writ. It is shown by the evidence, without contradiction, that this \$83.50 of interest was due by appellee to appellant at the time the writ in this case was issued, and it is expressly stated in the contract that appellant could remain in possession of the house and fields until it was paid. Therefore it is evident that the appellant was not guilty of the forcible detainer complained of.

It is contended that the action of the lower court should be upheld, for the reason that it was proven by two witnesses that appellant gave as a reason for remaining in possession of this property that he had not been paid for hauling some logs for the appellee, and that he intended to remain in possession until he was paid therefor. In this appellee is mistaken. The appellant cannot be deprived of a contract or lawful right because he gave a frivolous reason for his conduct.

For these reasons, the judgment of the lower court is reversed, and remanded, with directions to dismiss the writ of forcible detainer.

#### GIRDNER v. HAMPTON et al.

(Court of Appeals of Kentucky. Sept. 19, 1906.)

#### APPEAL—REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.

A finding of fact supported by conflicting evidence will not be reversed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

Appeal from Circuit Court, Knox County.  
"Not to be officially reported."

Action by Rebecca M. Girdner against James Hampton and others. From a judgment for plaintiff for less than the relief demanded, she appeals. Affirmed.

J. M. Hays and W. M. Deshman, for appellant. J. D. Tuggle, for appellees.

NUNN, J. The appellant is the widow of Wm. Girdner. He died in the month of March, 1904. He was the sheriff of Knox county for the years 1888 and 1889, and failed to account to the state for its revenue in a sum exceeding \$7,000. Judgment was recovered against him and his sureties for this sum. An execution was levied upon his land which was sold in satisfaction thereof. The home place, which is described in this action, consists of about 150 acres, was sold to one Sawyer for \$800, and by him sold to one James Hampton, who sold 100 acres of it to his son, James Hampton, and the remaining 50 acres to one Lay. After her husband's death appellant instituted this action against appellees, Hampton and Lay, for the purpose of having dower allotted to her out of this land. Appellees answered, and alleged that they had made permanent and lasting improvements thereon, which enhanced the value thereof as much as \$1,000. That part conveyed to Hampton was enhanced in the sum of \$700, and the part conveyed to Lay \$300. Appellant by reply controverted the allegations of the answers. The proof was heard and the court rejected the claim of Lay, but sustained the claim of Hampton to the extent of \$300; that is, the court adjudged that the improvements made by Lay had not enhanced the value of the piece owned by him to any extent, but that the improvements made by Hampton had enhanced the value of his part to the extent of \$300, and appointed commissioners directing them to first allot appellee, Hampton, \$300 worth of land of his survey, and then allot to the appellant one-third of the remainder, and one-third of the Lay tract so that the two pieces would form one tract. From so much of the judgment allowing Hampton anything for improvements, appellant appeals.

Section 2139, Ky. St. 1903, so far as applicable reads as follows: "Whether the recovery is against the heir or devisee or purchaser from the husband, the wife shall be endowed according to the value of the estate, when received by the heir, devisee or purchaser, so as not to include, in the estimated value any permanent improvements he has made on the land." The proof introduced by appellee conduced to show that the improvements made by him enhanced the value of the land in the sum of \$600 or \$700, and that introduced by appellant tended to show that its value was not increased to any appreciable extent by reason of the improvements. The statute is imperative that the enhanced value of the estate, by reason of permanent improvements made by the purchaser, shall not be considered or included in the allotment of dower. The question of the enhanced value of the land, by reason of the improvements is one of fact. We have examined the evidence with care, and do not feel authorized to disturb the finding of the lower court.

The judgment of the lower court is affirmed.

**DANT'S EX'RS v. COOPER**, County Judge.  
(Court of Appeals of Kentucky. Sept. 26, 1906.)

**EXECUTORS — SETTLEMENT — INVENTORY — STATUTORY PROVISION.**

Ky. St. 1903, §§ 3855, 3857, 3858, requiring personal representatives of decedents to return an inventory and sale bill of their estates, and authorizing fines for failure to make such return, is mandatory, so that executors are not entitled to a final settlement without making such a return, though they present a receipt from the devisees, all of whom are sui juris, showing the complete settlement of the estate to their satisfaction.

Appeal from Circuit Court, Marion County.  
"To be officially reported."

Application by the executors of J. W. Dant for prohibition and mandamus to John M. Cooper, county judge. From a judgment refusing the writs, the executors appeal. Affirmed.

H. W. Rives, for appellants. John McChord, for appellee.

O'REAR, J. J. W. Dant died testate, a citizen of Marion county. His will was admitted to probate. Appellants qualified as executors. Subsequently they settled the decedent's estate by paying his debts, as they aver, including the funeral expenses and costs of administration, and turned over to the devisees, as named in the will, the sums and property devised to them. Whereupon they took from the devisees a paper in the nature of a receipt, showing the complete settlement of the estate to their satisfaction. The executors presented this paper to the county judge of Marion county, sitting as the county court, and asked that it be filed as their settlement and that they be discharged. The county judge refused to file the paper as a settlement, and refused to discharge the executors. On the contrary, he issued a rule against them, requiring them to file an inventory and sale bill and to make their settlement by a return of all vouchers of sums paid out, whether to creditors or devisees. This action was brought by the executors against the county judge in the Marion circuit court to prohibit his imposing a fine against them for contempt for their failure to comply with the last-named orders, and for a writ of mandamus to require him to file the paper above referred to as their settlement; and, if no exceptions were taken thereto by any party in interest in the estate, to accept it as their settlement, and to discharge them from further liability as executors. The circuit court refused the writs prayed for, and dismissed the petition. Wherefore this appeal.

It is contended by appellants that, as the devisees were all sui juris, it was competent for them and the executors to settle the estate as among themselves in such a way as was satisfactory to them; that it did not concern the county court or any one else, after the debts were paid, how this was done; that it was not necessary to file

an appraisement or inventory, as they were satisfied with the action of the executors, nor was it necessary to file vouchers or to make an itemized statement between them and the executors, such proceedings being only for their benefit. It is contended, therefore, that they could waive the requirements of the statute concerning such proceedings, if they saw proper.

For the purpose of convenient study the sections of the statute (Ky. St. 1903) bearing upon the subject are here copied:

"Sec. 3855. It shall be the duty of a personal representative of a decedent to return an inventory and sale bill of his estate, the former within three months from the time of qualifying as such, and the latter within sixty days after the sale, to the clerk's office of the court in which he qualified, which shall be recorded by the clerk. Copies from the record of the inventory or appraisement shall be prima facie evidence for and against such representative."

"Sec. 3857. Any personal representative who shall fail for six months to return an inventory or sale bill shall, upon notice or rule served by copy, be fined by the county court not more than ten dollars, and be required to make such return by a day to be fixed by the court, and on failure he shall be fined ten dollars; and thus days shall be fixed, and fines of ten dollars each inflicted upon such personal representative until report is made. The clerk of the county court shall report delinquents under this section to the court."

"Sec. 3858. Every personal representative shall have his account settled, and the settlement and vouchers sustaining the same returned to the county court within two years after he qualifies, and as often thereafter as the court may require, which settlement, when approved by the court, shall be recorded and indexed by the clerk, and the original and the vouchers carefully kept by him in his office."

The devolution of the title to real and personal property of deceased persons, residents of this commonwealth, is regulated entirely by statute. Neither the descendants or other kindred of such decedent have an inherent right thereto. Such right as they may have is given to them by statute. It is competent then for the state to prescribe, not only the persons who shall take such property and the proportions in which they shall take it, but the conditions upon which they so take it. Administrators and executors of decedents' estates represent not only the creditors thereof, and those whom the statutes have designated to take by inheritance or devise, but they are the representatives also of the state in administering such estates. In the execution of their duties they discharge to a certain extent functions affecting the public; for it is deemed a matter of public concern that their administration of decedents' estates shall be made

matters of public record. Their failure to comply with the requirements of the law in the execution of their duties is, of course, a matter that may be a subject of complaint by any one directly concerned, whether a creditor or inheritor. But their failure is also a matter of public concern. The language of the statutes above quoted is mandatory. No discretion is vested in the county court to waive the exactions of the statutes, nor is it material whether some of the devisees were infants, or whether their trustee, named in the will, he being of contractual age and not under disability, could act solely for them in the matter; for, although all were adults, they could not dispense with the law. The county judge was therefore under the duty to require the inventory to be filed, and the settlement to be made as directed by the sections of the statutes *supra*.

Judgment affirmed.

#### LITTLE & HAYS INV. CO. v. PIGG.

(Court of Appeals of Kentucky. Sept. 26, 1906.)

##### 1. BROKERS—AUTHORITY—EVIDENCE—SUFFICIENCY.

Evidence examined and held to justify a finding that a broker, in purchasing stock on the account of a customer, did not buy it either under an employment by the customer or some one authorized to act for him, and he was thereby relieved from any liability for loss on a sale of the stock at a loss.

##### 2. ACCOUNT STATED—CONCLUSIVENESS.

Where an account is rendered and retained without objection for an unreasonable length of time, it becomes a stated account, and can only be assailed for fraud or mistake.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Account Stated, §§ 31-39.]

##### 3. SAME—QUESTION FOR JURY.

A broker bought stock for a customer pursuant to directions, and sold it at a profit. The amount the customer advanced and the profits were placed to his credit by the broker. Subsequently, the broker bought other stock for the customer, and placed dividends received thereon to his credit. Subsequently, the stock was sold at a loss. The customer claimed that he had no knowledge of the second purchase. The broker at the end of each month sent the customer a statement, showing the condition of the account. The customer claimed that he had no account with the broker, and that he was not indebted to him. Held, that the question whether there was a stated account, was for the jury.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Account Stated, §§ 40, 98.]

##### 4. DEPOSITIONS—REFUSAL TO ORDER FILING.

The refusal of the trial judge, on the motion of a party, to order the filing of a deposition by the adverse party given in his own behalf, is not error in the absence of a showing of the relevancy of the statements made in the deposition.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 202, 239.]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by the Little & Hays Investment Company against La Belle Pigg. From a

judgment for defendant, plaintiff appeals. Affirmed.

T. H. Collins and J. N. Elliott, for appellant. J. C. & D. M. Chenault, for appellee.

CARROLL, O. The principal question in this case is one of fact. Did appellee authorize appellants, who were stockbrokers in St. Louis, to buy for her 20 shares of Commonwealth Trust Company stock, that after the purchase by appellants was sold by them at a loss of \$1,711, which amount this action was instituted to recover?

It appears that appellee authorized one E. R. Norris, who was her brother-in-law, and in whose home in St. Louis she was residing at the time, to purchase for her, through appellants, some stock in the Lincoln Trust Company, and they contend that Norris, acting as her agent, authorized them to purchase for her the stock in the Commonwealth Trust Company. There is no doubt that the stock was purchased by appellants, and that it was sold by them at a loss in the amount sued for. The stock in the Lincoln Trust Company was purchased in August, 1901, and was sold on September 6, 1901, at a profit of \$175. This sum, together with the \$100 appellee furnished for the purpose of buying the stock, was placed to her credit by appellants. On September 20, 1901, \$25 of this \$275 was drawn out by appellee on her check, leaving a balance in the hands of the appellants of \$250. Afterwards in September, 1901, the shares of stock in the Commonwealth Trust Company were bought. The stock was held by appellants until March, 1903, when it was sold by them. During the time appellants held the stock, several dividends were collected on it by them and placed in connection with the \$250 of appellee's money in their hands to her credit.

Appellee in her own behalf testified that she knew nothing about the purchase of the stock in the Commonwealth Trust Company, nor did she authorize Mr. Norris to purchase it for her; that she had no connection whatever with it; that she left the \$250 in the hands of appellant under the impression that she would receive interest thereon. Mr. Norris died in the fall of 1903, previous to the institution of this action. No other witness was introduced in behalf of appellee.

Appellants' testimony tended to establish that they had not had direct, any business with appellee until some months after the purchase of the stock in the Commonwealth Trust Company, when they went to see her in reference to it; and that she informed them that they must see Mr. Norris about it, as he was attending to it for her; that at the end of each month, from the date of the purchase of the stock until it was sold, they sent her a statement showing the condition of her account; and upon this evidence the court instructed the jury, in substance, that if they believed that in the

purchase of the stock appellants acted for defendant either under employment by her, or by some person authorized to contract for her, they should find for the appellants; and further, that if they believed from the evidence that a mutual or running account existed between the parties, and appellants rendered to appellee a statement of account exhibiting the transaction, and she retained this account for an unreasonable length of time without objection, they should find for appellants. These instructions presented correctly the law of the case to the jury. Upon the issue thus formed by the evidence and the instructions, the jury found for appellee.

Appellants insist first that the verdict is against the evidence; and second, that they were entitled to a peremptory instruction. In respect to the first ground, it may be said that the jury had a right to accept as true appellee's version of the transaction, and having done so, we do not feel at liberty to disturb their finding of fact. The peremptory instruction was asked for upon the theory that as plaintiff's evidence tended to show that they furnished to appellee statements of her account, one of which she admitted having received, her failure to notify them that the statement was not correct, or to deny her liability, was conclusive of the correctness of the account, and that appellee was, after the lapse of a reasonable time, estopped to deny it. This assumption is based on the proposition that when an account is rendered and retained without objection for an unreasonable length of time, it becomes a stated or liquidated account, and can only be assailed for fraud or mistake; and our attention is called to a number of cases defining what a stated account is, and the rights and liabilities of the respective parties to the account, when it becomes a stated account. If it were conceded that there was a running account between these parties, and that appellee had, previous to the rendition of the account, acknowledged any indebtedness to appellant, then the doctrine of stated account would apply; but there is an emphatic denial by appellee that she had an account with appellant, or that she was indebted to them in any amount whatever, or that she ever had knowledge of any indebtedness to them growing out of this transaction. The issue made upon the question as to whether or not this was a stated account, was fairly presented to the jury by an instruction, and the jury found adversely to appellants' contention. *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; *Phelps v. Plum*, 32 S. W. 753, 17 Ky. Law Rep. 817; *Van Bebbler v. Plunkett (Or.)* 38 Pac. 707, 27 L. R. A. 811; *Langdon v. Roane*, 41 Am. Dec. 60; *Am. & Eng. Ency. of L.* (2d Ed.) vol. 1, p. 437.

It appears from the record that previous to the trial the deposition of appellee was given in her own behalf, and on the trial

of the case appellant moved the court to require the notary who took the deposition and whose fees had been paid, to file it in the clerk's office, in order that they might use it in the examination of appellee. This motion the court overruled, and of this ruling appellant complains. The record does not disclose any statement made by appellee in the deposition, nor the purpose for which appellant desired it filed. If a party to an action gives his own deposition, or takes in his behalf the depositions of other persons, the adverse party may require the officer taking the deposition, to file them upon the payment of fees; but in the absence of anything showing the value or relevancy of statements made in the deposition by appellee, we cannot see that the refusal of the trial judge to order the notary to file the depositions was erroneous.

Perceiving no error in the record, the judgment is affirmed.

#### COX v. CITY OF CYNTHIANA.

(Court of Appeals of Kentucky. Sept. 23, 1906.)

##### 1. WATERS AND WATER COURSES—MUNICIPAL WATER SUPPLY—VALIDITY OF REGULATIONS.

Where a city owns and operates a waterworks plant, a regulation that if water shall be supplied to one or more parties through a single tap the water supply will be shut off in case of nonpayment, notwithstanding one or more parties may have paid their proportion for the supply, is reasonable and valid.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Waters and Water Courses, §§ 295, 290.]

##### 2. SAME.

Where a regulation by a city owning a waterworks plant provides that where water shall be supplied to one or more parties through a single tap the water will be shut off in case of nonpayment, though one or more parties may have paid their proportion, it is immaterial to the rights of a tenant who has paid his proportion, whether the city offered to the other tenants of the building a printed or written contract or application provided in its scheme of furnishing water to the inhabitants.

Appeal from Circuit Court, Harrison County.

"To be officially reported."

Action by A. M. Cox against the city of Cynthiana. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. M. Cox, W. S. Cason, Joe Fennell, and M. C. Swinford, for appellant. Chester M. Jewett, for appellee.

O'REAR, J. The city of Cynthiana owns and operates for the benefit of its inhabitants a waterworks plant. Power is conferred by the statute on the city to provide water by erecting and maintaining its own waterworks, to make all necessary contracts with any person or corporation for those purposes, and to make by-laws and ordinances to carry into effect all the power granted to it. In pursuance thereof, the city adopted



the following by-laws, regulating the business of furnishing water to its inhabitants:

"Sec. 15. When water shall be supplied to one or more parties through a single tap, the bill for the whole supply furnished through such tap will be made to the owner of the estate. In case of nonpayment the water will be shut off; notwithstanding one or more parties may have paid their proportion to such owner or to any other party."

"Sec. 22. Whenever water has been turned off for the nonpayment of rent, or for purpose of repair, or construction, or for any other necessary or proper reason, no person is permitted to turn it on again who is not duly authorized so to do by the city. And when turned off for nonpayment of rent, it shall not be turned on again until the party in default shall pay all water rent due and an additional sum of \$1,200."

"Sec. 43. The city reserves the right to shut off the water without notice, if bills remain unpaid 15 days after they become due, and to charge an additional 10% of the annual rate to all consumers not making application and paying for same by the 15th of January, and the 15th of July of each year."

Appellant was a tenant in a building owned by another, there being another tenant on the second floor beside appellant, and two tenants occupying the first floor of the building. Appellant occupied a rear room in the second story as a law office. The building was supplied with water through a single tap, connected with the main upon the street. One or more of the tenants were in arrears for as much as a year in their water rates. Appellant offered to pay and did pay the rate assessed against him for the use of the water in his room. The other tenants and the landlord failing to pay the bills assessed against him, appellee cut off the supply of water from the building, and returned or offered to return to appellant the sum he had paid for the term contracted. Appellant brought this suit to recover the damages which he alleges he sustained by reason of being deprived of the water supply. Upon a trial the court peremptorily instructed the jury to find for appellee, under the foregoing facts.

The principal contention of the appellant on this appeal is that the ordinances above quoted are invalid because unreasonable. He argues that the water plant belongs to the city for the use of its inhabitants and taxpayers; that each inhabitant is entitled upon tendering the rate fixed in the schedule of published rates by the city to have supplied to him the water called for without regard to whether other occupants of the same premises which he occupies, complied with the conditions imposed by the city; that as the business of the city is to furnish water to its inhabitants, and to furnish water to all alike upon their paying for it, it would be an unreasonable and unjust regulation

to make the right of one depend upon whether another had failed to pay his, the latter's, bill. It must be born in mind that the city owns the waterworks plant, including the mains along its streets and highways. The pipes in the buildings and upon the private premises of citizens belong to the latter, and are under their control. The city would have no right to connect its watermains with the pipes upon or within private property without the consent of the owners of the latter. Appellant's landlord who owned the lot and premises partly occupied by him, had provided only a single tap for that building. In order to supply appellant, it would be necessary for the water to pass through the pipes which were also used by the other tenants, and which would have permitted them to have used the water therefrom without paying for it, or complying with the city's regulations as to payment in advance. The court is of opinion that under these circumstances it was not an unreasonable regulation for the city to require that where the building is supplied through a single tap, that all of the water that passed through that tap into that building should be paid for as a condition precedent to supplying water to any of its occupants.

This does not require one person to pay for the water furnished to another as is argued by appellant. If appellant or the owner of the property had provided by a separate tap and piping so that his room might be supplied independently of the others, then the question that he raises would be presented if the city still refused to supply him with water through that tap unless all other occupants of the same building also paid their rates. The right reserved by the city by section 43 quoted above, to shut off the water without notice if bills remained unpaid 15 days after they became due, is an additional remedy to the city to secure the collection of its water bills. It is not in conflict with the other sections quoted. Section 15 set out above, however, reserved to the city the right to cut off the water without notice when the landlord or the other tenants refused to pay any part of the rates assessed for the water passing into the building through the single tap.

It is not deemed material by the court whether the city offered to the other tenants of the building a printed or written contract or application provided in its scheme of furnishing water to the inhabitants. It is not shown that the landlord or other tenants asked for such a contract, nor does it appear that the failure to offer them such a contract otherwise than through the ordinances of the city is material to this case. The trouble is not that the city has failed to call upon the landlord or the other tenants and request them to take their part of the water, or to pay for the same, but it is that they have failed to pay for what they

have got, and are still in arrears, and that it would be impossible under the arrangement provided by the landlord in the piping of the building to supply appellant without having to give away to other occupants of the building water to which they were not entitled, whether with or without the written application.

Judgment affirmed.

GREENLEAF, Judge, et al. v. WOODS, Mayor.

(Court of Appeals of Kentucky. Sept. 20, 1906.)

1. CLERKS OF COURTS—APPOINTMENT—SALARY.

Ky. St. 1903, § 3514, provides that in cities of the fourth class the police judge shall be clerk of his own court, but that he may appoint a deputy clerk. Section 3515 provides that the board of council shall, by ordinance, fix the compensation for such police judge previous to his election or appointment. *Held*, that when a judge of a police court under such section appointed a deputy clerk, the council of the city had power, by ordinance, to fix the clerk's compensation in addition to that allowed to the judge for his services.

2. SAME—CONSTRUCTION OF STATUTE.

Ky. St. 1903, § 457, provides that a word importing the singular number only may extend and apply to several persons or things as well as to one person or thing, and vice versa; section 3514 provides that a police judge of a city of the fourth class shall be clerk of his own court, but may appoint a deputy clerk, and section 3515 declares that the council shall, by ordinance, fix the compensation of the police judge "for his services." *Held*, that the words "his services" might properly be construed to import "their services," and to authorize the council to make an allowance both to the judge and to the deputy clerk when appointed.

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by J. J. Greenleaf, judge, and others, against C. El Woods, mayor, to compel defendant to draw a warrant for the monthly salary of the clerk of the police court of the city of Richmond. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

J. J. Greenleaf, and A. R. Burnam, Jr., for appellants. T. H. Collins, for appellee.

CARROLL, C. The council of the city of Richmond—a city of the fourth class—enacted, prior to the election of Greenleaf as judge, an ordinance fixing the salary of the police judge at \$600 per year, and the salary of the clerk of the police court at \$200 per year, the salaries to be due and payable at the end of each month.

Section 3535 of the Kentucky Statutes of 1903 provides that the treasurer shall pay out money upon warrants drawn by the mayor and countersigned by the clerk of the board of council.

The appellant H. R. Tevis was appointed by J. J. Greenleaf, police judge of the city, as clerk of the police court, and when his

monthly salary became due, the appellee who was mayor of the city refused to draw a warrant for any part of it, and this action was instituted by the clerk against appellee Wood as mayor to compel him to draw his warrant for the monthly salary alleged to be due. A demurrer was sustained to the petition as amended, and the plaintiff electing to stand by his petition, the same was dismissed, and this appeal prosecuted.

Section 3514 of the Kentucky Statutes, which is a part of the charter of cities of the fourth class, provides that "the said judge shall be clerk of his own court; but it shall be lawful for him to appoint a deputy clerk who may perform all the duties of clerk of said court, who shall take the same oath of office as is required by law of a deputy clerk of a court." Section 3515, Kentucky Statutes, provides that "the fees and costs shall be taxed in cases in said court to the same extent, in the same way and under the same regulations as in courts of similar jurisdiction; but fees in all other than civil cases shall be paid into the city treasury. The board of council shall fix by ordinance the compensation for his services previous to his election or appointment." These sections of the statute direct that the judge shall be clerk of his own court, but give him the right to appoint a deputy clerk to perform the duty that the judge might discharge if he saw proper to do so. The statute does not expressly provide any compensation for a deputy clerk, if one should be appointed, nor does it make any direct provision for his payment, and it is insisted in behalf of the mayor that in the absence of legislative authority so to do, the council had no power to enact an ordinance giving to the deputy clerk \$200 per annum or any other compensation; and that if a deputy clerk is appointed by a judge, he must be paid, if at all, out of the compensation received by the judge.

Section 162 of the Constitution declares that "no county, city, town, or other municipality shall ever be authorized or permitted to pay any claim created against it, under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void." Under this constitutional provision, if the board of council made this allowance to the deputy clerk without express authority of law, the mayor of the city was fully justified in declining to draw a warrant in his favor for any part of it. The statute quoted gives the judge of the court the right to appoint a deputy clerk, and we have reached the conclusion that when the judge does appoint a deputy clerk that the council may, by ordinance, fix his compensation in addition to that allowed the judge for his services. It will not be doubted that the council had the power to fix the salary of the police judge at \$800 per year, or in such a reasonable sum as in the judgment of the council would compensate the judge for his services

as judge and clerk. The council in separate subdivisions of the ordinance fixed the salary of the judge and of the clerk. Suppose that the ordinance had provided that the police judge shall receive \$600 for his services as judge and \$200 for his services as clerk; could the validity of the ordinance be questioned? We think not, because the statute gives the council the right to fix the compensation of the judge in any reasonable sum, and in fixing his compensation the council, if it saw proper to do so, had the right to divide it into two or more amounts, specifying the service for which the compensation was allowed, and had also the power to enact that the judge should receive a designated part of the salary and any clerk appointed by him a fixed portion of it.

There is another view of this question that sustains the validity of the allowance by the council to the clerk. Section 457 of the Kentucky Statutes provides that "a word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing; and a word importing the plural number only may extend and be applied to one person or thing as well as to several persons or things." And the word "his" preceding the word "services" in the last sentence of section 3515 of the Kentucky Statutes before quoted, under the rule for the construction of statutes, and to carry out what seems to have been the intention of the Legislature, should be held to import "their services," and to authorize the council to make an allowance both to the judge and the clerk. *Henderson v. Commonwealth*, 91 S. W. 1141, 28 Ky. Law Rep. 1212. The Legislature, in authorizing the judge to appoint a clerk of his court, certainly did not intend that the clerk should not be compensated, nor did it contemplate that the clerk should be paid by the judge out of the salary received by him as judge. If the judge appointed no clerk, but performed the duties of clerk himself, the council might make him an allowance to cover his services in performing the duties of both offices; and if he appoints a clerk, the council has the same power to compensate both the judge and the clerk for their services.

As the charter of the city created the office of clerk and empowered the council to compensate him, there is express authority of law for the ordinance enacted, and therefore the mayor should have drawn the warrant in favor of the clerk for his salary.

The judgment of the lower court is reversed, with directions to proceed in conformity to this opinion.

#### THOMAS et al. v. ROBINSON et al.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

##### 1. REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE.

In an action to reform a written contract giving plaintiff a right of way over an existing passway through defendant's farm, evidence

held to show a mistake of the draftsman, whereby the contract failed to express the mutual intent of the parties that a new way should be opened from the existing passway to the boundary of defendant's farm.

##### 2. APPEAL—REVIEW—RECEPTION OF EVIDENCE.

The refusal to permit a witness to testify cannot be reviewed, where there is no showing of what he would have stated.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2905-2909.]

Appeal from Circuit Court, Boone County.  
"Not to be officially reported."

Actions by F. F. Robinson and others against Andrew J. Thomas and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

S. W. Tolin and John S. Gaunt, for appellants. D. E. Castleman, for appellees.

HOBSON, O. J. The farm of appellee Robinson was situated on Beaver Lick and Richwood turnpike, in Owen county. Back of his farm from the pike lay the farm of appellant Mary F. Thomas, and back of the Thomas farm lay a farm owned by B. W. Cleek. There was no outlet from either the Thomas or the Cleek land to the turnpike: Robinson was negotiating for the purchase of the Cleek land, and before he made the trade with Cleek proposed to Mrs. Thomas and her husband that, if they would grant him a right of way across her land to the Cleek farm, he would grant her a right of way across his own farm to the turnpike. They agreed to the proposition. He bought the Cleek farm, and the following written contract was made between them: "Article of Agreement Between F. F. Robinson and Georgia Robinson, and Andrew J. Thomas and Mary F. Thomas. It is hereby agreed by said parties that said Robinsons is to have the right of way over the present passway through the Thomas farm, and said Thomas and wife is to have a passway over said Robinson farm as follows on good ground. A. J. Thomas, Mary F. Thomas, F. F. Robinson, Georgia Robinson." As a matter of fact "the present passway" through the Thomas farm did not touch the Cleek land, and in order for Robinson to get to the Cleek land they had to open a way from that passway out to the line. Thomas and Robinson opened the way, and Robinson put in a gate where Thomas directed. Robinson used the passway from that time until this trouble arose, when, his cows having strayed from the passway on Thomas' land as they were driven through, Thomas closed up the passway and refused to allow Robinson to use it. Robinson then filed this suit to have the passway opened, charging that by a mistake of the draftsman the writing failed to express truly the contract, in that it called for a right of way over the present passway, when the agreement was that at a certain point it was to leave the existing passway and run out to the line of the Cleek land. The allegations of the

petition were denied by the answer, proof was taken, and on final hearing the court adjudged Robinson the relief sought. The defendant has appealed.

The proof leaves no doubt that there was a mistake in the drawing up of the written contract, the writer of the contract not understanding that, for a short distance, a new way was to be constructed. The mistake was in the draftsman of the contract. Both the parties understood the contract alike, as shown by their subsequent conduct, as well as by their testimony in the case. The proof discloses a state of case where there was a mutual mistake of the parties, in that the writing which they signed did not truly express the contract which both of them had in mind. It is not material that this new way is 140 feet long, and not 40 feet. It extends from the old way to the line of the Creek land. There was no material variance between the allegations of the petition and the proof. The relief granted by the court is the relief sought by the plaintiffs.

The action of the court in refusing to let Thomas testify as a witness cannot be reviewed, because there is no avowal of what he would have stated. It may be that, if he had testified, he would have stated no fact material to the case, so far as the record shows, or that his testimony would not have changed the result in any way.

Judgment affirmed.

#### COMMONWEALTH v. EVERSON.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

##### 1. WITNESSES — COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

Testimony as to private communications between a husband and wife, overheard by the witness, is admissible against the husband.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 740, 741.]

##### 2. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—MOTIVE—BURGLARY.

On a prosecution for housebreaking, it was error not to admit evidence that defendant had committed embezzlement by means of checks, which fact was shown by canceled checks in the burglarized house, as the evidence was competent on the question of motive.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 832.]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"To be officially reported."

H. J. Everson was acquitted of housebreaking, and the commonwealth appeals, Reversed.

N. B. Hays, Jos. Huffaker, Loraine Mix, O'Neal & O'Neal, and Isaac Woodson, for appellant.

**HOBSON, C. J.** H. J. Everson was indicted in the Jefferson circuit court on the charge of housebreaking. He was tried and acquitted. The commonwealth has prosecuted an appeal on certain questions of law

arising on the trial. Only so much of the facts of the case will be stated as is necessary for a proper understanding of the questions of law. Everson was in the employ of the Moran Flexible Steam Joint Company, as bookkeeper. The president and treasurer found the corporation was short of its cash, and not knowing what had become of it, decided to discharge the bookkeeper, which was done. After this, the corporation set about making an investigation of its affairs, to ascertain what had become of the money, and about this time its warehouse was broken into, its books and checks were all stolen, and it charged Everson with the breaking. There was money in the drawer. This was left, but the papers were taken, showing that the thief was not in search of money. The places where the books and papers were kept were all ransacked as though by a person who knew where everything was kept. Everson's wife boarded with Mrs. Delara. He and his wife had separated, and there was a suit pending between them. He came to see his wife the evening before the breaking. That night, after he left, his wife acted singularly. He came again to see his wife the next evening, and Mrs. Delara went to the door of the room in which they were, to hear what passed, as his wife had acted singularly the night before. She testified that, while eavesdropping there, she heard his wife ask him, "Did you do what you were going to do last night?" He said; "Yes, it is all clear." She said: "Did you get the books?" He answered: "Yes, I got the books, all but one, and I am going back after that. I left the place a total wreck. When Jenkins goes there in the morning he will think a cyclone struck the place." She said: "Did you get the money?" He said: "I wasn't out for money. There was \$17 or \$18 in the safe." C. H. Jenkins was the secretary and treasurer of the company. The house was entered by a door to which Everson had a key, and he was shown to have had a key made which unlocked a door necessary to be opened to get into this door. He claims to have had this key made to unlock a door at his home.

The court refused to admit the evidence of Mrs. Delara, on the ground that a communication between husband and wife was confidential. While neither the husband nor wife may testify as to any communication between them, the authorities, so far as we can find, are unanimous in holding that third persons may testify to communications overheard by them between husband and wife. *Bank v. Hutchinson*, 62 Kan. 9, 61 Pac. 443; *State v. Center*, 35 Vt. 379; *Allison v. Barrow*, 3 Cold (Tenn.) 414, 91 Am. Dec. 291; *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; *Commonwealth v. Griffin*, 110 Mass. 181; *Rex v. Simons*, 6 C. & P. 542. In the last case, *Alderson, B.*, said: "What a person is heard

saying to his wife, or even to himself, is evidence." The rule as to private communications between husband and wife is by all the authorities put on the same plane as private communications between attorney and client; and it has been said that if persons wish the communications they have with their attorneys to be kept secret, they should be careful not to talk in the hearing of others. 4 Wigram on Evidence, § 2339; 1 Greenleaf on Evidence, § 254. A contrary rule was not laid down in *Scott v. Commonwealth*, 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371. There the prisoner had written a letter to his wife, and the letter was obtained from her. It was held that it could not be given in evidence against the prisoner. To have allowed the letter to be given in evidence against the prisoner, under the circumstances, would have been in effect to allow her to disclose the communication which the husband had made to her. The commonwealth also offered evidence tending to show that Everson had placed to his individual credit, at the American National Bank, two checks of the Steam Joint Company, amounting to about \$600, and that these checks had not been issued by the company; that the defendant had obtained from the bank the bundle of checks containing these two checks. The court also ruled out this evidence.

The defendant could not be convicted of forging the checks, or of embezzling the money of his employer; but proof that he had embezzled the money of his employer, and that this fact was shown by the books and checks which were stolen when the warehouse was broken open, was competent evidence against him upon the question of motive. The court should have admitted the evidence, and should have instructed the jury as to the purpose for which it might be considered by them. *O'Brien v. Commonwealth*, 89 Ky. 354, 12 S. W. 471; *Bess v. Commonwealth*, 77 S. W. 349, 25 Ky. Law Rep. 1091. If the defendant had embezzled the money of his employer, and if he had cashed the checks made out to himself, which had not been given to him by the company, and the books and the papers in the office showed these facts, there would be a strong motive prompting him to destroy the evidence of his guilt; and in cases of this sort, depending upon circumstantial evidence, proof of this character, showing a motive on the part of the defendant to commit the crime, is universally held competent.

We are, therefore, of opinion that the circuit court erred in the rulings above indicated, and it is ordered to be so certified.

#### GARDNER et al. v. MOSS et al.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

#### 1. INFANTS—GUARDIAN AD LITEM—ALLOWANCE TO GUARDIAN.

The allowance to the guardian ad litem of a minor for services must be made by the

court appointing him to cover not only his services in the trial court but also those rendered on appeal.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 232-234.]

#### 2. SAME.

Where a partial allowance has been made to a guardian ad litem to cover his services in the trial court, a further allowance may be made to cover services thereafter rendered.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 232-234.]

#### 3. EXECUTORS—FEES.

Where an executor had reasonable grounds to take an appeal from a decree denying probate of the will, he was entitled to his necessary reasonable counsel fees in the Supreme Court as well as in the circuit court, and to his necessary costs on appeal, to be paid out of the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 448-456.]

Appeal from Circuit Court, Graves County.  
"To be officially reported."

Action between Sarah I. Gardner and another and Mary B. Moss and another. A judgment in favor of the latter was affirmed (91 S. W. 1148), whereupon Mrs. Gardner and others applied for an allowance of a reasonable fee to the executor for services of his attorney, and for an allowance to the guardian ad litem, etc. Overruled.

White & Ray and John M. Brummal, for appellants. Bennett, Robbins & Thomas, for appellees.

HOBSON, C. J. Appellants have entered a motion for an allowance of a reasonable fee to the executor for the services of his attorneys in this court in his effort to probate the will; also for an allowance to the guardian ad litem for his services in this court; and for a retaxation of the cost so as to include these sums, the whole to be ordered paid out of the estate.

The rule is that the allowance to the guardian ad litem must be made by the court appointing him; and that the allowance must be made by it to cover, not only his services in that court, but in this. *Cochran v. Lee*, 87 S. W. 769, 27 Ky. Law Rep. 1038. If a partial allowance has been made him to cover his services in that court, a further allowance may be made to cover his services since rendered, and if the case is off the docket, notice should be given of the application for the allowance to the parties in interest. The executor is entitled to his necessary reasonable counsel fees in this court no less than in the circuit court, and these, like his other cost on the appeal, should be paid out of the estate in his hands. He had reasonable grounds to take the appeal, as evidenced by the equal division of this court on the appeal, and is entitled to his cost in his reasonable efforts to probate the will under which he acted. But this matter, like the allowance to the guardian ad litem, should be settled first in the circuit court,

and not in this court. The taxed cost in this court, so far as it falls on the executor and curator, will be paid by him out of the estate of the decedent in his hands as such, and he will be credited therefor in his settlement. The judgment for costs has become final, and cannot now be modified; as the cost was adjudged against appellants jointly, each party appellant must bear his part of the burden; the executor's part will be paid by him out of the estate generally, and if he pays more for one of the distributees, it will be so charged in the settlement of the estate.

Appellant's motion is therefore overruled, but without prejudice to a motion in the circuit court for the relief indicated.

### TAYLOR et al. v. INDUSTRIAL MUT. DEPOSIT CO.'S RECEIVER.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

#### 1. APPEAL—FINDING OF CHANCELLOR—CONCLUSIVENESS.

The court on appeal will not disturb the chancellor's findings of fact, where the mind is left in doubt as to the truth.

#### 2. BILLS AND NOTES—CONSIDERATION.

A note executed for a specified sum, which the maker received from the payee, is not without consideration.

#### 3. MORTGAGES—FORECLOSURE—SETTLEMENT OF DEBT SECURED—EVIDENCE—SUFFICIENCY.

Evidence in an action to foreclose a mortgage given to secure a note examined, and held not to establish the defense that the note had been previously settled.

#### 4. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of evidence offered by the defeated party after the submission of the case does not warrant a reversal where the result would not have been changed if the evidence had been admitted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4033, 4190-4193.]

Appeal from Circuit Court, Owen County.  
"Not to be officially reported."

Action by the Industrial Mutual Deposit Company's Receiver against A. P. Taylor and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. G. Botts and W. A. Lee, for appellants.  
B. T. Southgate and Chas. Strother, for appellee.

HOBSON, C. J. A. P. Taylor borrowed of the Industrial Mutual Deposit Company \$3,000, for which he executed to it his note, and to secure the note, he and his wife executed to it a mortgage on three tracts of land in Owen county. Afterwards, by orders properly entered in the Fayette circuit court, B. T. Southgate was appointed receiver for the company, and, as such, filed this suit against Taylor and wife to recover on the note and foreclose the mortgage. Taylor answered, pleading that the note was without consideration. He also pleaded that while the company was doing business as

such, he was the owner and holder of coupons issued by it, upon which he had paid it sums aggregating \$74,500, which amount the company owed him. That he also owned an interest in the reserve fund of the corporation, amounting to several thousand dollars. That about February 19, 1902, the company desired him to surrender the coupons and the interest in the reserve fund which he held, and to take out certificates, or coupons, in a corporation known as the Germania Guaranty Company, of Covington, Ky., and to execute to that company a promissory note for the sum of \$11,000. That it agreed with him that if he would do this, it would release all of the indebtedness claimed by it against him, including the note sued on, and release the mortgage securing it. That he accepted the proposition, and executed his note for \$11,000 to the Germania Guaranty Company, and assigned to that company all his interest in the coupons, together with all his right to the assets of the Industrial Mutual Deposit Company, and all rights which had accrued, or might thereafter accrue, to him under his contract with that company; and in consideration of this, that company released and discharged all of the debts which it held against him, and surrendered to him all the evidence of the debts, including the note sued on. The allegations of the answer were denied by a reply. Proof was taken, and on final hearing the court gave judgment in favor of the plaintiff. The defendant appeals.

Only a question of fact arises on the appeal. Our rule is to give some weight to the finding of the chancellor on a question of fact, and not to disturb his finding of fact where the mind is left in doubt as to the truth. The proof leaves no doubt that the note was executed for \$3,000, which Taylor received from the company; it was not, therefore, without consideration. As to the other defense relied on—that the note had been settled—the statements of the answer are sustained by the deposition of Taylor, who was the president of the Industrial Mutual Deposit Company, and also by the deposition of J. H. Baker, who was one of his associates in the management of that company. On the other hand, this version of the matter was not given by Taylor in a sworn response which he filed in the Fayette circuit court, when the receiver was attempting to get possession of this note from William Curran, who then held it, and who, as an officer of the Industrial Mutual Deposit Company, was the proper person to have possession of notes which had been given it for money loaned out of the reserve fund, as was this \$3,000. If the defense now relied on had been presented as a defense to that rule, and had been shown to be true, it would have been a complete defense to it. The fact that this defense was not then made, and that a different claim was set up, when the facts were fresh in the minds of the

parties, is not without great weight. In addition to all this, Taylor does not appear well in the record; his course is not such as to commend his defense. The guaranty company has failed, and the facts shown would indicate that the whole transaction with that company was had after process had been served upon Taylor, as president of the Industrial Mutual Deposit Company, in the suit by a creditor to obtain the appointment of a receiver, and when he knew the company was not solvent. The effect of the transaction was to release a mortgage on his land, and to substitute for it, the obligation of a company which soon proved to be insolvent, and which is not shown then to have had any assets. Even if the arrangement had been made as now alleged, it would seem that the court would be forced to declare it void as against the creditors of the Industrial Mutual Deposit Company, upon the facts shown in the record.

If the new evidence which was offered by Taylor after the submission of the case, had been admitted, it would not have changed the result.

Judgment affirmed.

#### STINSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

##### 1. WITNESSES — IMPEACHMENT — CONTRADICTORY STATEMENTS—LAYING FOUNDATION FOR ADMISSION.

Where a witness in a prosecution for homicide, when asked whether he had subscribed and sworn to "that affidavit" containing statements contradictory to his testimony at the trial, answered affirmatively, it was proper to permit him to be examined as to its contents by counsel who had the affidavit in his possession, and then to permit the affidavit to be read to the jury, especially where the court instructed that the affidavit should be considered only in determining what weight should be given to testimony of the witness.

##### 2. CRIMINAL LAW—APPEAL—PRESENTATION OF QUESTIONS IN LOWER COURT—MOTION FOR NEW TRIAL.

Where the rulings of the trial court as to the comments of the commonwealth's attorney in a prosecution for homicide were not set up and relied on in the grounds and motion for a new trial, they cannot be considered on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2681.]

##### 3. SAME — OBJECTIONS — RULING BY TRIAL JUDGE.

Where there was no ruling by the trial judge on objections to misconduct of assistant counsel for the prosecution on trial for homicide, and no request for such ruling, the matter will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2666.]

Appeal from Circuit Court, Todd County.  
"Not to be officially reported."

R. B. Stinson was convicted of voluntary manslaughter, and appeals. Affirmed.

Petrie & Standard, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

SETTLE, J. Appellant was tried in the Todd circuit court under an indictment charging him with the murder of William Boule. The jury found him not guilty of murder, as charged, but of voluntary manslaughter, and fixed his punishment at confinement in the penitentiary for 15 years. He asks of this court a reversal of that judgment.

The facts of the killing were, in substance, as follows: Appellant, with three others, John Duncan, Doc Welborn, and William Boule, were engaged in a game of cards. During the progress of the game, \$1 of the money for which they were playing disappeared from a coat where the whole of the money had been placed. Boule accused appellant of taking or stealing the dollar, the latter denied it, whereupon the charge was repeated by Boule, who in addition called appellant "a durn liar." By this time the parties had arisen from their seats and were confronting each other; appellant at the time having his pistol in his hand and asking that he be searched by some of the party in order that it might be ascertained whether he had the missing dollar. While thus situated appellant threatened to shoot Boule if he repeated the charge of his having taken the money. Boule laid his hand upon Stinson's breast, making at the time a remark which was not fully understood by the persons present. Appellant then shot him three times with a pistol, and Boule shortly thereafter died from the wounds thus inflicted. Appellant claimed to have done the shooting in his necessary self-defense, and testified upon the trial that Boule, before he was shot, caught him by the throat with one hand and placed the other in his pocket as if for the purpose of drawing a pistol or other weapon, which conduct on his part induced appellant to shoot him, in the belief that it was necessary to do so to protect himself from death or great bodily harm at the hands of Boule. Appellant's testimony as to what occurred at the time of the killing was in large measure supported by that of W. W. Johnson, who was present at the time, though not a participant in the game of cards, and also to some extent by that of Doc Welborn. On the other hand, John Duncan, who was introduced as a witness for the commonwealth, testified, in substance, that, though Boule accused appellant of taking the dollar, he did not seize him by the throat, or otherwise assault him; that after appellant denied the first charge made by Boule that he had taken the dollar, Boule said to him, "You are a durn liar," and appellant then grabbed Boule's right wrist with his left hand and presenting a pistol said to Boule, "I will shoot the G—d d—n hell out of you if you call me a liar," and immediately thereafter the shooting occurred. Seeing that appellant was about to shoot Boule, Duncan and Welborn left the

scene of the shooting and did not stop until they reached a place of safety, a short distance away. Duncan further testified that he saw no weapon in Boule's hand, or upon his person, nor did the latter attempt to draw a weapon of any kind. It is evident that Boule had no pistol on his person at the time of the difficulty, for a search of his clothing, made immediately after the shooting, disclosed the fact that he had no weapon except a small knife, found in one of his pockets.

While numerous errors were assigned in appellant's motion and grounds for a new trial, his counsel urge but three of these in asking a reversal of the judgment of conviction, viz.: That the lower court erred in permitting to be read to the jury, for the purpose of discrediting the witness Johnson, an affidavit made by him shortly after Boule's death, purporting to contain a statement of the facts of the homicide, and also erred in allowing the commonwealth's attorney, on the cross-examination of the witness Johnson, to make improper comments in the presence of the jury upon the statements of Johnson contained in the affidavit in question. Finally, that the court further erred in permitting counsel employed to assist in the prosecution to argue before the jury that the statements in the affidavit of Johnson might be considered by them as substantive evidence. It is insisted for appellant that it was improper to allow the affidavit of Johnson to be read to the jury after he had testified, and that no foundation had been laid for its admission by reading it to the witness, or permitting him to see and identify it when he was on the witness stand, before asking him if he had made the statements it contained as to the killing of Boule. In support of their contention on this point, counsel cite the case of *Hendrickson v. Commonwealth*, 64 S. W. 954, 23 Ky. Law Rep. 1191, in which this court, in passing on the question of the right of the commonwealth to impeach a witness by the introduction of an affidavit previously made by her, said: "The proper way to introduce the evidence was to present the affidavit to the witness, and prove by her that that was the paper she signed, and then read it to the jury. It was not proper to ask her if the paper did not contain such and such statements, as the paper was the best evidence of its contents. \* \* \*" 1 Greenleaf, Evidence, § 463. We adhere to the above rule as to the manner of introducing as evidence, for the purpose of contradicting or impeaching a witness, a writing executed by him, and which is competent for such purpose; but we do not understand that the manner in which the affidavit of Johnson was gotten before the jury in this case was a substantial departure from that rule. In fact it was not.

The record does not, it is true, show that the affidavit of Johnson was read by him before it was admitted as evidence by read-

ing it to the jury; but it is reasonably apparent from the record that it was read to him, and equally apparent that it was in the hands of counsel by whom he was questioned as to its contents, at the time he was questioned. He admitted he signed and swore to the affidavit and must have seen the paper when this admission was made, for he was asked by counsel if he did not subscribe and swear to "that affidavit." The question was obviously attended by the exhibition to him of the paper, and his inspection of it, followed by his identification of the instrument, all of which is inferentially shown by his affirmative answer to the question. The fact that the entire paper was made known, if not connectedly read, to him upon the cross-examination, is demonstrated by a comparison of the matter contained in the questions asked him as to its contents and the language of the affidavit as a whole—that instrument being copied in the record in full—and the further fact that the record shows, after several of the questions as to the contents of the affidavit had been propounded, the witness was further asked: "Didn't you make that statement I have just read in that affidavit?" Manifestly the questions were but quotations from the affidavit. The circumstances under which the affidavit was made were fully brought out. It was written shortly after the death of Boule, at Johnson's dictation, and voluntarily signed and sworn to by him after it was read in his hearing. His purpose in making it was to furnish to an insurance company, which had insured Boule's life, proof of the manner of his death, in order that his family might obtain the amount of the insurance due them on the policy issued him. Though many of the statements of the affidavit were denied by Johnson on the trial, it is evident, from the testimony of those present at the time it was executed, that he understood its contents and voluntarily swore to the paper. In view of all the facts presented by the record, we are of opinion that in allowing Johnson to be questioned as to the contents of the affidavit, and in permitting the reading of the affidavit to the jury, no error was committed by the court to the prejudice of the substantial rights of appellant, and the instruction given the jury as to the effect of this evidence enabled them to fully understand the sole purpose of its admission. The instruction was as follows: "The court instructs the jury that the affidavit of W. W. Johnson, read in evidence to them, should not be taken by the jury to prove anything that the defendant or the deceased did or said, but should only be considered by the jury in determining what weight, if any, they will give to the testimony of the said Johnson."

We discovered from the record that the ruling of the court as to the comments of the commonwealth's attorney, upon the statements contained in the affidavit of Johnson,



and the effect thereof, made while Johnson was testifying, was not set up or relied on in the grounds and motion for a new trial. Consequently we cannot consider the matter. As to the misconduct of assistant counsel in argument to the jury, we also discover that, although his alleged improper statements seem to have been objected to at the time by counsel for appellant, the record fails to show that the trial judge ruled upon the objection, or that he was requested to do so, for which reason we are not permitted to consider that matter. Though the evidence in this case was quite conflicting, as some of it conduced to prove appellant guilty of the crime of which he was convicted, it is not our province to pass upon its weight or sufficiency, and being of opinion that the jury were properly instructed, and that appellant had a fair and impartial trial, we cannot interfere with the finding of the jury. Wherefore the judgment is affirmed.

#### HEAD v. PRYOR & BUTTON.

(Court of Appeals of Kentucky. Sept. 19, 1906.)

##### USE AND OCCUPATION—IMPLIED CONTRACT.

Where plaintiff continued to occupy a portion of defendants' building for storage purposes after notice that, so long as plaintiff permitted his property to remain in the building, defendants would not pay rent for other property leased from defendant, plaintiff became liable, in the absence of an express contract, to pay the reasonable value of the space so occupied after such notice.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Use and Occupation, §§ 1-11.]

Appeal from Circuit Court, Oldham County.

"Not to be officially reported."

Action by P. S. Head against Pryor & Button. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded, with directions.

D. H. French and Carroll & Yager, for appellant. J. S. and C. H. Morris, for appellee Pryor. A. T. Ladd, for appellee Button.

NUNN, J. The appellees were the owners of a large three-story building in which a woollen mill had been operated. The machinery which had been used in the operation of the mill was owned by appellant, and was permitted to remain in this building from January, 1891, to June, 1894, when a part of the machinery was moved and the remainder was burned with the building on the 16th day of November, 1894. Appellant owned a coalyard and office adjacent to the building of appellees, which he rented to them for \$6.50 per month. He also held a note for \$798, which was a lien on their lot and building. This action was instituted by appellant to enforce this lien, and collect his rent claim. Appellees answered, admitting the note, and alleged that the greater part had been paid by lumber sold

and delivered to the appellant. They also denied any indebtedness to appellant on account of rent, claiming that the storage of his machinery in their building for the time mentioned was worth more than the rent claimed by him. Appellant admitted the storage of his machinery in their building, but denied any liability thereon, averring that he never had any contract or agreement to pay them anything therefor. The issues were completed, the proof heard, and the court set off the claim of appellees for storage of machinery against appellant's rent claim, and gave appellant judgment on his note subject to the credits claimed by appellees for lumber furnished him.

The appellant contends that the court erred in allowing appellees their storage claim, also in allowing them credit for one item of their lumber account, to wit, \$50.63, three times, first, that appellees received a credit for it on the settlement of another note, which they owed appellant; second, they received a credit for it in the item of \$77.20 credited in the judgment; third, by a specific credit of it in the judgment. We have explained the evidence and find that appellant failed to sustain his claim that the item of \$50.63 for lumber was credited on the settlement of the old note, but we are convinced that the item of credit in the judgment, to wit, \$77.20, included the item of \$50.63; and the court erred in also giving a special credit to that sum. It also appears that the credit of \$77.20 should have been \$97.20. The error against the appellant amounts to \$30.63. The appellant, in effect, concedes that his machinery stored in the building of appellees filled the third and a considerable part of the second story and shedroom adjoining the first floor, and did not controvert the proof of appellees that the use of appellees' building for the storage of his property was worth as much or more than the rent of the coalyard and office belonging to appellant, but based his defense upon the proposition that he had never contracted or agreed to pay appellees anything for the storage of his property.

It is true that there was no proof introduced showing an express contract or agreement on the part of appellant to pay for this storage of his property, but the appellee Button and his son testified that often they needed the use of the space occupied by appellant's property to store appellee's lumber, and frequently informed appellant that, so long as he permitted his property to remain in the building, they would not pay him any rent for the use of his coalyard and office; that the use of appellees' rooms for such storage was worth more than the rent of the yard and office; that in each instance the appellant would answer that he would take his machinery out of the building in a few days or as soon as he could. The appellant states that no such conversation occurred or that he had no

recollection of such statements or conversations. It appears to us that it would be inequitable to require appellees to pay rent for property when appellant had the use of their property at the same time, which was of equal or greater value than his, especially after he had notice that they needed the space occupied by his machinery. In such case, in the absence of an express agreement, the law would imply a promise to pay a reasonable price for the use of the space after such notice. In our opinion the court did not err in setting off the one claim for rent against the other. The appellees concede another error of \$15.91, a mistake made in drawing the judgment. This added to the amount of the error above, \$30.63, makes \$46.54 total error committed against the appellant.

For this reason, the judgment is reversed and remanded, with direction to enter a judgment in accordance with this opinion.

### COMMONWEALTH v. AMERICAN TOBACCO CO.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

#### 1. TAXATION—ASSESSMENT—JURISDICTION OF COURTS.

That assessing officers assessed property too low, is no ground for relief by the courts in a proceeding by the state to assess omitted property, their supervisory jurisdiction being limited to cases of omission to list property at all.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 766, 769, 831-834.]

#### 2. EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—ASSESSMENT LISTS.

In a proceeding by the commonwealth to assess omitted property, where the assessment lists are silent as to the property to which they refer, parol proof may be heard to show what property was intended.

Appeal from Circuit Court, Daviess County.  
"Not to be officially reported."

Proceedings by the commonwealth against the American Tobacco Company to assess omitted property for taxation. From a judgment dismissing the proceeding, the commonwealth appeals. Affirmed.

J. R. Hays and E. H. Brown, for the Commonwealth. J. D. Atchison, for appellee.

HOBSON, C. J. Appellant instituted this proceeding against appellee in the Daviess county court to assess against it as omitted property tobacco of value \$800,000 for each of the years 1900, 1901, 1902, 1903, and 1904. The county court dismissed the proceeding, an appeal was taken to the circuit court where the judgment of the county court was concurred in, and from this judgment the appeal before us is prosecuted.

It appears from the proof that the appellee had tobacco in Daviess county subject to assessment as follows:

1900.....	5,391	hogsheads
1901.....	4,077	"
1902.....	5,782	"
1903.....	6,036	"
1904.....	8,666	"

It also appears that it listed this tobacco for taxation in its return to the assessor as follows:

1900.....	Miscellany.....	\$107,830
1901.....	Value of Tobacco.....	101,925
1902.....	" " "	125,400
1903.....	" " "	150,900
1904.....	" " "	163,320

The proof for the appellant heard on the trial tended to show that the tobacco was in fact of value as follows:

1900.....	\$300,000
1901.....	200,000
1902.....	300,000
1903.....	300,000
1904.....	500,000

The proof for appellee tended to show that the value of the tobacco was approximately what it was listed at. The county court and the circuit court both held that the property had been listed for taxation, that nothing had been omitted, and if an error had been made in valuing it, this error could not be corrected in a proceeding to list omitted property. It has often been held that the fact that assessing officers assess property too low is no ground for relief in a proceeding such as this, as the court has no supervisory jurisdiction on assessments which have been examined and approved by the boards provided by law. *Muir v. Com.*, 14 Ky. Law Rep. 478; *Com. v. Coffee*, 12 Ky. Law Rep. 717. It is only where the question is not one of valuation, but of omission to list at all, that the court may take jurisdiction in a case like this. *Butler v. Watkins*, 27 S. W. 995, 16 Ky. Law Rep. 305; *Coulter v. Bridge Co.*, 114 Ky. 42, 70 S. W. 29; *Chicago, etc., R. R. Co. v. Com.*, 115 Ky. 278, 72 S. W. 1119; *Citizens' Nat. Bank v. Com.*, 80 S. W. 479, 25 Ky. Law Rep. 2254. The case of *Bell v. Lexington*, 85 S. W. 1081, 27 Ky. Law Rep. 591, rests on the ground that there the property had been omitted. The law presumes the officer did his duty. The burden is on those complaining to show that the taxpayer omitted property subject to assessment. We must give some force to the finding of the county court which has been approved by the circuit court; and on the whole record we have reached the conclusion that we should not disturb the judgment on the facts that no property was omitted from assessment. If, in the lists, appellee had specified the number of hogsheads in giving the value of the tobacco listed, there would be no doubt about this. But where a writing is silent as to the property to which it refers, parol proof may be heard to show what property was intended. Judgment affirmed.

# ILLINOIS CENT. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

## NUISANCE—PUBLIC NUISANCE—CRIMINAL RESPONSIBILITY—OBSTRUCTING A STREET—EVIDENCE—SUFFICIENCY.

A railway company maintained and operated night and day, for about five months, a stationary engine, located either on a part of the street or on lands owned and controlled by an abutting owner near the street. Horses driven on the street were frightened by the noise and steam of the engine. The abutting landowner had not given the company any right to maintain the engine on the abutting land. *Held* to support a verdict of conviction for maintaining a public nuisance.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisances, §§ 143-149.]

Appeal from Circuit Court, Grayson County.

"Not to be officially reported."

The Illinois Central Railroad Company was convicted of a nuisance, and it appeals. Affirmed.

Trabue, Doolan & Cox, J. S. Wortham and J. M. Dickinson, for appellant. J. R. Layman, N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

**CARROLL, C.** The appellant was indicted for maintaining a common public nuisance by unlawfully, willfully, knowingly, continuously, and for a long and unnecessary and unreasonable length of time, suffering and permitting, maintaining and operating a stationary engine in the highway or the street of Spring Lick, an incorporated town of the sixth class, and for piling coal in the street, thereby obstructing, hindering, and delaying the people in the use of said street and frightening their horses.

It appears from the evidence that about November, 1904, the appellant, for the purpose of obtaining a temporary supply of water, erected a water tank on the bank of Caney creek and an engine nearby that was used in pumping water from the creek into the tank. This engine was operated night and day for probably five months. The street or road at the point where the engine was situated runs along the bank of the creek. The record does not show with certainty when the road or street was opened or its exact width. This omission may be accounted for by the fact that the courthouse containing all the county records was destroyed by the fire some 8 or 10 years ago. There is, however, no question that at this point there was a public thoroughfare. Whether the engine of appellant was located in the line of the road or immediately on the side of it, the evidence leaves us in some doubt; but the court instructed the jury that they could not find the appellant guilty unless they believed from the evidence beyond a reasonable doubt that the engine was located in or upon the road, or, if not in or on the road, that its location near the road would not of itself constitute a nuisance un-

less they believed from the evidence that it became a nuisance in the obstruction of travel by reason of the continuous and unreasonable use thereof. There was also evidence tending to show that appellant piled coal, that it used in connection with the engine, in and upon the road and permitted it to remain there for a considerable length of time, and the question as to whether or not this was a nuisance was also submitted by appropriate instructions to the jury. Whether the engine was situated directly in the road or immediately by the side of it, there is ample evidence in the record showing that horses driven and ridden by were badly frightened by the noise and steam of the engine. It is also plain that the engine was not situated on land owned, leased, or controlled by appellant. The land upon which the engine was located was either a part of the street or was owned by Wallace, an adjoining landowner. So that it is not necessary to determine in this case whether or not it is a nuisance for a person to erect on premises owned or controlled by him adjacent to a public highway machinery or other objects calculated to frighten horses passing on the highway. It is, however, actionable nuisance for a person to erect on land not owned or controlled by him, on which he has no legal right to enter, immediately adjacent to a traveled highway, machinery or objects that are calculated to, and that do, frighten horses. *Roberson on Criminal Law*, vol. 12, § 634; *Wood on Nuisance*, p. 74. Wherefore the instruction that if the jury believed from the evidence that the engine was not located in or on the road, but so near the highway as to frighten horses, was, under the facts of this case, entirely proper, as, if the engine was not in the street, it was immediately by the side of it.

We do not find in the record any error authorizing us to reverse the judgment of the lower court, and it is affirmed.

# ILLINOIS CENT. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

## 1. NUISANCE—PUBLIC NUISANCE—INDICTMENT—SUFFICIENCY.

An indictment for a nuisance, created by a railroad company suffering water to flow from a water tank onto a street and there become ice, which alleges that the ice was an obstruction "in and on the street of S., a town of the sixth class," shows that the town was incorporated, as the statute divides all towns and cities into classes, and all towns and cities in the same class are governed by the general law applicable to that class.

## 2. SAME.

An indictment for a nuisance, created by a railroad company suffering water to flow from a water tank onto a street and there become ice, which alleges that it unlawfully, unreasonably, unnecessarily maintained and suffered the nuisance to continue, sufficiently alleges that the ice was permitted to remain in the street for an unreasonable period.

### 3. SAME.

An indictment for a nuisance, created by a railroad obstructing a street by suffering water to flow thereon and form ice, which alleges that the ice obstructed those using the street, and prevented their free passage thereon, to the common nuisance of all citizens of the state, is not insufficient for failing to charge that the obstruction was to the common nuisance of all persons passing and repassing, and having the right to pass and repass.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 209.]

### 4. MUNICIPAL CORPORATIONS—OBSTRUCTION OF STREETS—CREATION OF NUISANCE—EVIDENCE—SUFFICIENCY.

A railway erected a tank on the side of a street. During cold weather water leaked from the tank and formed a cake of ice extending entirely across the street. The ice was several feet in width and sloped from a depth of three or four feet at the tank to five or six inches on the opposite side of the street. The ice was permitted to remain on the street for at least three days, during which time it was an obstruction to public travel. *Held*, that the obstruction was a nuisance, for which the railway was criminally liable.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Municipal Corporations, § 1493.]

### 5. SAME—PUNISHMENT—EXCESSIVE FINE.

A fine of \$200, imposed by the jury on the railroad for maintaining such a nuisance, is not excessive.

### 6. SAME—INSTRUCTIONS.

On a trial charging a railway company for maintaining a nuisance, occasioned by it obstructing a street, in consequence of permitting water to escape from a water tank and flowing on the street, there becoming ice, an instruction that the company was not guilty unless it willfully, knowingly, and unreasonably suffered water to escape from its tank and freeze on the street, in such quantities as to obstruct the street and interfere with travel, and permitted the same to remain on the street for an unreasonable length of time, properly presented the issues to the jury.

### 7. CRIMINAL LAW—VERDICT—CONCLUSIVENESS.

The court on appeal is not authorized to reverse a judgment in a criminal case where there is any evidence to sustain it.

Appeal from Circuit Court, Grayson County.

"Not to be officially reported."

The Illinois Central Railroad Company was convicted for maintaining a nuisance, and it appeals. Affirmed.

Trabue, Doolan & Cox, J. S. Wortham, and J. M. Dickinson, for appellant. J. R. Layman, N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

CARROLL, C. The appellant prosecutes this appeal from a judgment imposing a fine of \$200 upon it for an alleged nuisance committed by operating a large stationary water tank near the street of the town of Spring Lick and suffering water to escape therefrom and flow upon the street and there freeze and become dangerous to persons traveling the street.

Several errors are relied upon for reversal, and we will notice them in the order in which they have been presented in the brief of counsel.

It is urged that the indictment is defective because it failed to allege that Spring Lick was an incorporated town, and insists that it was entitled to know from the indictment whether the offense was committed within the town by obstructing one of the streets or without the town by obstructing the public road which was a continuation of the street. We think, however, that the allegation of the indictment that the obstruction was "in and on the street of Spring Lick, a town of the sixth class," was a sufficient averment to show that Spring Lick was an incorporated town. The statute has divided all of the towns and cities of the state into classes, and all the towns and cities in the same class are governed by the general laws applicable to the class in which the town or city is situated. There are no special or local acts of incorporation, and an averment that a city or town belongs to a designated class is a sufficient averment that it is an incorporated town.

It is also argued that the indictment fails to allege that the ice was permitted or suffered to remain in the highway for an unreasonable or unnecessary period of time. The indictment charges that appellant "did unlawfully, willfully, knowingly, unreasonably, unnecessarily, and for a long period of time, operate, maintain, and suffer" the nuisance to continue. So that this contention is not well founded.

It is further said that the indictment fails to charge that this obstruction was to the common nuisance of all persons passing and repassing and having the right to pass and repass. It is alleged in the indictment that the obstruction "did thereby hinder, delay, and obstruct those using said road and prevent their free passage thereon, and to the common nuisance of all good citizens of Kentucky," and comes up in this respect to the rule announced by this court in *Commonwealth v. Enright*, 98 Ky. 635, 33 S. W. 1111. In that case objection was made to the indictment because it did not contain the words "to the common nuisance of all good citizens of the commonwealth residing in the neighborhood or passing by" or other words of similar import, and the court held that as the acts stated in the indictment in themselves constituted a nuisance, and they were set out in the manner and with the degree of certainty required by the Code, that the omission of the words quoted did not render the indictment defective. In other words, where the thing complained of is a nuisance per se, it is not essential that the indictment shall conclude "to the common nuisance of all good citizens of the commonwealth"; but, as ruled in *Commonwealth v. T. J. Megibben Co.*, 101 Ky. 195, 40 S. W. 694, where the nuisance complained of grows out of the negligence and unlawful conduct of a lawful occupation or business that is not in and of itself a nuisance, then it is necessary that "there should either be a conclusion 'to the common nuisance of all persons there living

and abiding' or, 'all persons passing and re-passing and having the right to pass,' or else that the indictment itself should have shown proximity to human habitation or highways, and the use of the streams which would be damaged by their pollution." To obstruct a public road or street in the manner described in the indictment in this prosecution is a nuisance per se. Cincinnati R. Co. v. Commonwealth, 80 Ky. 137. It seems that at the time of the nuisance complained of the town of Spring Lick had neither officers nor ordinances.

The evidence shows that appellant erected a large water tank on the side of a street and that during the cold weather in January, 1905, the water leaked from or ran over the tank and formed a large cake of ice that extended entirely across the street, being several feet in width, and sloping from a depth of three or four feet at the tank to five or six inches on the opposite side of the street, and that this large cake of ice was permitted to remain on the street for at least three days, during which time it was an obstruction to public travel on the street. It cannot be doubted that this obstruction of the street was a nuisance for which the appellant was liable in damages under this indictment. The amount of the fine imposed by the jury trying the case is perhaps larger than the facts warranted, but we are not prepared to say that it is so excessive or unreasonable as to authorize us to reverse the judgment for this cause. Under the law the jury are authorized to impose any fine in their discretion; and whilst this court would not hesitate to interfere if the fine imposed was so large as to appear at first blush to have been the result of prejudice or passion on the part of the jury, we cannot say under the facts of this case that a fine of \$200 for the obstruction of a much-traveled street in a town indicates that the jury were influenced in fixing the fine by either passion or prejudice. The company in the construction or operation of its tank was clearly guilty of negligence in permitting the water to escape therefrom in such quantities as to permit this large cake of ice to form across the highway.

The instructions informed the jury that they could not find the defendant guilty unless they believed that the appellant willfully, knowingly, and unreasonably suffered and permitted the water to escape from its tank and freeze upon the street in such quantities as to obstruct the street and interfere with travel thereon, nor unless it permitted same to be and remain in and on the street for an unreasonable length of time. These instructions presented fairly to the jury the only issue in the case. This court, as has been frequently held, is not authorized to reverse a judgment in a criminal case when there is any evidence to sustain it.

We do not find in the record any errors prejudicial to the substantial rights of the appellant, and the judgment is affirmed.

## OVERTON et al. v. OVERTON et al.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

### 1. BASTARDS—CAPACITY TO INHERIT.

Under Gen. St. c. 31, § 5, providing that a bastard shall be capable of inheriting and transmitting any inheritance on the part of, or to the mother, and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock, a bastard may not inherit from his legitimate half-brother, their mother having predeceased him.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, §§ 250-255.]

### 2. PARTIES—ONE SUING ON BEHALF OF ALL INTERESTED.

Under Civ. Code Prac. § 25, providing that if the question involve a common interest of many, one may sue for the benefit of all, the one suing having no interest may not prosecute the action for others interested, but not named as parties, though the action purports to be on behalf of the one suing and all others interested.

### 3. QUIETING TITLE—CLOUDS—EVIDENCE OF HEIRSHIP.

Evidence in an action to remove a cloud on title held to show that the patentee of land, title from whom, through a deed from his son, executed after his death, was claimed by defendants, left no child surviving him.

### 4. WILLS—PROBATE—EFFECT OF JUDGMENT ON APPEAL.

The judgment of the circuit court on appeal under Ky. St. 1903, § 4850, from the judgment of a county court, admitting to probate, under section 4854, a will devising real estate in the state, and probated in the chancery court of H. county in another state, which adjudges that the decree of the H. chancery court offered as a supplied last will, has neither been proven nor probated, so as to be a valid will of real estate, and that, therefore, the probate of the alleged last will by the county court be, and the same is, set aside and held for naught, leaves the will as if it had not been probated in the county court, so that title to land in the state cannot be claimed under it.

### 5. ADVERSE POSSESSION—CONTINUITY.

There is not such continuity as will give title by adverse possession where persons live on and cultivate, at different times and for short periods only, small portions of the land.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 226-231.]

### 6. SAME—PAYING TAXES.

The mere payment of taxes will not give title by adverse possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 504-516.]

Appeal from Circuit Court, Harlan County.  
"To be officially reported."

Action by John T. Overton and others against Joseph Overton and others, to remove cloud on title. Judgment for plaintiffs. Defendants appeal. Reversed with directions.

H. C. Clay, Isham G. Leabow, and H. F. Coleman, for appellants. W. F. Hall and Greene & Van Winkle, for appellees.

CARROLL, C. This action involves the title to 4,000 acres of land in Harlan county. The controversy between appellants and appellees concerning its ownership, grows out of the following state of facts: In 1845

there was issued to John Taylor a patent for this land, and in 1874 he died in the state of Tennessee, the owner of the land. During the period of his ownership, the land was considered of trifling value, and it does not appear that any person was in actual possession of it, or exercised any particular acts of ownership over it, but in 1888, Joe Overton, one of the appellants, for the recited consideration of \$1,050 in cash, procured one, William Taylor, to make him a deed to this land. This deed was recorded in Harlan county soon after its execution, and shortly thereafter Overton undertook to place tenants in possession of the land and paid taxes on it from the time of his purchase until the institution of this action. The deed to Overton does not state what relation, if any, the grantor, William Taylor, was to John Taylor, the patentee, nor does it disclose how or under what claim of title the grantor was the owner of the land; but it is the contention of Overton that William Taylor was the only child and heir at law of John Taylor, the patentee, and that upon the death of John Taylor, William Taylor, as his heir, inherited this tract of land, and, therefore, had the right to convey it to him. In 1897, Elizabeth Berry, brought a suit in the chancery court of Hancock county, Tenn.—the county in which John Taylor died—setting up that about 1872 he made a will devising all of his property, including his lands in Kentucky, to her; that the will was duly executed and was placed in the hands of N. B. Overton, for the purpose of preserving it until the death of the testator, when it was to be probated; that the will had never been probated, and was either lost or destroyed; that she learned that a William Taylor was asserting title to the land as the son of John Taylor; and she prayed that the court establish the will of John Taylor and certify the same to the county court of Hancock county, Tenn., for probate, and asked for a warning order against William Taylor, whose residence was alleged to be unknown, as well as against any other heirs of John Taylor. In due time an order was made in the chancery court, under the Tennessee practice, taking for confessed the allegations of the petition; but soon afterwards Joseph Overton filed his petition in the case, averring that he was the owner of the land by virtue of his purchase of it from William Taylor, in 1888, and he asked that the judgment by default be set aside, and he be allowed to file his answer and assert his title to the land in Kentucky. This was permitted by the court, and his answer filed, denying that any will was made, or that if one was made, Taylor was incompetent at the time of its execution. He set up his purchase of the land from Taylor, averred that he had been in possession of it under his purchase from the date thereof, and asked that the petition of Elizabeth Berry be dismissed. The depo-

sitions of several witnesses were taken in this proceeding, and in October, 1897, an agreed judgment was entered in the action, establishing as the will of John Taylor a paper devising to Elizabeth Berry all of his estate. When this agreed judgment was entered, Overton, Mrs. Berry and her attorneys, executed to each other deeds, under which there was conveyed to Overton about two-thirds of this land, and to Mrs. Berry and her attorneys, the remainder of it. These deeds were put to record in Harlan county, and a copy of the will, established by the chancery court of Tennessee, and admitted to probate in the county court of that county, was presented for probate before the county judge of Harlan county, and in February, 1898, an order was made by the Harlan county court setting out, in substance, that the paper offered for probate as the last will of John Taylor, was duly and properly certified and proven to have been executed in such a way as to be a valid will of lands in this commonwealth, and the copy was admitted to probate, and ordered to be recorded as a valid will of real estate in this commonwealth. In June, 1900, the appellees in this appeal in behalf of themselves and the other heirs at law of John Taylor, appealed to the Harlan circuit court from the order of the county court, admitting to probate the paper offered as the last will of John Taylor. In the written statement filed by them, they charge that John Taylor died intestate; that he did not leave any child or children, or any direct descendants; that the appellants were his heirs at law, as the descendants of his brothers and sisters and his half-brothers and half-sister, and they asked to be allowed to contest the will for themselves and on behalf of all the heirs of John Taylor. To this appeal the devisee, Elizabeth Berry, entered her appearance and filed her answer, in which she charged that James Overton, John Overton, and Rebecca Overton, whom appellants claim were the half-brothers and half-sister of John Taylor, were not related to him in any legitimate degree, that if they were of kin to him at all, their father, while living with his wife, engaged in illicit intercourse with John Taylor's mother, and as a result of their cohabitation John Taylor was begotten and born out of lawful wedlock. To this answer the appellants filed a reply, reiterating the statement that John Taylor died intestate, leaving no children; that his mother, after the death of his father, gave birth to three illegitimate children—James Overton, John Overton, and Rebecca Overton; and that appellants were the descendants of these Overton children. They also alleged that the will controversy in Tennessee between Elizabeth Berry and Joseph Overton was a fraudulent scheme concocted between them, for the purpose of establishing a paper as the last will of John Taylor, to deprive his rightful heirs of the land in controversy. Pending this proceeding in the

Harlan circuit court, Elizabeth Berry died, and the action was revived against her heirs. A large quantity of evidence was taken by both parties to this controversy, and in 1903, the appellants moved the court to strike from the record the alleged will and transcript of proceedings in the chancery court of Tennessee, and the order probating the will, made by the Harlan county court, as well as the probate proceedings of the Hancock county (Tenn.) court.

The Harlan circuit court in disposing of this motion entered the following judgment: "This cause having been submitted to the court, on the written motion of appellants to strike from the record and files herein, the transcript of the proceedings in the chancery court of Hancock county, Tenn., to supply the alleged last will of John Taylor, deceased, in an action wherein Elizabeth Berry was complainant and William Taylor and the unknown heirs of John Taylor were defendants. The decree of said court in said action and the alleged proceedings thereon, in the Hancock county court of Tennessee, and the copy thereof filed in the Harlan county court of Kentucky, and all of which has been filed in an action, for the reason set out in said motion, and the court having considered said motion, and having heard the argument of the counsel, and being advised, it is ordered by the court that said transcript of said proceedings in Hancock county, Tenn., and the copy thereof filed in the Harlan county court of Kentucky, be and are, stricken from the record herein, to which ruling of the court Rachael Berry, etc., appellees, except, and the counter motion of appellees to quash the said motion of appellants having been considered by the court, is overruled, to which ruling of the court the appellees except, and the court being sufficiently advised, it is adjudged by the court the decree of the Hancock chancery court, on file herein and offered as the supplied last will and testament of the said John Taylor, has neither been proven nor probated, so as to be a valid will of real estate and to pass the title thereto, under the laws of this commonwealth. It is therefore adjudged that the probate of the alleged last will, by the Harlan county court be, and the same is, set aside and held for naught. It is further adjudged by the court that appellants recover of appellees their costs herein expended, for which they may have execution. To all of which the appellees object and except, and pray an appeal to the Court of Appeals, which is granted." Afterwards, in due time, the appellants filed their motion and grounds for a new trial, and the same having been overruled, they were given until a day of the next term to prepare and present their bill of exceptions. No appeal was prosecuted from this judgment, nor has it been in any way modified or vacated. After the rendition of the judgment by the Harlan circuit court in the will proceeding, and in June,

1903, the appellees herein, averring that they were the legal heirs of John Taylor, who died intestate, brought this suit in behalf of themselves and all the other heirs of John Taylor (who were estimated to number about 500) against the appellants, who are Joseph Overton, the vendee of William Taylor, under the deed before mentioned, and the heirs at law of Elizabeth Berry, and the attorneys for Elizabeth Berry, to whom deeds were made in the settlement of the will controversy in the Tennessee chancery court. They alleged that the defendants, now appellants, were asserting title to the land by virtue of the deeds made in the settlement of the will case in Tennessee, and the deed from Taylor to Overton, and asked that their title to the land be quieted. Afterwards they filed an amended petition, setting out specifically the conveyances under which the defendants, now appellants, claim title to the land; that these conveyances were fraudulent and void, and were a cloud upon their title; they also averred in replies filed, that the judgment of the Harlan circuit court in the will case was a bar to the assertion by the defendants of any further title to the land in controversy, and that it was a final adjudication of their ownership of it. The court required them to elect whether they would prosecute the action to quiet their title, or to remove the cloud from it, and they elected to prosecute the action to remove a cloud from their title. They were also permitted by the court to prosecute the action, not only in behalf of themselves, but for and on behalf of all the other heirs of John Taylor. Evidence was taken by both parties to this controversy; the record in the will proceeding in the Harlan circuit court, which contained a record of the proceedings in the chancery court of Tennessee, was made a part of the evidence in this action, and permitted to be read as evidence for the plaintiffs, now appellees, over the objection of the defendants, now appellants. The case coming on for trial, the court adjudged the plaintiffs, now appellees, and the other heirs of John Taylor, deceased, for whom they prosecuted the action, to be the owners of the land, and the deeds heretofore mentioned conveying said land to the parties, now appellants, were canceled and held for naught. From that judgment this appeal is prosecuted.

Several grounds for reversal are relied upon by appellants, among them being alleged error of the court in permitting the appellees to prosecute an action for the benefit of all the heirs of John Taylor, deceased; that the petition did not state a cause of action; that it being conceded that the heirs of Elizabeth Berry, who were the appellants, are also heirs at law of John Taylor, and resisting the claims of the appellees, that appellees ought not to be permitted to prosecute the action for their benefit against them; that the court erred in permitting the amended petition changing the cause of

action to be filed, that the judgment of the Harlan court in the will case did not estop them from asserting their title and ownership to the land; that they have shown themselves entitled to it by adverse possession; that appellants by their laches have denied themselves the right to prosecute the action; that incompetent evidence was admitted by the court; that under the statute in force when John Taylor died, the appellants were not his heirs at law, as their ancestors James, John, and Rebecca Overton, under whom they claim, were illegitimate children. In the petition filed by appellees, 10 persons are named as plaintiffs, and it is alleged that these 10 persons are the descendants of John Overton, who was a half-brother of John Taylor, and for and on behalf of themselves and the other heirs at law of John Taylor, they prosecuted the action against the appellants. The defendants to this action, now appellants, filed separate answers, denying that the persons named as plaintiffs, or any of them, were the heirs of John Taylor, deceased, or entitled to any interest in the land. They also asserted title in themselves, by virtue of the deeds heretofore mentioned, and by reason of their adverse possession of the land, and made their answers counterclaims against the plaintiffs. They further averred that John Taylor was the bastard child of James Overton. The question as to the legitimacy of James, John and Rebecca Overton is not made by the pleadings in this case, although it was raised in the pleadings in the will contest in the Harlan circuit court; but the defendants by their answers have put in issue the heirship of appellees, and deny their ownership of, or title to, the land in controversy, and the first question to be determined is, are any of the persons named as plaintiffs in this action heirs of John Taylor, deceased, and as such, entitled to inherit any part of the land in controversy. The appellees took the depositions of a number of witnesses, among them, John Overton and M. S. Overton, named as plaintiffs in the action, and proved by them and each of them, that James Taylor, the father of John Taylor, the patentee, was married twice; that he first married Ester Platt and by whom he had one child, Polly Taylor; that thereafter his wife died, and he married Rachael Swift, by whom he had three children, James Taylor, John Taylor, and Joseph Taylor; that after the birth of these children, their father, James Taylor, died, and his widow thereafter became the mother of three illegitimate children, namely, James Overton, John Overton, and Rebecca Overton. This illegitimate child, John Overton, was a half-brother of John Taylor, and the remote ancestor of the persons named as plaintiffs in the petition, and by virtue of their relationship to him, they claim an interest in the land. The appellants insist that under this

evidence, and the law in force at the time John Taylor died, neither James Overton, John Overton, nor Rebecca Overton, if they had been living at his death, would have inherited from him, nor do their descendants take any interest in the land left by John Taylor at his death. The solution of this question depends upon the statute in force at the time John Taylor died, because if he died intestate, his estate must be distributed under the statute of descent and distribution in force at the time of his death. Assuming, as is established by appellees, that James, John, and Rebecca Overton were the illegitimate brothers and sister of John Taylor, can their descendants take by descent any estate left by John Taylor? We think not. The General Statutes of Kentucky, which contains the law in force when John Taylor died, provides in section 5, c. 31, that "A bastard shall be capable of inheriting and transmitting any inheritance on the part of, or to the mother, and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock."

John Taylor's mother died many years before John Taylor did, and it is very plain under this statute, that the Overtons, being illegitimate children of John Taylor's mother, cannot inherit from him. *Allen v. Ramsey's Heirs*, 1 Metc. 638; *Remington v. Lewis*, 8 B. Mon. 606; *Berry v. Owens' Heirs*, 5 Bush, 452. Therefore no one of the descendants of James Overton, or John Overton, or Rebecca Overton, are entitled to any part of the land in controversy, and not being entitled to it, the next question that arises is, will they be permitted to prosecute this action for and on behalf of other persons who are not named as parties in the pleadings, but who have an interest in the land in controversy? Section 25 of the Civil Code of Practice provides that, "If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all." Under this section, which is the only authority for the maintenance of an action by one or more persons for the benefit of others, the persons who bring the action must themselves have an interest in the subject-matter of the action; otherwise they will not be permitted to maintain it. It would be manifestly improper and do violence to the meaning of this section if persons who had no interest whatever in the money or property sought to be recovered, were permitted to maintain the action. Under section 18 of the Civil Code of Practice, every action must be prosecuted in the name of the real party in interest, except as provided in section 21, which authorizes certain named fiduciaries and other designated persons, to bring actions



without joining the person for whose benefit it is prosecuted. Subject to the exceptions specified in section 21, and modified by the rule laid down in section 25, every action must be prosecuted in the name of the real party in interest, and a person who has no interest in the controversy in any capacity, will not be allowed to maintain an action either for himself, or for the benefit of any other person. It follows from this that appellees, who were the plaintiffs below, upon their own showing have no interest in the land in controversy, and consequently no right to maintain this action.

It further appears from the testimony of several witnesses, that there are living descendants and heirs at law of Polly Taylor, a sister of John Taylor, and possibly there are descendants of his brothers, James and Joseph Taylor. The descendants of his brothers and sister, if there in fact be any, may maintain an action for its recovery, as the evidence as it appears in this record is wholly insufficient to show that John Taylor was a bastard. The issue being made by the pleadings and evidence, whether or not William Taylor, who made the conveyance to Joseph Overton in 1888, was a son of John Taylor, the patentee, we deem it proper and necessary in this proceeding to determine that question. A careful reading of this voluminous record satisfies us beyond a reasonable doubt that John Taylor did not leave surviving him any child or children, and that William Taylor from whom Joseph Overton obtained the deed, was not the child of John Taylor. The deed made by William Taylor to Joseph Overton throws no light whatever on the question. It does not indicate by what claim of title the vendor became the owner of the land, and it is a significant fact that neither William Taylor nor Joseph Overton testified in the case, nor did the notary public who took the acknowledgment of William Taylor, although an effort was made by the appellees to obtain his deposition. A large number of witnesses who were acquainted with John Taylor for 30 or 40 years before his death, and who had ample opportunity of knowing his family history and his relations, have testified that he had no child or children. It is true that a few witnesses testified for appellants that John Taylor did have a son named William Taylor, but their evidence is not entitled to much weight.

The question as to the effect of the judgment of the Harlan circuit court in the will contest has been elaborately briefed by counsel on both sides of this case. Ky. St. 1903, § 4854, provides that: "When a will of a non-resident, or relative to an estate in this commonwealth has been proved without the same, an authenticated copy and the certificate of probate thereof, may be offered for probate in this commonwealth. When such copy is so offered, the court to which it is offered shall presume, in the absence of evi-

dence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the state or county of the testator's domicile, and shall admit such copy to probate as a will of personalty in this commonwealth. And if it appears from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this commonwealth, by the law thereof, such copy may be admitted to probate as a will to real estate." Section 4850 provides that an appeal may be taken from the county court to the circuit court, and thence to the Court of Appeals from every judgment admitting a will to record, or rejecting it. The circuit court shall try both law and facts, unless a jury be required. Under this section an appeal may be taken from the county to the circuit court, from a judgment of the county court probating the will of a nonresident, and an appeal was taken from the judgment of the Harlan county court probating the will of John Taylor, to the Harlan circuit court, and when the Harlan circuit court rendered the judgment heretofore mentioned, it had jurisdiction of the subject-matter involved, and the parties to the controversy; and the judgment of the Harlan circuit court until reversed, vacated or modified, in the manner provided by law, is conclusive and binding upon the parties as to the question adjudicated by that court. The Harlan circuit court did adjudicate that "The decree of the Hancock chancery court on file herein and offered as a supplied last will and testament of the said John Taylor, deceased, has neither been proven nor probated so as to be a valid will of real estate and to pass title thereto, under the law of this commonwealth. It is therefore adjudged that the probate of the alleged last will by the Harlan county court be, and the same is, set aside and held for naught." From this judgment the contestees prayed an appeal to the Court of Appeals, but have failed to prosecute it, and the judgment has not been vacated or modified by the court rendering it. The only question adjudicated by the Harlan circuit court was that the will of Taylor had neither been proven nor probated to be a valid will of real estate, and the order probating it was set aside and held for naught. Under this judgment, the case stands as if the will of John Taylor had never been probated or offered for probate in the county court of Harlan county; and therefore the appellants cannot claim title to the land in controversy under this will.

As the paper title of appellants depends on the alleged deed made by William Taylor to Joseph Overton, and the fact that the will of John Taylor was probated in the Harlan county court, it necessarily follows that their claims to the lands in controversy, in so far as it rests on their paper title must fail. Appellants further contend that they have been in the actual, adverse, and contin-

uous possession of the land in controversy for more than 15 years prior to the institution of this action, and that they are entitled to hold it by reason of this adverse possession. The facts in regard to this claim are substantially these: In the spring of 1888, after Joseph Overton had obtained the deed from William Taylor, it seems that he placed in possession of a small portion of the land one Berry Taylor, as his tenant; and that afterwards at different times, probably as many as five other persons, occupied small portions of the land as tenants of Overton; but it does not appear that either Overton or any of his tenants were in the continuous possession of the land. In fact, the impression is left from reading the evidence that the majority of these tenants only remained on the land a short time, and occupied it without any intention of living on, or cultivating it. It has been frequently held by this court, that to give a party the ownership of land by reason of his adverse possession, the possession must have been not only adverse and actual, but must have been continuous, open, and notorious. A title asserted by virtue of adverse possession cannot be maintained unless there has been a continuity of possession. The mere fact that Taylor and others lived on and cultivated, at different times and for short periods, small portions of this land, is not sufficient to satisfy the ruling of this court on the question of holding land by adverse possession.

In *Trotter v. Cassady*, 3 A. K. Marsh. 365, 13 Am. Dec. 183, this court held, in an action under the 20-year statute, that: "To make the bar of 20 years' possession operative and effectual, to destroy a right of entry, it is necessary that the possession, claimed as adverse, should be shown to be continued and uninterrupted. Or, in other words, if there is any period during the 20 years in which the person having the right of entry could not find an occupant on the land on whom he could bring and sustain his ejectment, that period cannot be counted against him as part of the 20 years." In *Jones v. McCauley's Heirs*, 2 Duv. 14, it was held that: "The law of limitation, being reasonable and founded on principle, does not allow the statute to run when there is no cause of action; and therefore to bar an ejectment by time, the adverse possession must have been, not only actual, but so continued for 20 years as to have furnished a cause of action every day during that whole period, and consequently, as conclusively and consistently adjudged, claim of title, however notorious, and occasional use under that claim, without actual possession, continued without intermission or interruption for 20 years, will not bar an adverse right of entry." To the same effect is *Barr v. Potter*, 57 S. W. 478, 22 Ky. Law Rep. 416; *Hibbard v. Wilson*, 32 S. W. 1086, 17 Ky. Law Rep. 930. It is also in evidence that Joseph Overton paid

the taxes on this land from the time he obtained the deed from William Taylor. The payment of taxes, however, is a small circumstance showing a claim of ownership of the land, and is not at all sufficient to establish an adverse holding within the meaning of the law. Many other questions have been made by counsel on both sides, who have written able and exhaustive briefs in support of their respective contentions, but in view of the conclusion arrived at, we do not deem it necessary to extend this opinion in the consideration of questions that could not affect the decision of the case.

The judgment of the lower court is reversed, with directions to dismiss the petition and counterclaims of the several defendants.

#### MCDERMOTT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

##### INTOXICATING LIQUORS—PLACE OF SALE.

Where M., while in H., ordered liquor by telephone from defendant in E., and defendant delivered the liquor in E. to the express company to take to M., which it did, M. afterwards sending for a bill, and on receipt of it mailing the pay, the sale was completed in E., on delivery of the liquor to the express company, which thereupon became M.'s agent; so that the local option law of H. was not violated.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 162.]

Appeal from Circuit Court, Larue County.  
"Not to be officially reported."

Harry McDermott was convicted of a violation of the local option law, and appeals. Reversed and remanded.

Williams & Handley, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

NUNN, J. The appellant was indicted at the January term, 1906, of the Larue circuit court, charged with retailing spirituous liquor in quantity less than five gallons, in the town of Hodgenville, Ky., a territory where the local option law was then in full force and effect. At the May term of the court a trial was had, and a fine of \$60 was assessed against the appellant, from which this appeal is prosecuted.

Upon the trial of the case the commonwealth introduced but one witness, Floyd R. Miller, who testified that he lived in the town of Hodgenville, Ky.; that some time in November, 1905, he ordered four quarts of whisky from the appellant, a saloon keeper, at Elizabethtown, Ky., over the telephone, he (Miller) being at Hodgenville, and appellant at his place of business at Elizabethtown; that the appellant delivered the liquor to the agent of the American Express Company at Elizabethtown, Ky., and was delivered by the express company to him at Hodgenville. It was not shipped C. O. D. (collect on delivery). Some time after this he paid the appellant for the whisky. It was agreed that

Hodgenville was in November, 1905, local option territory. The appellant then asked the court to give a peremptory instruction to the jury to find for him, which the court refused. The court gave to the jury two instructions. The first was in the usual form in such cases. Number 2 is as follows: "A contract of sale by telephone between parties at the time at Hodgenville and Elizabethtown is to be deemed a sale in Hodgenville, for the purposes of this trial." This amounted to a peremptory instruction by the court, to the jury, to find the appellant guilty.

We must apply the law to this case, as it existed at the time the alleged offense was committed, to wit, November, 1905. The only question necessary to be determined is: Where was the sale made, at Elizabethtown or Hodgenville? If made at Elizabethtown, the appellant should have been acquitted. If made at Hodgenville, local option territory, a fine was rightfully assessed against him. The case of *Doores v. Commonwealth*, 89 S. W. 162, 28 Ky. Law Rep. 192, is conclusive of the question involved on this appeal. Doores was a legalized whisky dealer in Bowling Green, Ky. Emmet Williams, the prosecuting witness, resided in Glasgow, a town where the local option law prevailed. Williams in that case testified as follows: "I ordered a gallon of whisky from Doores in April, 1905. I either called him up on the phone or wrote to him at Bowling Green, Ky. He sent whisky from Bowling Green to me at Glasgow by Adams Express Company. I received it in Adams Express Company's office in Glasgow. After that I wrote him to send me my account. He did so, and I mailed him a money order to Bowling Green in payment." This court said in that case: "We do not think this testimony established a sale in Barren county, by the terms of the C. O. D. statute, contained in section 2557b, Ky. St. 1903, for the reason that the whisky in question forwarded from Bowling Green to Williams at Glasgow was not shipped C. O. D. There was no contract for the sale of the liquor made in Barren county. \* \* \* The question at last is whether or not the sale was made in the county where the seller was at the time the order was received, or in the county where the witness received the liquor. If the principle announced in *James v. Commonwealth*, 102 Ky. 108, 42 S. W. 1107, prevails, clearly the sale was in Warren county, and this principle must prevail, unless the sale is controlled by the C. O. D. statute—a conclusion we think precluded by the very language of the statute, which is limited in its operation to goods shipped C. O. D." In this case the trade was not completed when the conversation by telephone between the prosecuting witness and the appellant ceased. The title to the whisky yet remained in the appellant. It was necessary for him to separate four quarts of whisky from his other liquors and deliver them to the prosecuting witness, or

to some one for him. It took this, at least, to complete the sale. The appellant delivered the four quarts of whisky to the agent of the American Express Company at Elizabethtown. This act passed the title from the appellant, in this liquor, to the prosecuting witness. The *Doores* Case, and the authorities therein cited, all agree that at the moment of the delivery of the article to the express company it became the agent of the purchaser. In this case the order was received by the appellant at his place of business, at Elizabethtown. The order was complied with by the appellant by delivering the liquor to the prosecuting witness' agent, the express company, at Elizabethtown. The trade was consummated there, and the lower court erred in not peremptorily instructing the jury to find for the appellant.

The appellee's counsel contends that the action of the lower court was proper under the authority of the case of *Adair v. Commonwealth*, 89 S. W. 1132, 28 Ky. Law Rep. 659. The cases are not alike. In that case the prosecuting witness, in the city of Mayfield, telephoned to a liquor dealer outside of the city boundary to send him a keg of beer. The seller, by his conveyance and driver, carried the beer to the purchaser and delivered it to him in Mayfield. The purchaser offered to pay the driver, who was authorized to receive it, but refused until the purchaser went with him outside of the boundary of the city. This was clearly a trick or device to evade the law, and, further, the sale in that case was not complete until the beer was delivered to the purchaser or his agent, and that occurred within the city.

For these reasons the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

#### COMMONWEALTH v. McDERMOTT.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

#### INTOXICATING LIQUORS—COMPLETED SALE.

There is not a completed sale, so as to constitute a violation of the local option law, where defendant merely solicited and obtained an order for whisky, and received payment for the liquor; nothing more being done.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 160.]

Appeal from Circuit Court, Larue County.  
"Not to be officially reported."

Harry McDermott was acquitted of a charge of violating the local option law, and the commonwealth appeals. Affirmed.

N. B. Hays, Atty. Gen., C. H. Morris, and D. A. McCandless, for the Commonwealth.

O'REAR, J. Appellee was charged with a violation of the local option law in force in Larue county, by selling spirituous liquors therein by retail. The facts shown are that he solicited an order from a party in Hodgenville, the county seat of Larue, to be filled

by shipping the whisky from appellee's place of business in Elizabethtown. The order was solicited, and the agreement to furnish the liquor, and probably the check in payment for same, all were transacted in Larue. But there is no evidence that any liquor was shipped or furnished under the order. Appellant contends that the sale was completed when the order was taken and the liquor paid for. The rule is a sale of personal property is not complete if there is anything left to be done by the seller, such as selection, or segregation of a parcel sold from a larger quantity in bulk. Benjamin on Sales, §§ 520, 521. In this case, the seller was bound to select a certain quantity, not theretofore set apart or identified, from a larger bulk or cask of whisky, and to ship it to the purchaser. There was not a change of title till that was done. Hence there was not a completed sale.

There was a failure of proof in this case, and the court properly instructed the jury peremptorily to find the defendant not guilty. Judgment affirmed.

#### JUNG BREWING CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1906.)

CORPORATIONS—CRIMES—ACTS CONSTITUTING OFFENSES—STATUTES—CONSTRUCTION.

Ky. St. 1903, § 576, providing that every corporation shall, immediately under its name on all "printed or advertising matter," print the word "incorporated," being enacted for the purpose of informing the public whether or not the concern with which it is doing business is a corporation, does not require a corporation to place the word "incorporated" under the corporate name printed on the label of goods which it manufactures and sells.

Appeal from Circuit Court, Boyle County. "To be officially reported."

The Jung Brewing Company was convicted of crime, and it appeals. Reversed.

C. H. Rodes and C. R. McDowell, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

**BARKER, J.** The appellant, the Jung Brewing Company, a corporation doing business in this state, was indicted by the grand jury of Boyle county, charged with a violation of section 576 of the Kentucky Statutes of 1903 which requires all (except certain named) corporations to place the word "incorporated" under the corporate name on all of their advertising and printed matter. A trial resulted in a verdict against the appellant for the sum of \$100.

The evidence shows that the labels on the beer bottles of appellant, as well as the labels on the boxes containing them, although bearing the name of the Jung Brewing Company, did not have the word "incorporated" printed thereunder, and this was all of the evidence introduced by the commonwealth upon

the trial. Section 576 of the Kentucky Statutes, of 1903 is as follows: "Every corporation organized under the laws of this state, and every corporation doing business in this state, shall, in a conspicuous place, on its principal place or places of business, in letters sufficiently large to be easily read, have painted or printed the corporate name of such corporation, and immediately under the same, in like manner, shall be printed or painted the word 'Incorporated.' And immediately under the name of such corporation, upon all printed or advertising matter used by such corporation, except railroad companies, banks, trust companies, insurance companies and building and loan associations, shall appear in letters sufficiently large to be easily read, the word 'Incorporated.' Any corporation which shall fail or refuse to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars and not more than five hundred dollars."

We are of opinion that this statute does not require corporations to place the word "incorporated" under the corporate name printed on the label of goods which it manufactures and sells. The object of the statute is to inform the public whether or not the commercial or manufacturing concern with which it is doing business is a corporation or not; and it would be going very far beyond the necessity or intention of the statute to require the word "incorporated" to be placed upon all of the goods or merchandise manufactured and sold by the corporation. Every benefit intended by the statute is effectuated by limiting the expression "printed or advertising matter" to billheads or advertisements in the newspapers, and other similar matter. The Legislature clearly did not intend to place so useless a burden upon the business done in the state by corporations as would be entailed by construing the expression "printed or advertising matter" as was done in this case. This, as all other statutes, should be given a reasonable construction, so that in spirit the purpose of the Legislature shall be effectuated; but to construe it so as to require each article of merchandise bearing a label with the corporate name on it to also have the word "incorporated" thereon, would be to make what was intended as a useful and beneficial statute unduly harsh and oppressive. Such construction is never indulged in by the courts unless pressed thereto by the very rigor of the legislative language; and to this we are not forced by the words of the statute under consideration. Primarily, the object of labeling goods or merchandise is to tell what it is, or, as in the case at bar, also to enable the consumer to know where to return the empty bottles. In a qualified sense, these labels are used for advertising purposes, and frequently contain words of commendation as to the quality of the articles upon which they are placed; but they are not advertising

matter within the meaning of the statute. No good purpose could be subserved by requiring the label of each article of merchandise, however infinitesimal, as, say, the wrapper on a piece of tolu, to bear the word "Incorporated" under the name of the manufacturer. The large fine provided in the statute for each offense precludes the idea that its meaning should be extended beyond the point where advertising is the primary object.

The court should have sustained the demurrer to the indictment in this case, and having failed to do this, at the close of the commonwealth's testimony, should have sustained defendant's motion for a peremptory instruction to find it not guilty.

The judgment is reversed, with instructions to sustain the demurrer, and dismiss the indictment.

**HOLT et al. v. MYNHIER'S ADM'X et al.**  
(Court of Appeals of Kentucky. Sept. 28, 1900.)

**1. COVENANTS TO REFUND FOR SHORTAGE—ACTION FOR DEFICIT—CONDITIONS.**

The petition of vendees of land alleging a resurvey by them of the land, and the finding of a shortage of 83 acres, and seeking to recover \$664.83, claimed to be due because of the shortage, the action is not one on the general covenant of warranty, so as to require the vendees to wait till they are evicted before suing, but an action on the special covenant in the deed to refund on the basis of the price of \$5,000 for 624 acres if the vendees make a survey and find there is less than 624 acres.

**2. SAME—LIMITATIONS.**

An action the petition in which alleges a resurvey of land by the vendees, and the finding by them of a shortage of 83 acres, and seeks to recover \$664.83, claimed to be due because of the deficit, being based on the covenant in the deed to refund for shortage, is not barred on the 5-year statute of limitations for implied assumpsit, but by the 15-year statute.

Appeal from Circuit Court, Montgomery County.

"Not to be officially reported."

Action by William H. Holt and others against William Mynhier's administratrix and others. Judgment for defendants. Plaintiffs appeal. Reversed and remanded.

Wm. H. Holt and R. H. Winn, for appellants. Prewitt & Senff, for appellees.

**BARKER, J.** On the 19th of December, 1888, William Mynhier, now deceased, sold and conveyed to the appellants a tract of land estimated to contain 624 acres, situated in Morgan county, Ky. The deed contains the ordinary covenant of general warranty, and this additional covenant: "The land hereby conveyed is in all six hundred and twenty-four acres and this is a sale by the acre at the rate of \$5,000.00 for said quantity, and this sale is subject to survey at the option of the parties of the second part, but

at their cost; and if it be made, and the land falls short of, or exceeds, said six hundred and twenty-four acres, there is to be a corresponding reduction or increase of price at the rate above stated." In 1892 the vendees resurveyed the land sold to them, and found a shortage of 83 acres, and in 1903 they instituted this action to recover the sum of \$664.83 claimed to be due them by reason of the deficit, alleging the descent of assets to appellees from William Mynhier's estate more than the amount of the claim sued for. The petition was amended three times, and a general demurrer to it as amended was sustained, and the appellants declining to plead further, their petition was dismissed.

We think the petition, as amended, states a cause of action. Appellees insist (1) that, because the boundaries of the tract as stated in the deed will show upon mathematical calculation that they include 624 acres, therefore, the vendees were placed in the position, by accepting the deed, of having to wait until they were evicted before they could sue on the covenant of warranty; and (2) that appellants' action was for the correction of a mistake in the original calculation as to the number of acres, and was, therefore, barred by five years under the statute of limitations in such cases. Neither of these propositions is sound. In the first place, this is not an action upon the general warranty of title, but is based upon the special covenant to refund at the contract price whatever may be found due for shortage upon a resurvey of the land. This covenant shows that the parties did not undertake to convey, at all hazards, 624 acres, but that the quantity was merely estimated, and the vendees were given the option to resurvey at their own cost, and then the vendors would refund whatever was due for shortage. Plaintiffs' cause of action being based on the covenant in the deed to refund for shortage, was not barred for 15 years after the making of the conveyance. The case of *Nave v. Price*, 108 Ky. 105, 55 S. W. 882, has no application to the case at bar. That, it is true, was an action based primarily on the correction of a mistake in the quantity of land sold; but there was no covenant for a resurvey, as here; the action was in reality on an implied assumpsit for money paid under a mistake of fact, and was barred, as stated in the opinion, by the 5-year statute. The case at bar falls under the principle of *Raley, Trustee, etc. v. Wathen*, 7 Ky. Law Rep. 766, which in all essential facts is identical with the case at bar. We there held that the cause of action was in covenant, and not barred by the 5-year statute of limitations.

For the foregoing reasons, the judgment is reversed for proceedings consistent herewith

O'REAR, J., not sitting.

**LEWIS v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Sept. 28, 1906.)  
**HOMICIDE—APPEAL—REVIEW—EVIDENCE.**

The evidence in a homicide case, being sufficient to warrant the submission of the case to the jury, prevents reversal on the ground of the verdict being against the weight of evidence. [Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 700-701.]

Appeal from Circuit Court, Letcher County.

"Not to be officially reported."

Sam Lewis appeals from a conviction. Affirmed.

Dishman & Dishman, Isham G. Leabow, D. D. Fields, and Forrester & Forrester, for appellant.

**BARKER, J.** The appellant, Sam Lewis, was indicted by the grand jury of Harlan county, charged with the murder of David Blair. After one mistrial and several continuances, the case was, on the motion of the commonwealth, transferred to the Letcher circuit court, where a trial resulted in the conviction of the appellant, and his punishment being fixed at confinement in the penitentiary for life.

We need not discuss the evidence with any elaboration. It clearly warranted the submission of the case to the jury, and that is sufficient to prevent a reversal here on the ground that the verdict was contrary to the weight of the evidence. The witnesses for the commonwealth testified to the deliberate shooting of David Blair by the appellant. There had been no trouble between the men prior to the shooting, so far as the record shows. Appellants' own testimony was all of the evidence as to what took place just before the shooting. He states that Blair approached him with the question as to what was meant by all the talk that was going on about him (deceased) and appellant's wife, to which appellant gave answer that he did not know; he supposed decedent did. Whereupon Blair replied, "I have courted your wife once, and I will court her again," at the same time approaching still closer to the appellant in a very threatening manner, and apparently drawing a pistol. Thereupon appellant, under the fear of being killed, shot his assailant. For the commonwealth it was shown that Blair had no pistol, and wore no coat at the time, so as to have concealed a weapon if he had had one. The jury evidently disbelieved appellant's statement, and as before stated found him guilty.

The evidence heard by the trial court on the motion to transfer from Harlan to Letcher county was not brought up with the record, nor was the transfer of the case assigned as error in the motion for a new trial. We cannot, therefore, consider the propriety of this ruling, although it is most urgently insisted by counsel that we should do so.

The instructions of the court fully and fairly state the law as applicable to the facts adduced upon the trial; and a careful and painstaking study of the whole record convinces us that no error prejudicial to the substantial rights of the appellant occurred, and the judgment is therefore affirmed.

**TOWN OF MT. PLEASANT v. EVERSOLE.**

(Court of Appeals of Kentucky. Sept. 28, 1906.)

**1. MUNICIPAL CORPORATIONS — ACTIONS — CAPACITY TO SUE—STATUTES.**

Under Ky. St. 1903, § 3660, providing that towns of the sixth class are continued corporate by the respective names they have, with power to sue, a town of the sixth class may in its own name sue and appeal from an adverse decision.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 2189.]

**2. SAME—TAXES — ORDINANCE LEVYING TAXES—VALIDITY.**

An ordinance of a town out of debt, levying a property tax "for municipal purposes" and a poll tax "for said purposes," sufficiently specifies the purposes for which the taxes are levied, within Const. § 180, requiring an ordinance imposing a tax to specify distinctly the purpose for which the same is levied.

**3. SAME—ORDINANCES—MUNICIPAL RECORDS.**

A city council can only speak by its records, and its records read and signed are the only evidence of its action, and if the council adopts an ordinance which is not put on the records which are read, approved, and signed, the ordinance cannot affect the rights of a third person.

**4. SAME—COLLECTION OF TAXES—AUTHORITY OF COUNCIL.**

Under Ky. St. 1903, § 3677, authorizing municipal boards of trustees to provide by ordinance a system for the assessment, levy, and collection of municipal taxes, and section 3687, making it the duty of the marshal to collect taxes placed in his hands by the board for collection, the board may by ordinance provide that the marshal shall collect the taxes under his official bond, or it may provide for a tax collector with bond; but it cannot provide that the sheriff of the county shall collect the taxes.

Appeal from Circuit Court, Harlan County.

"Not to be officially reported."

Action by G. A. Eversole to enjoin the collection of a tax imposed by the town of Mt. Pleasant. From a judgment for plaintiff, the town of Mt. Pleasant appeals. Reversed and remanded.

I. G. Leabow, for appellant. H. C. Clay, for appellee.

**HOBSON, C. J.** On March 7, 1905, the town of Mt. Pleasant, by ordinance of the board of trustees, levied a tax of 33½ cents upon each \$100 of all taxable property in the town, "for municipal purposes for the year 1905," and a poll tax of \$1, "for said purposes." G. A. Eversole, a citizen of the town whose property was assessed at \$55,014 and whose taxes amounted to \$183.08, brought this suit to enjoin the collection of the tax. The circuit court having adjudged him the relief sought, the town appeals.

It is insisted that the town of Mt. Pleas-

ant is without capacity to sue, and that the appeal should be taken in the name of the board of trustees of Mt. Pleasant. Section 3660, Ky. St. 1903, provides that all towns of the sixth class are continued corporate by the respective names they have, with power to contract, to sue and be sued in the courts. Mt. Pleasant is the name of the town. By the statute it is continued as a corporate entity under this name and given power to sue and be sued.

It is also insisted that the ordinance is in violation of section 180 of the Constitution, in that it does not specify distinctly the purpose for which the tax was levied. In *Pulaski County v. Watson*, 106 Ky. 505, 50 S. W. 861, an order of the fiscal court levying a tax "for the purpose of paying claims against the county" was held sufficient. By the acts of the Legislature the levy for the carrying on of the state government is expressed in these words: "For the ordinary expenses of the government." In the smaller towns of the state, where records are not carefully kept by persons skilled in making up records, greater liberality must be allowed than in records more carefully made up. The expression "for municipal purposes," in the ordinance, is the same in meaning as if it had read "for ordinary municipal purposes" or "for carrying on the town government in the ordinary routine." It is a levy to meet the ordinary expenses of the municipal government, and the purpose for which it is made is specified with sufficient distinctness to show what was meant. The town owed no debts, and the words the council used are fully as definite as the words of the county court levy above referred to.

The board of trustees placed the taxes in the hands of the sheriff of Harlan County for collection, but it put upon its order book no ordinance or order to this effect until after this suit was brought, when it undertook to enter an ordinance now for then, reciting that the ordinance had been adopted in April, 1905, and by mistake of the clerk was not entered on the book. A city council can only speak by its records. When its records are read and signed it is the only evidence of the action taken by the council at that time. If in fact the council agreed to take any action which is not put upon the book, and the book without such action is read, approved, and signed, then there is no ordinance which can affect the rights of third persons. Ward's term as sheriff had expired when the ordinance was put upon the book. By section 3677, Ky. St. 1903, the board of trustees must provide by ordinance a system for the assessment, levy, and collection of all town taxes, which will conform as nearly as may be to the provisions of the state laws in reference to the assessment, levy, and collection of state and county taxes. By section 3687, Ky. St. 1903, the marshal must collect all taxes placed in his hands by the board of trustees for collection.

Under these provisions the board of trustees may by ordinance provide that the marshal shall collect the taxes under his official bond, or they may provide for a tax collector and require bond of him. But they have no authority to provide by ordinance that the sheriff of the county shall collect the taxes, and, if they do put the taxes in the sheriff's hands, his sureties are not responsible for the money. We therefore conclude that the court below properly enjoined Ward, the ex-sheriff of Harlan county, from collecting the taxes in question, but that he erred in holding the ordinance levying the tax void. The town may upon the adoption of a proper ordinance for that purpose proceed with the collection of the taxes. The record does not show any defect in the assessment of the property. The presumption is that the officers did their duty until the contrary is shown.

Judgment reversed, and cause remanded for a judgment as herein indicated.

#### COLLINS v. BECKLEY.

(Court of Appeals of Kentucky. Sept. 28, 1906.)

##### 1. SALES — PASSING OF TITLE — ACTS PRECEDENT.

Where, under a contract for the sale of a crop of tobacco, it was to be delivered at a certain point and weighed by the seller, in order to ascertain the price, before the doing of such acts title did not pass.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 524, 525.]

##### 2. REPLEVIN—PLAINTIFF'S RIGHT TO POSSESSION.

Under Code Civ. Prac. § 180, relative to claim and delivery of personal property and providing that plaintiff when entitled to possession shall have immediate delivery at any time before judgment, the purchaser in a contract of sale under which title had not passed was not entitled to delivery merely because of the fact that the seller was insolvent.

Appeal from Circuit Court, Mason County.  
"Not to be officially reported."

Action by Pat Collins against J. L. Beckley. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. M. Collins, for appellant. Thos. R. Phister, for appellee.

LASSING, J. This is a suit brought by appellant in the Mason circuit court under section 180 of the Civil Code of Practice for the possession of a crop of tobacco raised by the appellee, Beckley. At the time of the suit the tobacco was in the barn on the farm of appellee, where it was raised, and an order of delivery was sued out, and appellee gave bond and retained the property. A demurrer was filed to the petition, and sustained by the court with leave to amend. Plaintiff filed an amended petition in which he set out the fact that the appellee was insolvent. A demurrer was entered and sustained to the petition as amended, and appellee failing and refusing to plead further, his petition was

dismissed. From the rulings sustaining the demurrers and dismissing the petition this appeal is taken.

The appellant claimed to be the owner of the tobacco and entitled to its immediate possession by reason of a purchase from appellee, and the only question in this case is whether the sale relied upon passed the title in this property from the appellee to the appellant. A written memorandum of the contract was filed with the petition. This memorandum is as follows: "Pat Collins bought J. L. Beckley's crop of tobacco, est. 8,000, at 7½ cts. per pound, to be delivered at Mill Creek, Ky., on or before April 18, 1904. J. L. Beckley. Pat Collins."

The appellant in his petition says that the crop was actually about 4,000 pounds, instead of the 8,000 estimated by the parties at the time the written contract was made. The petition further alleges that by a subsequent agreement the tobacco was to be delivered at a barn other than that specified in the contract of sale relied upon, and that on or before April 26, 1904, the appellee hauled said tobacco to the barn mentioned in the petition where same was to be delivered, reaching said barn about noon, when appellant and his employes were absent therefrom, and that before appellant's return to said barn appellee hauled said tobacco back to his home, and although appellant offered to pay appellee for said tobacco and to haul it himself at his own expense, appellee refused to comply with his contract.

The question for consideration is: Was the appellant the owner and entitled to the possession of this crop of tobacco, or did he have such an interest therein as entitled him to prosecute this suit? This question was fully discussed in the case of *Gibson v. Ray*, etc., 80 S. W. 474, 28 Ky. Law Rep. 444. In this

case the court said: "If, by the contract of sale of personalty, anything remains to be done by the vendor, such as weighing for the purpose of ascertaining the extent of the property or the amount of the purchase price to be paid, then the title does not pass to the vendee, but remains in the vendor."

In the case of *Crawford v. Smith et al.*, 7 Dana, 61, it is said: "If by the contract of sale anything is to be done by the vendor for ascertaining the weight or extent or price of the property sold by him, and there be no stipulation for passing the title before such thing shall have been done, then the law adjudges the right of property, as well as that of possession, to be in the vendor until after he shall have ascertained the weight, extent, or price of the property contracted to be sold."

Under the decision in these two cases, it is clear that the tobacco in question was, at the time of the institution of this suit, the property of the appellee, J. L. Beckley. In order to determine the price to be paid for the same, it not only had to be delivered at the point agreed upon, but had to be weighed; and until it was so weighed and the price ascertained, the appellant was not entitled to the possession of said property and had no such interest therein as entitled him to prosecute a suit therefor under section 180 of the Civil Code of Practice. This provision of the Code authorizes the maintenance of a suit only when plaintiff is entitled to the possession of the property in question, and the fact that the one from whom he seeks to recover possession is insolvent does not enlarge his rights.

The title to the property not having passed, and appellant not being entitled to the possession thereof, the trial court properly sustained the demurrer to the petition as amended, and the judgment is affirmed.



## IVIE et al. v. EWING.

(Kansas City Court of Appeals. Missouri. May 7, 1906. Rehearing Denied Oct. 1, 1906.)

## 1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIM—EFFECT.

The allowance of a demand against the estate of a deceased person, unappealed from, constitutes in general a final judgment which is conclusive of the validity of the claim on final settlement of the administrator's accounts.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 849.]

## 2. COURTS—PROBATE COURTS—EQUITABLE JURISDICTION.

Where the allowance of claimant's demand against the estate of a deceased person required the interposition of equity to set aside a contract entered into between claimant and decedent, the probate court had no jurisdiction to allow the claim.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Courts, §§ 409, 470, 472.]

Appeal from Circuit Court, Schuyler County; N. M. Shelton, Judge.

Judicial accounting by Joel Ewing, as administrator de bonis non of the estate of Horace G. Pitkin, deceased. From a judgment reversing an order of the probate court, charging the administrator with a claim unlawfully paid, and interest, objectors, Eva A. Ivie and another, appeal. Reversed, with directions.

E. R. Bartlett, for appellants. Smoot & Smoot and Mudd & Wagner, for respondent.

BROADBUSH, P. J. On the 3d day of July, 1895, Horace G. Pitkin, a resident of Scotland county, Mo., died intestate. On July 30th following, his widow, Rachael A. Pitkin, and his son, Albert H. Pitkin, were severally appointed administratrix and administrator of the deceased's estate, gave bond, and qualified as such. Afterwards, failing to give a new bond as directed by the probate court, their letters of administration were revoked and they made their final settlement which was approved by the court. The respondent, Joel F. Ewing, was appointed administrator de bonis non, who executed bond and duly qualified as such. On the 18th day of March, 1899, he presented his accounts and vouchers for a final settlement, at which time the appellants, heirs at law, appeared and filed objections to it. A great many items in the administrator's account were objected to, but these objections were overruled and an appeal was taken to the circuit court. The venue of the case was changed to Schuyler county circuit court, where it was tried anew. Among the credits allowed by the probate court was an item of \$2,500.

It appears from the record that the deceased was the promoter of what was known as the "Farmers Exchange Bank," with a capital stock of \$25,000, of which a very small portion had been paid up in cash. The deceased was the holder of most

of the stock, for which he paid in insolvent notes, which he transferred to the bank. He also deeded to the bank a building at the valued consideration of \$6,500, which it was claimed was greatly in excess of its real value. The Secretary of State required a reduction of \$2,500 on the said building. Thereupon, the bank presented a claim against the estate for that sum, which the court allowed, and the administrator paid it. The circuit court sustained appellants' objection to this claim, and charged the same to the administrator, with interest from the date of its payment in the sum of \$815, thus making the amount, with which he was charged on that item, \$3,315. The appellants were satisfied with the judgment of the court in that and all other respects, but the administrator moved for a new trial, on the hearing of which the court reversed its former decision, and gave credit to respondent for said sum of \$2,500, which, as a matter of course, resulted in abating the interest on the same from the date of its payment. From this judgment objectors appealed, especially alleging in their affidavit for appeal that they were aggrieved by the judgment of the court in making said allowance to the administrator, with interest from the date of payment. Therefore the sole issue before this court is as to the legality of said payment by the administrator. But respondent insists that the case is not here properly on appeal. While appellants' abstract is meager, informal, and defective, it shows the nature of the cause, that there was a trial and judgment, the filing of motions for new trial and in arrest of judgment, the action of the court in overruling them, and the signing and filing of the bill of exceptions. They also bring forward a copy of said bill of exceptions. All which, we think, is a substantial compliance with the statute regulating appeals.

The claim of the bank for \$2,500 overvaluation of the said bank building was filed for allowance on the 28th of June, 1897, and was presented in the following form: "The estate of H. G. Pitkin, deceased, To Farmers Exchange Bank, Dr. \$2,500.00. The Farmers Exchange Bank is willing to take the building, which it now occupies, at the sum of four thousand dollars by way of compromise, but will not take the same at \$6,500.00. That a reasonable price for the same would not exceed \$3,500.00. The estate claiming that said building was sold to said bank by H. G. Pitkin, now deceased, at price of \$6,500.00." The usual affidavit in demands against estates of deceased persons was attached to the claim. The administrator waived service of notice for presentation and allowance, and stated that he was satisfied of its correctness. On July 19, 1897, the probate court made the following entry on its records: "I hereby certify that the sum

of twenty-five hundred dollars was allowed on the within account of the sixth class of demands and costs." The respondent administrator contends that the matter is res adjudicata. That the allowance of the demand against the estate was a judgment and, not having been appealed from, was final. This contention, as a rule, is true. Therefore it is insisted that it was not a matter for adjudication on the final settlement. On the contrary, it is insisted by appellants that, as the probate court had no jurisdiction in the first place to allow the demand, the judgment was a nullity, and the administrator was not entitled to the credit on a final settlement. *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543. The demand calls for the exercise of the powers of a court of equity to set aside a contract entered into between the deceased and said bank. It has been held in this state that equitable as well as legal demands may be allowed against the estate of a decedent. *Maginn v. Green*, 67 Mo. App. 616; *Hammons v. Renfrow*, 84 Mo. 332. But in *Re Estate of Glover & Shepley*, 127 Mo. 153, 29 S. W. 982, it was said: "But whatever defendant's equities may be, no equitable relief can be afforded him in this form for want of jurisdiction in the probate court, which has always been held by this court to possess no equitable powers" (citing *Church v. McElhinney*, 61 Mo. 543; *Butler v. Lawson*, 72 Mo. 227; *Church v. Robberson*, 71 Mo. 326), and such was the holding in a recent opinion of this court (*Tenney v. Turner*, 111 Mo. App. 597, 86 S. W. 506).

It therefore follows that the probate court had no jurisdiction to allow the demand, and no such jurisdiction was conferred upon the circuit court on the appeal. The cause is reversed, with directions to the circuit court to disallow the claim, and to charge the administrator with interest on the same from the date of its payment. All concur.

#### STROTHER v. HILLIKER.

(Kansas City Court of Appeals. Missouri.  
June 18, 1906. Rehearing Denied  
Oct. 1, 1906.)

#### JUDGMENTS—REVIVOR—PARTIES.

A judgment cannot be revived in the name of an assignee.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1596.]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by Ben S. Strother against C. E. Hilliker. From a judgment for defendant, plaintiff appeals. Affirmed.

Geo. B. & Sam B. Strother, for appellant. Meservey, Pierce & German and Cameron L. Orr, for respondent.

BROADDUS, P. J. On the 30th day of January, 1900, one W. H. Dixon recovered a judgment against defendant herein in a justice's court, which he assigned to the plaintiff, Strother. On January 26, 1906, the plaintiff filed in the court of James B. Shoemaker, the successor in office of the justice who had rendered said judgment, a petition to revive the same; and at the same time filed an affidavit in attachment, stating certain statutory grounds therefor. He also gave the necessary bond for an attachment. Whereupon the justice issued a writ of attachment in the usual form which the constable executed by seizing two of defendant's horses. Proper notice of the proceedings was served upon defendant who appeared and filed a plea in abatement to the attachment, which, upon being heard, was sustained, and plaintiff appealed to the circuit court. When the case reached the circuit court, the defendant moved to dismiss it for the reason that the court had no jurisdiction of the subject-matter, which motion the court sustained, and plaintiff appealed to this court.

The action of the court was right. A judgment cannot be revived in the name of an assignee. *Bick v. Tanzey*, 181 Mo. 515, 80 S. W. 902. All the proceedings were void as the justice had no jurisdiction of the subject-matter.

Affirmed. All concur.

#### GOODLOE v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.  
July 2, 1906. Rehearing Denied  
Oct. 1, 1906.)

#### 1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PLEADING.

Contributory negligence in an action for injuries is an affirmative defense which must be specially pleaded.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 186, 195-197, 207, 210.]

#### 2. CARRIERS—STREET RAILROADS—INJURIES TO PASSENGERS—POSITION—CONTRIBUTORY NEGLIGENCE.

Where a street railway company adopted a rule requiring users of tobacco to occupy the rear vestibule of a car, and plaintiff was occupying such position in compliance with the rule at the time he was injured in a collision with another car, he was not guilty of contributory negligence because he was not seated in the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1876.]

#### 3. SAME—COLLISION—RES IPSA LOQUITUR.

Proof that plaintiff was a passenger on a street car, and was injured by a collision between the car in which he was riding and a car approaching from an opposite direction, was sufficient to raise a presumption of negligence which would be conclusive against the carrier on the issue of negligence, unless the carrier produced rebutting evidence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1287.]

**4. SAME—NEGLIGENCE OF CARRIER.**

The motorman of a street car, on which plaintiff was riding, drove the same onto an embankment, where the tracks were so close that cars could not pass. At this time, a car having the right of way approached from the opposite direction, a third of a mile away, and could have been seen by the motorman, but he failed to stop his car. The motorman of the car having the right of way saw the danger, and stopped his car before it reached the danger point, but a collision occurred, the only excuse given for which being the slippery state of the rails. *Held*, that the motorman of the car on which plaintiff was riding was guilty of gross negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1211.]

**5. DAMAGES — PERSONAL INJURIES — CONCLUSIVENESS.**

Plaintiff, a teamster 43 years of age, was injured while a passenger on defendant's street car. He sustained slight injuries to his head and shoulders, and a serious permanent injury to his left hand, the bones of which were broken, and healed so that the hand was so stiff that the fingers could not be closed. Plaintiff suffered great pain, and was disabled from following his vocation, or from doing any work that required the use of both hands. *Held*, that a verdict of \$1,500 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 372, 379, 390.]

**6. SAME—EARNING CAPACITY — IMPAIRMENT—ISSUES.**

Where the petition alleged that plaintiff's injuries were permanent and lasting in character and effect, and had caused plaintiff in the past, and would cause him in the future to suffer great bodily pain and mental anguish, and that his earning capacity had been impaired, it was sufficient to present the issue of plaintiff's total disability to earn money in the future as a result of his injury.

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by Robert F. Goodloe against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

John H. Lucas and Frank G. Johnson, for appellant. L. A. Laughlin, for respondent.

**JOHNSON, J.** Action by a passenger against a common carrier to recover damages for personal injuries sustained in consequence of the negligence of the carrier. Plaintiff had judgment in the sum of \$1,500, and defendant appealed.

The negligence charged in the petition is "that while plaintiff was a passenger as aforesaid, and was standing on the rear platform of said car, by reason of the negligence of the defendant, said car ran into another car of defendant standing on the same track. That the force of said collision threw plaintiff violently into the car on which he was riding and onto his head, inflicting upon plaintiff injuries as follows," etc. The answer is a general denial. Defendant, as a part of its street railway system, operates a double track railroad between Kansas City and Independence. Electricity is the power used in propelling the cars. On account of the presence in the roadway of a high embankment about one-fourth of a mile long, the

tracks thereon are laid so close together that both occupy a lateral space only a few inches more than that covered by each, so that while the tracks are not merged, a car going eastward on one cannot pass a westbound car on the other in that section of the road. On January 2, 1904, plaintiff, accompanied by his wife and their two sons, became a passenger at Independence on one of defendant's cars that was bound for Kansas City. His wife and sons seated themselves in the car, but plaintiff, who was chewing tobacco, stood in the rear vestibule to avoid spitting on the floor of the car, an act forbidden by the rules of defendant as well as by the dictates of common decency. The car proceeded on its way using the track for westbound cars, and all went well until it reached the section of track described. At that time, an eastbound car was passing over that section and had the right of way. It was the duty of the motorman of the westbound car to wait until the other car had passed out of the way before running his car on to the embankment, but he failed to stop, and the two cars collided. The eastbound car had come to a stop at the time of collision, but the westbound car, according to the testimony of defendant's witnesses, was running at the rate of about four miles per hour. The impact was sufficiently violent to wreck the front vestibule of the westbound car, and to pitch plaintiff forward through the open door between the body of the car and the rear vestibule, and throw him to the floor. The collision occurred about 200 feet west of the point where the tracks converge. Both cars carried headlights. The motorman of the eastbound car, introduced as a witness by defendant, testified that he saw the other car approaching when his car was on the embankment some 800 or 900 feet from the place of collision. He was running at the rate of 15 miles per hour, and, when he observed that the other car was on the point of entering into danger, he shut off the current, applied the brakes, and stopped. It was not shown that the motorman of the westbound car made any effort to stop before he reached the embankment. He was not introduced as a witness, and the only excuse for his remarkable conduct offered in evidence is that he was running downgrade and the rails were slippery owing to the condition of the weather.

The first instruction given on behalf of plaintiff is as follows: "The court instructs the jury that the burden of proof is on the plaintiff to establish his case by the preponderance of the evidence, and by a preponderance of the evidence is meant the greater weight of the credible testimony; but the court instructs the jury that if you find from the evidence that plaintiff was a passenger lawfully on board of the defendant's train at the time of the collision, appearing in evidence, and received injuries therein, then

the burden of proof as to the cause of the collision is shifted upon the defendant to show to the satisfaction of the jury that said collision was caused through no fault, negligence, or carelessness of defendant's agents; and unless it is so shown the jury should find that such collision was occasioned by the negligence of defendant."

Counsel for defendant appear to think that plaintiff was at fault in choosing to stand in the vestibule instead of seating himself in the car. Defendant did not raise the issue of contributory negligence in its answer, and therefore that issue is not in the case. But had it been presented, the fact suggested would not have sufficed to make plaintiff's conduct an issue for the consideration of the jury. Plaintiff had the right to indulge in the use of tobacco during the transportation, and was riding in the part of the car provided by defendant for such passengers. Defendant impliedly invited him to be there if he chose, and in no manner was relieved from the performance of the duty it owed him as a passenger by his acceptance of the invitation. Defendant criticises the instruction quoted because of the declaration that the burden of proof on the issue of negligence shifts to the carrier when the facts that plaintiff was a passenger, and was injured by the collision of the car, in which he was riding, are made to appear, and argues that when all the evidence was introduced the burden was still with the plaintiff to show by a preponderance of the evidence the existence of all of the facts elemental to the cause of action asserted. The instruction under consideration was copied literally from one approved by the Supreme Court in the case of *Clark v. Railway Co.*, 127 Mo. 197, 29 S. W. 1013, and it was there said that, "when the passenger suffers injury by the breaking down or overturning of the coach, the prima facie presumption is that it was occasioned by some negligence of the carrier, and the burden is cast upon the carrier to rebut and establish that there has been no negligence on its part and that the injury was occasioned by inevitable accident or by some cause which human precaution and foresight could not have averted." *Smiley v. Railway*, 160 Mo. 629, 61 S. W. 667; *Robinson v. Railway*, 103 Mo. App. 110, 77 S. W. 493; *Furnish v. Railway Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781.

With the fact established, that the passenger was injured by a collision of the car in which he was riding, he, as the proponent of the proposition that he was injured by the negligence of the carrier, produced evidence of sufficient strength, not only to carry the issue of negligence past the judge to the jury, but to raise a presumption of negligence that would become conclusive, should the carrier fail to produce rebutting evidence.

Defendant completely failed to produce

any evidence that even tended to exculpate it from the presumption of negligence, and in the state of the proof before us the only issuable facts that remained in the case at the conclusion of all the evidence, were those relating to the measure of damages. The court would have been justified in peremptorily instructing the jury on all other issues presented by the pleadings and, therefore, the question of whether the burden of proof ever shifts is immaterial. Defendant's witnesses all agree that plaintiff was a passenger; that the collision occurred in the manner described; that plaintiff was overthrown thereby, and received physical injury therefrom. Instead of producing evidence tending to show that the collision was the result of inevitable accident, the facts adduced by defendant accuse its motorman, who was operating the westbound car, of gross negligence. He must have seen the eastbound car when it was one-third of a mile away, for the motorman of that car saw his car at that distance. He must have known that the approaching car was on the embankment, and therefore had the right of way, and it became his imperative duty to stop his car before entering on the embankment, and there wait until the other car had passed. Instead of doing this, he approached the embankment without checking speed. The slippery state of the rails was a condition he, as an experienced motorman, should have taken into account and affords not the slightest excuse for his failure to stop his car before it reached the danger point. What we have said answers all the objections made to this instruction.

It is insisted by defendant that the verdict was excessive. Plaintiff at the time of injury was 43 years old, and was a teamster. He sustained some slight injuries to the head and shoulder from his fall, but his serious injury was to the left hand. At the time of the trial, which occurred more than a year after the injury, the hand was so stiff that the fingers could not be closed. The injuries are thus described by a physician who treated plaintiff, and who testified as his witness: "I found the worst trouble with the left hand; a sprained wrist and the whole hand in fact. Some of the small bones were broken; and soreness of the left shoulder, partly in front, and underneath the shoulder joint. I found the middle finger was fractured at this joint, right near the base joint. The third finger was dislocated at the metacarpo phalangeal joint, the third joint. There was a fracture of this bone at that point and also the bone here in the hand back of the joint (indicating). The little finger was fractured at this third joint, and it was a great deal more sore at the second joint; the soreness at that point continued much longer. I don't believe it is well yet at that point. And the whole hand was badly swollen." Shortly before going on the stand, witness examined the hand, and found

it in this condition: "some irregularity in the outline, some crookedness in two fingers, the little finger and the one next to it, and a set of broken muscles and tendons there which prevents closing the fingers to the extent they should be in ordinary use." Q. "Now, what, in your opinion, is the reason for this contraction there which prevents the closing of the hand?" A. "Well, the principal reason for that is the contraction of the tendons on the back of the fingers, which prevents the flexing or closing of the fingers, while the adhesion of both of those fingers back and front from the soreness there has caused them to be stiffened and practically useless, and prevents the closing and flexing or extending of the fingers." Q. "State whether or not you think that condition is permanent." A. "It is, I told him in the beginning, and he didn't believe me."

Defendant introduced as a witness the physician who first treated plaintiff for the injuries sustained. He testified: "When I first saw it, it was not swollen to any extent. I got there immediately after he got home, at least, he told me so. So I went down there, and looked at the hand. I looked at the hand, and examined it very closely, and found the first phalanx of the ring finger; that is, the first joint of the ring finger, up that close to the joint, was fractured; that is, within about half an inch of the first joint; that is, it was probably about that close, it might have run up tapering a little. The little finger was dislocated in the last joint next to the hand." Q. "Doctor, from your experience in setting fractured bones and reducing dislocations, I will ask you to state if that hand had been left as you placed it what would have been the result of it?" A. "He would have had a good hand." That plaintiff suffered great pain from the injury and that his hand was seriously crippled when the case was tried are facts not denied by defendant, and it is tacitly admitted in the guarded question and answer above quoted that the injury to the hand is permanent. Plaintiff testified that he had been disabled from following his vocation, or from doing any work that required the use of both hands. Under such facts, we cannot say that a verdict of \$1,500 must be regarded as excessive. The learned trial judge and jury, who saw and heard the witnesses, and who saw the injured member, were better able than we are to form an accurate opinion as to the extent of the injury and of the compensation plaintiff should be awarded. We do not interfere in such case unless it clearly appears that the verdict is so large as to indicate that it was not the result of judgment fairly and intelligently exercised, but of passion or prejudice.

Defendant objects to the instruction on the measure of damages on the ground that the issue of plaintiff's total disability to earn money in the future as a result of his injury

is submitted, while no such issue is pleaded, and no proof of total disability adduced. The petition alleges "that said injuries are permanent and lasting in character and effect and have caused plaintiff in the past, and in the future will cause him, to suffer great bodily pain and mental anguish. That his earning capacity has been impaired." To impair is to diminish, decrease, or deteriorate, and to allege that plaintiff's ability to earn money has been impaired, coupled with the statement that the cause that produced that result is permanent, is the assertion of the fact that the impairment likewise is permanent and therefore raises the issue of a permanent deterioration in earning capacity and satisfies the rule that loss of earnings, being in the nature of special damages, must be specially pleaded. *Wilbur v. Railway Co.*, 110 Mo. App. 689, 85 S. W. 671; *Gurley v. Railroad*, 122 Mo. 151, 26 S. W. 953; *Britton v. St. Louis*, 120 Mo. 437, 25 S. W. 366; *Mellor v. Railroad*, 105 Mo. 462, 16 S. W. 849, 10 L. R. A. 36.

The instruction, in employing the expression "will in the future disable him from earning money and making a support" does not enlarge the scope of the issue pleaded. The word "disable" is not modified by the adverb "totally" as erroneously assumed by defendant, and evidently is used to describe the condition of permanency in the impairment of earning capacity rather than the complete destruction thereof. The instruction is not subject to the criticism that it failed to restrict the recovery of damages for future consequences to such as were reasonably certain to result from the injury. *Wilbur v. Railway*, supra; *Halley v. Railway* (Mo. App.) 91 S. W. 163; *Reynolds v. Transit Co.* (Mo. Sup.) 88 S. W. 50.

The judgment is affirmed. All concur.

#### McKINNON v. WESTERN COAL & MINING CO.

(Kansas City Court of Appeals. Missouri.  
June 18, 1906. Rehearing Denied  
Oct. 1, 1906.)

#### 1. MASTER AND SERVANT—INJURIES TO MINERS—CONTRIBUTORY NEGLIGENCE.

Though a miner knew that his employer had not furnished props requested, he was not guilty of contributory negligence, as a matter of law, in continuing to work without props so as to preclude him from recovering for injuries sustained from the falling of the roof of the mine, where the danger was neither open nor patent, and did not appear imminent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

#### 2. SAME — SUPPLYING PROPS — STATUTORY DUTY.

Rev. St. 1899, § 8822, provides that the owner, agent, or operator of any mine shall keep a sufficient supply of timber, when required to be used as props, so that the workmen may at all times be able to properly secure the workings from caving in, and that the operator of the mine shall send down all such props when required. *Held*, that such section requires a

mining company to keep on hand a sufficient supply of props so that when a miner "requests" them it shall send them to him without unnecessary delay.

[Ed. Note.—For cases in point, see vol. 34 Cent. Dig. Master and Servant, § 209.]

#### 3. TRIAL—CONFLICTING INSTRUCTIONS—CUR- ING ERROR.

Where an instruction in an action for injuries to a miner erroneously declared that it was the duty of a mine operator to keep on hand a sufficient supply of timber for props, to be used "when required" by the workmen in the mines to keep the workings from caving in, etc., it was not cured by another instruction that the duty devolved on the workmen to request props when needed.

#### 4. MASTER AND SERVANT—INJURIES TO SERV- ANT—COAL MINES—STATUTORY INSPECTION.

The statute requiring inspection of coal mines in order to determine the presence of gas does not apply to mines that do not generate gas.

#### 5. SAME—PROTECTION OF STATUTE—COMPEN- SATION.

The protection of Rev. St. 1890, § 8822, requiring mine operators to keep on hand a supply of props to be furnished to miners on request, is not limited to miners working for wages, but extends as well to those mining coal at a fixed price per bushel.

Appeal from Circuit Court, Barton County; H. C. Timmonds, Judge.

Action by Charles McKinnon against the Western Coal & Mining Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

R. T. Ralley, for appellant. Cole, Burnett & Moore, for respondent.

**BROADDUS, P. J.** The defendant is a corporation engaged in mining coal in Barton county, Mo. The petition states that "on December 21, 1903, he was working as a laborer for defendant in its coal mine in said county, and while so engaged, without fault on his part, was crushed by a quantity of slate, stone, and earth falling upon him from the roof of the mine, where he was laboring, whereby he was bruised, injured, his back hurt, and several ribs broken," etc.; "that said injury was the result of defendant's negligence, in carelessly and negligently permitting the roof of said mine to become and remain in a dangerous and unsafe condition, so that slate, rock, and earth in said roof had become loose, unsupported, and liable to fall; that the condition of the roof required same to be supported by props, and defendant wrongfully and carelessly and negligently failed to support and prop said roof; that defendant negligently failed to keep a sufficient supply of timbers to prop the roof of said mine as required, so that plaintiff and other laborers therein might at all times be able to properly prevent said workings from caving in; that defendant negligently failed to send down into said mine such props as were required; and that said mine, in which men were employed, generated gas, and defendant negligently and carelessly failed to have the same examined

every morning by a practical and duly authorized agent to determine whether there were dangerous accumulations of gas, or lack of proper ventilation, or obstructions to roadways, or any other dangerous conditions in said mine; that plaintiff, by reason of defendant's negligence aforesaid, was injured as described; that defendant knew the dangerous and unsafe condition of said mine when plaintiff was injured, or by the exercise of ordinary care could have known it; that, notwithstanding the facts stated, defendant ordered and caused plaintiff to work in and at such unsafe and dangerous place, and under said unsafe and dangerous roof," etc. The answer consisted of a general denial and that plaintiff was an experienced miner, was fully acquainted with his room, its surroundings, and the danger to be apprehended in working therein; that it was plaintiff's duty to put up his own props, to look after and test the roof of his room to ascertain whether it was safe or otherwise, and to put up said props when they were needed; that at the time of the accident, and for some time prior thereto, ample props had been delivered to plaintiff, which were more than sufficient to have enabled him, in the exercise of ordinary care, to prop his roof and make the same safe against all danger; and that it was no part of the duty of defendant to examine said roof nor to prop the same; that plaintiff had both actual and constructive notice, prior to his injury and in ample time to have protected himself against the same, that the slate or rock which fell upon him was unsafe and liable to fall at any moment; that plaintiff, with both actual and constructive notice of the dangerous condition of said roof, and the danger to which he was subjecting himself in working without propping same, recklessly and negligently took his life in his own hands by continuing to work in said room after sufficient props had been furnished him without putting up any of said props, and by reason of his own reckless, willful, and wanton conduct he brought about his own injury, without any fault or negligence upon the part of defendant; and that the dangers arising from said work plaintiff was doing, were patent, open to observation, and were assumed by him, by reason of the facts aforesaid. The reply put in issue the facts set up in the answer. Plaintiff recovered judgment, from which defendant appealed.

The mine in this instance was operated in the following manner: First a shaft was sunk from the surface of the earth to a distance of about 46 feet. What are called mine entries were run out in different directions from the shaft, which were about 6 feet wide and 5 feet high. Before a miner begins to work, a neck is cut from one of these entries about 5 or 6 feet in length, at the end of which the miner be-

gins to dig coal. This latter place is called the miner's room and is of various widths of from 20 to 25 feet. It was in one of these rooms the plaintiff was at work when he was injured. The mine in question was operated as similar mines were, with a cage from the surface to the bottom of the shaft and there were tracks for transporting coal to the shaft and material from the shaft to the different parts of the interior of the mine. The cars that carried the material back and forth were operated by mules in charge of a driver. At the time of plaintiff's injury his room had been mined until it was about 16 by 25 feet. It was shown that it was the duty of the miners to look after the condition of their rooms and to do the propping themselves. It was also shown that defendant had a sufficient quantity of props at the mine for the use of the miners. On quitting work the day previous to his injury, plaintiff had drilled a hole in the coal of his room and filled it with explosives, which in the usual course of business was shot, as the miners call it, after he left the mine. The purpose of the shot is to loosen the coal for the convenience of the miner.

Plaintiff in his testimony stated that he had been working in the mine in question for about eight months previous to his injury; that the roof of his room in height was from two to three feet; that sometimes mixed with the coal is another material, which mixture the miners call "horseback"; that both the floor and roof of the mine were composed of slate, which on one side of the room was safe and sound, but on the other side the slate was what he called "draw slate" (that is, slate that cuts itself) which was unsafe and needed props; that on the morning in question there were no props in his room, nor any in the entry room; that it was a rule when a miner wanted props he ordered them through the driver, who delivered the message to the operator of the cage at the mouth of the shaft, who calls to the surface through a speaking tube for them, giving dimensions, which are furnished usually in a short time; that for several days prior he called for props, but did not get them and that on the morning in question, or a day or two previous, he is not certain which, he called upon the boss for props of a certain length and was informed by him that there were no such props on hand; that there was one prop in the room but it was too crooked to be used. At the time the roof fell upon him plaintiff was in a sitting position using the pick with his right hand, the usual manner of mining coal in that kind of a place. There was an abundance of evidence that there was a sufficient number of props in the room at the time in question; and evidence that plaintiff made no request for props as stated by him. He was not employed at regular wages, but was paid by the amount of coal

he mined. It stands admitted that the mine in question did not generate gas, and it was also shown that it was one of the rules of the company that the miners were to put in props whether they were needed or not. At the close of plaintiff's case and also at the close of all the evidence, defendant requested the court to instruct the jury that plaintiff was not entitled to recover and to return a verdict accordingly, which the court refused. There is no dispute but what the falling of the slate and rock upon the plaintiff was the result of the negligence of some one in failing to support the roof by means of props. The plaintiff in giving his reason for working under the roof without props stated that, although he would have used props if they had been furnished him, yet he thought it safe otherwise or he would not have gone into the room; that to him it seemed safe and sound and did not need props.

The contention of defendant is that, as it was the duty of plaintiff to look after the safety of his own room, he is not entitled to recover, as he was aware of the danger. In other words, that he was guilty of such contributory negligence as forfeited his right in that respect. But we are of the opinion that such is not the law. In *Adams v. Kansas & Texas Coal Co.*, 85 Mo. App. 486, the court held in an opinion by Ellison, Judge, "that, notwithstanding the plaintiff knew defendant had not furnished the props as requested, yet, as the danger from lack of them was not open and patent and did not appear imminent, he was not forced to quit work, or else to accept harmful results without complaint. Such is the rule in this state as shown by a long line of decisions in the Supreme Court and the Courts of Appeals." And that decision was expressly approved by the Supreme Court in *Wojtylak v. Kansas & Texas Coal Co.*, 188 Mo. 260, 87 S. W. 506. And such is the holding in *Western Coal Co. v. Beaver*, 192 Ill. 335, 61 N. E. 335, which also met the approval of the Supreme Court in *Wojtylak Case*, supra. The plaintiff's testimony, as stated, was to the effect that he thought the roof safe, although as a precaution he would have propped it if props had been furnished. It was therefore a question for the jury whether he was justified, under the circumstances, in working at the time stated, and not a question of law for the court. The Illinois case is to the same extent as what is said in *Adams v. Kansas & Texas Coal Co.*, supra. In the former, it is said that the "mere contributory negligence on the part of the miner will not defeat a right of recovery where he is injured by the willful disregard of the statute, either by an act of omission or commission on the part of the owner, or operator, or manager."

It is insisted that the court committed error in giving instruction numbered 1 for the plaintiff. It reads in part as follows:

"You are instructed that it is the duty of a mine operator to keep on hand a sufficient supply of timber for props, to be used when required by the workmen in the mines to keep the workings from caving in, and when a mine is being worked under the supervision and direction of a ground foreman or pit boss, and if props are required in the mine, he is presumed to know it, and his knowledge is that of the company, and when such props are so needed or required, it is the duty of the company to send them down to the workman." The theory of the instruction is that it is not the duty of the workman to request props, but that of the foreman to know when they are needed and send them down into the mine. This court in *Bowerman v. Mining Co.*, 98 Mo. App. 308, 71 S. W. 1062; *Weston v. Mining Co.*, 105 Mo. App. 702, 78 S. W. 1044; *Bruce v. Wolfe*, 102 Mo. App. 385, 76 S. W. 723, held that the word "required" did not mean "requested," but meant "when needed," and the miner did not have to request or demand that props be sent down, but the mine owner was charged with the duty of knowing when they were needed and to send them down without being requested so to do. But in the *Wojtylak Case*, supra, the Supreme Court disapproved of that construction and approved of the holding in *Adams v. Kansas & Texas Coal Co.*, supra, where the word "required" was construed to mean "requested," and also approved of the holding in the *Illinois case*, where it is also held that the word "required" means "requested." The court then proceeds in the following language: "We think section 8822, Rev. St. 1899, means that the mining company shall keep on hand a sufficient supply of props so that when a miner requests them, it shall send them to him without unnecessary delay, to enable him to prop his room."

Respondent insists that, as the opinion is obiter dictum, this court should disregard it and adhere to the holding in the *Bowerman* and other cases cited. But, as our decisions have been conflicting on the question, it is proper that we should say which is to govern. In so doing, due deference should be had for the opinion of the Supreme Court, which so pointedly calls attention to the conflict in the cases named. We take it for granted that that court, when the question again comes before it, will adhere to the decision in the *Wojtylak Case*. Uniformity in rulings of the appellate courts is of the highest importance to litigants.

Respondent, however, contends that, notwithstanding the instruction may have been erroneous, the error was cured by one given at the instance of defendant. It is true that defendant's instruction numbered 3 is to the effect that duty devolves on the workman to request props when needed, yet we cannot see that it had the effect of curing the defect in that of the plaintiff. They are absolutely in conflict with one another, and altogether irreconcilable. It is no such an

error that we can say was harmless on the ground that the verdict was for the right party, as the evidence greatly preponderated in favor of defendant.

There was another error committed in the trial of the case and that was the admission of evidence to show that defendant failed to daily inspect plaintiff's mining room, as it was proven, in fact admitted, that the mine did not generate gas. In *Poor v. Watson*, 92 Mo. App. 89, this court holds that courts should take judicial notice that coal mines generate gas, and that it was therefore the duty of the owner or operator to make the inspection as provided by the statute. The effect of the decision is that all coal mines are presumed to generate gas, and as such are to be classified, in contradistinction to other kinds of mines that do not as a rule generate gas. But it was not intended to apply the statute to coal mines that did not generate gas. The law does not require the doing of an useless thing.

The further question is raised by the defendant that, as plaintiff worked, not for wages, but that his compensation was to be a fixed price per bushel for the coal he mined, he was not such a workman for whose safety the statute was enacted. But we do not think the position is tenable. The purpose of the statute was to protect persons who worked for the owners of the mines in mining coal, without reference to the manner in which they might receive compensation for their work.

Respondent raises the point that the appeal should be dismissed because the defendant has failed to show certain matters in its abstract as are required by the statute and the rules of the court, but we find it is substantially good.

Other questions raised in the case are not well taken. For the errors noted, the cause is reversed and remanded. All concur.

STRAWN v. MISSOURI, K. & T. RY. CO.  
(Kansas City Court of Appeals. Missouri.  
June 18, 1906. Rehearing Denied Oct. 1,  
1906.)

#### 1. EVIDENCE—PAROL EVIDENCE—CONTRADICTION OF RECEIPT.

A receipt for goods delivered by a carrier is a non-contractual admission, and is open to explanation or contradiction by parol, or other competent evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1829-1842.]

#### 2. CARRIERS—LOSS OF GOODS—EVIDENCE.

In an action against a carrier for alleged loss of goods, evidence held sufficient to contradict a receipt given by the consignee's agent for the goods, and to sustain a finding that one case of the shipment was never delivered by the carrier.

Error to Circuit Court, Boone County; A. H. Waller, Judge.

Action by J. W. Strawn against the Missouri, Kansas & Texas Railway Company. From



a judgment for plaintiff, defendant brings error. Affirmed.

Geo. P. B. Jackson, for plaintiff in error.  
N. T. Gentry, for defendant in error.

JOHNSON, J. Plaintiff, a merchant at Columbia, sues to recover the value of a case of dry goods which he claims defendant as a common carrier received for hire for transportation and delivery to him at Columbia, and failed to deliver. A jury was waived, and the court sitting as a jury heard the evidence, and gave plaintiff judgment for the value of the goods. Defendant appealed.

Plaintiff's ownership of the goods, their description and value, their shipment at New York consigned to plaintiff, and their delivery to defendant in the course of transportation, are all conceded facts. The controversy between the parties relates to the fact of the delivery to plaintiff at Columbia. It appears that the shipment received by defendant consisted of six cases of dry goods consigned to plaintiff. Defendant's records show that all of them were carried to its station at Columbia, and then delivered together to plaintiff. In addition to this evidence, defendant produced a receipt for the six cases including the one in dispute, signed by D. E. Hulett, and in a stipulation made by the parties it was agreed that "at the time of said shipment and its delivery at Columbia Hulett was a drayman and transferman engaged in business at Columbia, and that it was then the custom of said Hulett acting under authority from plaintiff and other merchants to receipt for cases of goods shipped over defendant's railroad, and take the same in said Hulett's transfer wagons to different dry goods merchants in Columbia, and receive pay from said merchants for said services, and to pay the freight charges to the railroad company." The course of business here outlined was followed in the present instance. Hulett receipted to defendant for the cases, collected the freight charges from plaintiff, and paid them to defendant. After the loss of the case was discovered, plaintiff notified defendant, and a "tracer" was sent over the line of transportation, and the history of the shipment as recorded by the carriers that handled it tended to verify the fact of the delivery of the case in question to Hulett. It had not been misdelivered at any other station, nor was it in the possession of any of the carriers.

Counsel for plaintiff admit that Hulett was his agent authorized to receive and receipt for the case and that if it was in fact delivered to Hulett "that was just as valid as a delivery to the owner himself," and further they concede that the receipt given by Hulett "is prima facie evidence that such delivery was made." With the case in this posture, obviously the burden is on plaintiff to overcome the prima facie proof of delivery made by defendant in the production of the receipt signed by the agent of plaintiff. This burden

plaintiff assumed, and, in attempting to meet it, introduced evidence tending to establish the following facts: Hulett did not attend in person to the hauling of the cases to plaintiff's store. He called at the station, as was his custom, and learned that merchandise consigned to plaintiff had arrived. He then directed the driver of one of his wagons to haul the goods. The driver drove to the station, and loaded into his wagon all of the cases delivered to him by defendant's agent for delivery to plaintiff, hauled them to the store of the latter, placed them on the sidewalk in front of the principal entrance to the store, and drove away. Some time after this, Hulett called at the station, and signed the receipt. The missing case weighed about 300 pounds and in dimensions was 3 feet each way. The fact that the case was lost was not discovered by plaintiff until some 15 days had passed after the hauling of the other cases. The driver then could not remember how many cases he hauled on that occasion, but was positive that he delivered to plaintiff all he received from defendant. Plaintiff produced the invoice of the goods contained in the missing case, and offered the testimony of himself and of each of his clerks to show that the goods therein described were not received in the store. Defendant criticises this evidence saying that it is not sufficiently positive to offer any evidentiary opposition to the written receipt.

These are examples of the testimony defendant asserts is lacking in probative force. From the testimony of the clerk, who unpacked the cases delivered at the store: Q. "All you know about the matter is that some embroideries that were supposed to have been ordered had not arrived at your house?" A. "Yes, sir." Q. "And you think they never did get there?" A. "Not to my knowledge." From the testimony of one of the sales clerks: Q. "State if the goods in these three bills ever arrived at your store." A. "Not to my knowledge. They never were in the stock. I kept that stock." Q. "You were in the store every day during that time?" A. "Yes, sir." Q. "If such a box containing these goods were received there, would you have known it?" A. "Yes, sir."

Defendant asked and the court refused to give an instruction in the nature of a demurrer to the evidence, and then asked and the court gave declarations of law, from which we quote: "Unless the plaintiff has established to your satisfaction by the evidence in the case that the giving of the said receipt and the payment of the freight charges by the said Hulett was a mistake and unless the giving of said receipt and the payment of said charges are satisfactorily explained and are shown to have been through error or mistake, the same become conclusive evidence of the delivery of said goods \* \* \* in order to overcome the effect of such receipt, it is necessary that there should be evidence suffi-

cient to convince you that the said receipt was given by mistake, and, in reaching your conclusion upon that subject, you are not authorized to indulge in any mere speculation or possibilities, but must have substantial evidence sufficient to satisfy you that the said case was not delivered, and that the receipt was signed by mistake \* \* \* the mere fact that the plaintiff may not have received the case of goods is not sufficient evidence to establish the further fact that the same was not delivered to the said Hulett as the agent of plaintiff \* \* \* such fact (i. e., the nondelivery of the case to plaintiff) is only one of the circumstances that may be considered in reaching your conclusion in this case and, in the absence of other evidence tending to establish the nondelivery by the defendant to Hulett, the failure of Hulett to deliver the case of goods to the plaintiff does not relieve the plaintiff from the effect of the written receipt given by Hulett and under such circumstance *and in the absence of such evidence of nondelivery to Hulett*, your finding must be for the defendant," (the italicized words were interpolated by the court). No declarations of law were asked by plaintiff.

Defendant in effect concedes that the controlling question before us on this appeal is whether the facts adduced in evidence by plaintiff are sufficient to raise an issue of fact in the face of the admission expressed in the written receipt given by plaintiff's agent. If they are, the judgment must be affirmed on the ground that the court exercising the function of a jury has conclusively settled that issue in favor of plaintiff. In such cases, appellate courts do not weigh conflicting evidence, but confine themselves to the determination of the question of whether or not a substantial, or what may be termed a legal conflict, exists. Should we find that the judgment is supported by substantial evidence that serves to weigh in the balance against the written admission, defendant cannot complain of the adoption by us of the principles embodied in the declaration of law given at its instance. Indeed, aside from this consideration, we entertain the view that the learned trial judge clearly and correctly declared the principles of law applicable to an issue of this character. The receipt given by the authorized agent of plaintiff, containing, as it does, an admission of the fact of the delivery of the case of goods to the agent is prima facie evidence of the verity of the recited fact. It is evidence of a high character because it is an admission against interest, but it belongs to the class denominated "noncontractual admissions" and therefore is open to explanation or contradiction by parol or by any other competent evidence. *Weatherford v. Farrar*, 18 Mo. 474;

*State ex rel. v. Branch*, 112 Mo. 661, 20 S. W. 693; *Cardwell v. Stuart*, 92 Mo. App. 586; *State ex rel v. Cummiskey*, 34 Mo. App. 189; *Quattrochi Bros. v. Bank*, 89 Mo. App. 500; 23 A. & E. Ency. of Law (2d Ed.) 983 et seq.; 2 Wharton on Evidence, §§ 920, 1064, 1130, 1365; 2 Parsons on Contracts (9th Ed.) 709; Wigmore on Evidence, § 2432; Van Zile on Bailments and Carriers, § 452. When the evidence contradicting a receipt clearly shows that it was given under a mistake as to the facts, or in ignorance of material facts, or that it was obtained by fraud, its probative strength is overcome, and it ceases to possess any evidentiary value. No special character of evidence is required to establish the fact that a receipt was mistakenly given, but the facts and circumstances adduced, to be effective, should clearly show the nonexistence of the admitted fact.

Applying these principles to the facts of the present case, we entertain the view that should the testimony of plaintiff and his witnesses be accepted as true, he has clearly and convincingly established the facts that the case was not delivered by defendant to Hulett, and the receipt was given under a mistake as to the real fact. Hulett was not present when the cases hauled were delivered to his driver, and had no knowledge when he signed the receipt of the number of cases actually delivered. The driver states that he hauled all of the cases he received, and deposited them on the sidewalk in front of plaintiff's store. The facts and circumstances strongly tend to show that all of the cases placed on the sidewalk by the driver were taken into the store unpacked and their contents placed in the stock, and that the goods contained in the case in controversy were not received. The fact that the clerks qualified some of their answers with the expression, "not to my knowledge," does not alter the positive character of their testimony, as defendant erroneously assumes. When a witness is in position to know definitely of the existence of a fact, and testifies that he has knowledge of the subject, and states that the fact to his knowledge is nonexistent, he positively asserts a fact. Such was the character of the testimony criticised, and it was not deficient in probative vigor. The trial court, having before it clear and satisfying evidence tending to impeach the verity of the receipt, properly overruled the demurrer to the evidence. The issue of fact presented was one to be determined by that tribunal acting in the capacity of a trier of fact and its finding, that resulted in the judgment rendered, is not open to review.

The judgment is affirmed. All concur.

## WARNER v. CLOSE.

(Kansas City Court of Appeals. Missouri.  
July 2, 1906. Rehearing Denied Oct. 1,  
1906.)

## 1. JUSTICES OF THE PEACE—PLEADING—STATEMENT OF PLAINTIFF.

A statement for so much due on settlement does not wholly fail to state a cause of action.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 310.]

## 2. SAME—WAIVER OF DEFECTS.

Defendant, by going to trial without calling the attention of the court to, and having it act on, his motion to dismiss because plaintiff had filed no paper of any kind on which to base a cause of action, waives the defects in plaintiff's statement.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 342.]

## 3. TRIAL—ARGUMENT OF COUNSEL.

A party has no right of argument in a civil case, there being nothing fairly debatable.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 267.]

## 4. APPEAL—PRESUMPTION—NECESSITY OF ARGUMENT.

It will be presumed, where the court, in a civil case, submitted to it on the law and evidence, acts without hearing argument of counsel, that none was necessary.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3734.]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by A. J. Warner against F. D. Close. Judgment for plaintiff. Defendant appeals. Affirmed.

Horace Merritt, for appellant. Jno. C. Trigg, for respondent.

BROADDUS, P. J. This suit originated in a justice's court where the plaintiff filed the following account: "July 7th, 1904, F. D. Close, Carl Junction, Mo. to A. J. Warner, Dr. Jan. 1st, 1904. To balance due on settlement \$170.75. In. \$5.20—\$175.95."

The defendant filed a motion to dismiss plaintiff's suit because his statement was not sufficient as a basis for a cause of action, which the court overruled. But before trial plaintiff filed an amended statement as follows: "Fred D. Close to A. J. Warner to agreed balance on settlement July 21, 1902, \$10.45. To labor, repair work, and services as salesman from July 21, 1902, to Dec. 31, 1903, less 9 weeks and 3 days, at \$12.00 per week, \$782.00; credit by amount paid \$679.82; balance due \$102.18." The defendant filed a counterclaim. The case was submitted to the court without the intervention of a jury, and judgment was rendered for plaintiff in the sum of \$102.18. The defendant appealed to the circuit court, where on trial anew the plaintiff obtained judgment for \$64.26, from which defendant appealed to this court. The defendant contends that neither the original nor the amended account states a cause of action. We are cited to the case of *Watkins v. Donnelly*, 88 Mo. 322, which was on an account filed against an administrator, where

the charge was for services without specifying the kind of services. The court held that the statement was insufficient and reversed and remanded the cause, so that it might be made more specific. Numerous other cases are cited of a similar character, among which is that of *Brashears v. Strock*, 46 Mo. 221, alluded to in an opinion of this court in the case of *Keene v. Sappington* (Mo. App.) 90 S. W. 752. In *Nenno v. Railroad*, 105 Mo. App. 540, 80 S. W. 24, there was no cause of action of any kind stated against the defendant sought to be charged. The original statement is for so much due on settlement. None of the authorities we have seen go so far as to hold that a statement of the kind wholly fails to state a cause of action. They only go to the extent of holding such to be insufficient.

The amendment is somewhat more specific, but at the same time indefinite. Yet it states a cause of action. When the case got to the circuit court, the defendant filed a motion to dismiss because plaintiff had filed no paper of any kind on which to base a cause of action. The motion was never passed on and no reason given why it was not. But as defendant went to trial without calling the attention of the court to his motion and having it acted on, he waived the defects in plaintiff's statement. He should have proceeded in the manner pointed out in *Watkins v. Donnelly*, supra, and had his motion passed upon by the court. Section 4079, Rev. St. 1899, allows any amendment to a cause of action filed before a justice, embraced or intended to be included in the original account or statement so filed: *Keene v. Sappington*, supra. Practically speaking, the statute allows almost any kind of amendment: *Dowdy v. Wamble*, 110 Mo. 280, 19 S. W. 489. It appears that defendant did not believe that the statement was wholly bad, for at the very beginning of the trial he admitted that he owed plaintiff a balance of \$10.45. The defendant's second point is that the court, after taking the case under advisement, entered a judgment for the plaintiff in his absence without hearing his argument. It appears that defendant's attorney was absent from the courtroom, talking to some one over the telephone when the court announced its decision. He makes affidavit that when the trial was closed and the court took the case under advisement the judge announced that he would hear counsel for both sides on the next day or at some other convenient time. It is held that "where a controverted question of fact is to be submitted to a jury for its determination, either party has an absolute right to be heard by his counsel in argument thereon to the jury." *Douglass, Sheriff, v. Hill*, 29 Kan. 527. In vol. 1, p. 703, § 920, *Thompson on Trials*, the law is stated thus: "The right to appear and defend is undoubtedly an absolute right, existing in all cases, civil and criminal, of which no court possesses the power to de-

prive a party. But the right to be heard in argument in a particular case, is plainly not a right of this absolute nature, it does not exist at all unless there is something to argue about that is fairly debatable. Clearly, it is within the power of the court, in a civil case, to dispense with this aid or help, where it is not necessary." The law is well stated by Mr. Thompson, except we might add that, where a court decides a civil suit submitted to him on the law and evidence, where he acts without hearing the arguments of counsel, the presumption will arise that no such argument was necessary to aid the court to come to a just conclusion.

The defendant also discusses the merits of the case, but as the court sitting as a jury has passed upon the weight of the testimony and the credibility of the witnesses, and as there is evidence to support the finding, we are not authorized to go behind it. Affirmed. All concur.

#### DIAMOND v. KANSAS CITY.

(Kansas City Court of Appeals. Missouri.  
July 2, 1906. Rehearing Denied  
Oct. 1, 1906.)

##### MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

One who, on an exceedingly dark night, when there are no lights, goes over a sidewalk, which he has regularly traveled twice a day, and in which for a month there have been three transverse openings, six to eight inches wide, is guilty of contributory negligence, where he proceeds at the ordinary gait employed by him in the daytime, without feeling his way with his feet, and without taking hold of a hand rail at the side of the walk.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1677.]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by Henry Diamond against Kansas City. Judgment for plaintiff. Defendant appeals. Reversed.

Edwin C. Meservey and Francis M. Hayward, for appellant. Walsh & Morrison, for respondent.

JOHNSON, J. Action for damages resulting from personal injuries alleged to have been caused by a negligent defect in a public sidewalk. A verdict was returned in favor of plaintiff in the sum of \$5,000. He remitted \$500, and judgment was entered for \$4,500, from which defendant appealed.

The injury was inflicted March 24, 1903, at about midnight, on Allen avenue, between Eighteenth and Nineteenth streets, in Kansas City. This street ascends from the west bottoms to the top of the bluff in a northerly direction. At the time mentioned the roadway for vehicles was unimproved, rough, and muddy. Immediately west of this roadway, and running parallel to it, the city maintained a board sidewalk. Owing to the sharp declivity of the hillside, the sidewalk was a

causeway, the west side of which was four or five feet above the ground. It was about five feet wide, and had been provided on each side with a hand rail; but plaintiff stated that at the place where he fell there was no rail on the east side. The floor of the structure consisted of planks, six or eight inches wide, laid across and nailed to stringers running with the course of the sidewalk. At several places a plank had become detached and removed, and it was in one of the openings thus made in the floor that plaintiff stepped and fell.

Defendant contends that its instruction in the nature of a demurrer to the evidence should have been given, on the ground that plaintiff was, in law, guilty of contributory negligence. Plaintiff lived on the top of the hill, and worked as a switchman in the railroad yards in the bottoms. In going to and from his work he traveled this sidewalk twice a day. He worked at night, and generally carried his switchman's lantern with him. He knew of the defective condition of the sidewalk, that two or three planks were missing in the space of several hundred feet and that part of one of the hand rails was gone, but did not remember the exact location of the particular opening into which he fell. He went to work in the evening of the day of his injury, but after arriving at the yards permitted another switchman just employed by the company to take his place for that night and loaned him his lantern. In returning home, Allen avenue offered the only direct way. Had plaintiff chosen to return by the next street either to the north or south, he would have had to make a detour of five or six blocks. The night was dark, the street lamp was out, and as plaintiff proceeded towards the place of disaster his vision further was obscured by the presence of enveloping smoke that ascended from the bottoms. He states he was proceeding in an ordinary walk, such as he employed in the daytime, and was mindful of the holes in the sidewalk, but being unable to see them, stepped into one of them and fell. The hole had been there for a month or more, and had been observed by plaintiff that evening when he went to his work. A person walking on a sidewalk provided by the city for the use of pedestrians is where by implication he is invited to be, and the city owes him the duty of exercising reasonable care to maintain the same in a reasonably safe condition for travel. He is not, however, justified in relying altogether on the presumption that the city has performed its duty. Ordinarily prudent persons make reasonable use of their senses at all times to guard their own safety, and the degree of care exercised is measured by the exigencies of the particular situation. What reasonably prudent persons would or would not do in the given case, while observing due care, furnishes the standard by which the law classifies individual conduct; and when a person falls either to reasonably employ

his faculties to become aware of confronting danger, or knowing of its presence, to use reasonable care to avoid falling into it, the law calls his conduct careless, because it is out of harmony with ordinary prudence, and loads it with the entire responsibility for the consequences notwithstanding the negligence of another may have aided in producing it. But people are compelled by their affairs to use the public thoroughfares, and the mere fact that a person has knowledge of defects, which are suffered to remain in a street kept open for use, and that such defects make the use of the street more dangerous, does not of itself compel him to avoid that way if he would act within the bounds of reasonable care, except where the danger is so glaring and threatening that reasonable prudence would say the way could not be used in safety. In the latter case, the use of the street in the face of such knowledge would be deemed in law an act of negligence. But, where the known defects are not necessarily dangerous, due care requires nothing more than the adoption of such means to avoid injury from them as the situation and circumstances naturally would suggest to the ordinary prudent mind.

The facts before us do not warrant the inference that the few openings in the sidewalk in all events necessarily menaced the safety of a pedestrian, particularly that of one who knew of their presence. Except when surrounded by utter darkness, plaintiff, by giving ordinary attention to his course, easily could have avoided stepping into any of them. But, being plunged into what he pictures to be complete darkness, and knowing that the holes were there, his conduct in proceeding at the gait and in the manner he walked in the daytime appears to be palpably negligent. He neither attempted, by using the one good hand rail, to provide himself with the means of recovering his balance, should he make a misstep, nor did he feel his way with his feet, and thus make sure of the safety of his footing before placing his weight on the advancing foot, as people usually do who are compelled to grope in darkness. It is true, contributory negligence is an affirmative defense, but plaintiff's own statement of what he did shows that he made not the slightest effort to avoid the dangers which, from the fact of darkness, were threatening in the highest degree. And there is nothing in the record from which the inference may be drawn that he acted with reasonable care. He trusted entirely to chance to escape and, assuming that the distance of each of his steps was approximately 30 inches, and that he had to pass over three transverse openings in the sidewalk, he had no more than an even chance of missing a fall. Thus the danger under all the circumstances in the situation was such that it certainly menaced his safety, and, as he utterly failed to take any measures to avoid it,

his own negligence stands forth indisputably as the producing cause of his injury and precludes a recovery.

The judgment is reversed. All concur.

### KING v. ROWLETT.

(Kansas City Court of Appeals, Missouri.  
May 7, 1908. Rehearing Denied  
Oct. 1, 1908.)

#### 1. LANDLORD AND TENANT—CROPS—LIEN OF LANDLORD FOR RENT.

In an action by a landlord against the buyer of part of a crop of corn from the tenant, an instruction that if defendant knew at the time he purchased the corn so sold that it had been raised on premises rented from the plaintiff, and that the rent was unpaid, defendant was liable, otherwise not, was erroneous as requiring plaintiff to show that defendant knew that the corn was grown on plaintiff's premises.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 1022-1024.]

#### 2. SAME.

Where a buyer of corn from a tenant knew when he bought the same that it was raised on demised premises, the buyer's liability to the tenant's landlord for the value of the crop so purchased was not affected by the fact that at the time the purchase was made the buyer believed the corn had been raised by the tenant on demised premises other than those rented from plaintiff.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 1022-1024.]

#### 3. PRINCIPAL AND AGENT—NOTICE TO AGENT.

Where a hired man's duty was limited to weighing and receiving corn purchased by his master from a tenant, the servant's knowledge as to where the corn was raised could not be imputed to his master.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 680-684.]

Appeal from Circuit Court, Holt County; Wm. C. Ellison, Judge.

Action by D. Ward King against Elijah Rowlett. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

H. B. Williams and Lee Callow, for appellant. John W. Stokes and R. B. Bridgeman, for respondent.

BROADBUSH, P. J. The plaintiff was the owner and in the possession of a farm in Holt county, Mo. In December, 1900, he leased the farm to one John German for a term of three years for \$310 per year, payable annually on the 1st day of January each year. In 1903, German sold 800 bushels of corn raised on the leased premises to the defendant Rowlett at the price of 35 cents per bushel. German failed to pay his rent for that year. Plaintiff claims that defendant purchased said corn with the knowledge that the same had been grown upon his demised premises. The evidence tended to show that defendant, at the time he purchased from the tenant the corn in controversy, knew that he was not a landowner, and that for several years prior thereto he had been a tenant farmer in defendant's neighborhood. The defendant admitted that he knew that German was the

tenant of the plaintiff for the year 1903, and as such that he raised corn on plaintiff's premises for that year; that he knew that he was a tenant farmer and owned no land of his own; that he had bought corn of him for many years; and that he resided about four miles from plaintiff's farm. He stated that in 1903 he contracted with German to buy his corn off what was known as the "Old German Place," which the tenant cultivated that year; that he did not contract for any corn grown on plaintiff's place—as to what corn he got he could not say; that he was not present when it was delivered; and that the corn was received by his hired man named Noland. He stated that Noland was only acting in the capacity of hired hand in weighing and receiving the corn. Samuel Noland, the hired man who weighed and received the corn, testified that he knew it had been raised upon the plaintiff's premises. The finding and judgment were for the defendant, from which plaintiff appealed.

The court, of its own motion, instructed the jury to the effect that, if defendant knew at the time he purchased the corn that it had been raised upon premises rented from the plaintiff and that the rent was unpaid, the defendant was liable; otherwise, he was not liable. This instruction was erroneous. In such cases the landlord is only required to show that the crops were grown by a tenant on his premises, that the rent is unpaid, and that the purchaser had knowledge that they were grown on demised premises. The fault of the instruction is that it required the plaintiff to show that the defendant knew that the corn had been grown upon his premises. Such is not the language of the statute, and the holding of the appellate courts of the state. *Toney v. Goodley*, 57 Mo. App. 235; *Williams v. De Lisle Store Co.*, 104 Mo. App. 567, 79 S. W. 487.

The plaintiff contends that under the evidence he was entitled to a verdict, on the ground that plaintiff showed that the corn was grown by the tenant on his premises, that the rent was unpaid, and that defendant knew that the corn was raised on demised premises. The defendant understood when he bought the corn that it was raised upon rented premises, but not upon those of plaintiff. This raises the question whether or not defendant's understanding, at the time he purchased and paid for the crop, that it was raised by the tenant upon demised premises other than those of plaintiff, exonerates him from liability to the plaintiff. We think not. He had such knowledge as under the statute rendered him liable to the plaintiff for the value of the crop he purchased from the tenant. He is not permitted to excuse himself from liability on the ground of his mistake in that respect, as the statute fixed his liability upon the fact of his knowledge that the crop had been grown upon demised premises.

Plaintiff further contends that the defend-

ant was liable on the ground that his hired man knew, at the time he received the corn, that it was grown on plaintiff's premises. But, as the hired man's duty was limited to weighing and receiving the corn, we do not think his knowledge is to be imputed to his master.

For the reason given, the cause is reversed and remanded. All concur.

#### STATE v. KESSELS.

(Kansas City Court of Appeals, Missouri.  
July 2, 1906. Rehearing Denied  
Oct. 1, 1906.)

#### 1. INTOXICATING LIQUORS — REGULATION — STATUTES.

Rev. St. 1899, § 5508, provides that the mayor and common council of cities of the second class shall have power within the city, by ordinance not inconsistent with the Constitution or any law of the state (subdivision 17), to license, tax, and regulate saloons, tippling houses, and dramshops, and subdivision 21 provides that such cities are given exclusive power to regulate, license, tax, and suppress dramshops, and that all criminal courts shall have original and concurrent jurisdiction for the trial of offenses arising out of any violation of the laws in relation to dramshops. *Held*, that under such section a city of the second class had power to adopt an ordinance authorizing the sale of liquors within its limits on Sunday, and that such ordinance operated to suspend the application to such city of Rev. St. 1899, § 3011, making it a misdemeanor so to do.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 7-13; vol. 36, Cent. Dig. Municipal Corporations, §§ 1311-1314.]

#### 2. SAME—REPEAL.

The exclusive authority granted to cities of the second class by Rev. St. 1899, § 5508, to pass an ordinance authorizing the sale of liquors on Sunday, was not abrogated by the general dramshop law of 1891 (Laws 1891, p. 123), subsequently enacted, prohibiting such sale and repealing all inconsistent acts, nor by Laws 1903, p. 169, amending Rev. St. 1899, § 2997, and providing that in all cities of the second class no license shall be granted unless the petition therefor shall have indorsed thereon the approval of the mayor and president of the board of police commissioners of such city.

Appeal from Criminal Court, Buchanan County; B. J. Casteel, Judge.

William T. Kessels was convicted of keeping open his dramshop and selling intoxicating liquors therein on Sunday, and he appeals. Reversed. Defendant discharged.

Culver & Phillip and Brewster, Ferrell & Mayer, for appellant. John D. McNeeley, for the State.

ELLISON, J. The defendant was convicted in the criminal court of Buchanan county of keeping open his dramshop and selling intoxicating liquors therein on Sunday. The case shows defendant's dramshop to be located within the city of St. Joseph, a city of the second class in this state. By the law of the state (section 3011, Rev. St. 1899), under which this prosecution was begun, it was misdemeanor so to do. By an ordinance of

the city it was not a misdemeanor. If the state law applies, defendant is guilty. If the ordinance applies, he is not.

It is provided by the charter of cities of the second class (section 5508, Rev. St. 1899) that "the mayor and common council shall have power within the city, by ordinance, not inconsistent with the Constitution or any law of this state, or of this article," to do a great many things for the good order, regulation, and government of such cities. These things are set out in great number and particularity. The section is lengthy, being divided into 43 subdivisions. Subdivision 17 is a lengthy subdivision and gives authority "to license, tax and regulate" merchants, hotels, drummers, insurance agents, banks, livery stables, omnibuses, drays and a great variety of other callings and things. The subdivision then proceeds to authorize such cities "to license, regulate, tax or suppress \* \* \* saloons, tippling houses and dramshops." Passing to subdivision 21, such cities are given "exclusive power to restrain, regulate, license, tax or suppress dramshops. All criminal courts shall have original and concurrent jurisdiction for the trial of offenses arising out of any violation of the laws in relation to dramshops." The Supreme Court of the state has, from an early day, recognized the right and power of the Legislature to surrender control of misdemeanors to municipalities, and the Legislature has from time to time exercised that right. But when the right is not clearly surrendered to the municipality, each jurisdiction may have and enforce laws concurrently. *Harrison v. State*, 9 Mo. 530; *Baldwin v. Green*, 10 Mo. 410; *State v. Gordon*, 60 Mo. 383; *State v. Wister*, 62 Mo. 592; *State v. Harper*, 58 Mo. 530; *State v. Binder*, 38 Mo. 450; *State v. Vic. De Bar*, 58 Mo. 396; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471. The court of appeals has followed these cases. *State v. Willard*, 30 Mo. App. 251; *Kerney v. Barber Co.*, 86 Mo. App. 573. Of these cases, it was held in *State v. Gordon* that the city of Liberty, under its charter, had exclusive jurisdiction of the misdemeanor of disturbing the peace of a family; in *State v. Binder*, that fermented liquors might be sold on Sunday in St. Louis, though prohibited by state law. In *State v. Clarke*, the court held that a charter power vested in the city of St. Louis to regulate bawdy houses repealed, in the city, the state law prohibiting them. And that case was affirmed in *State v. Vic. De Bar*, and is cited with approval in *State v. Thompson*, 160 Mo. 833, 80 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468, and *City of Kansas ex rel. Blumb v. O'Connell*, 99 Mo. 357, 12 S. W. 791. So it will be seen from the foregoing that if it be true that the Legislature has surrendered to the city of St. Joseph, as a city of the second class, the exclusive control and regulation of saloons within its limits, such action is not without precedent.

The question recurs to an interpretation of

the charter above quoted. Subdivision 21 uses about as comprehensive a word as could be found when it reads that such cities should have "exclusive power to restrain, regulate, license, tax or suppress dramshops." There was at the time of the adoption of the charter, and is now, other concurrent power over such matter, and so, when the Legislature said that the city power should be exclusive, it excluded that other concurrent power. The last sentence of subdivision 21, that "all criminal courts shall have original and concurrent jurisdiction for the trial of offenses arising out of any violation of the laws in relation to dramshops," in no way refers to, qualifies, or affects the power granted in the first. Without that sentence, the criminal court of Buchanan county would only have had appellate jurisdiction of violations of city ordinances in relation to dramshops. With that sentence, the criminal court has original, concurrent jurisdiction with the city court, and by force of other law, it has appellate jurisdiction of cases which may be instituted in the city court. We must interpret the statute according to its plain words, and in so doing we cannot find any ground for saying that the act of conferring jurisdiction on a state court to enforce a city ordinance took from the city a clearly conferred exclusive power to ordain such ordinance. True, this statute, in the respect last mentioned, like many others, is made to appear inharmonious by other apparently inconsistent provisions. But it is only in appearance. It is enacted in section 5542 that "the judge of the police court shall have exclusive jurisdiction over all cases arising under any ordinance of the city, except suits brought for the collection of taxes due the city. Appeals in all cases tried before him as judge of the police court shall be taken to the court of record having criminal jurisdiction in the county where such city is located." Reading the two statutes together, the effect of subdivision 21 is to except cases arising under dramshop ordinances from the exclusive jurisdiction of the police judge and make it concurrent with the criminal court. But, as stated at the outset, the charter of cities of the second class only authorizes such cities to ordain ordinances which are not inconsistent with the state law. And the state law absolutely prohibits a dramshop keeper from selling liquor on Sunday. The ordinance of St. Joseph, in permitting sales on Sunday, is undoubtedly inconsistent with such state law. But, notwithstanding this prohibition in the part of the charter to which we have just referred, the other portion we have discussed, embodied in subdivision 21, is a particular provision in terms giving exclusive authority over the special subject of dramshops. Such particular provision, according to a fundamental rule of construction, must prevail over the general provision. In *State v. Binder*, heretofore cited, the

general state law disallowed the sale of beer on Sunday, but the special law of St. Louis, authorized by the state, permitted such sale and the latter was held to prevail. So the charter of the city of St. Louis contained a like provision to that now being considered. But another part of the charter specially authorized the city by ordinance to permit bawdy houses, under certain regulations, whereas the state law condemned them; yet the Supreme Court, in two cases, held "that a particular specified intent on the part of the Legislature overrules a general intent incompatible with the specific one." *State v. Clarke* and *State v. Vic. De Bar*, supra.

Nothing in the case of *St. Louis v. Meyer*, 185 Mo. 583, 84 S. W. 914, affects the views we have herein stated. In the *Meyer Case* the city of St. Louis, under one of its ordinances, attempted to punish Meyer, who was a farmer in St. Louis county, for peddling farm, dairy, and garden products in the city without a license. The general state law (section 8861, Rev. St. 1899) exempted such person from the definition of a peddler. It was held that the city ordinance, as thus attempted to be enforced, was contrary to the state law and therefore of no effect; and that the ordinances and the charter of St. Louis must always be and remain in harmony with the state law. We have already cited cases deciding that notwithstanding provisions in an early charter of St. Louis prohibited the city from passing ordinances inconsistent with the general law of the state, yet ordinances recognizing bawdy houses and permitting the sale of fermented liquor on Sunday were declared to be valid. Those cases and the *Meyer Case* are not in conflict. It is true that in those cases the Legislature in enacting the charter declared that the city could not ordain an ordinance which was inconsistent with the state law, but afterwards the Legislature, in effect, made an exception to that provision by amending the charter, so that in the instance of bawdy houses and sale of liquor on Sunday such city could ordain an ordinance contrary to the general law. The Constitution did not at that time prohibit St. Louis from ordaining ordinances contrary to the state law, and therefore the Legislature was at liberty to grant the city such right and the city was at liberty to exercise the right, when granted, free from any restraint by the Constitution. But the makers of the present Constitution gave to certain cities the right to frame charters of their own. That right was given specially to St. Louis by section 23, art. 9, of the Constitution, and to all cities of more than 100,000 inhabitants by section 16 of the same article. St. Louis framed a charter of its own under its special authority and Kansas City is the only city which has framed a charter of its own under the latter section. All other cities in the state have their

charters direct from the Legislature. The makers of the Constitution, realizing that they were granting this extraordinary power of self-government to a mere subdivision of the state, limited the power within such bounds as prevented them from framing a charter which would authorize ordinances that were inconsistent with the general law. So, therefore, the city of St. Louis (section 23 aforesaid) and other cities of over 100,000 inhabitants, adopting charters of their own (section 16 aforesaid) cannot get from under the control of the general law. It is thus plain that the decision in the *Myer Case* is based on the Constitution and a general state law, whereas the *Clarke*, *De Bar*, and *Binder Cases* were unaffected by any provision of the Constitution.

Neither is there anything in *State ex rel. v. Telephone Co.*, 189 Mo. 83, 88 S. W. 41, which is in anyway opposed to our conclusions in this case. That case related to the power of Kansas City to fix telephone charges, and was like the *Myer Case* in that it involved the power of a city which had had framed a charter for itself. In that case the charter and the "enabling act" itself had given to Kansas City the "exclusive control over its public highways, streets, avenues, alleys and public places \* \* \* any law of this state to the contrary notwithstanding." But keeping in view the fact that the Constitution only authorized the people of Kansas City (like those of St. Louis) to adopt a charter subordinate to the state law and there being a state law as to the use of the streets (as, for instance, in granting franchises to certain interests which included the use of the streets of such a city) it was properly held that the phrase "exclusive control," necessarily meant exclusive as to matters of mere municipal concern which did not conflict with the law of the state. But, as already stated, as regards all cities of the second class which have not framed their own charters, but have received them direct from the Legislature (the city of St. Joseph being one of them), there is no provision of the Constitution requiring that their ordinances shall be consistent with, or subordinate to, the state law. There is such a provision in the statutory charter of such cities, but not in the Constitution. But a disability imposed by the statute may be removed by the statute, as was done in the *Clarke* and *De Bar Cases*, supra. Now, in this case, the charter of cities of the second class has a general provision prohibiting an ordinance which is inconsistent with the state law, and it has a special provision (that of exclusive control of dramshops) which authorizes ordinances inconsistent with the state law. The two provisions are apparently in conflict, for an exclusive right excludes the state law instead of being subordinate to it. In such situation we must have recourse to a fundamental rule of construction, which is that



where a general provision of a statute is encountered by a special provision, the former must give way. In other words, the special provision becomes, in effect, an exception to the general provision, so that, as applied to this case, the statutory charter would read that cities of the second class cannot ordain ordinances inconsistent with the general state law except as to dramshops, they being hereby placed under the exclusive control of such cities.

We have just stated that the two provisions were apparently in conflict, but it is only in appearance and not in reality, for "a general prohibition is not inconsistent with a special indulgence." *Smith v. County of Clark*, 54 Mo. 58, 69; *St. Louis v. Alexander*, 23 Mo. 483, 510; *State ex rel. v. Macon Co.*, 41 Mo. 459. Recurring again to the ruling in *State ex rel. v. Telephone Co.*, supra, it may be asked if "exclusive" use of streets in the charter of cities which have framed their own charters is held to mean those uses not disturbed or intrenched upon by the state law as to the use of streets, why is not the same construction put upon charters of cities of the second class and a decision made that such cities will only have exclusive control of dramshops in those matters where no provision is made by the state law? The answer is that, in the telephone case, the rule of construction which we have stated as applicable to charters of cities of the second class could not be applied, because the Constitution stood in the way. The inconsistent provisions in the telephone case did not emanate from the same source, and the presumption that a special provision was not intended to be overcome by a general provision could not obtain. The Constitution, coming from the highest authority, provided that no ordinance of Kansas City should be inconsistent with the state law; and the word "exclusive," in an ordinance of such city, was therefore limited in meaning so as not to infringe upon the command of the Constitution. A general prohibitory provision coming from an independent superior authority, will overcome or control a special provision coming from an inferior authority, for the reason that the inferior has not power and will not be presumed to have intended to put an exception on what is prescribed by the superior. There was, therefore, no room in the telephone case for application of the rule we have applied in this case.

But it is said that the general dramshop law enacted in 1891 (*Laws 1891*, p. 128) operated as a repeal of this provision in the statutory charter of cities of the second class as it was enacted after the charter. But this cannot be allowed without violating a standard rule for the construction of statutes, which is that a general law, though later in time, will not operate as a repeal of a prior special law. *State ex inf. v. Dabbs*, 182 Mo. 359, 366, 81 S. W. 1148;

*Ruschenberg v. Railway Co.*, 161 Mo. 70, 61 S. W. 626; *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372; *State ex rel. v. Hostetter*, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515; *Pacific Ry. Co. v. Cass Co.*, 53 Mo. 28; *State ex rel. v. Judge of Probate*, 38 Mo. 529. It is stated by Sedgwick on Statutes, 98: "The reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." It is true that the law of 1891, declares that "all acts and parts of acts inconsistent with the provision of this act are hereby repealed"; but that is a formal provision which adds nothing to the act itself. A later law inconsistent with a former law will repeal the former, where they cannot be reconciled, without such general repealing clause. Such clause is not an express repeal of the special provision in the charter of cities of the second class, and repeals by implication, of special provisions are everywhere discountenanced. A similar repealing clause was regarded as noneffective in *St. Louis v. Alexander*, 23 Mo. 510.

But it is said that the intention of the Legislature to repeal the special provision in controversy is manifested in the proviso added in *Laws 1903*, p. 169, to section 2997 of the Revised Statutes of 1899. That proviso reads: "Provided, that in all cities of the second class no license shall be granted unless the petition therefor shall have endorsed thereon the approval of the mayor and president of the board of police commissioners of such cities." By reference to section 2997, it will be seen that the section is addressed to the county courts and this proviso could perhaps have been more appropriately attached as an amendment to subdivision 20 of section 5508, to which our attention has been called since the foregoing was written. It is altogether probable that whoever wrote the proviso and attached it to section 2997 was laboring under the impression that the county courts of counties in which cities of the second class were located, granted a license as in other towns and cities controlled by the general law. But that is not the case and could not be, under the terms of said subdivision 20. That subdivision discloses that a license from the city is the only license contemplated for a dramshop keeper in cities of the second class. It is there provided that the mayor and council authorize the proper officers of the city to grant and issue licenses and direct the manner of issuing and regulating the same and the fees and charges to be paid therefor; and that no li-

cense shall be granted for more than one year; that it shall not be for a less sum than \$750, 5 per cent. of which shall be for the state, 48 per cent. for the county, and the remainder for the city. It is conceded by the attorney for the state that under this provision of the charter the practice has ever been for the city alone to issue one license and that no license is issued by the county court under the general state law. In view of this subdivision 20, the county court has not exercised, and does not pretend to exercise, any right or authority over dramshop licenses in the city of St. Joseph. Though this proviso is thus strangely attached to a section of the statute pertaining to the duties of county courts, its practical effect and operation is to amend the charter of cities of the second class so that the city council cannot legally grant a license until the petition for such license has the approval of the mayor and president of the board of police commissioners (an office enacted by the charter) indorsed thereon.

But, passing this by, is there any, even the slightest, reason for the claim that such amendment discloses an intention on the part of the Legislature to place the dramshop keeper of cities of the second class under the general law? We cannot discover any. On the other hand, the provisions of subdivision 20 as is shown by what we have just written, add to the already manifest intention of the Legislature to surrender to cities of the second class the "exclusive power to restrain, regulate, license, tax or suppress dramshops" within the limits of such city. In assailing the right of the city under its charter to do as it has done through its council—in claiming that dramshops in cities of the second class are governed by the general law—it seems to us that the attorney for the state has allowed the exercise of the power of the council in the present instance

to blind him to other powers which the same charter provision gives to the council, which are contrary to the general dramshop law. The same provision of the charter empowers the city council to "suppress" dramshops in cities of the second class. Under the general law dramshops cannot be suppressed in cities of over 2,000 inhabitants. On the presentation of a proper application and petition the license must be granted. *State ex rel. v. Meyers*, 80 Mo. 601; *Scarritt v. Jackson County*, 89 Mo. App. 598; *State ex rel. v. McCammon*, 111 Mo. App. 626, 86 S. W. 510. If the city council should at any time conclude that the best interests of the city demanded that dramshops be wholly suppressed and an applicant for a dramshop license should ask us to compel the granting of the license as provided by the general law, would not counsel then seek to make us understand that the Legislature had wisely taken cities of the second class from under the control of the general law and intrusted such questions to the wisdom and policy of such cities acting through their legislative bodies?

After a careful examination of all the points which have been suggested in the different briefs for our consideration, we feel constrained to hold that the Legislature, by the statutory charter aforesaid, has given over to cities of the second class the exclusive power to regulate, restrain, license, tax, or suppress dramshops, and that the city of St. Joseph having exercised such power, the general state law as to dramshops is not applicable to that city, and that the state, until it resumes such authority by act of the Legislature, repealing or amending such charter, is without right to prosecute offenses under the state dramshop act.

The judgment is therefore reversed, and the defendant is discharged. The other Judges concur.

**KAVANAUGH et al. v. SECURITY TRUST & LIFE INS. CO.**

(Supreme Court of Tennessee. May 19, 1906.)

**1. INSURANCE — PREMIUMS — PAYMENT — NOTICE—MAILING.**

In the absence of statute or the express terms of a policy making the mere mailing of a communication containing information of the approaching maturity of a premium sufficient, it must appear that such communication was received before it can operate as notice and thereby affect a forfeiture of the policy on failure to pay on the day.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 908, 909.]

**2. SAME—FORFEITURE—NOTES—CONSTRUCTION.**

A policy provided for annual payment of premiums and for reinstatement in case of forfeiture on execution of a certificate of health. In accordance with custom on the maturity of the premium, one-fourth was paid in cash, and 3 notes given for the balance; the notes providing that they were given on the express understanding that for any loss occurring by death after the note was due and unpaid the company should not be liable. On the maturity of the first note notice thereof was mailed but never received, and after nonpayment the company refused a tender promptly made on notice being received of the maturity of the note unless a health certificate was furnished, which insured was not then able to give. *Held*, that after the giving of the notes the rights of the parties were measured by the provisions thereof, and, insured not having died until after tender of the amount due, no forfeiture was incurred.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Suit by L. T. Kavanaugh and another against the Security Trust & Life Insurance Company. From a judgment in favor of defendant, Kavanaugh and others appeal. Reversed and rendered.

The defendants issued a policy July 9, 1897, on the life of J. M. Bowen in the sum of \$5,000. This was assigned August 9, 1897, to complainants, L. T. and W. K. Kavanaugh, to secure a debt due them from Bowen. There was an agreement which was known to the company that the complainants were to pay the premiums.

The premium was \$223, payable annually, on July 15th, but an agreement was made with the company that the complainant should pay on that day \$55.75, and should give notes each for a like amount, maturing at three, six, and nine months.

From 1897 to 1905 this plan was followed by both parties; notes being made payable at the Memphis National Bank, Memphis, Tenn., and all notes were paid until the present controversy arose.

July 2, 1904, the defendant company notified the complainants that the premium of \$223 would be due July 15th. Complainants replied:

"Referring to your letter of the 2d, in reference to the Bowen policy, would like to ask if it would be agreeable to you for my brother and myself to pay this premium as heretofore; that is, one-fourth cash and three notes at three, six, and nine months for the

balance. If so, kindly forward the three notes and my brother and I will sign same and return with check for the first payment." This was signed by L. T. Kavanaugh.

The company replied: "We have yours of the 6th in re premium due on the Bowen policy, and it will be agreeable to us to accept one-fourth cash and three notes for balance, which notes are herewith inclosed for signature."

Upon receiving the notes the company wrote: "We have received from Mr. W. K. Kavanaugh check for \$55.75 and three notes properly signed, in settlement of premium on the Bowen policy, for which we hand you official receipt herewith."

This receipt, after stating the number of the policy and amount of the premium and date of its maturity, continued: "Received the above-noted premium, payable in terms of the policy."

The three notes were each for \$55.75, and matured October 15, 1904, January 15, and April 15, 1905. They were made payable at Atlanta, Ga. This fact was overlooked by the complainant, who rested under the belief that they were payable, as all the others for the previous seven years had been, at the Memphis bank above referred to. The previous premiums had been paid to the agent in charge of the Nashville office. The latter transaction was with the general agents of the company at the Atlanta office, Aaron Haas & Son, to whom the cash and notes were transmitted.

On October 8, 1904, Aaron Haas & Son deposited in the mail in Atlanta, Ga., postage prepaid, a letter addressed to complainants at Memphis, Tenn., advising them of the maturity of the premium note falling due October 15, 1904. This letter was not received by the complainants, and for that reason the note was not paid. It had been the custom of business between the complainants and the defendant during the preceding seven years that the defendant should notify the complainants of the maturity of notes several days before the falling due thereof, and the complainants had relied upon this custom, and had always paid promptly upon receiving the notice.

The note not having been paid at maturity, Aaron Haas & Son, on October 24, 1904, addressed a letter to the complainants, calling their attention to the fact, and adding: "As it was not paid when due, it will now be necessary for remittance to be accompanied by a health certificate signed by the assured, Mr. Bowen, the same subject to our company's approval." A blank certificate was inclosed.

To this letter the complainants on October 27th replied through L. T. Kavanaugh as follows:

"Gentlemen: I am in receipt of your favor of the 24th, with health certificate inclosed. I have had no notice whatever of this note,

As they have formerly been sent to the Memphis National Bank, Memphis, where they are made payable, I had overlooked the matter entirely. I hardly think it fair of you to have allowed this matter to go on without giving me some notice, but I herewith inclose you my check for the amount, with interest at 6 per cent. from July 15th, and will ask that you mail me receipt. I have tried to locate Mr. Bowen, the insured, but I understand he is out of the city, but under the circumstances, think you should accept this without the health certificate. However, I will have the certificate properly signed as soon as possible, and forward same to you. In future kindly send these notes here for collection, and they will be promptly paid.

"Awaiting your prompt reply, I am, Yours truly,

"[Signed]

L. T. Kavanaugh.

"P. S. I heard today that Mr. Bowen is in New Orleans and have written but have no definite address. I understand he is in good health. Please return receipt and oblige, Yours truly,

L. T. K."

To this letter Aaron Haas & Son replied, insisting upon a health certificate. Referring to the place of payment of the note, they said: "This particular note was not payable in Memphis, but in Atlanta, and on October 8th we wrote you notifying you that it would fall due on the 15th. So we did all that we should have done, under the circumstances."

Complainants at once set about to get the certificate of health required, and, being ignorant of the whereabouts of Mr. Bowen, only succeeded in getting a certificate from him on the 13th day of November, 1904, and then for the first time they became acquainted with the fact that he had had a stroke of paralysis in the preceding spring. Complainants at once sent the certificate to Aaron Haas & Son, with letters explaining the facts, and this was referred by them to the New York office.

After some correspondence the defendant company declared the policy forfeited because of the failure to pay at maturity the note above referred to, due October 15, 1904.

As already stated, complainants promptly tendered payment of the note due October 15, 1904, as soon as they received notice from the company. They subsequently tendered the amount of the note due January 15, 1905, and this was likewise refused. Thereupon the original bill in this case was filed, in the lifetime of Bowen. In this bill the complainants insisted that the policy had not been forfeited, but was merely suspended during the time the note remained unpaid, according to its terms, and sought an injunction restraining the defendant from asserting that the policy had become void or was in any wise forfeited. Pending these proceedings Bowen died, and thereupon an amended bill was filed, claiming a recovery

upon the policy and also a penalty under the statute.

The policy contains the following provision:

"Nonforfeitures—That if any payment on this policy be not made when due, this policy shall lapse and be ipso facto null and void. But if full premiums on this policy be paid as already provided, for not less than three complete years, and the policy thereafter lapse, it can be surrendered within six months from the date of the lapse, for the amount of nonparticipating paid-up insurance stated in the following table, subject to the conditions of this policy, except as to payment of premiums.

"That if the full premiums on this policy be paid as already provided for not less than five complete years at the option of the insured, it can be surrendered within six months from the date of lapse for the amount of cash stated in the following table"—setting out table.

The note due October 15, 1904, reads as follows:

"July 15, 1904.

"Three months after date we promise to pay to the order of the Security Trust & Life Ins. Co., \$55.75, with interest at 6 per cent., for value received, at Atlanta, Ga., hereby agreeing and admitting that this note is given as an extension of time for the payment of the premium, or part thereof, maturing this day on their policy on my life, but is not to be payment of said premium, or any part thereof, in any sense, nor is the same given or accepted as such, unless this note is paid at or before maturity.

"This note is given said company upon this express understanding or agreement that for any loss occurring by death after this note is due and remains unpaid, then said company shall not be liable.

"[Signed]

L. T. Kavanaugh,

W. K. Kavanaugh."

The chancellor dismissed the bill, and complainants have appealed and assigned errors.

Ewing & Williamson, for appellants. Smith & Trezevant and R. Lee Bartels, for appellee.

NEIL, J. (after stating the facts). 1. In *Insurance Co. v. Hyde*, 101 Tenn. 396, 404, 405, 48 S. W. 968, the court quoted as laying down the proper rule the following from *Joyce on Insurance*, vol. 2, § 132, viz.:

"If a life insurance company has been in the practice of notifying the insured of the time when the premium will fall due, and of the amount, and the custom has been so uniform and so reasonably long in continuance as to induce the assured to believe that a clause for forfeiture for nonpayment will not be insisted on, but that the notice will precede the insistence upon the forfeiture, and the insured is, in consequence, put off his guard, such notice must be given, and, if

not given, no advantage can be taken of any default in payment which it has thus encouraged, for the insured is entitled to expect the customary notification, and to mislead the insured by not giving such notice, and then insist upon a strict compliance with the conditions of forfeiture, constitutes, under such circumstances, a fraud upon the assured which the courts have refused in numerous cases to countenance"—citing *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. 107, 100 Am. Dec. 621; *Mayer v. Mutual Life Ins. Co.*, 88 Iowa, 304, 18 Am. Rep. 84; *Union Central Ins. Co. v. Pottker*, 33 Ohio St. 459, 31 Am. Rep. 555; *N. Y. Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; *Insurance Co. v. Pierce*, 75 Ill. 426; *Grant v. Alabama Gold Ins. Co.*, 76 Ga. 575. Other authorities to the same effect are *Gunther v. New Orleans Cotton Exchange Mut. Aid Ass'n (La.)* 5 South. 65; 2 L. R. A. 118, 8 Am. St. Rep. 554; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806, 808; *Johns v. Insurance Co.*, 2 Wkly. Notes Cas. (Pa.) 243; *Globe Mut. Life Ins. Co. v. Johns*, 4 Wkly. Notes Cas. (Pa.) 131; *Meyer v. Knickerbocker L. Ins. Co.*, 51 How. Prac. (N. Y.) 263; *Alexander v. Cont. L. Ins. Co.*, 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869; *Atty. Gen. v. Cont. L. Ins. Co.*, 33 Hun (N. Y.) 138; *Heinlein v. Imperial L. Ins. Co.* (Mich.) 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; *Elgutter v. Mut. Res. Fund L. Ass'n*, 52 La. Ann. 1739, 28 South. 289; *Mut. Res. Fund L. Ass'n v. Hamlin*, 139 U. S. 297, 11 Sup. Ct. 614, 35 L. Ed. 167.

In *Mayer v. Insurance Co.*, supra, the underlying reason is thus stated:

"Every law should be reasonable, and it is reasonable only when it is adapted to human conduct. Courts should not so administer the law as to require of individuals a course of conduct which, to a majority of reasonable and right-minded men, is unusual and unnatural. Indeed, it would be impossible long to maintain a law which is at variance with the judgment and sense of justice of a majority of those upon whom it operates.

"Now, it must strike every reasonable mind that a majority of ordinarily prudent persons, who had been customarily notified of the time when premiums upon their policies became due, and who had received no notice of an intention to abandon the customary course, would, in a particular case, expect and await a like notice. And, if such is the reasonable and natural result of the previous dealings of the company, it must govern its future conduct so as to accord with the reasonable expectation thus created; that is, having furnished a policy holder reasonable ground for expecting that he will be advised when his premium becomes due, the company must continue to give such notice until it furnishes the assured notice that he need no longer expect it.

Any other construction would make the law a trap to insnare the unwary."

*Mayer v. Mut. Life Ins. Co.*, 18 Am. Rep. 84, 38.

In the absence of a statute, or of an express term in a contract, making sufficient the mere mailing of a communication containing information of the approaching maturity of the premium, it must appear that such communication was received before it can be operative as notice, and thereby effect a forfeiture of the policy upon failure to pay at the day. *Brattleboro East Soc. v. Reed*, 42 Vt. 76; *Cont. F. Ins. Co. v. Adams*, 8 Ky. Law Rep. 269; *Protec. L. Ins. Co. v. Palmer*, 81 Ill. 88; *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273, 15 N. W. 452; *Burbans v. Corey*, 17 Mich. 282; *Mullen v. Dorchester Ins. Co.*, 121 Mass. 171; *Wachtel v. Noah Widows' & Orphans' Ben. Soc.*, 84 N. Y. 28, 38 Am. Rep. 478; *McCorkle v. Texas Ben. Ass'n*, 71 Tex. 149, 8 S. W. 516; *Merriman v. Keystone Mut. Ben. Ass'n*, 63 Hun. 635, 18 N. Y. Supp. 305; *Id.*, 138 N. Y. 116, 33 N. E. 738; *Crown Pt. Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147; *Amer. F. Ins. Co. v. Brooks*, 83 Md. 22, 35, 84 Atl. 373; *Peabody v. Satterlee*, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; *United States Mut. Acc. Ass'n v. Mueller*, 151 Ill. 254, 37 N. E. 882; *Cronin v. Sup. Council Royal League (Ill.)* 65 N. E. 323; *State v. Ins. Co.*, 106 Tenn. 282, 294, 295, 61 S. W. 75.

We shall now refer more particularly to some of the foregoing authorities.

In *Brattleboro East Society v. Reed*, it was held that notice of an assessment, sent by mail pursuant to a condition for a forfeiture in case of nonpayment after six months' notice, ran, not from the time when the notice was deposited in the post office, but from the time when the party received it.

In *Continental Fire Ins. Co. v. Adams*, it was held that the mere act of posting notice through the mail did not operate as notice to the insured.

In *Protec. L. Ins. Co. v. Palmer*, it appeared that the policy provided the assured should within 30 days from the date of notice pay to the company the assessment, collection costs, and annual dues, and a failure to do so should render it null and void and of no effect. It was held that the provision concerning 30 days' notice meant from the day notice was received by the party to whom it was sent, and not from the day on which it was dated or mailed.

In *Castner v. Farmers' Mutual F. Ins. Co.*, it appeared that it was provided by the charter of the mutual company that its members should be "notified by the secretary, or otherwise, either by circular or a verbal notice," of assessments made upon them, and if payment was not made in 60 days the insurance should be suspended. Notice was mailed in

this case June 8d. The fire occurred October 5th. Plaintiff claimed that notice was not received until some time in September. It was admitted that within 60 days of its receipt a tender of the amount due upon the assessment was made and refused. It was held that the policy was not liable to suspension until the expiration of the specified time after notice was received.

In *Burhans v. Corey* (not an insurance case, but germane upon the subject of notice, by mail), it was held that the mere mailing of notice was not sufficient; that it must have been received. In the opinion of the court it is said: "A party can be in no actual default who proceeds to comply with a notice as soon as he receives it, and to hold him guilty of a constructive default, when he has always been willing to do his duty, can only be allowed where he has consented to run the risk of a safe transmission through a given channel." *Id.*, 17 Mich. 285.

In *Mullen v. Dorchester Ins. Co.*, it appeared that there was a notice of assessment sent to a policy holder by mail, but not received by him. The directors of the company afterwards voted to cancel all policies the holders of which had not paid the assessment, and notice of such cancellation was sent to the policy holder by mail, but was not received. It was held there was no forfeiture.

In *Wachtel v. Noah Widows' & Orphans' Ben. Soc.*, 84 N. Y. 28, 38 Am. Rep. 478, it was held: "In the absence of any agreement by the member or any provision in the charter or by-laws for a different mode of service, it should be made personally, as is required at common law, where the object is to deprive a party of his rights or property; or, if that can be dispensed with, in such other mode as may be likely to effect its object."

In *McCorkle v. Texas Ben. Ass'n*, it appeared there was a by-law that required notice of assessment to be sent to each member, and this by-law provided that: "Any person who shall fall in arrears for dues or contributions after 30 days' notice shall cease to be in good standing and shall forfeit all rights and claims to any and all benefits of the association." It was the custom of the officer charged with the duty to mail such notice to each member. It was held that a reasonable construction of the by-laws required that notice should be in fact given to a member before a forfeiture would result from a failure to pay dues, etc., and that mailing to a member through the post office was not such notice. Referring to the case of *Castner v. Farmers' Mut. Ins. Co.*, supra, the court said: "The rule laid down by the Michigan court, we think, is fair and just to both parties, and should be followed. To deprive a person of his property rights without any notice is contrary to reason, and such a claim should not be en-

forced by the courts unless the terms of the contract plainly require it."

In *United States Mut. Acc. Ass'n v. Mueller*, it was held that, where the by-laws of the association contained the provision that "payments are to be made \* \* \* within 30 days of the date of the notice thereof," this meant from the date of the service of the notice, and not from the date of the writing; and in *Cronin v. Supreme Council Royal League*, it was held that, when the by-laws of a beneficial association provided that payments of assessments should be made within 30 days from the date of the notice, a member was not in default until 30 days from the time notice was received.

In *Crown Point Ins. Co. v. Aetna Ins. Co.*, the question was whether the notice of the cancellation of a policy of insurance would date from the mailing of the policies or from the actual reception of the notice. Speaking to this subject the court said:

"It is contended by the defendants that the mailing of the policies with a letter stating the object sufficed to cancel them, because it was equivalent to the acceptance of a proposition by mail; and the following cases are cited, among others, in support of the position: *Trevor v. Wood*, 38 N. Y. 307, 93 Am. Dec. 511; *Vassar v. Camp*, 11 N. Y. 441; *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Brisban v. Boyd*, 4 Paige (N. Y.) 17, 3 L. Ed. 322. These were cases of contracting wholly by letter or telegram. It was long ago held that, if an offer made by mail is accepted by mail, the contract is complete from the moment the letter of acceptance is mailed, even if it is never received. *Vassar v. Camp*, supra. Those cases have no application here, because no negotiation was pending, and no contract was proposed. The plaintiff did not make an offer to the insurance companies that might or might not be accepted. It sought to do an act that would be binding on the companies, whether they were willing or not. That act was a surrender of the policies with the request that they be terminated, and the act could not be complete until the request reached the companies or their agent. The policies and notice might have been sent by a messenger, who would have been the agent of the plaintiff for that purpose. Having been sent by mail, it was none the less the agency of the plaintiff than if a messenger had been selected. It was necessary for the plaintiff, in order to terminate the policies, to have its notice actually reach the companies or their representatives, and the instrument selected for that purpose was the agent of the plaintiff, not of the defendant. If the plaintiff lost control of the letter as soon as it was mailed, that fact has no bearing except upon the nature of its relation to the agent that it empowered to deliver the package. It seems, however, that the writer of a letter may

withdraw it from the office in which it is deposited, or from the office to which it is sent. United States Postal Laws & Regulations, pp. 531, 533. If the letter never reached the companies, they would not have been bound, or, if it had reached them, after a long delay, they would have been bound only from the date of receipt. So far as the delivery of such a letter is concerned, the law does not recognize the agency of the mail as of any higher or more binding character than that of an express company or a private individual, although it may presume that a letter duly mailed was received by the person to whom it was properly addressed."

In *State v. Insurance Co.*, it was held that delivery of a letter or package containing several premiums on a life policy, to a post office or carrier within this state addressed to the company at a point outside of the state, did not constitute delivery or payment of such renewal premium to the insurance company within the state, and that such delivery and payment did not become complete and effective until actual receipt of the premiums by the company at its office, and that the money remained in the meantime at the risk of the sender.

It is insisted that the contrary rule is laid down in the following authorities: *May on Insurance*, vol. 2, § 356a; *Bacon on Insurance*, § 381; *Lothrop v. Insurance Co.*, 2 Allen (Mass.) 82; *Survick v. Valley Mut. L. Ins. Co. (Va.)* 23 S. E. 223; *McKenna v. Insurance Co.*, 73 Iowa, 453, 35 N. W. 519; *Epstein v. Mutual Aid & Benev. Ass'n*, 28 La. Ann. 938; *McConnell v. Prov. Sav. L. Ins. Co.*, 92 Fed. 769, 34 C. C. A. 663; *Insurance Co. v. Eggleston*, 96 U. S. 573, 24 L. Ed. 841; *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; *Insurance Co. v. Hyde*, 101 Tenn. 403, 48 S. W. 968; *Otis v. Payne*, 86 Tenn. 663, 666, 8 S. W. 848.

In the section referred to in *May on Insurance*, it is said: "In regard to the effect of a habit or usage of sending notice of the date when each premium becomes due, opinions differ. On the one hand, it is held that, where from the course of dealing between the parties the insured has a right to believe that notice will be given to him of the amount due and the time it is to be paid, the company cannot, in the absence of such notice, set up the failure to pay. Usage makes the giving of notice a part of the contract. If, where there is a usage to give notice, none is sent, payment of the premium within a reasonable time will save forfeiture." Further along in the same section, it is said: "A failure of notice to pay a premium to reach the insured does not prevent the avoidance of the policy if the notice was properly mailed and directed"—citing *Lothrop v. Greenfield Stock & Mut. F. Ins. Co.*, 2 Allen (Mass.) 82. "So, under the Iowa statute, requiring notice to be given to the makers of premium notes when they

fall due, the service is complete on mailing a registered letter, or at least when it should be received in due course of mail"—citing *McKenna v. State Ins. Co.*, 73 Iowa, 453, 35 N. W. 519.

In *Lothrop v. Greenfield, etc., Ins. Co.*, supra, it appeared that the policy which controlled the matter contained a provision that: "If the assured should neglect for the term of 30 days to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," etc.

In *McKenna v. State Ins. Co.*, the court had under consideration a statute which provided that: "Such notice may be served either personally or by registered letter addressed to the assured at his post office address named in or on the policy," etc.

In *Survick v. Valley, etc., Ins. Co.*, it appeared that the by-laws of the defendant company provided that any member failing to pay his pro rata assessment within 30 days from notification in person, "or from date of mailing same to his address," should forfeit, etc. The decision of the court was placed expressly upon the provision as to mailing.

So, in *Epstein v. Mut. Aid & Ben. L. Ins. Ass'n*, the decision was based upon the ground that the policy provided that the insured should "be notified by written notice deposited in the post office in the city of New Orleans, addressed to such address as has been left in writing at the office of the association with the secretary."

*McConnell v. Prov. Savings L. Ins. Co.* was also based on a statute providing for notice by mail.

The case of *New York Life Ins. Co. v. Eggleston* does not sustain the defendant's contention. It is true that the circuit judge charged the jury that, if the notice was mailed within such time as the insured would in due course of mail have received it, then he should be held to have received it. This portion of the charge, however, was not drawn in question or considered by the Supreme Court; but a previous portion inclosed in brackets which treated of the custom to give notice. In addition, the court, at the close of the opinion adverted in pointed terms to the fact that the insured had never received any notice. There was evidence that notice had been mailed, and also evidence that it had not been received. In the case of *Phoenix Mut. L. Ins. Co. v. Doster*, there is some language in the opinion, used in an incidental way, supporting the defendant's contention here; but in the later case of *Mut. Res. Fund Ass'n v. Hamlin*, supra, the same justice suggested a doubt of the correctness of that view, in the following language: "Whether the clause in the certificate of insurance relating to notice means anything more than that proof of mailing a notice according to the defendant's usual course of business, directed to the in-

sured at the post office address as appearing upon its books, made a prima facie case of compliance upon its part with the terms of the contract, leaving the insured to prove, in order to prevent a forfeiture of his membership, that the notice was not in fact received by or for him, we need not determine."

The passage cited from Bacon on Benefit Society and Life Insurance is based on cases dealing with contracts which by their terms provided that notice might be given by mail.

In the case of *Insurance Co. v. Hyde*, supra, it is true the charge of the circuit judge contained the expression that the assured was not bound to pay "until such notice was mailed"; but no point was made upon that feature of the charge, and the mind of this court was not directed at all to the subject, and it was not dealt with in the opinion. That case is therefore not authority for defendant's contention.

Nor is the case of *Otis v. Payne* applicable. In that case the court had under examination a negotiation conducted by mail. Such a case stands on a rule different from the one we now have before us. 1 Page on Contracts, § 52. And see *Pennsylvania Lumberman's Mut. F. Ins. Co. v. Meyer*, 126 Fed. 352, 61 C. C. A. 254. Here we have not a negotiation, but a claim that a right already acquired was forfeited by miscarriage of the mail; that the mere posting of a letter properly stamped and addressed should be treated as notice and a valuable right thereby defeated, although such letter never reached its destination, no information was conveyed by it, and it in no sense performed the purpose it was designed to perform.

Before such a conclusion can be properly reached, it seems to us there should be direct statutory provisions requiring it, or the clear terms of a contract.

The purpose of a letter is to give information. If it never reaches its destination, it fails of its purpose. To say that nevertheless it must be held to have accomplished the purpose could only be justified, as we have said, by the terms of a statute or of an express contract authorizing such result. In the absence of these, it would not be reasonable to infer that a man would agree that his ignorance of a fact should fix him with all of the consequences of knowledge.

It is said in the present case that the custom had been to give notice by mail, and that, when a letter was properly posted, all of the requisites of the custom were complied with. This is not a sound view. All of the previous letters had reached their destination, and had conveyed the information they were designed to convey. The custom was not merely to mail, but to give notice by mail, to actually convey the information intended to be delivered by that means.

We see no hardship to the insurer in this

view of the matter. It is surely not admissible to suppose that any insurance company is alert for occasions to declare forfeitures and thereby to keep moneys for which no equivalent has been rendered. The company is entitled to prompt payment of premiums. It is only by such payments that its business can be carried on. The power to declare forfeitures for nonpayment is given to effectuate this purpose. But it is a perversion of the purpose when forfeitures are in themselves made an object or end to be attained. Therefore the courts have always seized upon every reasonable circumstance presented in a case to prevent the taking effect of a forfeiture. In the case of a miscarriage of the mail, the insured performs his duty if, upon subsequently receiving notice, he promptly complies by paying the premium due. *Grant v. Alabama Gold L. Ins. Co.*, 76 Ga. 583. The complainants in the present case did so comply and thereby saved the forfeiture.

2. Aside from the question just considered, and passing without special remark the peculiarity of the policy, in that it places the provision for forfeiture for nonpayment of premiums under the misleading head of "nonforfeitures," we are of opinion that under a proper construction of the policy considered in connection with the language of the notes and the correspondence at the time, it was intended that the rights of the parties should be measured by the provision embodied in the notes, the last sentence of which contained a summation of the agreement of the parties under the new phase it had assumed. A portion of the premium had been paid in cash, and notes executed for the residue, which were enforceable by the company. This clause reads: "This note is given said company upon this express understanding or agreement that for any loss occurring by death after this note is due and remains unpaid, then said company shall not be liable." The effect of this was that, if the complainants permitted this note to go to maturity and remain thereafter unpaid, they took the risk of the death of the insured, Bowen, thereafter and pending such default. The rights of the parties were reciprocal. The defendant had the right to collect and thus restore the insurance, and the complainants the right to pay, with the same result. But in the meantime the advantage was with the company in one aspect, since, if Bowen had died while the note still remained unpaid, the insurance would have been lost.

The foregoing seems the most reasonable construction, since under no other can full effect be given to the words, "and remains unpaid."

Even if we did not deem this construction the best, still, if a reasonable one, we should feel bound to adopt it, when considering whether a forfeiture should be allowed, since, when dealing purely with the question



of forfeiture, "the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract." *McMaster v. N. Y. L. Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. And see *Insurance Co. v. Dobbins*, 114 Tenn. 233, 234, 86 S. W. 383; *Schmidt v. German Mut. Ins. Co.* (Ind. App.) 30 N. E. 939; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205.

For cases construing fairly similar clauses, substantially as herein construed, see *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 639, 40 S. W. 1092; *Williams v. Albany City Ins. Co.*, 19 Mich. 451, 2 Am. Rep. 95; *Hooker v. Cont. Ins. Co.* (Neb.) 96 N. W. 663; *Houston v. Farmers' & Merchants' Ins. Co.*, 64 Neb. 133, 89 N. W. 635; *Robinson v. Insurance Co.*, 76 Mich. 641, 43 N. W. 647, 6 L. R. A. 95; *Hummel & Company's Appeal*, 78 Pa. 320; *Matthews v. Insurance Co.*, 40 Ohio St. 135; *McEvoy v. Mich. Mut. L. Ins. Co.*, 2 Ohio Cir. Dec. 329, 3 Ohio Cir. Ct. Rep. 569; *East Texas F. Ins. Co. v. Perkey*, 5 Tex. Civ. App. 698, 24 S. W. 1080. And see *Am. Ins. Co. v. Klink*, 65 Mo. 78.

*Ressler v. Insurance Co.*, 110 Tenn. 411, 75 S. W. 735, is not in conflict with what we have herein decided.

No loss occurred by the death of Bowen, while the note was in default. That event did not occur until a considerable time after complainants had made a full tender of the amount due upon the notes. Hence there was no forfeiture.

It results that the decree of the chancellor denying complainants relief was erroneous, and must be reversed, and judgment must be rendered here for the amount of the policy and interest.

The points decided being decisive of the case, we need not consider the other points raised by the facts set forth in the statement and argued in the briefs of counsel.

We do not think this is a proper case for the imposition of the statutory penalty upon insurance companies for the interposition of frivolous defenses.

### TRAYLOR v. STATE.

(Supreme Court of Arkansas. July 23, 1906.)

#### 1. HOMICIDE — MURDER — EVIDENCE — SUFFICIENCY.

On a prosecution for murder evidence considered, and held sufficient to sustain a conviction of murder in the second degree.

#### 2. SAME—PUNISHMENT.

Where, on a prosecution for murder, the evidence was sufficient to sustain a conviction of murder in the second degree but it appeared that at the time of the crime the parties had been drinking and that the fatal altercation was brought on in an effort on the part of defendant to get decedent, who was intoxicated and boisterous, to go home, and the testimony of defendant and other eyewitnesses tended to

show that defendant was not the aggressor, a sentence of 15 years in the penitentiary was excessive by 10 years.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 731.]

Hill, O. J., dissenting in part.

Appeal from Circuit Court, White County; H. N. Hutton, Judge.

Jim Traylor was convicted of murder in the second degree, and he appeals. Modified and affirmed.

Appellant killed a man named Thompson on the 9th of September, 1905, in White county, Ark. At the January term of the circuit court he was indicted for this killing, the indictment charging him in apt words of the crime of murder in the first degree. He was tried and convicted of murder in the second degree and sentenced to 15 years in the penitentiary. He filed the following motion for new trial: "(2) Because the verdict is against the law and the evidence in this cause. (3) Because the jury in this cause was allowed to separate without, and in violation of, the orders of this court, after being impaneled and sworn. (4) Because, while the jury was being impaneled, six members went out of the courtroom without an officer in charge, in violation of the law. (5) Because the court erred in refusing to permit the defendant to introduce as evidence the warrants issued by the clerk of this court, with the indorsements thereon, against Frank Traylor and Will Booth, charged with the same identical offense as charged against this defendant. (6) Because Bradley Humphreys, a member of the jury, was not a resident citizen of the state of Arkansas for one year before he was selected." This motion was overruled January 29, 1906. The appellant was given 30 days in which to file his bill of exceptions, and in due time presented same to the circuit judge, which was signed by him, and this appeal duly prosecuted.

G. W. Bruce, for appellant. Robt. L. Rogers, Atty. Gen., and G. W. Hendricks, for the State.

WOOD, J. (after stating the facts). Passing over details, the facts show that Thompson and appellant were neighbors living a short distance from the town of El Paso, in White county. On the evening of the fatal fight, Thompson and the Traylor brothers, Jim and Frank, and a man by the name of Booth, were in El Paso. There was a traveling man in town giving whisky "to the boys." Thompson, when in liquor, was a "turbulent" citizen. He was drinking considerably, and it was feared he would get very drunk. The appellant and his brother and one Booth at the request of one of the merchants of the place had attempted to get Thompson out of town before he got too drunk. Thompson was put in his wagon and appellant and another were in a buggy.

They started out ahead of Thompson towards his home and he was to follow them in his wagon. When they were some distance from El Paso appellant and his companion attempted to evade Thompson, thinking they could return to town, as they desired to do so, and that Thompson would go on home. But Thompson saw them, and followed them back to town. Later they started again to take him home. This time appellant drove Thompson's wagon and went in front, while Thompson, Frank Traylor and Booth followed in a buggy. On the road as they were passing a certain house Thompson wanted to stop, and got out of the buggy. Booth got out of the buggy to keep him from stopping at the house, and Frank Traylor went on in the buggy till he overtook appellant. Appellant began to upbraid Frank for letting Thompson get out and he and appellant had a fight during which the horse ran off with the buggy. Soon Thompson and Booth overtook them. The Traylor boys and Booth went to hunt the horse and buggy and when they returned they again tried to persuade Thompson to go on home. He was very bolsterous. Appellant proposed to go back and get in his wagon, and drive for him, but Thompson objected. Appellant and Thompson got into a dispute about this, appellant trying to prevail upon Thompson to go home, while Thompson objected and wanted to return to town. According to appellant's testimony he told Thompson he should not go back. He says he feared Thompson would be arrested if he returned, and he tried to dissuade him. Thompson cursed him and said he would kill him, he thought he did not mean it at first, but he grabbed appellant in the collar, and appellant tried to get his hand loose. Thompson was striking at him, and appellant discovered that he was cutting at him. Not being able to get loose from Thompson appellant took out his knife and tried to cut Thompson loose to keep him from cutting appellant. Frank Traylor and Booth, who it seems had started back to town heard appellant and Thompson in a fuss. Frank Traylor heard Thompson call appellant a liar and asked Booth to hasten back to where they were, and he went back also. Booth preceded him and found appellant and Thompson cutting at each other. He got between them, and separated them. Thompson had his knife out and refused upon request to give it up. He was very badly cut, and Frank Traylor upon discovering that, according to his statement took Thompson in the buggy, and carried him to a neighbor's house, and went for the doctor. The defendant went on home and next day surrendered himself. Thompson had several mortal wounds, one wound severed the jugular vein. These are about the facts as detailed by the eyewitnesses. Thompson, when asked who cut him, said "Jim Traylor."

One witness heard appellant say at El Paso that evening that if Thompson fooled with him (appellant) he would down him and stamp him. There was also evidence to the effect that in the spring or summer before the killing, the father of the Traylor boys had caused Thompson to be arrested for using abusive language about him, Traylor. Thompson submitted the case, and was fined. But appellant testified that he and Thompson had never had any ill will toward each other, that they had always been on friendly terms. The eyewitnesses testified that neither of the combatants got down on the ground. But one witness, the magistrate who conducted the examining trial testified that he, next morning after the difficulty occurred, examined the place, and saw a mud hole around which there appeared to have been a considerable scuffle. He saw the prints of a man's hands and knees in the mud and it looked like a man had been down on his side or back. There was a pool of blood and a print of where something had been lying on the ground. It was shown that about one month before the killing Frank Traylor speaking of Sutton Thompson on one occasion coming from a meeting of the Farmers' Union had said: "Damn him he ought to be expelled." It was shown that Frank Traylor and Booth were arrested also for the offense, but were released at the examining trial. Thompson's knife was taken from his pants pocket next day closed and with no blood on it. Appellant testified that Thompson cut the fingers of one of his hands. We are unwilling from these facts, to disturb the verdict of the jury as to the degree of homicide. It cannot be said that the verdict for murder in the second degree is wholly without evidence to sustain it. But the majority of us are of the opinion that the punishment assessed is entirely too severe. The parties were all drinking and it is evident that the fatal fight was brought on in an effort on the part of appellant to get Thompson, who was under the influence of liquor and bolsterous, to go home. If the testimony of appellant and the other eyewitnesses be true, appellant was not the aggressor, but really acted in self-defense, or if not, at the most, his crime was only that of voluntary manslaughter. But in view of conflict in the testimony of these witnesses, with what appeared to other witnesses to be the physical appearances at the place of the fatal encounter, and in view of the ill feeling indicated by appellant in his remarks about Thompson at El Paso that afternoon, and in view of the fact that Thompson seemed to be much more under the influence of liquor than appellant, and in view of the fact that appellant cut Thompson so severely with a deadly weapon, we cannot say that there was no evidence to support the jury's verdict on the question of malice. But while this is

true, the jury should certainly have considered the circumstances which led up to the fatal fight, and have given appellant the benefit of the insulting language and other conduct used by Thompson toward him, at least in mitigation of his punishment. This, it seems to a majority of us, they have not done. The affidavits in the record, and which appear to be in the bill of exceptions, show upon their face that they were taken long after the court had passed upon the motion for new trial. This motion was passed upon the 29th of January, and the affidavits show that they were taken on the 13th, 15th, and 20th of February. There is no statement in the bill of exceptions showing that the parties were heard before the court passed upon the motion, and that time was given to reduce the testimony to the form of affidavits. There is no explanation of how these affidavits, which appear to have been made long after the motion for new trial was overruled, found their way into the bill of exceptions. But we cannot consider affidavits as proof of facts al-

leged to have taken place before the trial court, which show upon their face that they were not brought before such court for its consideration, and could not have been. Aside from these affidavits there is nothing in the record to support appellant's third, fourth, and sixth grounds of the motion for new trial. No error is presented in the court's charge.

The judgment of the circuit court is modified by reducing appellant's sentence to five years in the state penitentiary, and as thus modified is affirmed.

HILL, C. J. I dissent from a reduction of the punishment fixed by the jury. The court finds the conviction of murder in the second degree was without error, and I think should be sustained in toto. There is nothing more peculiarly within the province of the jury than the amount of punishment meted out to a defendant, and I can see nothing in this case calling for a reversal of their judgment as to the enormity of the crime.

## DAY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1906.)

## 1. INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION—EVIDENCE—SUFFICIENCY.

On a trial for violating the local option law, evidence held to support a conviction.

## 2. CRIMINAL LAW—PUNISHMENT—INSTRUCTIONS.

An instruction, on a trial for violating the local option law, requiring the jury to believe that accused would fail to pay or replevy the fine imposed by them before they could adjudge that he be placed at hard labor at the rate of one day for each one dollar of the fine and cost, was favorable to accused.

Appeal from Circuit Court, Leslie County. "Not to be officially reported."

I. S. M. Day was convicted of violating the local option law, and he appeals. Affirmed.

John L. Dixon, for appellant. N. B. Hays and Chas. H. Morris, for the Commonwealth.

LASSING, J. I. S. M. Day was indicted in the Leslie circuit court for selling spirituous, vinous, and malt liquors in quantities of less than five gallons, in violation of the local option law in force in said county. He entered a plea of not guilty, and was tried by a jury, who returned the following verdict: "We, the jury, agree and find the defendant guilty, and fix his fine at \$60, and if he fails to pay or replevy he shall be placed at hard labor one day for each one dollar of the fine and cost." Upon this verdict judgment was entered.

Upon the trial of this case, the commonwealth introduced a witness, James A. Vernon, who testified that within 12 months next before the date of the indictment he had bought a bottle of whisky from appellant in Leslie county, and paid him for it; that "I hauled a load of lumber over to his (Day's) place, and near there I met Day above the house, went down to his house, gave him a check for \$10, and he gave me his check for \$8 or \$9 and a bottle of whisky." Testifying in his own behalf, Day denied every statement made by the witness Vernon, and introduced the witness Jack Wilson, who testified that the character of the witness Vernon was bad. This same witness on cross-examination testified that the character of appellant Day was bad. This was all the testimony introduced. The appellant relies upon two grounds for a reversal: First, that the verdict of the jury and the judgment of the court are not sustained by sufficient evidence; and, second, that the court erred in instructing the jury. The appellant does not state, either in his motion and grounds for new trial, or in his brief, wherein the instructions given by the trial court are faulty, but leaves it to this court to discover the error, if any there was. The instructions complained of are as follows: "(1) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, I. S. M. Day, in this county and within one year next before the finding of the indictment herein, sold directly or in-

directly, to the witness James A. Vernon spirituous, vinous, or malt liquors, in a quantity less than five gallons at the time mentioned by the witness, then you ought to find the defendant guilty as charged in the indictment herein and fix his punishment at a fine of not less than \$60 nor more than \$100, or at imprisonment in the county jail not less than 10 nor more than 40 days, or you may both so fine and imprison the defendant within the above limits, at your discretion, according to the proof. And if you shall believe from the evidence that he will fail to pay or replevy said fine, you may, at your discretion, say that he be placed at hard labor on some public road or street in the county at the rate of one day for each one dollar of the fine and cost and likewise for the imprisonment, if any. (2) Or, if you shall believe from the evidence, beyond a reasonable doubt, that the defendant was engaged in the sale of liquor at the place mentioned in evidence, and entered into any scheme, plan, device, arrangement, or subterfuge in evasion of the local option law, whereby he sold or transferred to the witness liquor mentioned in the evidence for the pay or as agent for another, who received the pay, within 12 months before the date of the indictment, then you ought to find him guilty and fix his punishment as provided in instruction No. 1 above."

There was abundant proof to sustain the finding of the jury and the judgment of the court, if the jury believed the statement of the witness Vernon, who stated he bought the whisky of appellant Day, to be true, and disbelieved the statement of the appellant Day, who denied making the sale. These witnesses flatly contradicted each other. It was for the jury to say which told the truth. They decided that the witness Vernon did, and the trial judge approved their finding.

The instructions given by the court are as favorable to appellant as he could have asked, and more so than he was entitled to have, inasmuch as the first instruction required that the jury should believe that appellant would fail to pay or replevy any fine they might assess against him before they could impose the hard-labor sentence.

There were no errors prejudicial to the rights of appellant, and the judgment is therefore affirmed.

## DAY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1906.)

## 1. CRIMINAL LAW—REVIEW—OBJECTIONS TO JURY—NECESSITY.

Where, at the time of the formation of the jury in a criminal case, accused made no objection on the ground that the jurors had heard the argument of the prosecuting attorney in a similar case against accused, the objection would not be considered on appeal.

## 2. SAME—ARGUMENT OF PROSECUTING ATTORNEY—EXCEPTIONS—NECESSITY.

Where no exception was taken to the statements of the prosecuting attorney in the presence of the jury during the progress of a

criminal trial, the making of the statements was no ground for reversal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2666.]

**8. SAME—INSTRUCTIONS—ASSESSMENT OF PUNISHMENT.**

An instruction that, if the jury believe that accused will fail to pay or replevy any fine which may be assessed against him, they may say in their verdict that he be placed at hard labor, one day for each one dollar of the fine and cost, is more favorable to accused than it should have been.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1928-1934.]

Appeal from Circuit Court, Leslie County.

"Not to be officially reported."

I. S. M. Day was convicted of violating the local option law, and he appeals. Affirmed.

Jno. L. Dixon, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

LASSING, J. The appellant was indicted in the Leslie circuit court for the sale of spirituous, vinous and malt liquors, and mixtures thereof, in quantities of less than five gallons, in said county, "in violation of the provisions of an act of the General Assembly of the commonwealth of Kentucky to prohibit the sale of intoxicating, spirituous, vinous and malt liquors, and mixtures thereof, in quantities less than twenty gallons, in the counties of Bell, Harlan, Leslie and Perry, approved February 9, 1884 [1 Acts 1883-84, p. 214, c. 186]; and in violation of the provisions of an act approved March 10, 1894 [Acts 1894, p. 123, c. 52], and in violation of the provisions of an act approved March 11, 1902 [Acts 1902, p. 41, c. 14]; said acts being and containing the local option law in the territory aforesaid, and known and designated as such; and the said acts were in full force and effect in Leslie county, the place of said sales, at the time it was made." To this indictment, the defendant appeared in open court, and entered his plea of not guilty. On the trial the commonwealth introduced a witness, Speed Spurlock, who testified that within one year before the finding of said indictment he bought from appellant one quart of liquor in Leslie county, and paid him 80 cents therefor; that the purchase was made at the storeroom of appellant; that the liquor was poured out of a large sized jug. The same facts were testified to, substantially, by Charlie Spurlock, the father of Speed Spurlock. The appellant in his own behalf testified that on the occasion named by the commonwealth's witnesses he was very drunk, and had no recollection whatever as to letting them have any whisky at all. And this was all the testimony introduced. The court thereupon instructed the jury as follows: "Gentlemen of the jury: If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, I. S. M. Day, in this county, and within 12 months next

before the finding of the indictment herein, willfully sold, directly or indirectly, to the witnesses Speed Spurlock and Charlie Spurlock, or either of them, at the time mentioned by both of them, any spirituous, vinous, or malt liquors, in quantities less than five gallons, at that time, then you ought to find the defendant guilty, and fix his punishment at a fine not less than \$80 nor more than \$100, or an imprisonment in the county jail for a period of not less than 10 nor more than 40 days, or you may both so fine and imprison him within the above limits, at your discretion, according to the proof. (2) If you shall believe from the evidence he will fail to pay or replevy any fine which you may assess against him, you may say in your verdict that he be placed at hard labor, one day for each one dollar of the fine and imprisonment and cost. (3) If you shall believe from the evidence, beyond a reasonable doubt, that the liquor mentioned in evidence was transferred to the witness at the time mentioned in evidence, within 12 months next before the finding of the indictment herein, by the defendant, through and by any scheme, plan, device, arrangement, or subterfuge whatever, for the purpose of evading the local option laws in force in this county, and in that way he did receive the pay, or the promise to pay, therefor, then you ought to find him guilty under instruction No. 1, as for an indirect sale. (4) If you shall have a reasonable doubt from the evidence of the defendant having been proven guilty, you ought to find him not guilty." Appellant excepted to each of the instructions given. The jury found appellant guilty, and fixed his fine at \$100, with 40 days' imprisonment, "and, if he fail to pay or replevy, he shall be placed at hard labor one day for each one dollar of the fine, imprisonment, and cost." Judgment was entered upon this verdict, and from this judgment defendant appeals.

In his motion and grounds for new trial, the appellant complains that the jury which tried his case was permitted to sit by and hear the argument of the attorney for the commonwealth in another case similar to this one; and, again, because the attorney for the commonwealth, in the presence of the jury, made a statement in regard to the verdict in another case being a verdict of guilty. He also complains that the court permitted incompetent evidence to go to the jury, and that the court erred in giving the law of the case. As no complaint was made at the time of the formation of the jury because the jurors had heard the argument of the commonwealth's attorney in another case, this ground will not be considered here. The record does not show that any exception was taken to any statement made by the commonwealth's attorney in the presence of the jury during the progress of the trial, relative to the verdict that had been returned in another case,

and this objection therefore affords no ground for reversal. The appellant does not point out, and this court is unable to discover, any incompetent evidence which was given in this case. The law as given was certainly not prejudicial to the appellant, but was more favorable to him than it should have been, as in instruction No. 2 they were required to believe that appellant would fail to pay before they could impose the hard-labor sentence.

For these reasons, the judgment is affirmed.

#### DAY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1906.)

##### 1. CRIMINAL LAW — APPEAL — OBJECTIONS — NECESSITY — JURY — SELECTION.

Under Cr. Code Prac. § 281, providing that the decision of the trial court in the formation of the jury is not subject to exception and cannot be reviewed on appeal, an accused cannot be heard to complain on appeal that jurors had heard other similar cases against him tried, where he made no such objection at the time of the selection of the jury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2636, 2637.]

##### 2. SAME — COMPETENCY OF JURORS — PRESUMPTIONS.

In the absence of a showing that jurors had formed an opinion as to the merits of the case, the presumption is that they were properly qualified before being accepted.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3023.]

##### 3. SAME — OBJECTION TO EVIDENCE — EXCEPTIONS — NECESSITY.

A party seeking to avail himself of error in the admission of evidence in a criminal case must show by the bill of exceptions that, at the time the evidence complained of was offered, he objected and excepted to its admission, and an objection made for the first time in his motion for a new trial is too late.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1630.]

##### 4. SAME — IMPOSITION OF PUNISHMENT — AUTHORITY OF JURY — INSTRUCTIONS.

Under Ky. St. 1903, § 1377, providing that the jury may in its discretion impose the hard-labor sentence where the punishment is a fine or imprisonment, an instruction that, if the jury believe that accused will fail to pay or replevy the fine assessed against him, they may say in their verdict that he shall be placed at hard labor one day for each one dollar of the fine and cost, is erroneous as limiting the exercise of the jury's discretion to a case only in which they believe the defendant will fail to pay or replevy.

##### 5. SAME — ERROR IN FAVOR OF ACCUSED — RIGHT TO COMPLAIN.

One on trial for crime cannot complain of an instruction more favorable to him than it should have been.

##### 6. SAME — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

An instruction, on a trial for a violation of the local option law, directing the jury to find accused guilty on finding that he kept liquor for sale and entered into a device "in error of the local option law," whereby he sold liquor for pay, is not misleading for the use of the word "error"; the word "violation" being plainly intended.

Appeal from Circuit Court, Leslie County.

"Not to be officially reported."

I. S. M. Day was convicted of violating the local option law, and he appeals. Affirmed.

John L. Dixon, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

LASSING, J. The grand jury of Leslie county returned an indictment against the appellant, I. S. M. Day, charging him with the sale of spirituous, vinous, and malt liquors in quantities less than five gallons in Leslie county, in violation of the local option laws then in force in said county. At the June term, 1906, of said court, the appellant was tried and convicted, and from that judgment this appeal is prosecuted.

On the trial the commonwealth proved by one Elisha Pennington that, within one year next before the finding of the indictment, he had bought whisky of the appellants in Leslie county; that he paid him \$2.30 for a gallon of whisky, which appellant delivered to him at his (appellant's) store; that he first ordered it, and about two weeks later received it; that appellant poured the whisky out of a large jug into bottles, and delivered the bottles to him; that at the time he ordered the whisky the appellant showed him a catalogue of prices for whiskies, and that he selected a \$2 whisky from the list; that he paid a part of the price therefor in cash, and the balance by an order on one Joe Gum. Appellant testified that he had a catalogue from Heller Bros., manufacturers of whiskies at Bristol, Va.; that Pennington got him to order a gallon of whisky from them for him. Appellant says: "I made out his order and sent my own check to the manufacturers for \$2.50 and the express on the gallon from Bristol, Va., to London, Ky., and had the jug hauled in my wagon from London, Ky., to my store for him, and made no charge whatever for it. I never sold him any whisky, only ordered it for him as an accommodation. I had within a year before this ordered as much as 30 gallons or more for people in that neighborhood in the same way, but made no charge for any of it." This was all the testimony.

The court thereupon gave the following instructions to the jury:

"(1) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, I. S. M. Day, in this county, and within 12 months next before the date of the indictment, willfully sold, directly or indirectly, to the witness Elisha Pennington any spirituous, vinous, and malt liquors in any quantities less than five gallons, at the time mentioned by the witness, then you ought to find him guilty as charged."

ged in the indictment herein, and fix his punishment at any fine not less than \$80 and not more than \$100, or imprisonment in the county jail not less than 10 nor more than 40 days, or you may both so fine and imprison him within these limits, at your discretion, according to the proof. And, if you shall believe from the evidence that he will fail to pay or replevy the fine which you assess against him, you may say in your verdict that he shall be placed at hard labor one day for each one dollar of the fine and cost, and likewise for the imprisonment, if any.

"(2) Or if you shall believe from the evidence beyond a reasonable doubt, that the defendant, I. S. M. Day, at the time mentioned in the evidence, and within 12 months before the finding of the indictment was acting as agent for liquor dealers living out of the state, and received the pay for the liquor mentioned in evidence as agent for such dealers alone, and not as agent for the witness alone, and delivered it to the witness in this county, then you ought to find him guilty and fix his punishment as provided in instruction No. 1 above.

"(3) Or if you shall believe from the evidence, beyond a reasonable doubt, that the defendant, in this county, and at the time mentioned by the witness, kept liquor for sale at his place of business, and had the liquor mentioned in evidence for sale, and then and there entered into any scheme, plan, device, arrangement, or subterfuge, in error of the local option law, whereby he did sell, give, loan, procure for, or furnish the witness the liquor mentioned in evidence for the pay, then you ought to find him guilty, and fix his punishment as provided in instruction No. 1 above.

"(4) If you shall believe from the evidence that the defendant acted merely as accommodation for the witness in procuring the liquor mentioned in evidence for the witness, and not as agent for the dealers who furnished the liquor, and not as a part of a scheme, plan, device, arrangement, or subterfuge, whereby he sold liquor in evasion of the local option law in force in this county at the time, then you ought to find the defendant not guilty.

"(5) If you shall have a reasonable doubt from the evidence of the defendant's having been proven guilty, you ought not to find him not guilty."

On the conclusion of the argument, the jury returned the following verdict: "We agree, and find the defendant guilty, and fix his fine at \$100 and 10 days in jail, and, if he fails to pay or replevy, he shall be placed at hard labor one day for each one dollar of the fine and cost." Upon this verdict the court entered judgment, and the defendant appeals.

Three grounds are relied upon for reversal: First, because the court erred in

giving the law of the case; second, because the court permitted incompetent evidence to go to the jury; and, third, because the court permitted the jury that tried this case to sit by and hear various other cases similar to this case tried against this defendant, and had formed an opinion before they tried this case.

Section 281 of the Criminal Code of Practice provides that the decisions of the trial court in the formation of the jury, either as to the qualifications of the jurors or the manner in which the jury is selected, are not subject to exception, and the action of the trial court on these matters cannot be reviewed on appeal. The record in this case does not show that appellant made any objection at the time that the jury was being selected to try his case that certain of the jurors had heard other similar cases against him tried. He should have done so, and given the trial judge an opportunity to pass upon this question, and, failing to do so, he cannot be heard to complain. Besides, there is not the slightest evidence or showing on his part that the jurors, or any of them, had formed any opinion as to the merits of this case, and, in the absence of any such showing, the presumption is that they were properly qualified before being accepted.

Appellant complains that the trial judge permitted incompetent testimony to go to the jury, but fails to say what it was, and the record does not show that any objection or exception was made or taken during the trial to any testimony that was offered. No question was raised during the trial as to the competency or incompetency of any testimony offered during the trial, and this court has repeatedly held that, in order to avail himself of any error in the admission of evidence, the party seeking to do so must show by the bill of evidence and exceptions that at the time that the evidence complained of was offered he objected and excepted to the ruling of the court in admitting it. In this case appellant made his objection for the first time in his motion and grounds for a new trial, and this, the court has repeatedly held, is too late, for, says the court in *Redmon v. Commonwealth*, 82 Ky. 336: "We can no more consider an alleged error so presented than we could a case in which there was no bill of exceptions, for in fact a bill of exceptions not authorized is no bill." This same question is fully and thoroughly discussed in the case of *Clarence Vinegar v. Commonwealth*, 104 Ky. 108, 48 S. W. 510, and the doctrine as laid down in the *Redmon Case* is approved.

Appellant complains of the instructions given by the court as being prejudicial to his interests. Section 1377, Ky. St. 1903, provides that the jury may, in its discretion, impose the hard-labor sentence, where the punishment is a fine or imprisonment, or both, when the defendant is a male. In instruction 1 the court tells the jury that, if

they believe from the evidence that the defendant will fail to pay or replevy the fine, they may impose the hard-labor sentence. The court should have followed substantially the wording of the statute in his instruction, and not required of the jury that they should first believe that the defendant would "fail to pay" before they could impose the hard-labor sentence. The statute says the jury may in their discretion, etc., impose the hard-labor sentence, and are not limited in the exercise of this discretion to those cases only in which they believe the defendant will fail to pay or replevy. But appellant cannot complain of this instruction, as the error was in his favor; the instruction being more favorable to him than it should have been. In instruction No. 3, the court uses the word "error" where he should have and evidently intended to use the word "violation," but the plain intent and meaning of the said instruction is not thereby changed, nor was the use of this word in any wise prejudicial to the rights of appellant. Subject to the corrections as above given, the instructions present the law of the case, as warranted by the facts proven. The only error made by the court was in appellant's favor, and he is not in any wise prejudiced thereby.

The judgment is therefore affirmed.

**PROCTOR COAL CO. v. TYE & DENHAM.**  
(Court of Appeals of Kentucky. Sept. 27, 1906.)

**1. APPEAL—HARMLESS ERROR—PLEADINGS—DENOMINATION.**

Where after the settlement of litigation between the parties, without the knowledge of plaintiff's attorney, he petitioned, before the action was dismissed, for the recovery of his fee from defendant, under Ky. St. 1903, § 107, giving attorneys a lien on all claims placed in their hands for the amount of the fee agreed on, or a reasonable fee, the error in denominating the attorney's petition a cross-petition because, under section 96, Civ. Code Prac. a cross-petition is only allowed to one who is a party, was not prejudicial.

**2. ATTORNEY AND CLIENT—ATTORNEY'S LIEN—ENFORCEMENT—SETTLEMENT BETWEEN PARTIES.**

Ky. St. 1903, § 107, gives attorneys a lien on all claims placed in their hands for the amount of any fee agreed on, or for a reasonable fee. *Held*, that where plaintiff and defendant settled the litigation without the knowledge of plaintiff's attorney, and before the action was dismissed he petitioned therein to recover his fee from defendant, it was not necessary for him to make plaintiff a party.

**3. SAME.**

Under Ky. St. 1903, § 107, giving attorneys a lien on all claims placed in their hands for the amount of any fee agreed upon, or for a reasonable fee, plaintiff and defendant cannot divest plaintiff's attorney of the lien by compromising without the knowledge or consent of the attorney, unless, as expressly provided by the statute, the settlement is made in good faith and without the payment of money or other thing of value.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 407-411.]

**4. SAME.**

Where the parties to an action settle it without the knowledge or consent of plaintiff's attorney, he may either institute an independent action against defendant to recover his fee, or proceed against him by a pleading filed in the original action, if the same be pending.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 412-417.]

**5. SAME.**

Ky. St. 1903, § 107, gives attorneys a lien on all claims placed in their hands for collection for the amount of any fee agreed upon, or, in the absence of such agreement, for a reasonable fee. *Held*, that where an action was settled by defendant, giving plaintiff a small sum of money and employment, it was proper for plaintiff's attorney, who had no knowledge of the settlement until after it was made, to prosecute an action against defendant for the recovery of a reasonable fee, though under his contract with plaintiff he was to receive a sum equal to a certain part of the amount recovered.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 417.]

**6. SAME.**

Ky. St. 1903, § 107, gives attorneys a lien on all claims placed in their hands for the amount of any fee agreed on, or for a reasonable fee, but provides that, if the parties, before judgment, compromise in good faith without the payment of money or other thing of value, the attorney shall have no claim against the defendant. *Held*, that where an action was settled between the parties without the knowledge of plaintiff's attorney, and plaintiff received valuable consideration, it was not necessary for the attorney in his petition against defendant to allege bad faith.

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by J. O. Chandler against the Proctor Coal Company, in which after settlement of the litigation one Tye and another, attorneys for plaintiff, petitioned for the recovery of their fee, and from a judgment in their favor defendant appeals. Affirmed.

Sharp & Siler and T. L. Edelen, for appellant. Tye & Denham, for appellees.

CARROLL, C. Appellees, as attorneys for J. O. Chandler, filed a suit in the Whitley circuit court against appellant to recover \$10,080 damages alleged to have been sustained by Chandler through the negligence of appellant. A short time after this action was brought, and after summons had been executed upon the defendant, Chandler and the defendant in that action, now appellant, without the knowledge or consent of his attorneys, compromised and settled the litigation between them, and it was agreed that the action should be dismissed at the costs of the defendant. After appellees ascertained that the compromise had been made, and before the action was dismissed, they filed their petition to be made parties, and on their motion they were made parties, and their petition was treated as a cross-petition against the Proctor Coal Company. In this petition they sought to recover from appellant \$1,000, which they alleged was a reasonable fee for their services in the suit of Chandler against appellant. Issues were



made by appropriate pleadings, and upon a trial of the action appellees were awarded by the jury \$275. From a judgment for this amount, appellant prosecutes this appeal.

Ky. St. 1908, § 107, provides: "Attorneys at law shall have a lien upon all claims or demands, including all claims for unliquidated damages put into their hands for suit or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or in the absence of such agreement, for a reasonable fee for the services of such attorneys; and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee; and if the records show the name of the attorney, the defendant in the action shall have notice of the lien; but if the parties before judgment, in good faith, compromise or settle their differences, without the payment of money or other thing of value, the attorney shall have no claim against the defendant for any part of his fee." Appellant insists that error to its prejudice was committed in permitting the pleading which was made a cross-petition against it to be filed, because under section 96 of the Code of Civil Practice a cross-petition is only allowed to a person who is either party plaintiff or defendant in an action, and, as appellees were not parties to the action of Chandler against the Proctor Coal Company, a cross-petition in their behalf was not allowable. They further say that Chandler was a necessary party to the proceeding by appellees, and the court erred in not requiring him to be made a party. Strictly speaking, the pleading filed by appellees was not allowable as a cross-petition against appellant, as appellees were not parties to the action in which the pleading was filed; but the mere technical error in denominating the pleading a cross-petition did not prejudice the rights of appellant. Nor does it present sufficient reason why the judgment below should be reversed. Nor was Chandler a necessary party to the pleading filed by appellees. The pleading set out that the action brought by Chandler had been settled, and Chandler had no further interest in the controversy with appellant. As he was not made a party to the proceeding by appellees against appellant, he is not bound by it; nor will appellant be permitted to complain of his failure to be made a party. If they had desired to bring Chandler into court they could have done so by an appropriate pleading; but it was not necessary that appellee should do this, because they asserted no cause of action against Chandler, nor did they seek any recovery against him.

The statute gave to appellees, as attorneys for Chandler, a lien upon the claim for unliquidated damages placed in their hands against appellant for suit, and when suit was filed on this claim by appellees as attorneys of record for Chandler, and summons

served on appellant, they had notice of the fact that under the statute appellee had a lien upon the claim sued on for a reasonable fee, and they could not divest appellees of this lien by compromising the claim with Chandler, without the knowledge or consent of appellees, unless, in the language of the statute, the settlement was made in good faith, without the payment of money or other thing of value. This statute was not intended to deny to parties to an action the right to settle their differences independent of their attorneys, and without notice to them; but if they do so settle, and money or other thing of value is paid by the defendant to plaintiff as a consideration for the settlement, the attorney for plaintiff may recover from the defendant a reasonable fee for his services. Nor was it designed to prevent the compromise or settlement of lawsuits out of court by the parties. The only purpose of it is to provide a means whereby attorneys who have been instrumental in bringing the settlement about, by reason of the claim being placed in their hands for collection, shall receive a reasonable compensation for the services they have rendered. Where the record shows the name of the attorneys, the statute provides that the defendant in an action shall be charged with notice of their lien, and, if with knowledge of this lien the defendant sees proper to settle with the plaintiff, he must satisfy the lien the claim was charged with when settled. When an action is brought by attorneys on a claim or demand placed in their hands for collection, and is settled by the parties without their knowledge or consent, the attorneys may either institute an independent action against the defendant to recover their fees, or they may proceed against them by a pleading filed in the original action, if it be pending.

In this action, Chandler testified that appellees, under this contract with them, were to receive a sum equal to a certain part of the amount recovered; but as no particular amount, as we will hereafter see, was paid to Chandler in settlement of his claim, it was not practicable for appellees to recover from appellant the sum they might have required Chandler to pay them. Therefore it was proper for appellees to prosecute their action against appellant for the recovery of a reasonable fee. It appears from the evidence that Chandler in settlement of his claim for damages was paid a small amount of money and was to be given employment by appellant as long as it remained in existence. It will thus be seen that the amount received by Chandler was not definite, but there can be no question that he did receive money and other things of value. Aside from the cash payment, the obligation upon the part of appellant to give him employment as long as the company continued in business was a valid and enforceable obligation against it, upon which Chandler could have maintained an action for its breach.

It is further insisted that the claim of appellees was a debt against Chandler, and not against the Proctor Coal Company, and that, before appellees could prosecute the action against the Proctor Coal Company, the amount of their demand against Chandler should have been ascertained and made certain. It was not necessary to do this, because the statute gave them a cause of action against the Proctor Coal Company for their fee, and this claim they had a right to prosecute against the Proctor Coal Company without having made any settlement with Chandler. The question of the amount of their fee and the services they rendered Chandler were questions of fact, to be determined in the usual manner, and it was not necessary to first institute an action against Chandler to fix the amount of their fee.

Our attention is called to the case of *Hubble v. Dunlap*, 41 S. W. 432, 19 Ky. Law Rep. 656, and it is insisted that under the authority of that case it was necessary for appellees to allege that the settlement between Chandler and the Proctor Coal Company was not made in good faith, but was entered into for the fraudulent purpose of depriving appellees of the fee they were entitled to under the contract with Chandler. The rule laid down in that case is not applicable to the state of facts here presented. Under the statute "If the parties in good faith compromise or settle their differences without the payment of money or other thing of value, the attorney shall have no claim against the defendant for any part of his fee"; but if the settlement is made not in good faith, but with the fraudulent purpose of depriving the attorney of his fee, then he may maintain an action against the defendant, although the plaintiff in the action did not receive from the defendant any money or other thing of value. In that case the client appeared in court and filed a writing, reciting that the defendant did not owe him anything; but, on the contrary, he was indebted to the defendant. Thereupon his attorneys instituted their action against the defendant asserting that, although it appeared from the settlement that no money or other thing of value had been received by plaintiff, the settlement between the plaintiff and the defendant was not made in good faith, but with the fraudulent purpose to defeat them in the collection of their fee, and the court said: "The plaintiff and defendant in an action cannot compromise and settle their differences with a view of depriving the attorney of his fee, and while, the policy of the law was not to interfere with the compromise of suits made in good faith, yet the Legislature did not intend to place it within the power of plaintiff and defendant by fraudulent conduct to deprive attorneys of just reward for their services." The radical difference between that case and this is

in the fact that in this case Chandler did receive money and other things of value.

Complaint is also made of the instructions. The court instructed the jury, in substance, that if they believed from the evidence that the Proctor Coal Company settled with Chandler without the consent of Tye or Denham, by paying Chandler money, or other thing of value, they should find for the plaintiff such a sum as they believed from the evidence would be a reasonable fee for services as attorneys for Chandler in his case against the Proctor Coal Company.

We find no error in the instructions, nor was there any error committed in the admission or rejection of evidence, and the judgment of the lower court is affirmed.

#### WILSON'S ADMR v. DE LOACH et al.

(Court of Appeals of Kentucky. Sept. 28, 1906.)

#### DISMISSAL—STRIKING CAUSE FROM DOCKET—REINSTATEMENT.

An order striking an action from the docket on motion of plaintiff, without any reservation or qualification, is a dismissal without prejudice, and, being a final order, the court has no jurisdiction to reinstate the cause after the expiration of the term.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, §§ 84-91.]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by Ora Lee Wilson, as administratrix of the estate of Clifford J. Wilson, deceased, against R. De Loach and another. The cause was stricken from the docket, and subsequently F. G. Rudolph, administrator de bonis non of the estate of decedent, instituted proceedings to have the cause reinstated, and from a refusal to reinstate it he appeals. Affirmed.

Taylor & Lucas, for appellant. Wheeler, Hughes & Berry, J. M. Dickinson, and Traub, Doolan & Cox, for appellees.

BARKER, J. In 1903 Ora Lee Wilson, as administratrix of the estate of Clifford J. Wilson, deceased, instituted an action in the McCracken circuit court to recover damages from the Illinois Central Railroad Company and R. De Loach for his death by their negligence. On the 17th of October, 1904, on motion of plaintiff, this action was stricken from the docket by order of the court. In August, 1905, the plaintiff, having married, was removed as administratrix, and appellant F. G. Rudolph was appointed administrator de bonis non of the estate, and thereupon instituted this procedure to have the case, which had theretofore been stricken from the docket, reinstated. This the court refused to grant for want of jurisdiction; and the merits of this ruling is the only question involved on this appeal.

In the case of *Ashlock v. Commonwealth*, 7 B. Mon. 45, this court, on the subject of striking an action from the docket without reservation or qualification, said: "An order striking a suit from the docket, made on motion of the plaintiff and without reservation or qualification, we should be inclined to regard as a voluntary dismissal or discontinuance, and as placing the case, after the term when the order was made, beyond the power of the court. But here the right to reinstate the case upon the docket being expressly reserved, the order, we think, should not be construed as a dismissal or discontinuance, but as a mere removal, or omission of the case upon the docket." In the case of *Henry v. Commonwealth*, 4 Bush, 428, the death of one of the defendants in an indictment was suggested, and it was ordered that the action abate as to the supposed decedent. Subsequently it developed that the defendant was not dead, and it was moved by the commonwealth's attorney that the action be reinstated on the docket; but the court held that the order of abatement was a discontinuance of the action, and it could not be reinstated after the expiration of the term at which it was made. We think it clear that an order striking an action from the docket, without any reservation or qualification, as was done here, is a dismissal without prejudice; and, being a final order, the court loses jurisdiction to reinstate it after the expiration of the term at which it was made.

The judgment is affirmed.

#### RAYMOND v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1906.  
Dissenting Opinion, Sept. 23, 1906.)

##### 1. CRIMINAL LAW — EVIDENCE — PROOF OF OTHER OFFENSES—ADMISSIBILITY.

On a trial for burning a barn on a farm, evidence that a month before, the dwelling house on the farm was burned, was inadmissible because collateral to the issue, though accused had threatened to get even with the owner and occupant of the farm.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 822-824.]

##### 2. SAME—ERRORS IN ADMISSION OF EVIDENCE CURED BY INSTRUCTIONS.

The error on a trial for burning a barn on a farm, arising from the admission of proof of the burning a month before of the dwelling house on the farm, was not cured by an instruction directing the jury to consider the evidence of the burning of the house only in so far as it tended to establish the guilt of accused of the offense charged.

##### 3. SAME — EVIDENCE — OTHER OFFENSES—ADMISSIBILITY.

The exception to the rule that on a trial for crime evidence of another crime is inadmissible covers the cases where the commission of other offenses shows the intent or guilty knowledge of accused, or where the two crimes are so interwoven that one cannot be proved without the production of the facts constituting the evidence of the other.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 822-824, 830-832.]

Hobson, C. J., dissenting.

Appeal from Circuit Court, Fayette County.  
"To be officially reported."

W. R. Raymond was convicted of the offense of barn burning, and he appeals. Reversed and remanded.

C. W. Miller and W. A. Jesse, for appellant. N. B. Hays and Chas. H. Morris, for the Commonwealth.

**BARKER, J.** The appellant was tried in the Fayette circuit court and found guilty of the offense of barn burning, and his punishment fixed at confinement in the penitentiary for a term of 6 years.

He was the subtenant of J. O. Ruark, the tenant of S. L. Van Meter, and having had some misunderstanding with the latter, proceedings were instituted against him by Ruark, at the instigation of Van Meter, to evict him from the room he was occupying as subtenant. These proceedings were so successful that appellant was forced to leave the premises in February when the weather was very inclement. He was greatly angered at what he considered this oppression on the part of his landlords, and made threats that he would "get even" with them both. After his eviction he seems to have left the state, and taken up his residence in Cincinnati. On the 10th of July, 1905, the house occupied by Ruark on the Van Meter farm was burned in the nighttime, and on the 6th of August, 1905, the barn of Van Meter was also burned in the night. Appellant was indicted by the grand jury of Fayette county, charged with this latter offense. He was arrested in Cincinnati, brought to Lexington, and tried, with the result before stated.

The conclusion we have reached as to the merits of this appeal renders it improper that we should discuss the evidence further than to say that, in our opinion, it was sufficient to warrant the submission of appellant's guilt or innocence to the jury.

One of the rulings complained of is that the court permitted the fact that Ruark's house was burned to be given in evidence on the trial. This we think was error. The issue being tried by the jury was whether or not appellant burned Van Meter's barn. The fact that, a month before, Ruark's house had also been burned had no legal connection with the guilt or innocence of the accused of the offense with which he stood charged. The first was entirely collateral to the latter, and the fact that there was evidence that the accused had threatened to "get even" with both Ruark and Van Meter did not so connect the two offenses as to make the production of the evidence of one a necessity in establishing the other. At best, the fact that Ruark's house was burned was only an incident which would tend to establish a suspicion in the minds of the jury that he was also guilty of the offense for which he was being tried. The necessity of confining the evidence adduced, to that which tends to establish the issue being

tried, is too apparent to need elaborate elucidation. The defendant is called upon to defend himself against the charge set forth in the indictment. He cannot intuitively know how to produce evidence to defend himself against a charge which he cannot in advance ascertain will be made against him.

The case in hand affords a good illustration of the evil arising from a violation of the rule we have under discussion. In the indictment against the accused he is charged with the burning of Van Meter's barn. In the trial, evidence is adduced to show that Ruark's house was burned a month before the burning of Van Meter's barn. This evidence was adduced for the purpose, as the court told the jury, of establishing (if in their opinion, it had that effect) the guilt of the defendant of the offense for which he was being tried. By this evidence he was reduced to the dilemma of either saying nothing as to the burning of Ruark's house, or of attempting to disprove his guilt of that offense. What opportunity was given him to produce witnesses to show his innocence? Suppose, for instance, at the time Ruark's house was burned he was in Louisville, Ky., and could have established an alibi if given an opportunity. No such opportunity was, or could be, given him; and, therefore, he was forced to allow this damaging testimony to go to the jury undenied, except by his own testimony. The caution of the judge to the jury that they were only to consider this evidence in so far as it tended to establish the guilt of the defendant of the crime of burning Van Meter's barn, in no wise tended to cure the evil of the admission of the incompetent evidence. It simply transferred to the jury the question as to whether the evidence was or was not competent, a decision which should have been made by the court, it being the duty of the latter to decide all questions of the competency of the evidence, and the duty of the former to give the proper weight to that which is competent.

In Russell on Crimes (9th Ed.) vol. 3, p. 279, it is said: "No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule, that the evidence is to be confined to the point in issue; for where a prisoner is charged with an offense, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule, that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge." The foregoing rule is quoted with approval by Roscoe in his work on Criminal Evidence (8th Ed.) vol. 1, page 92. In the case of

Snapp v. Commonwealth, 82 Ky. 173, the court, after stating the rule that, where several felonies are parts of the same transaction, evidence of all is admissible on an indictment for any one of them, said: "This rule, however, does not apply to a case like this, where a charge of larceny alleged to have been committed on one day is attempted to be established by proof of another larceny committed on a different day, although from the same party and under the same employment." In the case of Spurlock v. Commonwealth, 20 S. W. 1095, 14 Ky. Law Rep. 605, the defendant was charged with the murder of one Caywood, and it was shown that he belonged to one of two bands of murderers and marauders who were engaged in a feud in Harlan county, Ky.; and it was sought, in his trial for the offense of murdering Caywood, to show that other persons had been murdered by the band to which he belonged. For the admission of this evidence the judgment of guilt was reversed by this court, it being said in the opinion: "He was arraigned and placed on trial for the murder of Caywood, and for this offense he could be tried under the indictment, and for no other; and, therefore, all the evidence as to the offenses certain murderous clans had previously committed was incompetent, or that other men had been shot and killed or wounded, should have been excluded from the jury." In the case of Clark v. Commonwealth, 111 Ky. 443, 63 S. W. 740, the defendant, who was a physician, was charged with the murder of Cora Waller, committed in an attempt to perform an abortion upon her. Upon his trial, evidence of his admission that he had committed abortions upon other women was permitted by the trial court. This was held by this court to be error, it being manifest that the evidence was adduced to establish primarily the guilt of the accused in having perpetrated the act of abortion, and not for the purpose of showing the intent.

Greenleaf in his work on Evidence, after stating the rule that the evidence must correspond with the allegation, says (section 52): "This rule excludes all evidence of collateral facts, or those, which are incapable of affording any reasonable presumption or inference, as to the principal fact or matter in dispute, and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and, moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it." In Cyc. p. 405, it is said: "The general rule is that on a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime, wholly independent of that for which he is on trial, even though it be a crime of the same sort, is irrelevant, and inadmissible."

The exceptions to the rule as herein stated

are those cases where the commission of other offenses tend to show the intent with which the act is committed, or the guilty knowledge of the defendant, or where the two crimes are so interwoven that one cannot be proved without the production of the facts which constitute the evidence of the other. Nothing of this sort existed in the case at bar. If the defendant burned Van Meter's barn at all, the intent to commit the crime with which he stood charged could not be denied; and the fact that Ruark's house was burned a month before was not so connected with the burning of Van Meter's barn as required evidence of the one to be produced in order to establish the other.

Throughout this opinion we have discussed the proposition under consideration as if the evidence showed that Ruark's house was burned by an incendiary, this attitude being more favorable to the commonwealth; but, in reality, there was no evidence that the house was burned feloniously; indeed, the trial court ruled, expressly, that it was not competent to establish incendiarism with reference to the burned house; so that the mere fact that the house was burned was allowed to go to the jury as evidence (if they chose to deem it so) of the felonious burning of the barn by the defendant. By the introduction of this incompetent evidence the undisciplined minds of the jurors were given free rein to suspect what they pleased from the coincidence of the two fires. First, they might suspect, without evidence, that Ruark's house was burned by an incendiary; second, they might, without evidence, suspect that the incendiary was the accused, and then draw the conclusion that, if he had burned Ruark's house, he also burned Van Meter's barn. That this elevated what was, at best, a mere coincidence, into probative evidence, to the manifest injury of the material rights of the accused, cannot be doubted. We see no reason why any other unexplained misfortune which happened to Ruark prior to the burning of Van Meter's barn could not also have been given in evidence on the trial of this case with equal propriety. For instance, if a member of his family had died under circumstances that were mysterious, or any of his stock had died without cause therefor being apparent, these facts might with equal justice have been allowed to be shown to the jury for the purpose of establishing the guilt of the accused of murder or malicious mischief, and thus aided them in reaching the conclusion that he was also guilty of arson.

Alone for the error herein pointed out, the judgment is reversed for a new trial consistent with this opinion.

HOBSON, C. J. (dissenting). Appellant was indicted for burning the barn of S. L. Van Meter. The barn was found afire about 1 o'clock at night under circumstances indicating that it had been set afire. There

was no direct evidence connecting the defendant with the commission of the crime. The evidence against him was wholly circumstantial. The commonwealth showed that at the instigation of Van Meter appellant had been evicted from the house of Ruark in February and that he had then vowed vengeance against them both, declaring that he would get even with them and that they would regret it. He then shipped his goods away from Lexington under an assumed name, and when found in Cincinnati gave an assumed name, denying his identity. He also claimed that he had not been back to Kentucky since he left there, after his eviction. A few weeks before Van Meter's barn burned Ruark's house burned, the circumstances pointing to its being set afire, the fire occurring about the same time of night as the burning of the barn. There was proof that the prisoner was seen in the neighborhood on the morning the barn burned, and when he was told what he was arrested for in Cincinnati, he said in effect: "Would you not burn anybody's barn, too, who would set you out in the road in the middle of winter?" The question is on these facts, whether the burning of Ruark's house was competent to be proved by the commonwealth on the trial.

The rule that the commission of other crimes may not be shown is subject to some well-defined exceptions. When the motive of the defendant is material, any fact throwing light upon that question may be shown, and when two crimes are the result of the same motive, or part of the same plan or design, both may be proven. In other words, all that the defendant did in execution of the one design, where that design is a material fact of the case, may be shown, although it involved the commission of other offenses than that for which he is on trial. Proof of the commission of other offenses is also sometimes admitted, to rebut the presumption of accident. Fires occur mysteriously. Every midnight fire is not of incendiary origin. Any fact which reasonably tended to show that the burning of Van Meter's barn was not accidental, but the work of an incendiary, or which tended to connect the defendant with the burning, was competent. There are a great many authorities illustrating these conclusions. Thus where a prisoner was charged with the murder of her child by poison and the defense was that the taking of the poison was accidental, evidence was admitted to show that two other children of the prisoner and a lodger in her house had died from the same poison, within a year previous to the death of the child. (Reg. v. Cotton, 12 Cox's Cr. Cas., 400); and where the prisoner was charged with suffocating her infant child in bed, evidence was admitted that she had had four other children who had died at early ages by causes not shown. Reg. v. Roden, 12 Cox's Cr. Cas., 630. So, on trial for infanticide, a confession that the woman had before had a

child in the same way, and had put it away, was admitted. *State v. Shuford*, 69 N. C. 486. In *Rex v. Bailey*, 2 Cox, Cr. 311, the fire had originated near the kitchen where the prisoner stayed as a servant. Evidence was offered of two fires occurring shortly before in other parts of the house, though no connection of the prisoner with these was shown. The evidence was held clearly competent. In that case the following precedent is cited: On the trial of Donellan for the murder of another by administering poison to him, evidence was allowed that the deceased was in the habit of fishing under a certain tree which hung over a deep and dangerous brook, and that this tree had been sawn almost in two, by some unknown person. In *State v. Thompson*, 97 N. C. 496, 1 S. E. 921; *Commonwealth v. McCarthy*, 119 Mass. 355; *Kramer v. Commonwealth*, 87 Pa. 299, all burning cases, where the proof of the prior burning was no more connected with the offense charged than with the one we have before us, the evidence was admitted. The rule is that where several felonies are connected together as part of one common scheme and all tend to a common end, they may be given in evidence. *People v. Stout*, 4 Parker, Cr. R. (N. Y.) 71; 1 Wigmore on Evidence, § 304; 1 Jones on Evidence, § 144.

In 4 Elliott on Evidence, § 2720, the rule is thus stated: "Generally speaking, it may be said that evidence of other crimes is admissible for the purpose of showing—when it fairly tends to do so—motive, intent, the absence of mistake or accident, common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, or the identity of the person charged with the commission of the crime on trial. But the particulars of a collateral crime should not ordinarily be gone into, further than they are relevant to the purpose for which the evidence is competent." See, also, *State v. Molineux* (N. Y.) 61 N. E. 286, 62 L. R. A. 193, and notes; *People v. Seaman* (Mich.) 65 N. W. 203, 61 Am. St. Rep. 326.

In *O'Brien v. Commonwealth*, 89 Ky. 362, 12 S. W. 473, this court thus laid down the rule: "Necessarily, where the commission of crime can be shown only by proof of circumstances, the evidence should be allowed to take a wide range, otherwise the guilty would often go unpunished. It is true, there must be some connection between the fact to be proved and the circumstances offered in support of it, yet any fact which is necessary to introduce or explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proven. Even evidence tending to prove a distinct offense is, therefore admissible, if it shows facilities or motives for the commission of the one in question. The purpose is to weave a net about the guilty, and often this can no more be done by proof of

a single circumstance than the building of a house with a single brick." This was approved in the recent cases of *O'Brien v. Commonwealth*, 74 S. W. 666, 24 Ky. Law Rep. 2511, and *Bess v. Commonwealth*, 77 S. W. 349, 25 Ky. Law Rep. 1091. The threat of the prisoner was against both Ruark and Van Meter. His hostility was directed to both of them. The criminal design which he had in mind was to get even with both of them. If the commonwealth is allowed to prove only the burning of Van Meter's barn it will not make out that the defendant carried out his threat. For all that would then appear the jury might be left in doubt whether he had carried out his threat as to Van Meter, there being no evidence that he had carried it out as to Ruark. It being admitted that he had made the threat, proof of the different steps that he had taken in executing the threat was competent to throw light upon his motive in being in the vicinity of the barn on the morning when it burned. If he had already burned Ruark's house, in execution of the threat, it was at least some grounds for inference when Van Meter's barn burned and he was in the neighborhood without any business there, that he was there for the purpose of carrying out the threat that he had made, and which he had already carried out in part by burning Ruark's house. The proof also tended to show that Van Meter's barn did not burn by accident. If his threat had been in so many words that he would burn the house and the barn, would it be maintained that proof that he had already burned the house would not be admissible in connection with the other circumstances proved here, to show that he had burned the barn? If this was a civil case and Van Meter was suing appellant for damages for burning his barn, would it be maintained that proof of his one threat to burn both houses and the partial execution of that threat by the burning of one of the houses, would not be competent evidence against him on the facts shown?

There was sufficient evidence that Ruark's house was set on fire by an incendiary, to go to the jury. The fire occurred in the part of the house which the prisoner occupied and with which he was therefore familiar. The way in which the house and barn were fired afforded a reasonable inference that they were the work of the same hand. But if there is any doubt about this, the defendant cannot complain, for on his objection the commonwealth was required to limit its evidence to that above indicated. The opinion of the court proceeds on the broad ground that evidence that he had committed the previous offense is incompetent. In so holding, the court overlooks the fact that the two fires were set in execution of one threat, and pursuant to one plan. All of the cases cited in the opinion relate to independent offenses which are wholly disconnected. Not a single authority cited in the

opinion touches the principle upon which the circuit court proceeded in admitting the evidence. To say that the evidence was incompetent because the defendant was reduced to the dilemma of saying nothing as to the burden of Ruark's house, or of attempting to disprove his guilt of that offense, is to say that under no circumstances would the evidence of the commission of another offense be competent, for wherever proof of the commission of another offense is introduced, the defendant is reduced to this dilemma, and that the evidence may be admitted for the purposes indicated, is conceded by all text-writers on evidence. If the defendant is taken by surprise by the evidence his remedy is, as in any other cases of surprise. He should ask for time to meet it.

The court certainly does not mean to commit itself to the doctrine that proof of the commission of other offenses is only competent to show the guilty knowledge of the defendant, or the intent with which he committed the act charged. No text-writer so limits the doctrine. It is true that if the defendant burned Van Meter's barn at all, the intent to commit the crime of arson cannot be denied, but the evidence offered was competent to show the intent which induced his presence in the neighborhood at the time of the burning of the barn, and to show that the burning of the barn was not accidental. The evidence served to connect the defendant with the burning. Circumstantial evidence is not rejected if it fails to prove a fact absolutely. It is admitted if it reasonably tends to prove it. The common sense of the jury is the reason that our law prefers a jury trial. It proceeds upon the idea that the jury have sufficient intelligence to weigh the circumstances, and draw proper conclusions. The burning of the two houses was not a mere coincidence. The circumstances show a direct and logical connection between them.

I therefore dissent from the opinion of the court.

#### MALONE'S COMMITTEE v. LEBUS.

(Court of Appeals of Kentucky. Sept. 27, 1906.)

##### 1. APPEAL—SUBSEQUENT APPEALS—LAW OF THE CASE.

The decision of the appellate court will be followed on a subsequent appeal where the record therein supports the conclusion reached on the prior appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358-4368.]

##### 2. ESTOPPEL—BY DEED—TITLE OF VENDOR—RIGHT TO DISPUTE TITLE.

An owner of land conveyed it to a purchaser. Subsequently he conveyed the same land to a third person under whom another claimed as remote grantee. *Held*, that such remote grantee in an action to foreclose a mortgage in such land given by him was estopped to question the title of the vendor and the third person under whom he claimed.

##### 3. VENDOR AND PURCHASER—LIEN ON PREMISES—LIABILITY OF SUBSEQUENT PURCHASER.

A vendor conveyed land to a purchaser, and made a third person a beneficiary for life of the interest on the note the purchaser gave for the premises, and retained a lien thereon for the payment of the same. The vendor subsequently conveyed the land to another. The purchaser in the first deed made no claim to the land. *Held*, that if the purchaser in the first deed was the holder of the legal title, the lien created in favor of the beneficiary continued to exist, and one claiming title through the subsequent conveyance acquired the premises subject to that lien.

##### 4. ATTORNEY AND CLIENT—PURCHASE BY ATTORNEY AT EXECUTION SALE—TITLE ACQUIRED.

An attorney of a judgment creditor purchasing the land of the debtor at the execution sale, purchases for the benefit of the creditor and his beneficiary.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 250-263.]

##### 5. VENDOR AND PURCHASER—VENDOR'S LIEN—CONVEYANCES—DESTRUCTION OF LIEN.

A vendor conveyed land to a purchaser and made a third person a beneficiary for life of the interest on the purchase-money note. The purchaser defaulted, and the vendor obtained a judgment for the enforcement of the lien. The premises were sold, and the vendor's attorney became the purchaser, and he, for the recited consideration of a specified amount and the surrender of a note held by the vendor and executed by a subsequent purchaser from the vendor, received a deed from the subsequent purchaser. The attorney had no authority from the vendor to surrender the note, and the vendor himself had no right to surrender it to the extent of the interest to accrue during the life of the third person made beneficiary. The attorney conveyed the premises, and a remote grantee claimed them. *Held*, that the conveyances did not destroy the right of the beneficiary to the interest on the purchase-money note.

##### 6. GIFTS—REVOCATION.

A vendor constituting himself a trustee, to hold a note received for the purchase price of land sold for the use of an imbecile for life, to the extent of the interest accruing on the note during that period, creates a valid gift, which it is beyond his power to revoke.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, § 20.]

##### 7. VENDOR AND PURCHASER—VENDOR'S LIEN—SUBSEQUENT PURCHASER—LIABILITY TO PERSONAL JUDGMENT.

A vendor conveyed land and made a third person the beneficiary for life of the interest on the purchase-money note secured by lien. The purchaser conveyed the premises, and a remote grantee held them under a deed making no reference to the note. *Held*, that the remote grantee was not personally liable on the note, but the land remained subject to the lien created.

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Action by Nora Malone's committee against Lewis Lebus. From a judgment granting insufficient relief to plaintiff, both parties appeal. Affirmed on both appeals.

W. S. Cason and H. Peterson, for appellant.  
W. T. Lafferty, for appellee.

SETTLE, J. This action was instituted against appellee by appellants, Nora Malone,

a deaf mute and imbecile, and P. P. Wyles, her committee, to recover interest at the rate of 6 per cent. per annum, from June 1, 1873, to June 1, 1904, on a \$300 promissory note, bearing date June 1, 1872, alleged in the petition to have been executed to Caleb Jones, trustee for Nora Malone, by M. D. Whittaker in part payment for a lot of ground in the city of Cynthiana, described in the petition, and conveyed to the latter by Jones.

The petition further alleges that by the terms of the deed to Whittaker, this note does not mature until the death of Nora Malone, but the interest thereon is to be paid annually for her use, and that a lien was retained, in the deed, on the lot in question as security for the payment of the note and interest.

It is also averred in the petition that by successive deeds the title to this lot passed through the hands of several intermediate grantees and finally vested in appellee Lewis, the present owner thereof; that the note of \$300 and accrued interest for the years mentioned, executed by his remote grantor, Whittaker, to Caleb Jones, trustee for Nora Malone, has never been paid, and that the lien retained on the lot to secure its payment with interest is still alive and in full force. Therefore judgment was prayed against appellee for the accrued interest, and also for the enforcement of the lien and sale of the lot for its payment. A demurrer was filed to the petition by appellee, which was sustained by the lower court, and the petition dismissed. On appeal that judgment was reversed by this court. *Malone's Committee v. Lebus*, 77 S. W. 180, 25 Ky. Law Rep. 1146. The opinion sets out the several deeds from Caleb Jones down to appellee, together with an elaborate statement of the facts of the case, which renders unnecessary a further statement of the facts in this opinion.

In discussing the questions of law involved, the former opinion says: "The reservation in the deed from Jones to Whittaker of the interest on the \$300 note for the use of Nora Malone during her life is unequivocal, and sufficiently explicit to create a valid gift thereof to the beneficiary, Nora Malone, and having been once made, it was beyond the power of Jones to thereafter revoke it, without the consent of the donee. The note was not, by its express terms, to mature within the life of Nora Malone, and at her death it provided that the principal was to be paid to the donor. It was therefore natural and proper that he should have retained its possession. Besides, if, as alleged, Nora Malone was an imbecile, or a person of unsound mind, at the date of the gift, no acceptance thereof by her was essential to render it valid, as the law will presume an acceptance on her part. *Pennington v. Lawson*, 65 S. W. 120, 23 Ky. Law Rep. 1340; *Bunnell v. Bunnell*, 64 S. W. 420, 23 Ky. Law Rep. 800. A purchaser of real property must look to

the records for evidence of title, and when it is there shown to be encumbered with liens in favor of a third person, he is presumed to have purchased it with such knowledge and subject to such conditions, and himself becomes a trustee for the beneficiary with respect to the property, and is bound in the same manner as the original trustee from whom he purchased. *Jones on Liens*, §§ 1083, 1084; 2 *Pomeroy's Eq. Jur.* §§ 581 and 688; *Johnston v. Gwathmey*, 4 Litt. 319, 14 Am. Dec. 135. Nor is appellee's contention that appellant's claim is stale and barred by the statute of limitations maintainable, at least in so far as her claim to the annually accruing interest is not within the statute."

Upon the return of the case to the lower court, appellee filed answer and later several amendments thereto. The answer as amended traversed the allegations of the petition, pleaded the statute of limitation as a bar to the action, and in addition averred that at the time Caleb Jones conveyed the lot in controversy to M. D. Whittaker, whereby it is claimed the lien was retained on the lot to secure the payment of the note and interest, payable to himself for the use of Nora Malone, he (Jones) did not hold the title to the lot. For he had theretofore, in 1869, conveyed it by deed to one S. S. Veech, in consideration of \$795, for which Veech gave his note, also secured by a lien on the lot. That Veech having defaulted in the payment of that note at its maturity, Jones instituted suit thereon and to enforce his lien on the lot, in the Harrison circuit court, and later obtained judgment against Veech for the amount of the note and the enforcement of the lien as prayed. That there was a sale of the lot under that judgment, and James R. Curry, Jones' attorney in that suit, became the purchaser of the lot, and the sale thus made was confirmed by the court. That in view of these facts, the deed from Jones to Whittaker was invalid for any purpose, as was the deed from Whittaker to Curry, but that the deed from Curry and wife to J. A. Fennell, and those from Fennell's executor to Struve, and from the latter to appellee conveying the same lot, vested in him the title to same, and as these last several deeds contain no mention of the \$300 note executed by Whittaker to Jones, or of the right of Nora Malone to the interest thereon, no lien in her favor exists upon the lot in question, or has done so since the title vested in appellee. After certain parts of the answer as amended had been stricken out, and the remainder controverted by reply, proof was taken by the parties, but as practically all of it was on the question of Nora Malone's imbecility—which was already sufficiently shown, by the inquest held some years previously in the circuit court—no light was thrown by any of it upon the main questions involved in the case. Upon the hearing, the circuit court rendered judgment in appellant's behalf for the several years' accrued in-



terest claimed, with interest on each installment of interest, from the date it should have been paid, and directed a sale of the lot in satisfaction of the aggregate amount, and costs of suit, but refused appellants a personal judgment against appellee, to which judgment appellants and appellee both excepted. The former, because of the refusal of the lower court to give them a personal judgment against appellee for the amount recovered, and the latter, because the lot was adjudged to be sold for the interest claimed. And both have appealed. As shown by the quotation from the former opinion, this court held that, upon the facts stated in the petition, appellants were entitled to a lien upon the lot in question for the interest upon the \$300 note claimed. That conclusion was also sustained by all the deeds between the parties, copies of which were filed with the petition, and therefore before this court on the former appeal. As the record on this appeal supports the same conclusion, we feel bound by the opinion delivered on the first appeal.

The only matter presented by the record before us that was not considered on the first appeal is the question as to the conveyance by Caleb Jones to Veech. It is true the deed to Veech was executed by Jones in 1869, while that to Whittaker from Jones was made in 1872. If the latter deed is invalid, appellee is without title to the lot in controversy. It does not, therefore, lie in his mouth as remote vendee of both Jones and Whittaker, to question the title of either. On the other hand, if Veech, who is not asserting claim to the property, is by virtue of the deed from Jones to him, still the holder of the legal title thereto, as his deed also made Nora Malone the beneficiary for life, of the interest on the note he executed to Jones for the lot, and retained a lien thereon for its payment to her, that lien still exists, and appellee therefore acquired the lot, subject to that lien. We are of opinion, however, that Curry's purchase of the lot in 1871, under the judgment in favor of Jones against Veech, was for his client, Jones, and consequently for the benefit of the latter's *cestui que trust*, Nora Malone.

It is not to be presumed that Curry acted in bad faith towards his clients, and if he had by his purchase of the lot intended to acquire the title for himself without their consent the law would not have permitted him to do so. It does not appear from the record that Curry received a deed from the court's commissioner by virtue of his purchase of the lot at the decretal sale. He did, however, for the recited consideration of \$50 and the surrender of the \$300 note, held by Caleb Jones, receive from M. D. Whittaker and wife a deed to the lot in 1873, but in what way he came into the possession of the note of \$300, executed by Whittaker to Jones, does not appear, nor does it appear

that he had any authority from Jones to surrender the note. Indeed, Jones himself had no right to surrender it, for the note, to the extent of the interest to accrue during her life, was the property of Nora Malone. Though Curry after receiving the deed from Whittaker conveyed the same lot to J. A. Fennell for \$50 in cash, and three notes for \$100 each, payable to Caleb Jones in one, two and five years respectively, with interest from date, secured by a lien upon the lot; neither the conveyance from Whittaker to Curry, from Curry to Fennell, nor those of Fennell's executor to Struve, or Struve to appellee, had the effect to destroy the lien retained for the benefit of Nora Malone in the deed from Caleb Jones to M. D. Whittaker of the 30th of April, 1872. As by the latter deed, Jones constituted himself a trustee to hold the note then taken from Whittaker, for her use and benefit, to the extent of the interest that might accrue thereon while she lived, it created a valid gift thereof to the beneficiary, which it was beyond the power of the trustee to revoke without her consent, and being an imbecile she could not consent. This was our conclusion on the first appeal, and to that conclusion we still adhere.

The lower court did not err in refusing appellant a personal judgment against appellee. He was not an obligor in or party to the note executed by Whittaker to Jones. His acceptance of the deed from Struve conveying him the lot in controversy imposed on him no personal obligation to appellant. His misfortune is that he acquired a lot upon which existed a lien for the several amounts of interest claimed by appellants. He took it, therefore, subject to the lien, and though the lot was properly adjudged to be sold in satisfaction of appellants' debt, appellee is not personally bound therefor.

Wherefore the judgment is affirmed on both the original and cross appeal.

#### DAILEY et al. v. O'BRIEN et al.

(Court of Appeals of Kentucky. Sept. 28, 1906.)

#### 1. ACTION—JOINDER—PARTIES AND INTERESTS INVOLVED.

Under Civ. Code Prac. § 83, providing that several causes of action may be united if each affect all the parties to the action, and may be prosecuted by the same kind of action, an action by the heir of a decedent to compel a settlement of the estate could not be joined with an action to set aside a deed given by decedent, where the parties to the suit to settle the estate had no interest in the suit to cancel the deed.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 511.]

#### 2. PLEADING—PETITION—REFERENCE FROM ONE PARAGRAPH TO ANOTHER.

The averments of one paragraph of a petition cannot be connected with or relied on in aid of another.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 118.]

**3. PARTIES—PERSONS ENTITLED TO SUE.**

Under the express provisions of Civ. Code Prac. § 18, every action must be prosecuted in the name of the real party in interest.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 3, 5-7.]

**4. PLEADING—CONCLUSIONS OF LAW.**

An allegation that plaintiff was the sole "heir at law" of a decedent amounted to no more than a conclusion of law.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 27.]

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Suit by Mollie Dalley and another against Pat O'Brien and others. From a judgment dismissing the petition, complainants appeal. Affirmed.

Ira Julian, for appellants. John W. Rodman, Frank Chinn, and Jas. Andrew Scott, for appellees.

**LASSING, J.** This was a suit brought by Mollie Dalley and her husband, James Dalley, against Pat O'Brien, L. B. Marshall, administrator of John Callery, and the Farmers' Bank of Frankfort, in which plaintiffs seek a settlement of the estate of John Callery, deceased, and ask that a deed from John Callery to Pat O'Brien be set aside, and that certain purchase-money notes executed for said land be canceled. The petition is in two distinct paragraphs; the first seeking a settlement of the estate, and the second a rescission and cancellation of the deed. The trial court sustained a motion, over plaintiffs' objection, to require plaintiffs to elect which cause of action they would prosecute. Plaintiffs elected to prosecute the cause as set forth in the second paragraph, viz., to cancel the deed. A motion was then made to strike from the second paragraph these words, "Reiterating each and all the averments of the first paragraph of the petition." And the court sustained this motion over plaintiffs' objection. A general demurrer was then entered to the second paragraph of the petition. The court sustained the demurrer, with leave to amend; and plaintiffs, electing to stand by their petition, refused to amend, and the court dismissed their petition. From this ruling this appeal is taken.

The trial court properly required plaintiffs to elect which cause of action they would prosecute, as there were clearly two causes of action in this petition which were improperly joined. Section 83 of the Civil Code of Practice provides: "Several causes of action may be united, if each affect all the parties to the action; may be brought in the same county, and may be prosecuted by the same kind of action." In this case the parties to the suit to settle the estate, including the administrator and the creditors of the decedent, had no interest whatever in the suit to cancel the deed. Therefore the actions, not affecting the same parties, could

not be properly joined. Nor can the plaintiffs complain of the ruling of the court in sustaining the motion to strike from the second paragraph the words embraced in said motion, for it is a well-settled rule that, while a pleading may contain as many distinct causes of action or defenses as the pleader may have, yet each paragraph must be complete in itself. "The averments of one paragraph cannot be connected with or relied on in aid of another." *Black v. Holloway*, 41 S. W. 576, 19 Ky. Law Rep. 694.

The serious question remaining in this case is, does the second paragraph present a cause of action? Section 18 of the Code of Civil Practice provides that every action must be prosecuted in the name of the real party in interest. No one other than the heirs at law of John Callery, deceased, could maintain an action to cancel the deed made by him to Pat O'Brien. The petition alleges that "John Callery departed this life intestate, resident and domiciled in Franklin county, Kentucky, on the 17th day of May, 1905, unmarried and childless, and plaintiff Mollie Dalley was his sole heir at law." This is all that is said as to heirship. This allegation is a conclusion of law, as was decided in *Fite v. Orr's Assignee*, 1 S. W. 582, 8 Ky. Law Rep. 349, where this court says: "An allegation that certain persons are the only heirs of another is but a conclusion of law. A party who claims his title or right to property by reason of his heirship must state whatever degree of relationship in which he stands to the person through whom he claims, and must also show that there are none standing in a nearer degree of relationship." See, also, *Larue*, etc., v. *Hays*, etc., 7 Bush, 50. The plaintiffs failing to show their right to prosecute or maintain this action, the demurrer was properly sustained.

The ruling of the lower court was correct, and the judgment is affirmed.

**COMMONWEALTH v. BRAY.**

(Court of Appeals of Kentucky. Sept. 25, 1906.)

**1. PERJURY—INDICTMENT—SUFFICIENCY.**

On a prosecution under Ky. St. 1903, § 1174, defining the offense of false swearing as willfully and knowingly swearing to that which is false, an indictment charging that defendant swore that he never "made any trade" with a certain person was demurrable as not charging that defendant swore falsely to any fact as distinguished from a conclusion.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, § 61.]

**2. INDICTMENT AND INFORMATION—SUSTAINING OF DEMURRER—RESUBMISSION TO GRAND JURY.**

It was not an abuse of discretion for the court to refuse to resubmit the case to the grand jury, under section 170, authorizing resubmission and holding of defendant on bail or in custody, on the sustaining of a demurrer to the indictment.

**3. CRIMINAL LAW—DISMISSAL OF INDICTMENT—FORMER JEOPARDY.**

Under the express provision of Cr. Code Prac. § 178, the dismissal of an indictment by the court on demurrer is no bar to a further prosecution, unless it is dismissed for an objection to its form or substance taken at the trial, or variance between the indictment and proof, or because the indictment contains matter which is a legal defense or a bar to the indictment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 312-321.]

Appeal from Circuit Court, Larue County.  
"To be officially reported."

G. H. Bray was prosecuted for false swearing, and the state appeals from a judgment dismissing the indictment on demurrer thereto. Affirmed.

N. B. Hays, Atty. Gen., C. H. Morris, and D. A. McCandless, for the Commonwealth.

O'REAR, J. Appellee was indicted upon the charge of false swearing. The accusation in the indictment runs: "The said G. H. Bray did willfully, knowingly, and falsely swear and give in evidence the following false statement, to wit: 'That he never did make any trade with the said G. W. Morris of any kind whatever,' when in fact and in truth the said G. H. Bray had made a trade with said Morris, and then and there knew he had made said trade, and knew that said statement was false." Whether the accused and Morris had made a "trade" depended upon whether they had had such negotiations as resulted in a legal contract between them. The result of such negotiations is a question of law. Whether that result is a binding legal contract is therefore a matter of opinion concerning the legal effect of what had transpired. False swearing, as a crime, is a name given by the statute to the act of willfully and knowingly deposing falsely in a sworn statement before some officer authorized to administer an oath, concerning some fact. Our statute reads (section 1174, Ky. St. 1903): "Shall willfully and knowingly swear, depose, or give in evidence that which is false." It is true that opinions are sometimes evidence, so are belief and knowledge—all mental acts. And a witness may swear falsely or commit perjury with reference thereto, in stating on oath that such and such was his opinion concerning a matter about which his opinion became a fact, and was receivable as such as a matter of evidence, when in truth such was not his opinion, and he willfully, knowingly, and corruptly falsely stated that as his opinion which was not his opinion. *Com. v. Edison*, 10 Ky. Law Rep. 340, 9 S. W. 161; *Commonwealth v. Thompson*, 3 Dana, 301. But where the statement which is the basis of the accusation, is a matter of construction, or a deduction from given facts, that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts, cannot constitute

it false swearing. The aim of the statute was not to repress freedom of thought, or to in anywise control the exercise of the judgment. But it was to prevent the giving in evidence or sworn statements, a verity to facts which did not exist, upon which judgment and mental speculation were to be indulged. The accusation in this indictment does not charge that appellee swore falsely as to any fact. The demurrer was therefore properly sustained.

The commonwealth's attorney moved the court, upon the demurrer's having been sustained, to resubmit the case to the grand jury, which was overruled. The commonwealth is complaining also of that action of the court. The Criminal Code provides that an indictment is demurrable if it show (1) that the offense charged is not within the jurisdiction of the court (section 166, Cr. Code Prac.); or (2) if the indictment improperly charge more than one offense (section 168, Cr. Code Prac.); or (3) if the indictment contain matter which is a legal defense or bar to the prosecution (section 169, Cr. Code Prac.); or (4) if the facts stated do not constitute a public offense (section 165, Cr. Code Prac.). Section 170 then provides: "If the demurrer be sustained on any other grounds than those mentioned in the last four sections (166, 167, 168, 169) the case may be submitted to another grand jury, and an order to that effect may be made by the court on the record, whereupon the defendant shall be held in custody or on bail in the manner and for the time provided in sections 159 and 160."

The purpose of this section is to allow the commonwealth to hold the custody of the accused pending the perfection of the pleadings in the case in which he is charged. Whether the accused should be held or not, pending further investigation, seems to be left to the discretion of the court, and not to the prosecutor. The practice ordinarily is to grant this request of the commonwealth's attorney for a resubmission to the grand jury where the form of the indictment is defective, and which may be cured by proper pleading. Such would doubtless have been the action of the court in this case had it seemed probable that the case of the state could have been perfected by a better pleading. But the matter charged was, as we have seen, not indictable at all. No kind of pleadings could have helped out the case. For the deficiency was, not in accurate pleading, but in the matter charged as constituting the offense. There is no suggestion in the record that the alleged false statement was not correctly set out. Then why harass the accused by holding him in court for further fruitless effort concerning the same thing? Such probably was the reasoning of the learned trial judge, and we are not prepared to say that he abused the judicial discretion with which he was invested by section 170, *supra*. The dismissal of the in-

dictment was not a bar to further prosecution. Section 178 Cr. Code Prac.; Commonwealth v. Swanger, 108 Ky. 579, 57 S. W. 10. Judgment affirmed.

### BOLDRIK v. MILLS.

(Court of Appeals of Kentucky. Oct. 4, 1906.)

#### 1. HUSBAND AND WIFE—WIFE'S PERSONALTY—RIGHTS OF HUSBAND—WAIVER.

While a husband, prior to the act of 1894, was entitled to all his wife's personality which he reduced to possession during the marriage, he could waive such right and permit the wife to own and control such personality as of her separate estate.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 27, 38-46.]

#### 2. FRAUDULENT CONVEYANCES—TRANSACTIONS BETWEEN HUSBAND AND WIFE.

One who is not a creditor of a husband at the time he paid for certain bank stock for his wife at her request, when he was indebted to her to an amount exceeding that paid for the stock, was not entitled, on subsequently becoming a creditor of the husband, to claim that the issuance of the stock in the wife's name was fraudulent as to his creditors.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 631-634.]

Appeal from Circuit Court, Marion County.  
"Not to be officially reported."

Action by C. C. Boldrick, as trustee in bankruptcy of John D. Mills, against Mrs. Martha Mills. From a judgment for defendant, plaintiff appeals. Affirmed.

H. W. Rives, for appellant. Proctor Knott McElroy and S. A. Russell, for appellee.

LASSING, J. On October 20, 1904, J. A. Stillwell obtained a judgment against John D. Mills for \$637.51 for breach of contract. Ten days later Mills was adjudged a bankrupt, and appellant appointed trustee of his estate. In April, 1905, this suit was instituted by the trustee to recover of the defendant, Martha Mills, wife of John D. Mills, three shares of bank stock in the Raywick Bank, worth \$300, on the grounds that it was the property of the bankrupt and was held by her in fraud of the right of the creditors of her husband's estate, and especially of the right of John A. Stillwell. Proof was taken, and these facts developed: Martha Mills had received some money and personal property from the estate of her father, prior to 1894. She had, during her married life, kept certain live stock and claimed it as her own; that her husband had sold its increase from time to time, and retained the money for her; that her husband, at all times prior to 1894, recognized the claim of his wife to this money and property; that after 1894 defendant continued to trade in stock in a small way, and in addition asserted ownership to the proceeds of sales of butter, eggs, poultry, etc., which amounted to something over \$75 per annum; that in the spring of 1903 the bank stock in question was subscribed for, and later paid for, and that it

was taken in the name of the defendant; that all of this occurred more than nine months before the claimant, Stillwell, obtained his judgment, and more than six months before John D. Mills was adjudged a bankrupt. Under this proof, the chancellor adjudged the wife, Martha Mills, the owner of the bank stock, and the trustee appeals.

It is true that, before the act of 1894, by marriage the husband acquired a right to all the personality of the wife, and his right was perfected by reducing it to possession. It has been repeatedly held that, while he had this absolute right, he might waive it and permit the wife to own and control such personality as her separate estate. The proof in this case shows that the husband at all times recognized the right of the wife's claim to certain live stock which she had, and, further, that he recognized her claim against him for certain money which she let him have. At the date of the subscription for the bank stock, and when it was paid for and the certificate issued to the wife, the creditor Stillwell had no claim against her husband whatever. Hence he cannot complain that the husband, John D. Mills, paid for the bank stock for his wife at her request. He owed her the money, and more.

There is no fraud shown in this transaction between the husband and the wife, and the chancellor properly adjudged her the owner of the bank stock in question, and the judgment is affirmed.

### COMMONWEALTH v. YOKELEY et al.

(Court of Appeals of Kentucky. Oct. 8, 1906.)

#### INTOXICATING LIQUORS — ILLEGAL SALES — SPECIAL LAWS AND LOCAL OPTION.

Though the special act (Acts 1873, vol. 1, p. 891, c. 312), prohibiting the sale of intoxicating liquor, except by druggists for medicinal purposes, in or within a mile of the city of T., is not repealed by the general local option law, when put into operation in the same territory by vote of the people, not having been vacated in the manner prescribed by Ky. St. 1903, § 2560, yet it is modified by the general law as to procedure, the quantity of liquor constituting the offense, and the penalty, so that under section 2558, as modified by Acts 1904, p. 160, c. 76, it is not an offense for a manufacturer to wholesale liquor of his own make.

Appeal from Circuit Court, Monroe County.

"Not to be officially reported."

Sam Yokeley and others were indicted for selling liquor. From a judgment dismissing the indictment, the commonwealth appeals. Affirmed.

H. L. Harlan, N. B. Hays, and Charles H. Morris, for the commonwealth.

SETTLE, J. Appellees were indicted for unlawfully selling spirituous liquor within a mile of the city of Tomkinsville, Monroe county, in violation of a special act of the Legislature, approved March 5, 1873 (Acts 1873, vol. 1, p. 391, c. 312), whereby the sale

of spirituous, vinous, and malt liquors except by druggists for medical purposes upon the prescription of a practicing physician is prohibited in the city of Tompkinsville, and within one mile thereof. Appellees filed a demurrer to the indictment and the case was submitted to the court upon demurrer and certain agreed facts which appear in the record. Judgment was entered sustaining the demurrer and dismissing the indictment. From that judgment the commonwealth has appealed.

The agreed facts were: that the indictment was found under the special act of March 5, 1873; that the act had been made operative by a majority vote of the citizens of the territory to be affected taken at an election duly held April 5, 1873; that defendants are partners conducting a distillery for the manufacture of spirituous liquors within a mile of the city of Tompkinsville, that the sale of whisky for which they were indicted was made at their distillery to Sam Hagan as charged and that the quantity sold was five gallons or more, of their own manufacture; that the general local option law was in force throughout Monroe county when the sale was made to Hagan, having theretofore been put into operation by an election properly held in each of the voting precincts of the county on the 8th day of September, 1900. It is conceded for the commonwealth that as the indictment was found under the special act which prohibits the sale of spirituous liquor by a distiller, or other person, in any quantity in the territory defined therein, except for medicinal purposes upon the prescription of a physician, the prosecution should have been proceeded with under that act; that the special act has not been repealed by the general local option law, consequently the lower court erred in holding that the provisions of the general local option law apply to the case.

It has been uniformly held by this court that a special prohibitory statute like the one here involved, enacted prior to the adoption of the present Constitution, is unrepealed by the general local option when put into operation in the same territory by vote of the people, except where it has been vacated in the manner prescribed by section 2560 of the Kentucky Statutes which is by a vote of the people in the district affected by the statute authorizing the sale of liquor, yet the special statute and general law are both in force there, the former modified by the latter as to procedure, the quantity of liquor constituting the offense and the penalty. *Locke v. Commonwealth*, 74 S. W. 654, 25 Ky. Law Rep. 76; *Raubold v. Commonwealth*, 54 S. W. 17, 21 Ky. Law Rep. 1125; *Brann v. Hart*, 97 Ky. 735, 31 S. W. 736; *Thompson v. Commonwealth*, 103 Ky. 685, 45 S. W. 1039, 46 S. W. 492, 698; *Stamper v. Commonwealth*, 102 Ky. 33, 42 S. W. 915. It therefore follows that both the special act of 1873, and the general local option law

are in force in the territory in which appellees sold the liquor for which the indictment in question was found against them; the former being modified by the latter to the extent indicated.

Section 2558 of the general local option law provides: "The provisions of this act shall not apply to any manufacturer or wholesale dealer, who in good faith and in the usual course of trade, sells by the wholesale, in quantities of not less than five gallons, delivered at one time and not to be drunk on the premises. By act of the General Assembly approved March 22, 1904 (Acts 1904, p. 160, c. 76), which was in force when appellees sold the liquor for which they were indicted, the right to sell spirituous, vinous, or malt liquors by wholesale in territory where prohibition prevails, under the local option law, is restricted to manufacturers selling liquor of their own manufacture. As, according to the admitted facts, appellees were distillers at the time of making the sale charged in the indictment, and the quantity sold was five gallons or more of their own manufacture, and the sale was made at the distillery, the lower court did not err in rendering the judgment complained of.

Wherefore the judgment is affirmed.

#### LOUISVILLE & N. R. CO. v. METCALF. (Court of Appeals of Kentucky. Oct. 5, 1906.)

##### 1. MASTER AND SERVANT—INJURIES TO SERVANT—RISKS ASSUMED—DANGERS INCIDENT TO EMPLOYMENT.

Where several servants, after rolling a large wheel upon a flat car, were holding on to it, when the foreman gave orders to let go, and one of the servants, by reason of his position, was unable to get entirely out of the way of the falling wheel and was injured, the danger was not an incident of the employment.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 547-550, 563.]

##### 2. SAME—CONTRIBUTORY NEGLIGENCE—METHODS OF WORK.

The servant was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1093.]

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by Joe Metcalf against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Benjamin D. Warfield and J. W. Alcorn, for appellant. James Sparks, for appellee.

O'REAR, J. Appellee, Joe Metcalf, a section hand in appellant's employ, was directed by his foreman to assist others of his crew in loading onto a flat car a large iron wheel, weighing about a ton. The foreman was present, directing the work. The wheel was rolled up onto the flat car, the men holding on to it, when the foreman gave orders to let go,

having previously instructed the men when he gave such order for them to turn loose the wheel and let it fall flat on the bed of the car. Appellee by reason of his position, having hold of the top of the wheel on the side toward which it was to fall, had to jump further to get out of the way of the falling wheel. He failed to get away, and had his fingers crushed by it.

It is charged in this suit for damages that the foreman was negligent in giving the order to the workman to turn the wheel loose before appellee had time to reach a place of safety. The court submitted to the jury that question. They found for appellee. We cannot say their verdict is without support in the evidence.

It is further argued that appellant was entitled to a peremptory instruction on the ground that whatever danger appellee was subjected to was such only as was incident to his employment in that work, and that his failing to get away in time was necessarily due to his own act; that to hold on to such a heavy falling wheel was itself culpable negligence when the result must have been inevitably to injure him. If appellee had been alone in charge of the wheel there would be much force in appellant's argument. But where there were others also holding it and controlling its action, in accordance with the direction of the overseer, appellee's peril was not necessarily self-imposed. It might have been negligent in the foreman to have the wheel thrown down toward appellee before he had had time to get a safe distance from the falling object.

We think the instructions fairly submitted the questions of negligence and contributory negligence to the jury.

Judgment affirmed.

#### HOCKER v. LOUISVILLE & N. R. CO. (Court of Appeals of Kentucky. Oct. 4, 1906.)

##### 1. APPEAL—FORMER DECISION—LAW OF CASE. The decision on a former appeal is the law of the case on a retrial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661-4665.]

##### 2. MASTER AND SERVANT—INJURIES TO SERVANT.

Where plaintiff, a servant of a railroad, had given up his purpose of going to a closet which was located across defendant's tracks, at the time he was injured while standing between two cars, he could not recover on the theory that defendant had located the closet beyond the tracks, and had thus licensed him to cross for the purpose of going to the closet.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 153.]

##### 3. RAILROADS—ACCIDENT IN YARDS—PERSONS ON TRACK—NOTICE—PRECAUTIONS.

Where plaintiff was injured while standing between two cars by the sudden movement of the train, the mere fact that one of defendant's servants in charge of the train crew saw him crossing the tracks and standing near or at the cars was insufficient to charge defendant

with knowledge that plaintiff was in a place of danger.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1275-1280.]

##### Appeal from Circuit Court, Boyle County. "Not to be officially reported."

Action by J. C. Hocker against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Robt. Harding, John W. Voris, John W. Rowlings, and Green & Van Winkle, for appellant. O. R. McDowell, C. H. Rhodes, Chenaault Huguely, and Benjamin D. Warfield, for appellee.

HOBSON, C. J. On the former appeal of this case it was held that under the evidence the court should have instructed the jury peremptorily to find for the defendant, there being no testimony that the servants of the company knew that the plaintiff was between the cars; that it was negligence on his part to stand between the cars, and that there being no proof that his danger was perceived by those in charge of the train he could not recover. See *L. & N. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119. On a retrial of the case at the conclusion of the plaintiff's evidence the court instructed the jury to find for the defendant, which was done and the plaintiff appeals.

It is insisted for him that there was on this trial evidence that those in charge of the train were aware of his peril. His testimony on the subject is as follows: "Q. Now, Mr. Hocker, as you started from the telegraph office northwest, going to the water closet, and before you took your position and when you took your position at the point where you say you were at the edge of the cars, was there anybody north of you; if so, who? A. There was Mr. Biddell up north of 'Southern Avenue,' the foreman of the crew. Q. Of what crew? A. The one standing up there by the switchman's shanty. Q. How far was he from you when you took your position and while you were going to the place where you were injured? A. When I took my position he was about 475 feet north of me. Q. Could you see him? A. Yes, sir, I saw him. Q. Did he see you? A. Yes, sir, he was looking right at me. Q. Did he see you while you were coming from the telegraph office over to where you took your stand? A. Yes, sir. Q. What was he doing when you took your position at the edge of the cars? A. He was looking up and down the track, north and south, of the track I was on. Q. Was your body in plain view of him? A. Yes, sir. There was no obstruction. \* \* \* Q. Then Mr. Hocker, when you took your position there, at which box car did you take it? A. The second box car at south end. Q. How much of your body was exposed to plain view in the direction, and from the direction that you saw Mr. Biddell looking down

there towards you? A. Fully half of my body, if not more."

On cross-examination he testified as follows: "Q. Could you or could you not see it? [the switch.] A. I could see it, when I was halfway between the two tracks and saw the switch closed and Mr. Biddell on the east side of the track, when I took my position he was looking at me. Q. Where was Mr. Biddell? A. Right about the east rail. Q. The east rail? A. Yes, sir. Q. And this switch was on the west side? A. Yes, sir. \* \* \* Q. Now at the time you took your position, when you say Mr. Biddell saw you, saw or was looking at you, he was on the east rail of B-1? A. Yes, sir. Q. Is that correct? A. About the east of side rail B-1-east rail. Q. In order to throw that switch he would have to cross B-1 and go a foot farther and get to the target? A. Yes, sir. Q. That is the last time you saw Mr. Biddell? A. I saw him when I stopped there and took my position. Q. Was it after you had put your head partially behind the cars? A. I looked up when I was standing right at the cars. Q. Right at the cars? A. I looked up there and saw him, that was when I started to unbutton my pants. I looked down. Q. After you commenced to unbutton your pants, wasn't it then you partially concealed your body? A. I just turned my shoulders. He was looking at me, and could see me. Q. That was before he crossed the track? A. He was standing on the east side of the track. Q. He had to go to the other side of the track to throw the switch? A. Yes, sir. Q. How can you tell the jury he saw you? A. He was looking at me."

Hocker was 475 feet from Biddell who was the foreman of the crew handling the train. He was walking from the telegraph office across the tracks to the water closet, and, finding a train moving on one of the tracks in front of him, got between two cars standing on another track to urinate, and while he was urinating there the crew of which Biddell was the foreman made a running switch which threw some of the cars of that train in on the track on which the cars were where Hocker was urinating. The collision of these cars against the others knocked him down and injured him. It is apparent from his evidence that Biddell was on the east side of the track when Hocker last saw him, and that after Hocker went in between the cars to urinate, and while he was standing there urinating, Biddell crossed over to the west side of the track and the cars were run over upon it, causing the collision which injured him. It is also apparent from his testimony that Biddell had no knowledge that he was about to go between the cars for the purpose of urinating, and from all that appears Biddell had no reason to suppose when he saw him near the cars that he was going to remain there. Hocker says that he looked up when he was standing right at the cars; that he then saw Biddell; that he started to

unbutton his pants and looked down. This is the last that he saw of Biddell. He does not profess to have seen Biddell any more after he started to unbutton his pants and looked down. Conceding that Biddell saw him in this position, we have the question whether this should have put Biddell on notice that Hocker would be endangered by his running the other cars in on that track. In determining this question, we must bear in mind that Biddell was handling his train, and that when he saw a man crossing the tracks he would naturally assume that he would keep out of the way of the cars. As Biddell did not know for what purpose Hocker was crossing the tracks, or for what purpose he had come up to the cars, and had no reason to suppose that he was going to stay there, or to go in between the cars and stay there, it is not easy to see upon what principle it can be held that Biddell should have perceived his danger when he turned the switch and threw the cars in on that track; for, after Biddell saw him standing at the car, he crossed over and threw the switch, and the cars must have run something over 500 feet after the switch was turned before the collision. As Biddell did not know that Hocker had any business at the cars, or any reason for remaining there, we do not see that he should have apprehended any danger to Hocker when he turned the switch and ran the cars in on that track. It is not sufficient that Biddell saw Hocker in time to have avoided the injury to him; he must have perceived his danger, or the circumstances must have been such as to put a man of ordinary prudence on notice of his peril. The mere fact that Biddell saw him crossing the tracks and standing near or at the cars is insufficient; for, in yards of this sort, the employes of the company are required to go about the cars constantly, taking the numbers on them, making examinations, and the like. In the absence of something to charge Biddell with notice that Hocker was about to go between the cars, or about to get on them, and that there would be danger to him from running the other cars in on that track there can be no recovery. The plaintiff is the only witness who testifies on the subject, and, taking his testimony as a whole, we conclude that the last time he saw Biddell, or knows of Biddell's looking towards him, was when he was standing right at the cars and started to unbutton his pants.

The opinion delivered on the former appeal is the law of the case. The plaintiff cannot recover on the idea that the company had located its water closet beyond the tracks, and had thus licensed him to cross the tracks to go to the water closet, for the reason that he was not hurt while trying to go to the water closet. He had given up the purpose of going to the water closet, and was attempting to urinate between two cars. This precise question was determined on the or-

iginal appeal. The circuit court should not have allowed the amended petition to be filed, but, at the conclusion of the evidence, he properly instructed the jury peremptorily to find for defendant.

Judgment affirmed.

### SCOTT v. BALES et al.

(Court of Appeals of Kentucky. Sept. 26, 1906.)

#### 1. BILLS AND NOTES—SIGNING AS SURETY.

A note signed B., principal, M., surety, with the name of S. immediately below, without more, does not show that S. was a surety, so as to authorize the sustaining of the demurrer of S. to the petition thereon, on the ground that, he being a surety, the cause of action as to him was barred by limitation.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 255, 256.]

#### 2. SAME—PLEADING EXECUTION.

The petition in an action on a note sufficiently avers its execution by alleging that defendants by their note agreed and promised to pay plaintiff.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1474.]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by S. E. Scott against J. W. Bales and others. From a judgment sustaining a demurrer of a defendant and dismissing the petition as to him, plaintiff appeals. Reversed and remanded.

W. B. Smith, for appellant. G. M. Smith, for appellee.

O'REAR, J. Appellant filed a suit upon the note hereinafter copied. The petition reads as follows: "Samuel E. Scott, plaintiff, v. Joseph W. Bales, Socrates Maupin, Thomas J. Smith, defendants. The plaintiff, S. E. Scott, says that the defendants by their promissory note, dated April 3rd, 1893, which is filed as a part hereof, agreed and promised, ninety days after the date thereof to pay to the plaintiff the sum of twenty-one hundred and fifty-eight dollars and  $\frac{25}{100}$ . That on the 3rd day of April, 1894, one thousand dollars was paid on said note, and on the 3d of April, 1900, eight hundred and six dollars and  $\frac{25}{100}$  was paid on said note. This note bears interest from date. The remainder of said note and the interest are due and owing to this plaintiff, and for which he prays judgment, and for his cost and all proper relief. S. E. Scott, by W. B. Smith, Atty. 1906, September 22nd, filed, one exhibit filed, summons and 3 copies issued."

The note reads as follows: "Exhibit. \$2158.35. Richmond, Ky., April 3d, 1893. Ninety days after date, we, or either of us promise to pay to the order of S. E. Scott, two thousand one hundred and fifty-eight &  $\frac{25}{100}$  dollars, value received, with interest at the rate of 7% per annum after maturity, until paid. Negotiable and payable at the

Madison National Bank, Richmond, Ky. J. W. Bales, Principal. Socrates Maupin, Security. T. J. Smith."

A demurrer filed by T. J. Smith was sustained to this petition. Appellant declined to plead further, and the petition was dismissed as to appellee Smith. Plaintiff appeals.

It is argued that the demurrer was sustained because the petition disclosed on its face that the cause of action sued upon was barred by limitation; that T. J. Smith was a surety on the note, and being such the cause of action against him thereon was barred after seven years from the maturity of the note, which was before the petition was filed. We are not otherwise advised whether such was the basis of the ruling of the circuit court. If it was, then that court was in error, because neither the petition nor the exhibit filed with it disclosed that appellee Smith was a surety. It is true the note shows that J. W. Bales was a principal and that Socrates Maupin was a surety, but the relation of appellee Smith to the note is not shown further than that he was a payor. The mere position of his name upon the note does not necessarily indicate that he was a surety. There is no legal presumption indulged from the position of names on a promissory note as to their mutual relation. That is a question of fact. If he was surety, then that fact must be shown by plea, and the statute of limitation relied on in the plea as a bar, if he would avail himself of it.

It is argued for appellee, furthermore, that the judgment must be affirmed because the petition is not good in other respects. The petition does not expressly aver that appellee, Smith, signed the note or delivered it, nor is it expressly averred that he "executed" the note, which would include the act of signing and delivering. Ward v. Coffey, 12 S. W. 145, 11 Ky. Law Rep. 339; Rudd v. Cohan's Ex'r, 4 Ky. Law Rep. 997, and Brown v. Ready, 20 S. W. 1036, 14 Ky. Law Rep. 583, are relied on by appellee. Rudd v. Cohan is an abstract of an opinion of the superior court, and is not full enough to show all that the pleading contained, but so far as it shows anything it is only that the allegation that the defendant "made and executed the note," is equivalent to an allegation of delivery. Brown v. Ready, supra, is not in point, and does not touch the question being considered. In Bell v. Mansfield's Assignee, 13 S. W. 838, 12 Ky. Law Rep. 89, the pleading runs: "The defendant by his promissory note filed herewith agreed and promised to pay," etc. Of this pleading the court said: "It includes all the essentials of a complete undertaking by the defendants." The petition was held sufficient.

The action of the circuit court sustaining the demurrer to the petition was erroneous, and the judgment is reversed and cause remanded for proceedings not inconsistent herewith.



**WILSON v. JOHNEON'S ADM'X et al.**  
(Court of Appeals of Kentucky. Oct. 4, 1906.)  
**APPEAL—FINDINGS—REVIEW.**

A finding by the court will not be disturbed on appeal, if there is any evidence to support it, though the weight of the evidence may be against it.

Appeal from Circuit Court, Bell County.  
"Not to be officially reported."

Action by E. G. Wilson against Rice W. Johnson's administratrix and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. Low, for appellant. Calvin Hurst, for appellees.

**LASSING, J.** Appellant sued Rice W. Johnson and others for the possession of certain logs, which were sawed from timber taken from land claimed by appellant. The logs had been sold to the Jones Lumber Company, and by agreement of parties the purchase price therefor was paid into court, with the understanding that the parties shown to own the logs should take the money in lieu thereof. Rice Johnson, who claimed to own the land, died, and the action was revived by agreement against his administrator. The case was tried by the court without a jury.

The proof shows that appellant's title is based upon a patent, dated July 5, 1846, to William and Martin Hoskins for 100 acres. The patentees divided the land between them; the north half being allotted to William Hoskins, whose heirs conveyed same to appellant. The appellees' claim of title to the land in question is based upon a deed from J. W. Johnson to James Johnson, dated April 13, 1885, and upon adverse holding. The whole dispute in these cases arises out of the fact that a certain hollow, known as "Horse Ford Hollow," has two forks or prongs, one known as the "Right-Hand Fork," which is the longest, and one known as the "Left-Hand Fork." The Johnson deed calls for the line in dispute in this language: "Thence up the Horse Ford Hollow to the low gap at the head of the hollow; thence with the outside lines to a yellow pine on the top of the ridge." Appellant contends that this call should be run up the Left-Hand Fork, while appellees contend with equal earnestness that it in fact runs up the Right-Hand Fork, or the longest fork; and each side introduces witnesses to establish its contention.

The court found that the true line separating the land of appellant from that of appellees runs up the long fork of said hollow, and that the appellant is the owner of the timber cut on the southwest side of a line running from the head of Horse Ford Hollow to the pine mentioned in the Johnson deed, and that the appellees own the timber on the northeast side of said line. He further finds that 10 of the trees stood on appellant's side of the said line, and 29 trees on appellees' side of said line, and the parties agreeing

that the trees were of about uniform size, adjudged the appellant the owner of ten thirty-ninths of the fund in court, and ordered it paid over to him, with judgment for his costs.

The only questions to be determined in this case are: Where was the true line which separated the land of appellant from that of appellees? And, if appellees held by adverse possession, had he held for such length of time as to give him a good title to the land? These are the questions which should have been submitted to a jury. This court has repeatedly held that the finding of a properly instructed jury will not be disturbed if there is any evidence to support it, even though the weight of evidence may be against it. The finding of the court is entitled to as much consideration; and, there being proof to support his finding, this judgment is affirmed.

**POTTER et al. v. REDMON'S GUARDIAN**  
(Court of Appeals of Kentucky. Oct. 3, 1906.)

1. **HOMESTEAD—RIGHTS OF SURVIVING INFANT CHILDREN—STATUTES.**

Ky. St. 1903, § 1707, providing that the homestead shall be for the use of the widow, and the unmarried infant children of the deceased husband shall be entitled to the joint occupancy with her until the youngest unmarried child arrives at full age, gives to the infant children of a deceased husband the joint occupancy, with the widow, of the homestead, and the fact that infant children were not living with the father at his death does not deprive them of their statutory right.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 261-273.]

2. **GUARDIAN AND WARD—SURETIES—LIABILITY.**

A guardian of two of six infant children of a decedent rented the homestead and collected the rent. The four infants asserted no claim to it, and their right was barred by limitation. The guardian made no settlement for the rent collected. *Held* that, as the children were joint tenants, the renting of the homestead by the guardian was not wrongful, he was liable to account for the rent received, and on his failure to do so the sureties on his bond were liable.

3. **JUDGMENT—RES JUDICATA.**

An order striking an action from the docket without trial, being in effect an order dismissing the case without prejudice, is no bar to a subsequent action.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1018, 1028.]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by the guardian of Onie Redmon and another against J. E. Potter and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Crice & Ross, Bradshaw & Bradshaw, and W. T. Bradshaw, Sr., for appellants. D. G. Park, and A. L. Harper, for appellees.

**HOBSON, O. J. F. M.** Houser qualified as guardian for Onie and Nonie Redmon on September 4, 1884. He renewed his bond as guardian on July 14, 1891, with J. E. Potter

and E. R. Bradshaw as his sureties; the surety in the original bond having died. F. M. Houser died in the year 1896, and W. H. Donaway was appointed as guardian for Onie and Nonie Redmon in his stead. This suit was subsequently filed by the wards to recover of the sureties of the former guardian an alleged balance in his hands. J. Q. Redmon, the father of the infants, owned at his death a homestead. He had been married twice. By his first wife he had four children, who were infants at his death, and by his second wife he had two children, Onie and Nonie, both then infants of tender years. The second wife, who was their mother, survived her husband, but died shortly afterwards. At the father's death the four children by his first wife were not living with him, but were living with their mother's kindred. His widow continued to occupy the homestead with her two children until her death. The guardian, Houser, after her death, collected \$200 for the rent of the homestead; he having taken charge of the place after the mother's death and rented it out as guardian. He did not qualify as guardian of the other four children, and credited all of the rent to his wards in his settlements. This money, with its interest, is the chief ground of contention here.

Section 1707, Ky. St. 1903, provides: "The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age. But the termination of the widow's occupancy shall not affect the right of the children." All six of the infant children of the husband were entitled to a joint occupancy with the widow, and the termination of her occupancy did not affect the right of the children. The fact that four of the infant children were not living with the father at his death is immaterial. The purpose of the statute is to create an asylum for the unmarried infant children of the husband, and they are entitled to this asylum under the statute, whether they reside with the father at his death or not. Being infants, they are not chargeable with laches, and did not lose their rights by not asserting them at the time or abandoning the home. But, while this is so, the guardian found his wards in possession. He took charge of them and the property. He received the property as guardian. He rented it out as such and collected the rents, charging himself with it in his settlements. The other four infants asserted no claim for it. The time in which they might have asserted such claim has long since passed, and, while the guardian might show that he had accounted to the co-tenants for the rent, as between him and his wards, he cannot deny their title to the money which he received as their guardian when he has not accounted

to any one else for it and is under no liability to any one else.

But it is earnestly insisted for the sureties that they are only responsible for the estate of the wards in the hands of the guardian, that they are not responsible for any other money which he got into his hands, and that, if they were not responsible for the rent money when it came into his hands, they did not become so by lapse of time or by the other children losing their right to sue for it. There would be great force in this, but for the fact that the six infant children were joint tenants of the homestead. A joint tenant may lawfully rent out the common property and collect the rent. When he so collects the rent, the money which he collects is his, although he may be under liability to account to his co-tenants, if on the whole he receives more than his share of the rent. But this liability to an accounting is purely a personal liability. The money which he collects is his, and he may do as he pleases with it. When sued for an accounting he may show that on the whole he got no more than his fair share of the rents. If Onie and Nonie Redmon had been of age, and had rented out the common property and collected the \$200, the money would have been theirs. When the guardian rented it out, the money which he collected was the money of his wards. If the other infants sued for an accounting and he had to account to them, he might be credited for anything he had paid on this liability; but it would have been a liability paid as guardian. He was not a wrongdoer in renting out the property, nor was he in any sense a trustee for the other four children. He received the money for his wards and his sureties were responsible for it. As he has not been made to account to the other four infants for any part of the rent, the court properly held him liable to his wards.

The plea in bar cannot be sustained. An order striking an action from the docket without trial is in effect an order dismissing the case without prejudice. *Wilson's Adm'r v. De Loach*, 29 Ky. Law Rep. —, 96 S. W. 514. The action in the quarterly court was dismissed without prejudice at plaintiff's cost.

As to the additional credit claimed of \$45, and as to the claim that more money was charged than the guardian received, we see no reason for disturbing the chancellor's conclusions on the facts.

Judgment affirmed.

#### DOW WIRE WORKS CO. v. MORGAN.

(Court of Appeals of Kentucky. Oct. 4, 1906.)

##### 1. MASTER AND SERVANT—APPLIANCES—DUTY OF MASTER.

It is the duty of an employer furnishing to an employé a rip-saw with which to work, to maintain it in a reasonably safe condition, and to provide it with such appliances as will make

it reasonably safe; but he is not obliged to adopt such appliances as have been found by actual test to materially contribute to the reduction of injury or accident, nor is he required to furnish the latest improvements.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 171-184.]

## 2. SAME—ASSUMPTION OF RISK.

An employé 19 years of age, without experience in operating a circular rip saw, was ordered to operate such a saw. He was not instructed as to the work. The employer could have reduced the danger by furnishing the saw with reasonably safe appliances, or by warning or instructing the employé. *Held*, that the employé did not assume the risk as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 552, 553, 565, 601.]

## 3. SAME—INJURY TO EMPLOYÉ—ACTIONS—EVIDENCE.

In an action for injuries to an employé while operating a circular rip saw, evidence that the danger in operating it could have been in a large measure obviated by appliances which would have rendered it reasonably safe, was admissible.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 920, 921.]

## 4. SAME—INSTRUCTIONS.

In an action for injuries to an employé while operating a circular rip saw, an instruction that the employé assumed the ordinary risks incident to the employment, if he knew the danger incident thereto, or was instructed concerning it, and how to operate it, is proper.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 550.]

## 5. JURY—COMPETENCY—INTEREST IN CASE.

It was not error to permit counsel for plaintiff suing for injuries received by an employé to ask jurors whether they were connected with the accident insurance business.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by E. D. Morgan against the Dow Wire Works Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Forcht & Field, for appellant. B. H. Young and M. W. Ripy, for appellee.

**OARROLL, C.** The appellee was seriously injured by a rip saw he was working with in ripping planks into small strips, and brought this action to recover damages for the injury which was caused, as he alleged, by the negligence of the appellant in failing to furnish him safe and sufficient tools to work with and in failing to instruct him as to the danger incident to the employment. From a judgment in his favor the appellant prosecutes this appeal, and asks a reversal chiefly because the court refused to instruct the jury to find for it, and for error in giving and refusing instructions.

At the time of the injury the appellee was about 19 years of age and had been employed as a common laborer at one of appellant's factories. The evidence in his behalf tended to show that he had never had any experience in operating a rip saw and that the foreman of appellant had knowledge of this

fact when he requested the appellee to leave the work he was engaged in and operate the saw, and that he was not instructed as to the use of it, or the danger incident to the employment. Appellee testified that he did not ask or receive any instructions or information as to the work, except that the foreman went with him to the saw, set the gauge, ripped one strip from the plank, and then left; that the accident occurred a few moments after the departure of the foreman, no person except appellee being present at the time, and he did not know what caused the accident, except that when the saw was about two-thirds through the 14-foot plank he was ripping, the plank suddenly jerked or jumped and left the saw, throwing his hand against the saw, which cut off four fingers. The foreman testified that appellee said he had theretofore worked with a circular rip saw, and that he remained with him some time and saw that he understood how to operate it. Evidence was introduced tending to show that it was usual and proper to instruct inexperienced hands how to operate a rip saw, and as to the danger incident to the employment, and that it was the usual and safe plan to have the saw equipped with a cover or hood that prevents the hand or person of the operator from coming in contact with the teeth of the saw, and to have a spreader, which is a small wedge-shaped implement, set on the table back of the saw for the purpose of keeping the plank open as it is sawed, thereby preventing it from pinching the saw. The saw appellee was engaged in operating was circular in form, was attached to a table, the top of the saw being about two inches above the table, the plank to be ripped was placed by the operator on the table, and pushed against the saw by the operator, who also held it on the table and against the gauge that regulated the width of the strip to be sawed. This saw was not covered in any way, nor was there any spreader attached to it, and evidence was introduced for the appellant tending to show that neither a spreader nor cover was necessary in sawing the kind of lumber that appellee was sawing.

A peremptory instruction offered by appellant was overruled, and upon the conclusion of the evidence its counsel offered several instructions, all of which were refused. Thereupon the court instructed the jury as follows: "If you shall believe from the evidence that there were dangers incident to the operation of the rip saw, referred to in the evidence in this case, which were unknown to plaintiff and which were known to its foreman, superior to plaintiff in its service, and that it was known to defendant's agent or foreman in charge of its establishment, that the plaintiff had no prior experience in the operation of a rip saw, if such was a fact, and that such dangers incident to the operation of a rip saw were known to defendant, and that the means of

guarding against them were also known to defendant, if there were such means, and its agent, the foreman in charge of its shop, and superior to plaintiff in defendant's service, and were unknown to plaintiff, then it was the duty of the defendant, or of its said foreman, to explain the danger to plaintiff before putting him to work upon the said rip saw, and to explain to him also the means of guarding against such dangers, if there were any of the kind I have mentioned; and if you shall believe from the evidence that the defendant's agent, or foreman in charge of its shop, and under whose supervision the plaintiff was working, failed to explain the dangers to plaintiff, if there were any, connected with the operation of the saw, and the means of guarding against such dangers, and shall further believe that by reason of the failure of defendant's foreman in this respect the plaintiff sustained the injuries by him alleged, then the law is for the plaintiff and you should so find, unless you shall believe from the evidence that the plaintiff failed to exercise ordinary care for his own safety, and by such failure upon his part, so far contributed to his injuries that but for which he could not have been injured. (2) The court further instructs you that it was the duty of the defendant company to have and maintain the rip saw, in the evidence referred to, in a condition reasonably safe for use, and to adopt and provide such appliances as have been found by actual test and experience to materially contribute to the reduction of injury or accident to persons operating such rip saw, and if you shall believe from the evidence that there were any appliances which had been found by test and experience to materially contribute to the reduction of such injuries and such accidents, at the time that this disaster to plaintiff occurred, and that such appliances were known at the time to the defendant, or to its agents in charge of its factory, and charged by it with the duty of supervising its machinery, and that by reason of such failure upon their part, if there was any, the plaintiff sustained the injuries by him alleged, then, and in that event, the law is for the plaintiff, and the jury should so find, unless, as in the other case stated in the first instruction, the jury should be of the opinion and believe from the evidence that the plaintiff failed to exercise ordinary care for his own safety, and by such failure upon his part, so far contributed to his injury, that but for it he would not have been injured." Other instructions were given—the converse of these—and also defining the measure of damages.

It has been frequently held by this court that in negligence cases, based on facts similar to those shown in this case, it is the duty of the master to furnish the servant with a reasonably safe place in which to work and reasonably safe tools and appliances to work with (*Henderson Tobacco Extract Works v.*

*Wheeler*, 76 S. W. 34, 25 Ky. Law Rep. 495; *Covington Saw Mill Mfg. Co. v. Clark*, 76 S. W. 348, 25 Ky. Law Rep. 694; *Ky. Free-stone Co. v. McGee*, 80 S. W. 1113, 25 Ky. Law Rep. 2211; *Carey v. Samuels & Co.*, 88 S. W. 1052, 28 Ky. Law Rep. 6; *Corley v. Paducah Cooperage Co.*, 89 S. W. 512, 28 Ky. Law Rep. 449; *Pfisterer v. Peter & Co.*, 78 S. W. 450, 25 Ky. Law Rep. 1005); but it has never gone so far as to impose on the master the duty exacted of him by instruction No. 2—to adopt and provide such appliances as have been found by actual test and experience to materially contribute to the reduction of injury or accident, nor is he required to furnish the latest improvements. *McCormick Machine Co. v. Liter*, 68 S. W. 761, 23 Ky. Law Rep. 2155. In lieu of instruction No. 2, the court should have told the jury that it was the duty of the appellant to have and maintain the rip saw in reasonably safe condition to work with, and to provide it with such appliances as would make it reasonably safe for use by the operator.

It is insisted by counsel for appellant that the danger in operating this rip saw was so obvious that the servant was charged with the duty of looking after his own safety, and assumed the risk incident to his employment, and that where the danger is obvious it is not the duty of the master to warn or instruct the servant. It is true, as a matter of fact, that a circular saw in motion is a dangerous piece of machinery, and that ordinarily the servant assumes the risks and hazards incident to the employment, and, as held in *Wilson v. Chess, Wymond & Co.*, 78 S. W. 453, 25 Ky. Law Rep. 1655, *Shemwell v. O. & M. R. Co.*, 78 S. W. 448, 25 Ky. Law Rep. 1671, *Duncan v. Gernert & Bros.*, 87 S. W. 762, 27 Ky. Law Rep. 1039, when the work is in and of itself dangerous, or the danger attending it is perfectly obvious, the master does not insure the safety of the servant; but the principle announced in those cases is not applicable to the facts here presented. If the doctrine contended for by appellant was the law, then in every case the employer could excuse himself on the ground that the machinery was dangerous, and the servant should be held to have assumed the risk incident to the employment, although the servant was inexperienced and uninstructed, and the master had failed to provide the machinery with such appliances as would render it reasonably safe. The master cannot exonerate himself from liability by sheltering behind the plea that a saw is a dangerous implement, when the servant is young or inexperienced, and the master could have reduced the danger by furnishing the saw with reasonably safe appliances for the protection of the operator, or by warning or instructing him in its use. *Cobankus Mfg. Co. v. Albert Rogers*, 96 S. W. 437, 29 Ky. Law Rep. 747. There was evidence tending to show that the danger in operating this saw could have been in a large measure obviated by ap-

pliances which would have rendered it reasonably safe. This evidence was competent and properly permitted to go to the jury. In the case of *Chicago Veneer Works v. Walden* (Ky.) 82 S. W. 294, relied on by appellant, the servant was 52 years of age, and had had experience about sawmills, and informed the master that he could operate the saw, and the court held that he assumed the risk; and in *McCormick Machine Co. v. Liter*, 86 S. W. 761, 23 Ky. Law Rep. 2154, also relied on by appellant, the servant was fully acquainted with the operation of the machinery, and previous to the injury had assisted in operating it, and must have known of the danger incident to the employment, and how to protect himself against it, and under these facts the court held that he could not recover.

Complaint is made that a peremptory instruction should have been given for the jury to find for appellant. In view of the fact that there will be a retrial of the case, we do not deem it proper to comment on the evidence, except to say that it was sufficient to authorize a submission of the case to the jury.

It is also insisted that the court failed to instruct the jury that appellee, when he undertook to operate the ripsaw, assumed all the ordinary risks incident to the employment. An instruction of this kind might properly have been given, with the addition that if the appellee knew the danger incident to the employment, or was instructed concerning it, and how to operate the saw, then he assumed the risks incident to its operation.

It is further urged that the court erred in permitting counsel for appellee to ask the jurors whether or not they were engaged in or connected with the accident insurance business. This question may not occur on a retrial of the case; but, in view of the fact that it is presented for our consideration, we will dispose of it. It does not appear from the record that any accident insurance company was a party to or interested in this action, but counsel may have had information that such a company was interested in the result of the trial, and therefore had the right to inquire of the jurors touching this point, although their connection with such company might not be challenge for cause. If in the trial of a case counsel believes or has information that a juror is directly or indirectly interested in the result of a trial, he has a right to question the juror touching his interest. Neither the Civil Code nor the statute defines what constitutes actual or implied bias on the part of jurors, or prescribes the inquiries that may be made to ascertain the juror's bias or interest; but it is well settled that the parties litigant have the right to a trial by a thoroughly impartial and disinterested jury, and consequently the privilege of making such inquiries as may be necessary to elucidate this fact. The inquiry made of the jurors in this case was, "Are you

engaged in or connected with the accident insurance business?" And although the pertinency or relevancy of this inquiry does not appear in the record, we are not prepared to say that counsel, in making the inquiry, did not have some knowledge or information to justify them in the belief that an accident insurance company was interested in the result of the trial. Suppose counsel for plaintiff had information that an accident insurance company had insured appellant against any loss because of injury to appellee, and the manager or president of the accident insurance company having the risk had been called as a juror; would not counsel have the right to elicit this information for the purpose of excusing or challenging the juror? We think so.

For the error mentioned, the judgment is reversed, and cause remanded, with directions to proceed in conformity to this opinion.

### LOUISVILLE & A. R. CO. v. DAVIS.

(Court of Appeals of Kentucky. Oct. 4, 1906.)

#### 1. APPEAL—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

#### 2. DAMAGES—PERSONAL INJURY—EXCESSIVE DAMAGES.

A person 50 years old, through the negligence of another, sustained severe, though not permanent, injuries. *Held*, that a verdict for \$400 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 357.]

#### 3. RAILROADS—INJURIES TO TRAVELER ON HIGHWAY NEAR TRACK—NEGLIGENCE.

A person, driving horses afraid of cars on a public highway contiguous to a railway crossing, has a right to rely on the railroad giving the statutory warnings in approaching the crossing, so that he may take such precautions as are necessary to protect himself from injury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1311-1313.]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Cash Davis against the Louisville & Atlantic Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wallace & Harris, J. Tevis Cobb, and H. A. Schoberth, for appellant. Grant E. Lilly, for appellee.

**BARKER, J.** The Louisville & Atlantic Railroad Company's line runs through Madison county, Ky. In the neighborhood where the accident involved in this litigation occurred, the line of the railroad and the public highway for some distance run parallel and in close proximity to each other. The place of the accident is called "Million's Crossing." The appellee and his wife were in a buggy driving along the public highway approaching this point, and when within 600 feet of it one of appellant's trains coming from the opposite direction ran out of

a cut, and by reason of the smoke and noise frightened appellant's horse, which swerved, upset the buggy, and threw out the occupants, inflicting upon them severe personal injuries. Appellee claims that the employes of appellant having charge of the train with gross negligence failed to give any of the statutory signals of its approach to Million's Crossing; that he knew the train was about due, and was listening and watching for it with the intention of getting out of the buggy and holding his horse when it came; that by reason of the long cut through which the road ran he was unable to see or hear the approach of the train until it emerged from the cut at a point just opposite him on the highway, and not over 30 or 40 feet distant; that he did not have time then to get out of his buggy and hold his horse, and as a result the animal, becoming frightened, wheeled and overturned his buggy, with the disastrous result to him and his wife before mentioned. The issues were made up on this line, with the usual plea of contributory negligence on the part of the defendant, and a trial before a jury resulted in a verdict of \$400 in favor of the appellee.

Appellant complains that the verdict is contrary to the evidence. To the soundness of this position we cannot agree. The testimony, as usual in such cases, is conflicting upon the question as to whether or not the employes of appellant gave the signals required by the statute. But this was a question peculiarly within the province of the jury, and their finding was adverse to appellant. We do not feel at liberty to reverse the judgment upon the evidence as shown in the bill of exceptions. Nor do we think the verdict excessive. The evidence shows that appellant was over 50 years old; that he was thrown out of his buggy on the rocks of the pike, and sustained severe, though not permanent, injuries. The amount of the verdict—\$400—while perhaps ample, cannot be considered excessive.

The court did not err in overruling appellant's motion for a peremptory instruction at the close of the testimony. The rule is well settled in this state that travelers upon a public highway contiguous to a railroad crossing, driving horses afraid of the cars, have a right to rely upon the employes of the railroad to give the statutory warnings in approaching the crossing, in order that they may take such precautions as are necessary to protect themselves from injury. In the case of *Rupard v. Chesapeake & Ohio Railroad Company*, 88 Ky. 280, 11 S. W. 70, 7 L. R. A. 316, it was held that, where a horse was frightened by the noise of the train on a trestle over the highway, and damage resulted to the driver, the railroad corporation was liable for the failure to give the statutory signals of the approach to the crossing, although above

grade. The opinion in this case was approved in *Chesapeake & Nashville Railroad Company v. Ogles*, 73 S. W. 751, 24 Ky. Law Rep. 2160. It is not necessary to repeat at extended length the reasoning of the court in these opinions. They settle adversely to appellant the question as to whether or not a traveler upon the highway near a railroad crossing may rely upon the diligence of the employes of the railroad to give the statutory warnings in order that he may protect himself from injury resulting from the frightening of his horse by the train.

No complaint is made of the instructions awarded by the court, and we believe they contain a full and fair exposition of the law of the case.

Judgment affirmed.

#### LOUISVILLE RY. CO. v. MASTERSON.

(Court of Appeals of Kentucky. Sept. 27, 1906.)

##### TRIAL—MISCONDUCT OF JURORS.

Where, during an adjournment of court during the trial of a cause, counsel for plaintiff took a drink with two of the jurors at the invitation of one of them, but nothing was said with reference to the case in question, and defendant's counsel, though he had knowledge of such fact, proceeded with the trial until near its completion before he moved that the jury be discharged because of misconduct, the motion was properly denied.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 729.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"Not to be officially reported."

Action by Emma Masterson against the Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh, Kohn, Baird & Spindle, and Greene & Van Winkle, for appellant. Edwards & Ogden, for appellee.

NUNN, J. This is an appeal from a judgment for \$1,000. Appellee, a colored woman, resided on the east side of and near Thirtieth street, and south of Greenwood avenue, in the city of Louisville, Ky. On the 22d day of June, 1904, she was returning to her home, and was riding upon one of appellant's cars going south, and when the car reached Thirtieth street, it was stopped, and she undertook to get off. She and her witness stated that when in the act of alighting the car was started, and she was thrown to the pavement and seriously and permanently injured. It is not necessary to state further the circumstances connected with the transaction, nor the appellant's theory of defense, as the appellant does not contend in this court that appellee's claim was not supported by sufficient evidence, nor that the court's instructions were prejudicial to it, nor that the verdict was excessive. It is sufficient to say, however, that we have examined the record, and find no errors in the respects named.

The appellant asks a reversal only for the reason of alleged misconduct of two of the trial jurors and one of the counsel of appellee. The substance of the alleged misconduct occurred as follows: Vogt and Ahren were the jurors referred to. Vogt had been engaged upon a panel for two days, trying a case, and had been discharged from that one immediately preceding his being taken upon the panel to try the one at bar. The court commenced to try the case at about the hour of noon, and continued until the hour of 1 p. m., and then adjourned one hour for lunch. Only one witness had been introduced, to wit, the appellee, before this adjournment. During this recess the jurors named met one of appellee's counsel out of, and near, the court building. One of them, Ahren, invited him to go with them to a nearby saloon and take a drink. About that time appellant's counsel and its superintendent came up, who were also requested to join them in taking a drink. They respectfully declined. Appellee's counsel took a drink with them, and only one drink was taken. There was not anything said by any one with reference to the case on trial, nor any other case. When the court reconvened, at the hour of 2, the appellee introduced 12 other witnesses, and the appellant 3, and was reading a deposition in its behalf. When it reached the sixty-ninth question in the deposition, the court discovered that the juror Vogt was asleep, and immediately adjourned the jury for a ten minutes recess, stating to them "that it would be well for them to walk around, stretch their knees, and for some of them to wake up." During this recess counsel for the appellant and appellee were with the judge in his office adjacent to the courtroom, and appellant's counsel said to the court that he believed the jury ought to be discharged, because one of the jurors had been asleep and that two of the jurors had gone to a saloon and taken whisky. Thereupon appellee's counsel said that was true; that he had taken a drink with them at the invitation of one of the jurors. Then it was that the counsel for the appellant requested the court to discharge the jury until the next morning, stating that he would make no complaint of the matters to which he had then called the court's attention. The court granted this request, and discharged the jury until the next morning at 9 o'clock. Upon the convening of the court next morning, the counsel for appellant stated to the court that upon a reconsideration of the matter he had arrived at the conclusion that appellant could not get a fair and impartial trial for the reasons brought to the court's attention upon the previous afternoon, presented affidavits, and asked the court to discharge the jury and grant a continuance of the case. The court overruled this motion and proceeded with the trial. The appellant introduced its superintendent as a witness, and concluded

the reading of the deposition referred to, by beginning at the place left off on the afternoon before, to wit, question 69. They had an understanding with the court that they would be permitted to read the whole deposition on the next morning. The appellant declined to read the whole of it again, on the ground, it claimed, that it was necessary to state to the jury the reason for re-reading it, and by so doing it might make a bad impression upon some of the jurors.

The conduct of appellee's counsel and the jurors named was imprudent and improper, but it appears to have been a thoughtless and careless act. There is not the slightest evidence in the record that there was any improper influence, either attempted or resulting from the conduct of counsel or the jurors. Yet, notwithstanding this, if the court's attention had been called to this conduct immediately upon the reconvening of the court, and before any other proceedings were had in the case, the question would be serious and difficult. In view of the fact, however, that it did not do this, and continued with the trial of the case until near its completion, consuming the time of the court, and all the while with the full knowledge of the improper conduct referred to, it is deemed to have waived its right to object thereto, and, in fact, it is shown by the record that it did expressly waive by agreement this right to so object. It is pretty clear from the record before us that appellee was in no wise responsible for this conduct, and that it did not, in fact, injure or prejudice the substantial rights of appellant.

The judgment is affirmed.

#### BARTEE v. EDMUNDS.

(Court of Appeals of Kentucky. Oct. 5, 1906.)

##### 1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT—MARRIAGE WITH DECEDENT.

Under Code Civ. Prac. § 606, providing that no person shall testify for himself concerning any transactions with a decedent, in an action by a widow for the allotment of dower in her deceased husband's land, she is incompetent to testify to the marriage.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 592, 639.]

##### 2. MARRIAGE—PROOF—REPUTATION.

Marriage may be proved by evidence of cohabitation as husband and wife.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 76.]

##### 3. DOWER—ACTION FOR ALLOTMENT—PETITION—DEMURRER.

Where, in an action by a widow for allotment of dower, she fails to file the title papers of the decedent with her petition, as required by Code Civ. Prac. § 490, it is not ground for demurrer, but the proper practice is to have plaintiff ruled to file the title papers, if there be any accessible to her.

##### 4. PLEADING—DEFECTS—CURE BY JUDGMENT.

Where, in an action by a widow for allotment of dower, she fails, as required by Civ. Code Prac. § 490, to file the title papers of decedent with her petition an objection be-

cause of such failure cannot be made for the first time after trial and judgment.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1469.]

**5. DOWER—ADMEASUREMENT—PETITION—SUFFICIENCY.**

In an action by a widow for allotment of dower, an allegation in a petition that decedent and plaintiff owned it jointly, and that they had been in possession of it and living on it for 30 years up to his death, was sufficient, though it did not allege that the husband was "seised and possessed" of the land.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, § 280.]

**6. SAME—JUDGMENT—SUFFICIENCY.**

Though the law requires that the commissioners appointed to allot dower under Civ. Code Prac. § 499, subd. 4, should be sworn before acting, a judgment appointing the commissioners is not insufficient for failing to direct that they be sworn.

**7. LIMITATION OF ACTIONS—ACCRUAL OF RIGHT OF ACTION—DOWER—ALLOTMENT.**

Until dower has been allotted to a widow, limitations do not run against her cause of action to recover the possession of the same.

**8. SAME—ALLOTMENT—LOSS OF RIGHTS.**

A wife's absence from the land of her deceased husband does not bar a suit to have dower and homestead allotted to her out of it.

Appeal from Circuit Court, Trigg County.  
"Not to be officially reported."

Action by Clarissa Edmunds for an allotment of dower in the lands of her deceased husband. From a judgment in her favor, J. B. Bartee appeals. Affirmed.

R. A. Burnett, for appellant. Max Hanberry, for appellee.

**O'REAR, J.** This is an action by a widow for allotment of dower in her deceased husband's land. The circuit court granted her prayer.

It is objected on this appeal that as it was denied by the defendants in their answer that plaintiff and the former owner of the land had ever been married, that it was error to adjudge her to be entitled to dower in the absence of competent evidence of such marriage. It may be conceded that the plaintiff was incompetent as a witness under section 606, Civ. Code Prac., to testify on that point. Still, we find enough evidence in the record, as the circuit court did, to show that she and James Edmunds, concededly the owner of the land at his death, had been married. There are several ways in which marriage may be proved. One is by evidence of reputation; the parties having cohabited together as husband and wife. It was this character of proof that sustains her claim. There is no evidence in the record to the contrary.

It is next contended that as the plaintiff did not file the title papers of the decedent with her petition as required by section 499, Civ. Code Prac., the petition is defective, and the demurrer thereto should have been sustained. Failure to file the title papers as required by that section of the Code is not ground for demurrer. The proper practice is to have the plaintiff ruled to file

the title papers, if there be any accessible to her. There was not a motion or objection by defendant on that score. A failure of the defendant to make such complaint is waived after trial and judgment.

It is next contended by appellant that the petition is defective because it does not allege that plaintiff's deceased husband was "seised and possessed" of the land in suit. The petition states that the deceased husband and plaintiff owned it jointly, he owning an undivided two-thirds and she the other third; that they had been in possession of it and living on it for 30 years up to his death. We think this is a sufficient averment of seizure of title and possession.

Another criticism of the judgment is that it failed to direct that the commissioners appointed to allot the dower to plaintiff be sworn before beginning their work. Section 499, subsec. 4, Civ. Code Prac. The section relied on does not require that the judgment appointing the commissioners shall direct them to be sworn. But the law does require them to be sworn, and they can be and should be before acting. It is not material what the judgment may show on that point, as the requirement to the commissioners to be sworn is not derived through the judgment, but through the statute.

It is finally contended by appellant that plaintiff had abandoned the land for about 15 years since her husband's death, and had thereby waived and forfeited her homestead. Until dower and homestead had been allotted to the widow, she had not a cause of action to recover the possession of same. Hence limitation does not run against her until such allotment. Her absence alone from the land of her deceased husband will not bar a suit to have dower and homestead allotted to her out of it.

Judgment affirmed.

**DOWNES v. DOWNES' ADM'R.**

(Court of Appeals of Kentucky. Oct. 4, 1906.)

**JUDGMENT—ALIMONY—ENFORCEMENT IN ANOTHER STATE.**

A judgment against defendant in divorce for a sum of money as alimony, being in personam, is not enforceable in another state, where defendant was not personally served within the state of the forum and did not voluntarily appear.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1461, 1462.]

Appeal from Circuit Court, Henry County.  
"To be officially reported."

Action by Allie Downs against the administrator of John Downs, deceased, for the settlement of the estate and to subject it to the satisfaction of a judgment in favor of plaintiff against deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

R. R. Tiffany, W. S. Pryor, H. K. Bourne, and John W. Ray, for appellant. John D. Carroll, for appellee.



**BARKER, J.** The appellant, Allie Downs, intermarried with John Downs in the state of Missouri in 1891. After their marriage they moved to the state of Indiana, where they lived for some time as man and wife, but where the appellant, owing, as she claims, to the brutal treatment of her husband, left him and returned to her former home in Missouri, where she afterward instituted an action against him for divorce, which was granted her, and in addition she was awarded a judgment against him for the sum of \$1,500 as alimony. This judgment was obtained by constructive process. After residing in Indiana for some time after the obtention of the judgment by his wife, Downs returned to his old home in Eminence, Ky., where he died intestate, without having again married, and leaving an estate valued at about \$8,000. The appellant then instituted this action in the Henry circuit court, for the purpose of settling his estate, and subjecting it, in so far as that was necessary, to the payment of her judgment. Her claim was resisted by the personal representative and heirs of the decedent, mainly upon the ground that the judgment, being in personam, is void for want of jurisdiction in the Missouri court.

For the purpose of discussing the question thus arising, it may be assumed that appellant was legally domiciled in the state of Missouri at the time of the institution of her action there, that all of the proceedings had were entirely regular, and that the statutes of Missouri fully warranted the judgment which was returned. The question still recurs: Could the statutes of Missouri authorize, by any procedure short of actual process upon the defendant within its boundaries, or the entry of his appearance to the action, a personal judgment against him? We have no doubt of the jurisdiction of the Missouri court to decree the divorce of the appellant from her husband. This was a procedure in rem, and of the res undoubtedly the court had jurisdiction; the plaintiff being lawfully domiciled in Missouri. But a judgment for a sum of money by way of alimony is in personam, and in order to acquire jurisdiction for this purpose it was necessary to obtain jurisdiction of the person of the defendant. This, as said before, can only be done in one of two ways: First, by the service of process upon him within the territorial jurisdiction of the court; or, second, by the voluntary entry of his appearance to the action. No state can, by force of its own laws, acquire jurisdiction of the person of an absent defendant. If it could, then no defendant, no matter how far removed from the country in which the plaintiff resides, could escape being dragged away from his home in order to defend any claim set up against him, or, failing to do so, having rendered against him a judgment by default, which could follow him to the ends of the earth. There-

fore it is of no moment that, as a part of the constructive process issued against the defendant in the procedure for divorce, a summons was issued in Missouri directed to a sheriff in Indiana, and by him served upon the defendant. The sheriff in Indiana acted only under authority of the laws of Missouri, and these had no force in the state of Indiana.

In Freeman on Judgments, § 564, the rule is thus stated: "It is said that 'no sovereignty can extend its process beyond its own territorial limits, to subject either person or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity.'" And, speaking particularly of judgments of divorce, the learned author says (section 584): "Judgments procured in any state by constructive service of process upon nonresidents are, as we here have already seen, of no extraterritorial force in imposing obligations in personam. But a sentence of divorce has, or may have, a dual nature. It is a decree in rem, so far as it fixes the status of the parties by dissolving their marital obligations. But, so far as it disposes of any other matter than the marriage relation, it is in personam." Cooley, in his work on Constitutional Limitations (7th Ed. p. 584), says: "But in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the state, it would be competent to provide by law for the seizure and appropriation of such property, under the decree of the court, to the use of the complainant; but the legal tribunals elsewhere would not recognize a decree for alimony or for costs not based on personal service or appearance. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the state." From Story on Conflict of Laws, § 539, we quote: "Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for otherwise there can be no sovereignty exerted. \* \* \* On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort of thing beyond beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." The principles herein announced are fully maintained in

*Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179; *Kerr, &c. v. Condy*, 9 Bush, 372; *Wickliff v. Dorsey*, 1 Dana, 462; *Cobb v. Haynes*, 8 B. Mon. 137; *Latimer v. Union Pacific R. R. Co. (Mo.)* 97 Am. Dec. 378; *Prosser v. Warner (Vt.)* 19 Am. Dec. 132; *Kilne v. Kilne (Iowa)* 10 N. W. 825, 42 Am. Rep. 47; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Thompson v. Whitman*, 85 U. S. 457, 21 L. Ed. 897; *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867; *De La Montanya v. De La Montanya (Cal.)* 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; and the editor's note to *Moyer v. Buck*, 16 L. R. A. 231, where a large number of cases are cited and reviewed.

The question for appellant fail to recognize that a proceeding for divorce may be dual in its nature; that in so far as it settles the civil status of the parties or their children, or subjects property within the jurisdiction of the court to the satisfaction of the decree, it is in rem, and the defendant may be bound, although before the court only by constructive process; but that, when the court goes further, and awards a money judgment against him, it must have obtained jurisdiction of his person in one of the two ways heretofore pointed out, in order that the judgment may be enforceable in a foreign state.

When this distinction is borne in mind, the authorities are harmonious, and without exception, so far as we are advised, sustain the ruling of the circuit court in the case at bar, in holding appellant's judgment for alimony on constructive process against her husband void.

The judgment is affirmed.

#### COVINGTON & C. BRIDGE CO. v. LILLARD.

(Court of Appeals of Kentucky. Oct 5, 1906.)

#### MASTER AND SERVANT—INJURIES TO SERVANT—PUNITIVE DAMAGES.

In an action for injuries to a servant from the breaking of a joist of a scaffold on which he was at work, the evidence showed that the timber was a dry-rotted sap plank, brittle with age, that the attention of the foreman had been called to it, and that the plank was not fastened in the stirrup, so as to be held on edge, and that it turned in the stirrup, and so broke. *Held*, that punitive damages could not be recovered, as the evidence showed merely ordinary, and not gross, negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 998.]

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Robert Lillard against the Covington & Cincinnati Bridge Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

S. D. Rouse, for appellant. James P. Tarvin, for appellee.

NUNN, J. The appellee was a painter performing labor for the appellant. In September, 1904, he was at work on a scaffold suspended from the underside of the Covington & Cincinnati Bridge, when one of the joists, upon which the floor of the scaffold was laid, broke and precipitated him and the others thereon, to the ground below. The appellee's left ankle was sprained, the left arm and hip were bruised, and he received another injury at or near the point where the hip bones join the back. At the time of the trial, which was about nine months after he received the injuries, he still suffered pain by reason of the injuries on the back. He obtained a verdict and judgment for \$1,650, from which appellant appeals.

At the time this scaffold fell there were eight other persons upon it with appellee. Several of them received injuries, Jasper M. Hull being one of them. His injuries were very severe. Hull sued the appellant and recovered \$3,500. That case was appealed. The opinion in that case, is reported in 90 S. W. 1055, 28 Ky. Law Rep. 1038. The evidence in each case was, in substance, the same, and we refer to that opinion for a full statement of the facts proven. The appellant presents several reasons why the judgment of the lower court should be reversed, but they are without merit, except one. The court gave an instruction authorizing the jury to find punitive damages, provided that the jury found that the negligence of the appellant was gross. This instruction was not given in the other case. In our opinion the instruction was erroneous, for the evidence presented a case of only ordinary negligence.

For this reason alone the judgment is reversed and remanded for a new trial in conformity herewith.

#### BISCHOFF v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

#### 1. CRIMINAL LAW—APPEAL—VERDICT ON CONFLICTING EVIDENCE.

Where, on the issue of the insanity of accused on trial for crime, the testimony is conflicting, the verdict of the jury is conclusive on appeal.

#### 2. SAME—ARRAIGNMENT—SUFFICIENCY.

An order reciting that accused was brought into court accompanied by his counsel, and the court, with the consent of accused, dispensed with the arraignment, and the defendant pleaded not guilty, is in conformity with Cr. Code Prac. § 155, providing that an arraignment, defined by section 154 as the reading of the indictment by the clerk to the defendant, asking him if he pleads guilty or not guilty, shall only be made on indictments for felony, and may be dispensed with by consent of defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 614, 615.]

#### 3. SAME—EXCEPTIONS—NECESSITY.

Where accused did not except to the failure of the clerk to state to the jury accused's

plea, as required by Cr. Code Prac. § 219, nor rely on it as a ground for a new trial, the court on appeal could not reverse a conviction therefor.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2665-2667, 2672-2677.]

#### 4. SAME—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, on a trial for crime, the court, after the admission of evidence, excluded it as incompetent, the court on appeal must assume that the jury did not consider it, and that accused was not prejudiced by its temporary admission.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3141.]

#### 5. SAME—RECEPTION OF EVIDENCE—OBJECTIONS—EXCEPTIONS.

Where the record in a criminal case does not show that an objection to the admission of evidence was passed on by the court, or that it was asked to rule on the objection, or that its failure to do so was excepted to by accused, the objection will not be considered on appeal.

#### 6. SAME—RECORD—OMISSIONS—AFFIDAVIT TO SUPPLY—SUFFICIENCY.

The affidavit of counsel for accused, filed on a motion for new trial, averring that it was affiant's "impression" that an objection to the admission of evidence was overruled, is not sufficient to supply the omission in the record which does not show that the objection was ruled on or that the court's failure to do so was excepted to.

#### 7. WITNESSES—COMPETENCY—ATTORNEY AND CLIENT—CONFIDENTIAL COMMUNICATIONS.

An attorney who has acted as attorney in a civil matter for one on trial for crime, is competent to testify with respect to his knowledge of accused's condition of mind.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 747-758.]

#### 8. CRIMINAL LAW—TRIAL—SEPARATION OF WITNESSES.

An attorney is not subject to the rule requiring the separation of witnesses in a criminal case, and the fact that he was not sent from the courtroom with the other witnesses during the trial does not exclude him from testifying.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1550.]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"To be officially reported."

Jacob Bischoff was convicted of murder, and he appeals. Affirmed.

Edwards & Ogden, for appellant. N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

**SETTLE, J.** By this appeal the reversal of a verdict and judgment of the Jefferson circuit court, criminal division, convicting appellant of the murder of his wife and fixing his punishment at death, is sought, the trial having followed by some months the return of an indictment by the grand jury, charging him with the crime. Appellant's motion for a new trial in the lower court was based on numerous grounds, but those relied on for a reversal of the judgment may be included on two propositions; that is, appellant contends (1) that the judgment should be reversed because the record fails to show that

the appellant's plea was stated to the jury, after it was sworn and when the indictment was read, or at all; (2) because of the admission by the trial court of incompetent evidence.

The crime with which appellant is charged, according to the evidence, was committed under circumstances of extreme brutality. While his wife, Julia Bischoff, was engaged with Mrs. Derne in carrying coal into the house of Mrs. Delkan, a sister of Mrs. Bischoff, appellant came from a nearby alley, and approaching her, said: "You son of a bitch, I got you just where I want you," at the same time firing his pistol at her. The wife then ran from the pavement into the street, he continuing to shoot at her until she fell dead on the pavement to which she had returned. There were five shots, all of which took effect upon the person of Mrs. Bischoff, three of them entering the heart. Immediately after firing the last shot, appellant said to his wife: "You son of a bitch, you want a divorce, I give it to you," thereby disclosing the motive for the crime. He then reloaded his pistol, and attempted to make his escape, but was overtaken by two policemen, at one of whom he shot twice, before submitting to arrest. It appears from the evidence that appellant's wife had a few days before the homicide, instituted against him, in the Jefferson circuit court, a suit for divorce; that he was a man of violent and ungovernable temper, had frequently assaulted and beaten his wife, and threatened to kill her, saying on more than one occasion in connection with such threats, "I will do it, and I will get as clear as a whistle." Only a few days before she was killed, Mrs. Bischoff, on account of a beating received at the hands of her husband, left his home, and went to that of her sister, Mrs. Delkan, on Clay street in the city of Louisville, in front of which the homicide occurred.

The only defense interposed by appellant on the trial was that he was insane at the time he killed his wife, and by reason thereof not responsible for the crime. A great deal of evidence was introduced through members of his family and others, in the effort to prove that a year or more previous to the homicide, appellant in a collision between his market wagon and a street car, was thrown to the street and received a cut on his forehead and bruises on other parts of his body; that he hurts thus received required the care of a physician, and confined him to his bed or room for several days; that his condition of mind was not the same after he received these injuries as before, and later became so unsound that he was incapacitated for his usual occupation, which was that of a market gardener; that he became peculiar in his ways and violent toward his family, and that his unsoundness of mind also manifested itself in irrational conversation and by such conduct as getting on his knees in bed at night, and sometimes under

the bed, and doing other things equally unusual. Three physicians, Drs. Pope, Bogges and Samuels, the first an alienist of prominence, were introduced for appellant. One of them knew him before he was hurt in the collision with the street car. The other two became acquainted with him after his incarceration in jail for the murder of his wife, and their examination of him was made only a few days before the trial. Two of these medical experts, from the examination they had made of appellant, and in answer to certain questions hypothecated upon the character of the injuries he received in the car collision, particularly the wound on the forehead, and his subsequent peculiarities of conduct, expressed the opinion that he was of unsound mind. The third physician, though inclined upon the same hypotheses to think him of unsound mind, did not freely commit himself to that opinion. On the other hand, there were several witnesses introduced for the commonwealth who testified, in substance, that appellant is an illiterate man of violent temper, uncouth manners, and harsh in his bearing towards his family, but that they did not regard him a person of unsound mind, nor had they discovered that his conduct after the collision of his wagon with the street car differed from what it had been before. In their opinion he had attended to his market garden and business affairs after that occurrence and down to the death of his wife, as he had done before. One of the witnesses, Maj. R. O. Davis, was the attorney of appellant in the divorce suit brought by his wife and had acted as his attorney in other matters in previous years. Appellant frequently went to see Davis, and consulted him as to the preparation of his defense in the divorce case. Maj. Davis testified that he did not think appellant a man of a high order of intelligence, but had seen no change in his mind after the collision with the car, except on one occasion when he called at his office while in a state of intoxication, seeing which, witness told him to leave, and return when he got sober. Appellant took his advice and left, but later returned to the office sober, and in his usual condition of mind. Another witness, Charles Veling, a deputy county court clerk, testified, that by request of appellant's attorney he called at the jail to take his acknowledgement to a deed; that upon meeting him he read him the deed and asked him if he understood it, appellant replied that he did, and upon being told to sign it, said he was nervous, and requested Veling to write his name and let him make his mark, but this being declined he wrote his own name, in German, to the instrument, and immediately thereafter duly acknowledged it. Veling further testified that appellant seemed to understand the transaction, and talked and acted intelligently while he was with him. Three physicians were introduced in rebuttal by the commonwealth, and interrogated as to the condition

of appellant's mind. Two of them, Drs. Marshall and Rapp, said they were called to see him when he was hurt by the car. They dressed his wounds, and Dr. Marshall, after attending him about 10 days, discharged him as well. The wounds, they testified, consisted of a cut on the head and bruises on the hip and leg. None of them were dangerous; the cut on the head went through the skin of the forehead, but did not wound or fracture the skull bone, or affect the brain. On cross-examination these two physicians were asked if it was possible that the cut in the forehead could affect appellant's mind. In reply they were unwilling to say such a result was not possible, but thought it very improbable. No discovery was ever made by them that appellant's brain was affected by his wounds, or information given them by his family, that there was any change in his mind. Dr. Rapp also visited appellant in jail, to collect of him a surgical bill for attending him, as stated. Appellant had previously obtained of witness a statement of the account, for use in settling with the street railway company. Appellant said to Dr. Rapp in jail, that he remembered the bill, that he had given his wife the money to pay it and supposed she had done so, but as she had not, the doctor could get it by calling on his lawyer. In this interview the witness saw nothing in the conversation or conduct of appellant to indicate unsoundness of mind. Dr. Garvin, the third physician, introduced for the prosecution, is jail physician for Jefferson county. He testified that he had seen appellant three or four times each week since his incarceration in jail and had often prescribed for him for nervousness and probably other ordinary ailments, but he had never seen any evidence of his being of unsound mind.

It will be observed from the foregoing synopsis of the evidence, that the question of whether or not appellant was so unsound of mind at the time he killed his wife as to make homicide excusable in law, was fully gone into upon the trial. The testimony was conflicting, but the issue having been decided by the jury, under proper instructions, adversely to the appellant's contention, he must accept, and this court approve, the verdict of guilty, unless the alleged errors complained of compel a reversal of the judgment. When one charged by indictment with a crime or misdemeanor is put upon his trial, following the impaneling and swearing of the jury, "the clerk, or commonwealth's attorney, shall read to the jury the indictment, and state the defendant's plea." Cr. Code Prac. § 219.

The record contains the following order, which was entered after the return by the grand jury of the indictment: "This day the defendant is brought into court by the jailer, and comes W. B. Hoke, his attorney, and the court with the consent of the de-

fendant dispenses with the arraignment herein, and the defendant pleads that he is not guilty of the crime charged in the indictment." Section 154, Cr. Code Prac., requires that in every case of felony there shall be an arraignment which is "the reading of the indictment by the clerk to the defendant, and asking him if he pleads guilty, or not guilty, to the indictment." Section 155 provides, "The arraignment shall only be made on indictments for felony, and may be dispensed with by the court with the defendant's consent." The above order was entered in conformity with section 155. At the beginning of appellant's trial, an attempt was made to comply with the provisions of section 219, *supra*, by entering of record the following order, which appears next after the order showing the swearing of the jury. "The indictment was duly read by the clerk to the jury and"—, then follows, after a dash, this sentence: "Dr. Harris Kelly, a witness, introduced by the commonwealth, being duly sworn \* \* \* testified as follows." Manifestly the above order does not comply with section 219 of Cr. Code of Practice. It only shows the reading by the clerk of the indictment to the jury, whereas, it should also say that the clerk, in addition to the reading of the indictment, stated to the jury the defendant's plea, and whether it was guilty or not guilty.

It is argued by counsel for appellant that this section of the Code is mandatory, and it must appear of record that its provisions were strictly complied with. In support of this view, the following authorities are cited: *Galloway v. Commonwealth*, 5 Ky. Law Rep. 213; *Farris v. Commonwealth*, 111 Ky. 236, 63 S. W. 615. We cannot better distinguish the case at bar from the authorities, *supra*, than to quote from *Howard v. Commonwealth*, 67 S. W. 1003, 24 Ky. Law Rep. 91, what is said about them in connection with the question under consideration. "In the *Galloway* Case it was held that it was essential that the indictment should be read and the plea of the defendant stated to the jury, but it was expressly held that this duty might be performed at any time before the close of the evidence for the prosecution, and that it was immaterial that the indictment was read by an attorney employed to prosecute, instead of the clerk, or the commonwealth's attorney. In the *Farris* Case the indictment was not read, nor the plea of the defendant stated to the jury at all, and the case was reversed for this reason." It does not appear from the *Galloway* or *Farris* Cases, or from that of *Hendrickson v. Commonwealth*, 64 S. W. 954, 23 Ky. Law Rep. 1191—which though not relied on by appellant's counsel, is apparently in line with the *Galloway* and *Farris* Cases—that there was not an exception to the failure to read the indictment and state the plea of the defendant, or that such failure was not made ground for a new trial.

In *Howard v. Commonwealth*, *supra*, the appellant insisted upon a reversal because the record failed to show that the indictment was read to the jury, or that the plea was stated. This contention was rejected, the court holding, as it was shown by the record that upon the calling of the case for trial both parties announced ready; that a jury was impaneled and sworn; and that the defendant, in the presence of the jury, thereafter waived arraignment and entered a plea of not guilty, this amounted to a substantial compliance with section 219, Cr. Code Prac. Therefore, the failure to read the indictment and state the defendant's plea of not guilty, did not authorize a reversal. It was also held in the *Howard* Case, that there could be no reversal for a failure to comply with the provisions of this section, unless it had been assigned as a ground for new trial, which was not done in that case.

In *Meece v. Commonwealth*, 78 Ky. 586, the record was silent as to whether the defendant was arraigned, or any plea entered in his behalf, for which reason a reversal was asked. In response to this contention the court said: "The record fails to show that the plea of not guilty was entered, but it is manifest from the entire record that an issue was made and the accused had a fair and impartial trial."

In *Griffin v. Commonwealth*, 66 S. W. 740, 23 Ky. Law Rep. 2148, it is said: "The record does not show that the defendant pleaded not guilty, or that he was arraigned, or waived arraignment, or that his plea was stated to the jury, or that the indictment was read to them. It is insisted by appellant that the judgment should be reversed for these reasons. No arraignment is necessary except in felony cases. In the grounds for new trial, appellant did not rely on any of the matters referred to. \* \* \*"

In *Ison v. Commonwealth*, 66 S. W. 184, 23 Ky. Law. Rep. 1805, the same question arose, in disposing of which the court said: "The appellant in his brief assumes that the indictment was not read to the jury, nor the plea of the defendant announced by any one, and insists upon a reversal for that reason, citing in support, *Farris v. Commonwealth*, 63 S. W. 615, 23 Ky. Law Rep. 580. It is true that the opinion in the case, *supra*, decides that such failure is ground for a reversal, but we apprehend that the error complained of in that case was objected to at the time of trial and relied on as one of the grounds for a new trial. Nothing of that kind appears in the bill of exceptions in the case at bar. It is true, that at the close of the bill of exceptions this language is used: 'This being all that was done, or all the proceedings had on said trial, or concerning same.' We are not authorized to assume from this statement that the indictment in fact was not read to the jury, and besides the failure to so read it, was not relied upon or referred to in any manner in the motion

for a new trial. Even if it be conceded that the bill of exceptions should be construed to show that the indictment was not read, the failure of the appellant to make the same one of the grounds for a new trial, precludes him from relying on such omission as ground for reversal. It is a well-settled rule that appellant should state in his reasons for a new trial, the ground upon which he thinks the prejudicial error was committed. If the attention of the trial court had been called to this error, if such in fact occurred, doubtless the circuit judge would have granted a new trial."

The most recent case in which this court has passed upon the question under consideration, is that of *Herr v. Commonwealth*, 91 S. W. 666, 28 Ky. Law. Rep. 1131, in which it was also held, that though the record did not show that the indictment was read, or that the plea of the defendant was stated to the jury, such omissions would not authorize this court to assume that these requirements of the Code had not been complied with, unless it be made to appear that such failure had been excepted to by the defendant and relied on as a ground for a new trial. In the case at bar, it does not appear that appellant either excepted to the failure, if any, to state his plea to the indictment, or relied upon the omission to do so, as a ground for a new trial; we are, therefore, without power to now consider it, or to reverse the judgment therefor.

The second contention of appellant is, we think, equally untenable. The testimony, in part claimed to have been improperly admitted on the trial, was that of Mrs. Derne, in respect to appellant's having thrown his wife's sister, Mrs. Delkan, over a fence and broken her limb. As it appears that this testimony, after its admission and during the cross-examination of the witness, was wholly excluded from the case by the court, as incompetent, we must assume that the jury in obedience to the court's admonition did not consider it, and therefore appellant could not have been prejudiced by its temporary admission. It is also insisted that it was error to allow Mrs. Delkan to testify as to an act of personal violence of appellant to her. Upon being asked by counsel for the commonwealth, why Mrs. Bischoff went to her house, Mrs. Delkan said; "Because Mr. Bischoff, her husband, abused her and whipped her on the 19th. I went home with him to the country and he whipped her, and I went to take her part and he hurt her, also he threw me across the rain barrel and broke my" —. At this point the testimony was objected to. It is apparent from the record that the particular injury inflicted upon the witness was never mentioned by her. The objection interposed stopped her. It is probable that the testimony of Mrs. Delkan on this point was offered by the prosecution to show a motive for the homicide, as it apparently referred

to what caused Mrs. Bischoff to leave appellant, tended to show his ungovernable temper and brutal treatment of her and also of the sister for trying to protect her, both being assaulted by him at the same time. It is not necessary, however, to determine whether or not it was competent. The record does not show that the objection to it was passed on by the court; that he was asked to rule on it, or that his failure to do so was excepted to by appellant, for which reason we cannot consider it. *Stinson v. Commonwealth*, 96 S. W. 463, 29 Ky. Law Rep. 733; *Hendrickson v. Commonwealth*, 64 S. W. 954, 23 Ky. Law Rep. 1191. It is true an affidavit of one of the counsel filed on the motion for a new trial, states it was his impression that the objection was overruled, but this is not sufficient to supply the facts omitted from the record. If mere impressions as to a matter of such importance can be allowed to have any weight, it would be as reasonable to indulge the impression that the failure of the witness to complete the answer to the question asked her, was because the objection made to same by appellant's counsel was sustained by the court, and the answer excluded.

We also fail to find any error in the admission of the testimony of Maj. Davis. Though he had been the lawyer of appellant in other matters, he did not represent him in this case; his testimony did not relate to any matter growing out of his relations to appellant as attorney, and was in no sense of a confidential character; it only related to his knowledge of appellant's condition of mind. The fact that Davis was not placed under the rule and sent from the courtroom with the other witnesses during the trial, should not, as insisted by appellant, have excluded him from testifying. As an attorney of the bar and member of the court, he was not subject to the rule requiring the separation of the witnesses. Though the instructions are not criticised by counsel, we have carefully examined, and find them correct in every particular. If, as intimated by counsel, appellant's condition of mind has grown so much worse since the trial as to demonstrate his insanity, the Code provides a way by which that matter may yet be inquired into.

As on the whole case we find no error that can be said to have prejudiced the substantial rights of appellant, the judgment is affirmed.

#### ZUMBIEL v. ZUMBIEL.

(Court of Appeals of Kentucky. Sept. 25, 1906.)

#### 1. DIVORCE—CONVEYANCE BY HUSBAND IN FRAUD OF ALIMONY—EVIDENCE.

Ky. St. 1903, § 2126, provides that sales and conveyances to a purchaser with notice, in fraud or hindrance of the right of wife or child to maintenance, shall be void as against them. Pending a suit by a wife for divorce a mensa and maintenance for herself and chil-

dren, the husband conveyed land for an inadequate consideration, to the wife of the husband's brother; the grantee and her husband knowing at the time of the purchase of the pending litigation, and that the house and lot was all the property of which defendant was possessed. Plaintiff did not sign the deed, nor was she requested to. *Held*, that a finding that the conveyance was made with intent to deprive defendant of maintenance, and that the grantee had notice of such intent, was warranted.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 750, 751.]

## 2. SAME—SEPARATE MAINTENANCE—JUDGMENT.

Ky. St. 1903, § 2126, provides that sales and conveyances to a purchaser with notice, in fraud or hindrance of the right of wife or child to maintenance, shall be void as against them. *Held*, that in a suit by a wife for divorce a mensa and for maintenance, on an issue as to the validity of a conveyance by the husband, the court had no authority to declare the conveyance void, except as against the wife.

Appeal from Circuit Court, Kenton County.  
"Not to be officially reported."

Suit by Mary Zumbiel against John Zumbiel, for divorce, to which Anna K. Zumbiel and others were made parties, and, from a judgment in favor of plaintiff, defendant Anna K. Zumbiel appeals. Affirmed.

See 83 S. W. 598.

O. M. Rogers and L. M. Morgan, for appellant. Wm. A. Byrne, for appellee.

NUNN, J. The appellee, Mary Zumbiel, prior to the year 1902, instituted an action against her husband, John Zumbiel, for divorce, a mensa et thoro, and maintenance for herself and children. On the trial of that action, in the lower court, her petition was dismissed, and she appealed. This court reversed that judgment, and concluded the opinion in the following language: "The judgment is reversed, and the cause remanded, with directions to grant the appellant a divorce from bed and board from appellee; to award her the custody of the children, affording appellee reasonable opportunities to visit them and have them to visit him; for a judgment decreeing appellant a suitable maintenance, not less than \$30 per month, in addition to the use of the house, and for other necessary proceedings not inconsistent herewith." See 69 S. W. 708, 24 Ky. Law Rep. 590. During the pendency of this litigation John Zumbiel, her husband, sold and conveyed the house and lot referred to in the opinion to his sister-in-law, Anna K. Zumbiel, the appellant in this case, for the price of \$1,250. Upon the return of the mandate, issued in the case referred to, the lower court made an order in conformity thereto; Mary Zumbiel and the appellant, Anna K. Zumbiel, having attempted to form an issue upon the question as to whether or not the conveyance of the house and lot to Anna K. Zumbiel by John Zumbiel was fraudulent as against her, Mary Zumbiel, as provided in section 2126 of the Kentucky Statutes of 1903. On March 10, 1903,

that court tried this question, and entered a judgment holding the deed valid, subject to Mary Zumbiel's potential right of dower in the property, and that Anna K. Zumbiel was the owner of it, and was entitled to the possession thereof. From that judgment Mary Zumbiel again appealed. This court again reversed the judgment upon the ground that the proper parties were not before the court, and closed the opinion with the following language: "The case as now presented is not such as to enable us to determine whether the deed was fraudulent or not, or what are Mary Zumbiel's rights in the house and lot, which is the home of the family." Upon the return of the mandate in that case it was prepared in conformity to that opinion, the proof was taken, the case tried, and the court decided that the deed was fraudulent, and Anna K. Zumbiel has appealed.

She asks a reversal of the judgment for the reason that there was not sufficient evidence to support it. The proof shows, without contradiction, that John Zumbiel, the then husband of the appellee, in this case, was indebted to his brother and brother-in-law, in about the sum of \$950, and that he sold the house and lot and paid these debts. That he made the trade with George Zumbiel, his brother, the husband of the appellant herein; George Zumbiel having acted for his wife as her agent. She paid in cash, at the time of her purchase, about \$550, the amount of the note due Jordan, the brother-in-law referred to, and a few months thereafter she paid \$400, the amount due by John Zumbiel to his brother Charles, and the balance of the purchase price was paid from time to time, in small amounts, until the whole price, \$1,250, was paid. The proof also shows that the price paid for this property was inadequate. Appellee's witnesses fixed its value at about \$2,400, appellant's at about \$1,500. It appears that appellant and her husband knew at the time of the purchase of the pending litigation between the appellee and her husband, and that she, the appellee, had at least been given temporarily the use of this house for herself and children, and that this was all the property he owned. Appellee did not sign the deed, nor was she ever requested to sign it.

In view of these facts we are of the opinion that the court did not err in arriving at the conclusion that John Zumbiel made this conveyance with intent to deprive his wife of maintenance, and that appellant had notice that such was his intent. The appellant contends that the provisions of section 2126 of the Kentucky Statutes, referred to, cannot be made to apply to this case because John Zumbiel was not the husband of appellee at the time the judgment appealed from was rendered; that, prior to the rendition of this judgment, he had in a separate action against the appellee obtained a judgment severing the bonds of matrimony,

which had previously existed between them; and that appellee stood in the place of an ordinary creditor, and should have prepared and prosecuted her case as provided in section 1907 of the statute and refers to the case of *Campbell v. Trosper*, 57 S. W. 245, 22 Ky. Law Rep. 278, to support her contention. In this she is in error. In that case the husband sold and conveyed the realty after the bonds of matrimony had been severed between him and his wife. In this case the sale and conveyance was made to appellant when the marriage relation existed between John Zumbiel and the appellee.

Appellant complains that the court by its judgment erred in depriving her of all right or interest in this house and lot. We do not so understand the judgment. Section 2126 of the statute reads as follows: "Sales and conveyances made to a purchaser with notice, or for the benefit of any religious society, in fraud or hindrance of the right of the wife or child to maintenance, shall be void as against them." As stated, the gist of appellee's action was for maintenance for herself and children, and the statute expressly states that a sale or conveyance made in fraud or hindrance of such a right shall be void as against them; that is, the wife and children. As we understand the judgment the court did not declare it void as to others, nor did it have the power to do so under the statute and the state of the pleadings. When appellee's interest in the property, as fixed by the lower court, expires or ceases, then appellant's title to the property will become perfect, and she will be entitled to the possession thereof.

For these reasons the judgment of the lower court is affirmed.

#### FOSTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 3, 1906.)

##### 1. LARCENY—EVIDENCE.

In a prosecution for larceny, evidence held to sustain a finding that there was a prearranged agreement between defendant and R. to take the goods alleged to have been stolen, and that, in pursuance of such understanding, either defendant or R. took the goods, and that they thereafter divided them.

##### 2. SAME—AIDING AND ABETTING.

Where defendant aided in taking a box containing goods and appropriated a part of its contents to his own use, he was guilty of larceny of the whole.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 22, 29.]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"Not to be officially reported."

Ambrose Foster was convicted of grand larceny, and he appeals. Affirmed.

W. H. Wright, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

O'REAR, J. Appellant was indicted, tried, and convicted of grand larceny. He is charged

with having taken and converted to his own use a lot of clothing of the value of \$85, contained in a box shipped to Louisville over the Illinois Central Railroad. Appellant was not seen to take the box of goods. Nor was it shown to have been in his possession. Only one suit of the clothing was proved to have been in his possession. Its value was less than \$20. Appellant contends that he ought to have had a peremptory instruction of not guilty on the proof.

A detail of the evidence shows the following circumstances: The box of goods was set out on the railroad platform with a large quantity of other freight, waiting for the drays and delivery wagons to load it and take it away. Appellant and one George Rogers were drivers for a transfer company, each in charge of a team. They were at this depot while the box was on the platform, and were loading freight into their wagons. The box disappeared without the knowledge of the freight clerk in charge about the time appellant and his companion left there, which was some time in the afternoon. The box was not receipted for to the railroad company, nor was it delivered by the railroad company to any one. That night George Rogers carried the box in his wagon to the house of a negro woman, and asked to leave it there for a while. Presently appellant came in and he and Rogers opened the box, and divided the goods. The woman, who was the only witness testifying on that point, did not see and did not know in what proportion they were divided. There was proof that appellant sold one suit of the clothes to a second hand clothing dealer for \$3. It was worth probably \$10 to \$15. Rogers was found with some of the clothes on his person, and had disposed of some. All the clothing was not found. This proof was sufficient to submit to the jury whether there was a prearranged agreement between Rogers and appellant to take the goods, and, in pursuance of which, one of them took the box, and both divided and appropriated its contents. If appellant aided in taking the box, and appropriated any part of its contents to his own use, he is guilty in law of the larceny of the whole. And so is his accomplice. The proof warranted the submission of his guilt to the jury. Their verdict is conclusive of it, so far as an appeal is concerned. No other question is presented. Judgment affirmed.

#### DOTY et al. v. DICKEY.

(Court of Appeals of Kentucky. Oct. 5, 1906.)

##### 1. HUSBAND AND WIFE—CONVEYANCES BY WIFE—INTEREST IN LIFE POLICY.

Prior to the married woman's act (Ky. St. 1894, p. 773), an assignment by a married woman if joined by her husband, of her interest in a life policy as beneficiary therein, to one having an insurable interest, was valid.



## 2. CONTRACTS—CONSIDERATION—NATURAL AFFECTION.

Love and affection is a sufficient consideration to uphold either an executed or an executory contract between parent and child.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 287.]

## 3. EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—ASSIGNMENT OF INSURANCE POLICY.

Where the beneficiaries in a life policy assigned their interest in writing to the insured, and the written assignment appeared to be complete in itself, in the absence of any showing of mutual mistake or fraud on the part of the insured, it could not be shown that the assignment was special, and limited to a particular purpose, which, when discharged, was to reveal the interest in the assignors.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1733-1735½.]

## 4. WITNESSES—COMPETENCY—HUSBAND AS WITNESS FOR WIFE.

A husband may not testify on behalf of the wife to matters as to which she is herself incompetent to testify.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 124-136.]

## 5. BILLS AND NOTES—CONSIDERATION—IMPLICATION.

Under Ky. St. 1903, § 470, subsec. 7, providing that no action shall be brought on any agreement not to be performed within a year, unless it be in writing, but that the consideration need not be expressed, a note in the form of a duebill implied a consideration.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1652-1654.]

## 6. INSURANCE—ASSIGNMENT OF POLICY—SUFFICIENCY OF ASSIGNMENT.

An assignment by the beneficiary in a life policy to the insured is valid, though the assignment is not indorsed on the policy, as required by the terms thereof.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 479, 480.]

## 7. DESCENT AND DISTRIBUTION—RIGHTS OF CHILDREN.

Children cannot be heard to say that a gift from their deceased father to his wife was in fraud of their rights, where the property was his absolutely.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 206-209.]

Appeal from Circuit Court, Ballard County.

"Not to be officially reported."

Interpleader by the Connecticut Mutual Life Insurance Company to determine the rights of Julia E. Dickey and others under a policy issued on the life of T. M. Dickey, deceased. From the judgment, T. F. Doty and others appeal. Affirmed.

J. M. Nichols & Son, Jas. D. White, and Jno. W. Ray, for appellants Ida Doty et al. Robbins & Thomas and John E. Kane, for appellees.

O'REAR, J. T. M. Dickey, now deceased, was twice married. By his first wife, Jane Dickey, he had born two children, appellants Ida Doty and Mollie S. Dickey. He contracted his first marriage in this state, and while a resident of this state procured on March 5, 1877, a policy of life insurance on his life

in the Connecticut Mutual Life Insurance Company for \$3,285, payable to "Jane Dickey, wife, and children of the said assured, or their legal representatives." In 1889, while the policy was yet in force, it was assigned to T. M. Dickey by Jane Dickey and their two children, Ida Doty and Mollie S. Dickey, in which Mrs. Doty's husband joined. This assignment was made after T. M. Dickey and his family had removed to Kansas. It reads: "State of Kansas, Finney county. We, Jane Dickey, wife of T. M. Dickey, Ida Doty, daughter of T. M. Dickey, T. F. Doty, her husband, and Mollie S. Dickey, daughter of said T. M. Dickey, hereby surrender all of our right, title, and interest in and to the within policy of insurance on the life of T. M. Dickey, No. 144,008, to the said T. M. Dickey, and we hereby direct that the same be paid to the order of said T. M. Dickey. [Signed] Jane Dickey, Mollie Dickey, Ida Doty, T. F. Doty." Mrs. Jane Dickey died some years later. T. M. Dickey then married Mrs. Julia E. Ballentine, a widow, and executed to her the following note and assignment of the policy of insurance: "\$4,000.00. Due Mrs. J. E. Dickey four thousand dollars in cash paid me by her, she being my wife, in consideration of policy 144,008 on my life for \$3,285.00, dated March 5th, 1877, in Connecticut Mutual Life Ins. Co. of Hartford, Conn. The beneficiaries having assigned the same to me (all of them being adults) to enable me to pledge the same, and she holds it for this loan. February 26th, 1895. T. M. Dickey." The assignment referred to is as follows: "This policy having been transferred to me for a valuable consideration by my former wife, Jane Dickey (now deceased), and T. F. Doty, Ida Doty, and Mollie Dickey—beneficiaries—all being adults when it was transferred to me, I now for a valuable consideration transfer this policy to my present wife, Julia E. Dickey, authorizing her to collect the same when due. [Signed] T. M. Dickey."

After the death of T. M. Dickey the insurance company interpleaded Julia E. Dickey and Mrs. Doty and Mollie Dickey in this suit paying the money into court on behalf of the one to whom it might be adjudged in that action. The policy contained this provision: "That no assignment of this policy shall be valid." The printed form on which the policy was issued contained this clause originally: "(4) That no assignment of this policy shall be valid, unless made in writing, endorsed hereon; and that any claim against this company, arising under this policy, made by any assignee, shall be subject to proof of interest." But all of that clause was erased when the policy was issued, excepting the first sentence first above quoted. The circuit court adjudged that Mrs. Julia E. Dickey was entitled to subject the proceeds of the policy to the payment of her \$4,000 note. This matter may be treated

as the first branch on this appeal. Appellants' contentions are that they, the children of T. M. Dickey, are alone entitled to the proceeds of the policy for these reasons: (1) That the assignment by Jane Dickey to her husband was void, it being a transaction between husband and wife in which she was incapable of contracting; (2) that the assignment by Mrs. Doty was void because she was then a married woman, and incapable of making such a contract; (3) that the assignment was without a valuable consideration, and for that reason was void; (4) that the assignment had been made by the wife and daughters of T. M. Dickey to enable him to borrow money from a bank at Kansas City, that he did borrow money upon it, and repaid it, whereby the purpose of the assignment having been fulfilled, his title under the agreement was canceled, and the policy reverted to the original beneficiaries; that therefore its subsequent assignment by T. M. Dickey to Julia E. Dickey was ineffectual to pass title thereto. (5) It is contended that T. M. Dickey was not indebted to Julia E. Dickey at the time of the assignment in the sum of \$4,000, or in any sum, and that in consequence the assignment to her was void; (6) that the policy by its terms was not assignable.

Section 654 of the Kentucky Statutes of 1903, enacted first by the General Assembly of 1870, provides: "A policy of insurance on the life of any person expressed to be for the benefit of, or duly assigned, transferred or made payable to any married woman, or to any person in trust for her, or for her benefit, by whomsoever such transfer may be made, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or any other person effecting or transferring the same, or his creditors." Construing this statute, this court, in *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208, held that the interest taken in the life insurance policy by the wife and the children of the assured was an inchoate one; that it was necessary for the beneficiary to survive the insured in order to have a fixed interest in the policy. It was also held that if one or more of the named beneficiaries died before the insured, that the whole of the sum insured would go to the survivors. That case was followed in *Gault v. Gault* (Ky.) 80 S. W. 493. Under this construction it becomes immaterial whether Mrs. Jane Dickey's assignment of the policy to her husband was valid or not, because the assignment of the daughters, if binding upon them, and not prohibited by law, is sufficient to convey their entire interest, which is the whole of the sum insured.

The contention that a married woman may not assign her chose in action is not tenable. Even before the enactment of the present "Married Woman's Act," the statute of 1894 (Acts 1894, p. 773), a married woman's executed contract, assigning her choses in ac-

tion, when joined in by her husband, was effectual to convey her title, the transaction being fair and voluntary. This was not because she had the power to bind herself or her property by contract, or to convey her property otherwise than in the manner expressly provided by statute. Her personal property, except her separate estate, was generally subject to the conversion of her husband, and of sale or assignment by him. Whatever interest a married woman may then have had in a life insurance policy, might have been assigned by her and her husband to any person having an insurable interest in the life of the insured. At the common law, if a married woman, being the main beneficiary in a policy, should become entitled by the death of the assured to collect it, her husband alone would have been authorized to have received the money and to appropriate it to his own use, subject, of course, to her claim for an equitable settlement under principles familiar to that branch of the law. The interest in such a policy before the death of the assured was of the nature of a chose in action, belonging to a feme covert, which she and her husband might assign upon the ground, it would seem, that the less estate was included in the greater, and what might legally be done with the latter, could by a parity of reasoning be done with the former. The interest of such a beneficiary was more than an expectancy. It was an expectancy, it is true, but an expectancy coupled with an interest, subject to be defeated alone upon the contingency, first, that she should die before the assured; or, second, that the policy should lapse or become void for some reason stated in the contract, before she or any one else could have a right to assert it as a claim or demand against the insurer.

The contention that the assignment of Jane Dickey and her daughters to T. M. Dickey was void upon the ground that there was no consideration to support it, is not well taken. There is no competent proof in the record that there was not a valuable consideration to support the assignment. But, whether there was or not, in this state love and affection, growing out of the relationship of parent and child, is a good consideration, and sufficient to uphold not only an executed, but an executory contract between them. *Ford v. Ellingwood*, 3 Metc. 359; *Berry v. Graddy*, 1 Metc. 553; *Bufford v. McKee*, 1 Dana, 107; *McIntire v. Hughes*, 4 Bibb, 187; *Mark v. Clark*, 11 B. Mon. 46; *Arnold v. Park*, 8 Bush, 4; *Jennings v. Anderson*, 4 T. B. Mon. 445.

As to the alleged agreement between Mrs. Jane Dickey and her daughters and T. M. Dickey, that the assignment was special and was limited to a particular purpose, which when served and discharged, was to release the policy, and revert the title in the assignors, the original beneficiaries, it was properly disallowed under the state which

the record presented. The contract, which is the written assignment, appears to be complete of itself. There is no claim that by mutual mistake of the parties, or by the fraud of T. M. Dickey, the assignment did not contain the terms of the contract as now contended. It must then be conclusively presumed that the written memorial embraced the whole of the agreement between the parties. T. F. Doty, husband of appellee's widow, testifies, it is true, that such was the agreement between T. M. Dickey and his wife and children. But this witness was incompetent on behalf of his wife (*Bright's Ex'rs v. Swinebroad*, 106 Ky. 737, 51 S. W. 578), and his testimony was not receivable on behalf of appellants because of his incompetency, even though the pleadings had been such as to have admitted evidence to enlarge the contract shown by the written assignment. The effect of the foregoing is to vest in T. M. Dickey the complete title to the life policy. It was then his to do with as he pleased, subject always to the restraint of the law against his assigning it to any one not having an insurable interest in his life. His second wife, of course, had an insurable interest in his life. It was lawful for him to have assigned the policy to her then without consideration. But the note and the written assignment which he executed show on their face that he did owe to his wife \$4,000 of borrowed money. His note not only implies a consideration (subsection 7, § 470, Ky. St. 1903), but it contains within itself an express admission of a valuable consideration. The genuineness of the note and of the written assignment being undenied, these admissions of a decedent against his own interest, as it is called, are of great weight, and coupled with the other evidence in the record, leave no doubt in our minds, as they left none, it seems, in the mind of the trial court, that the recited consideration was real.

The contention that the policy of insurance is not assignable because of the prohibitory clause contained in it, is equally unavailing. A policy of life insurance is assignable or not according to the law of the land. If it is assignable by the law, the parties to it cannot by their agreement change the law with reference thereto. A policy of life insurance is a chose in action—a promise to pay money upon a given contingency. By statute in this state such contracts are assignable. The only limitation against such assignability is that public policy of the law that forbids an assignment of an insurance policy to one not having an insurable interest in the life of the assured. It cannot be supposed that one has not an insurable interest in his own life. It was then competent for the assured to acquire the interest of the beneficiaries in the policy on his life. The provision in the policy that it was not assignable is a provision for the benefit of the insurer, to protect it. It was to relieve

it from the necessity of looking into the title and insurable interest of such assignee. *Manning v. United Order Ancient Workmen*, 86 Ky. 136, 5 S. W. 385, 90 Am. St. Rep. 270; *Embry's Admr. v. Harris*, 107 Ky. 61, 52 S. W. 958; *Morehead v. Mayfield*, 58 S. W. 473, 22 Ky. Law Rep. 580. But in any event, the insurer could waive this provision in its behalf, which it has done in this case.

Another branch of this appeal involves the title to 50 shares of the capital stock in the First National Bank of Wickliffe. T. M. Dickey had issued to himself by the bank, of which he was president, certificates for 53 shares of stock. By written indorsement he had assigned 50 of these shares to his wife Julia E. Dickey. The certificates were in her possession at the time of his death. The writing signed by T. M. Dickey states that his wife's, appellee's, money paid for them. The circuit court adjudged appellee Julia E. Dickey to be the owner of these 50 shares. It is attempted to be shown by appellants that the expressed consideration for the assignment was not true. But we deem that not so material. Although there is abundant and satisfying evidence in the record that appellee's means did buy this stock, there is no controversy between T. M. Dickey's creditors and his wife. It does not become his heirs at law, and is not allowed to them, to say, that he gave his personal property to his wife in fraud of his children's rights. They had no legal rights with reference to his property. Assuming that it belonged absolutely to T. M. Dickey, and not appellee, and if it be true, as contended, that he was not indebted to his wife, still he had the right to give her his bank stock, no rights of creditors being involved. Whether or not his motive was just is beyond the province of the court to inquire into. It is enough that of his own volition, and not contrary to any provision of the law, he has seen proper to give his property to his wife, and has executed the gift in his lifetime.

Appellee Julia E. Dickey was allowed by the report of the master commissioner a claim of \$1,000 against her deceased husband's estate, which the report describes as a note. Appellants did not except to the commissioner's report concerning this item, nor is the proof and claim that were before the commissioner brought up in the record.

We perceive no error prejudicial to appellants, and the judgment is affirmed.

#### POGGENBORG v. CONNIFF.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

#### ARBITRATION AND AWARD—ECCLESIASTICAL COURT AS ARBITRATOR—AWARD—ENFORCEMENT.

Where an ecclesiastical court proceeded as arbitrator on a complaint filed by a party without any agreement of either party to abide by the judgment of the court, and both parties abandoned the arbitration and appealed to a

higher court, which reversed the judgment of the ecclesiastical court, the award of the ecclesiastical court was not enforceable in the civil courts.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by Matilda Poggenborg against James J. Conniff to enforce an award. From a judgment for defendant, plaintiff appeals. Affirmed.

D. T. Smith, for appellant. McDermott & Ray, O'Neal & O'Neal, and Kohn, Baird & Spindle, for appellee.

HOBSON, C. J. When this case was here last it was held that the petition stated a cause of action; that although the civil courts will not enforce the judgments of ecclesiastical courts the parties may submit their controversies to any arbitrators they see fit to agree upon, and that the cause of action as disclosed in the petition was based upon an agreement of the parties by which they constituted the ecclesiastical court an arbitrator between them and agreed to abide by its decision as an award. *Poggenborg v. Conniff*, 67 S. W. 845, 23 Ky. Law Rep. 2463. On the return of the case an answer was filed denying the allegations of the petition. Proof was taken, and on the trial judgment was entered for the defendant. The plaintiff again appeals.

The proof utterly fails to sustain the allegation that the parties agree to submit their controversy to the ecclesiastical court as an arbitrator. On the contrary, the proof clearly shows that the ecclesiastical court proceeded upon a complaint filed by appellant, and without any agreement of either party to abide its judgment. The record shows, as now presented, that not only was there no agreement to abide the judgment of the ecclesiastical court, but that both parties abandoning it, appealed from it to a higher tribunal. On appeal the judgment relied on by appellant was reversed.

Judgment affirmed.

#### THIXTON'S EX'R v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

CARRIERS—INJURIES TO PASSENGER—CARE AS TO INTOXICATED PASSENGER.

Where a passenger, waiting to change cars at a junction, was so intoxicated that he was boisterous and staggered, but was not helpless, and the conductor took him to a place of safety, telling him to remain there with the other passengers, and when the passenger's train came in he was run over, the carrier was not liable on the ground that it did not properly care for the passenger.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1095, 1350.]

Appeal from Circuit Court, Ballard County. "Not to be officially reported."

Action by W. H. Thixton's executor against the Illinois Central Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

J. B. Wickliff and J. K. Hendrick, for appellant. Robbins & Thomas, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

HOBSON, C. J. W. H. Thixton was 63 years of age. He got on a train of appellee at Cairo, Ill., having a ticket to Wickliffe. Cairo is not on the main line of the road and a short train called a dummy runs out from Cairo to the junction. The dummy, when it reached the station, stopped on the side track. Between the side track and the main track was a space 10 feet wide filled with crushed stone and used as a platform. Thixton was drunk and talking loud to the trainmen in the coach before he reached the junction. He staggered as he walked. He was the last person to get off the dummy, and when he got on the ground he staggered over to the main track. The conductor took hold of him and led him back to the end of the dummy away from the main line and turned him loose, telling him to go on back with the other people. This was the last he saw of him. Soon afterwards, as the other train pulled in, Thixton was struck by the crossbar of the locomotive and killed. This action was filed to recover for his death on the ground that he was drunk and helpless, and that the company did not properly care for him.

There is nothing in the record to show that the carrier would have been justified in refusing to take Thixton as a passenger when its train left Cairo, or that it would have been justified in refusing to sell him a ticket when he applied for it there. While it plainly shows that he was under the influence of liquor, he was by no means helpless. When he reached the junction and staggered over on the main track the conductor took him off the track and took him to a place of safety, telling him to remain there with the other passengers. The railroad company was not required to furnish a guard for a passenger of this sort. The conductor, having taken the unfortunate man to a place of safety, was not required to stay there and guard him until the other train came and then place him under the care of somebody who would guard him while on that train and until he was safely landed at Wickliffe. He was not in a place of danger when left by the conductor with the other passengers. The circuit court properly instructed the jury peremptorily to find for the defendant.

Judgment affirmed.

**SMITH v. SISTERS OF GOOD SHEPHERD OF LOUISVILLE.**

(Court of Appeals of Kentucky. Oct. 9, 1906.)

**1. APPEAL—MATTERS CONSENTED TO.**

One having, for the purpose of preventing a continuance, consented to the reading of a deposition, though not properly certified, may not complain of its having been read.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3611-3616.]

**2. WORK AND LABOR—RIGHT TO COMPENSATION.**

On who renders services, without objection, knowing that they are rendered in return for support and that no further pay is to be demanded, cannot recover therefor.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 8-10.]

**3. HUSBAND AND WIFE—ESTOPPEL.**

Estoppels bind married women as other people.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 282-284.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"Not to be officially reported."

Action by Hattie Smith against the Sisters of the Good Shepherd of Louisville. Judgment for defendant. Plaintiff appeals. Affirmed.

D. T. Smith, for appellant. Kinney & Fitzgerald, for appellee.

**HOBSON, C. J.** The facts of this controversy are stated in *Smith v. Sisters of the Good Shepherd*, 87 S. W. 1083, 27 Ky. Law Rep. 1107. That was an action for false imprisonment and cruel treatment. This is an action to recover for services rendered. The jury found for the defendant, and the plaintiff appeals.

When the case was called for trial the defendant asked a continuance because a deposition which it had taken was not properly certified, it turning out that the notary before whom it was taken had since ascertained that his commission had expired. To prevent the case being continued, the plaintiff consented that the deposition might be read on the trial. It is now urged that the court erred in allowing the deposition to be read. The objection cannot be maintained. A party cannot complain of that which he consented to.

The instructions of the court fairly submitted the question to the jury, and the evidence warranted them in finding that the plaintiff's services were rendered under circumstances requiring her to know that no pay was to be made for them. She well understood the character of the institution. She knew upon what terms everybody else remained there. One who renders services without objection, knowing that they are accepted on the ground that they are rendered in return for support and that no further pay is to be demanded, cannot recover for such services; and the fact that the person rendering the services is a married woman separated from her husband is immaterial. Es-

toppels bind married women as other people. Appellant enjoyed the home which appellee furnished her. She enjoyed it knowing that she was to receive nothing further for her services, and she cannot now demand other compensation.

Judgment affirmed.

**ROBINSON v. CARLTON et al.**

(Court of Appeals of Kentucky. Oct. 5, 1906.)

**1. EXECUTION—RELIEF—INJUNCTION—PETITION—SUFFICIENCY.**

Where, in an action to restrain the sale of petitioner's land under execution, the petition alleged that he was not served with summons, and that the judgment was not rendered against him, but against another person of the same name, the petition was not insufficient for failing to allege that petitioner was not at the time of the rendition of the judgment indebted to plaintiff in the action, on the demand sued on.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 525.]

**2. COURTS—CONFLICTING JURISDICTION—ENJOINING JUDGMENT OF ANOTHER COURT.**

Civ. Code Prac. § 285 providing that an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered, does not apply where the one seeking the injunction was not a party to the judgment, and in such a case an injunction might issue from the circuit court to restrain the sale of land under an execution issued by a justice.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1270-1278.]

**3. SAME—GROUNDS.**

Injunction will lie to restrain the sale of land under execution in satisfaction of a judgment, which, as to the landowner, is void, or founded on a debt owing by a third party, to prevent irreparable injury or oppressive litigation, and this without a showing of insolvency or other facts showing that a judgment at law would not afford adequate relief.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 497.]

Appeal from Circuit Court, Grant County. "To be officially reported."

Action by Marion Robinson against John M. Carlton and others. From a judgment sustaining demurrers to the petition, petitioner appeals. Reversed for proceedings consistent with the opinion.

J. G. Tomlin and J. L. Vest, for appellant. C. H. Beasley, for appellees.

**SETTLE, J.** This equitable action was instituted by appellant to prevent, by injunction, the sale of his land under an execution for a small amount in favor of appellee, John M. Carlton, which was levied on the land by the appellee, W. H. Barker, sheriff of Grant county. It appears that judgment was obtained by appellee, Carlton, in the court of F. M. Blackburn, a justice of the peace of Grant county, against one Marion Robinson, for the amount named in the execution. An execution issued from the magistrate's court on this judgment, and was

returned "No property found," thereafter, a transcript of the judgment, execution and return, and taxation of costs was filed in the office of the clerk of the Grant circuit court, and from that office the execution issued which the sheriff, to whom it was directed, levied on appellant's land. Upon the filing of the petition, appellant was granted a temporary restraining order. At the succeeding term of the circuit court, demurrers, special and general, were filed to the petition by appellees, the former raising the question of want of jurisdiction, and the latter assailing the sufficiency of the petition. Both demurrers were sustained. Appellant then filed an amended petition, and appellees insisting upon the demurrers to the petitions as amended, they were again sustained by the court. As appellant did not further amend, judgment was entered dismissing the action at his cost, and from that judgment he has appealed.

Do the facts alleged in the petition authorize the granting of the relief asked by appellant? The original petition was clearly insufficient. As amended some of its averments are inaccurate in form and incomplete in statement, others are mere conclusions of the pleader, but considered as a whole it substantially manifests these essential facts which on the face of the petition are confessed by the demurrer. (1) That appellant was not served with summons from magistrate Blackburn's court, or any other court, in the action of John M. Carlton v. Marion Robinson, wherein was rendered the judgment supposed to authorize the issue of the execution levied on appellant's land. (2) That the judgment in question was not rendered against him. (3) That at the time of the institution of the action in the justice's and when the judgment was rendered, there was another man residing in Grant county bearing appellant's name, Marion Robinson, and he—the other Marion Robinson—is the person against whom the judgment was rendered, if rendered at all. (4) That not only had execution issued on this judgment, but it had been levied by the sheriff on his land, and the land duly advertised for sale thereunder, and finally, that the sale thereof would immediately be made by the sheriff under, and in satisfaction of, the execution, to the injury and irreparable loss of appellant, unless prevented by injunction. We think the petition as amended states a good cause of action.

It is contended by counsel for appellees that the petition is bad because it fails to allege in terms that appellant was not at the time of the rendition of the judgment in the magistrate's court, indebted to Carlton, the plaintiff therein, on the demand sued on. It is true, such averment is wanting, but if appellant had been indebted to Carlton that fact would not have authorized a judgment against him, or given any legal effect

to that rendered, if, as alleged in the petition, he had not theretofore been served with summons or warrant. In other words, if, as alleged in the petition, appellant was not served with summons in the magistrate's court in the case mentioned, and the judgment therein was not rendered against him, but against another resident of the county of the same name, the judgment is void as to him, and his land is not subject to the execution levied on it. Did the lower court err in sustaining the demurrer to jurisdiction? Section 285, Civ. Code Prac. provides: "An injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction, in any other court than that in which the judgment was rendered." The mandatory character of this section of the Code has been recognized in many decisions of this court. *C. O. & S. W. R. Co. v. Reasor*, 84 Ky. 369, 1 S. W. 599; *Kelly v. Kelly*, 2 Duv. 363; *Davis v. Davis*, 10 Bush, 274; *Neeters v. Clements*, 12 Bush, 359; *Jacobson v. Wernert*, 41 S. W. 281, 19 Ky. Law Rep. 662. While the cases supra seem to apply the mandatory provisions of section 285 to all actions to enjoin proceedings on judgments, by whomsoever brought, yet a careful reading of them will show that in each case the party seeking the injunction was likewise a party to the judgment proceedings on which were attempted to be enjoined. In *Mallory v. Dauber's Ex'r*, 83 Ky. 239, it was apparently held that this section applied to a party there seeking by injunction to stay proceedings on a judgment, though he was not a party to said judgment. But as in that case the question determined was one of priority of lien, which was decided independently of any objection made to the injunction that had been granted by the lower court, and this court refused to reverse the judgment because of the granting of the injunction; it may be concluded that what was said in the opinion in applying section 285, Civ. Code Prac. to the party obtaining the injunction in that case, was unnecessary to its decision, and is therefore to be regarded as mere dicta.

In the more recent case of *Bean v. Everett*, 56 S. W. 403, 21 Ky. Law Rep. 1790, it seems to have been held that section 285 did not apply to an injunction to stay proceedings on a judgment where the party asking it was not a party to such judgment. We think this view of the matter consonant with reason and justice. There is every reason for requiring one seeking to enjoin proceedings under a judgment, to which he was a party, to go for relief to the court which rendered it, for it is binding upon him and conclusive of his rights until reversed, or otherwise legally vacated. Therefore, the framers of the Code, in order to prevent one court from having control over a judgment of another court, rendered in pursuance of

its jurisdictional powers, wisely enacted the section supra. On the other hand, no good reason can be advanced for holding that this section should be so interpreted as to extend its provisions to one seeking to enjoin proceedings under a judgment to which he was not a party, and by which he is not in any way legally bound. Accepting as true, for the purposes of the demurrer, the averments of the petition in the case at bar, the judgment under which the execution levied on appellant's land was issued has no legal force or effect as to him or his property. Indeed, as to him, it is absolutely void, and this being true, he may attack it collaterally, or by injunction stay proceedings thereon, and prevent the sale of his land under the execution issued in pursuance thereof.

Whilst, as a general rule, courts of equity will not interpose by injunction to try title, either as to personal or real property, the remedy at law ordinarily being sufficient for that purpose, yet they will do so in a case of this character, where the real estate of the plaintiff is about to be sold in satisfaction of a judgment which as to him is void, or under execution for debt owing by a third party, to prevent irreparable injury to his title, or oppressive litigation growing out of a multiplicity of suits in which he might be involved with purchasers, in the event such sale were permitted. Nor is it necessary, in order to avail himself of the remedy here sought, that appellant should allege the insolvency of appellee, or other facts and reasons showing that a judgment of damages at law would not afford adequate relief. From what has been said, it follows that the lower court erred in sustaining the demurrers.

Wherefore the judgment is reversed for proceedings consistent with this opinion.

#### PENNSYLVANIA IRON WORKS CO. v. HENRY VOGHT MACH. CO.

(Court of Appeals of Kentucky. Oct. 4, 1906.)

#### 1. LIBEL AND SLANDER—ACTION BY CORPORATION—RIGHT TO SUE.

A corporation may sue for libel on it as distinct from a libel on its individual members. [Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 174.]

#### 2. PRINCIPAL AND AGENT—ACTS OF AGENT—LIBEL—LIABILITY OF PRINCIPAL.

Defendant's authorized agent in charge of its branch office wrote a libelous letter to an ice company concerning plaintiff's ability to fulfill a contract for the purchase of an ice machine for the purpose of obtaining for defendant the contract to build the machine and take the business away from plaintiff. Defendant did not authorize the insertion of libelous statements in the letter, but did not repudiate the same until it was sued for libel. *Held*, that defendant was chargeable with the acts of its agent, and was liable for the damages sustained by plaintiff from the libel.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 604.]

#### 3. LIBEL AND SLANDER—WRITINGS LIBELOUS PER SE.

Plaintiff and defendant were rival ice machine manufacturers, both endeavoring to secure a particular contract, and defendant's agent for this purpose wrote a letter to the proposed purchaser stating that plaintiff was a secondhand dealer, that it put in a class of inferior work, was a scab establishment and did not have a mechanic in its employ. *Held*, that such writing was libelous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 85, 86.]

#### 4. SAME—PUNITIVE DAMAGES.

Where a letter was written concerning a corporation's business which was libelous per se, the jury was at liberty to presume that it was published with a malicious intent authorizing a recovery of punitive damages.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 278.]

#### 5. CORPORATIONS—ACTS OF AGENT—RATIFICATION.

A corporation's failure to disapprove or repudiate a letter written by its agent which was libelous per se after obtaining knowledge of its publication operated as a ratification and approval of the libel.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 636-641.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by the Henry Voght Machine Company against the Pennsylvania Iron Works Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bennett H. Young and M. W. Ripy, for appellant. Thum & Clark and Gibson, Marshall & Gibson, for appellee.

CARROLL, C. The appellant is a Pennsylvania corporation and the appellee a Kentucky corporation, and they are rivals in the manufacture of ice machines. In 1896, the appellant opened an office in Louisville, Ky., and placed it in charge of William Wilson. In 1897, appellant and appellee were competitive bidders for an ice machine desired by the Northern Lake Ice Company of Louisville. Appellee was the successful bidder, and when Wilson learned of this fact he wrote a letter to the Northern Lake Ice Company, the material parts of which are as follows: " \* \* \* The reason we withdrew our proposition is because you telephoned us that the tank was let to the Sulzer-Voght Machine Co., and another reason is because we could not figure against a secondhand dealer. We do not recognize that company as ice machine builders, and they know absolutely nothing about the compression system. They never have done any work in connection with the compressed system, and at any time they do they will make a failure. \* \* \* The material they put in the work of this class is so far inferior to ours that we could not figure with them; and you will find this when the tank is erected. \* \* \* Our shops and equipments are the largest in existence in our line, and we employ nothing but union labor, whereby the other

parties run a scab establishment and have not a mechanic in their whole establishment, including the head of the concern. We will not be slow to make this known to the different unions in this and other cities. \* \* \* The above might seem strong, but it is our sentiment. We know the machine will not make its capacity with a tank built by parties who absolutely know nothing of it and will eventually give us a black eye as the other parties are interested in running down the compression system. They cannot make capacity with their own machines and could not try to do it with another make, and the whole system will not be put in right. If it is not too late, you had better reconsider the matter and let it to parties who know how to do it." This letter was written on a letter head of the Pennsylvania Iron Works Company, from Southern Office, 44 Bull Block, Louisville, Ky., and was signed "Pennsylvania Iron Works Co., Wm. Wilson, Manager Southern Office." After this time, the Sulzer-Voght Machine Company changed its corporate name to the Henry Voght Machine Company, but before changing its name the Sulzer-Voght Machine Company brought this action against appellant, alleging that appellant by the manager of its southern office at Louisville, wrote and delivered to the Northern Lake Ice Company the letter mentioned, the purpose of which was to induce the ice company to decline to award the contract to appellee, and that the letter was written falsely, wickedly, and with malicious intent to deprive the appellee of said contract, and to injure it in its reputation and business, and asked damages for the libelous matter in the sum of \$20,000. The appellant, in its answer, after traversing generally the allegation of the petition, denied that Wilson had any authority from, or on behalf of it, to write the letter, and that if Wilson did write such letter, it was entirely unauthorized. To this answer a reply was filed, in which it is averred that Wilson, at the time he wrote the letter, and for a long time prior thereto, with the knowledge and approval of appellant, held himself out as the manager of the southern office, and as such manager, with the knowledge and consent of the appellant, was conducting and carrying on business for it; and further, that appellant after learning said letter had been written by Wilson acting as its agent, failed and refused to disavow or retract the same, but adopted and confirmed the act of Wilson in writing and delivering said letter, knowing the statements therein to be false and malicious. This completed the pleadings in the case except an entry of record controverting the affirmative matter contained in the reply. On a trial, appellee recovered judgment for \$5,000, to reverse which this appeal is prosecuted; and it is urged (1) that the principal is not liable in damages for the unauthorized wrongful act of its agent; (2) that there was no evi-

dence upon which to submit to the jury the ratification of it; (3) that there was no evidence to authorize a finding of punitive damages; and (4) that the petition does not state a cause of action.

It appears from the evidence that Wilson had been an employé of appellee, and in March, 1896, he solicited employment from appellant, and appellant wrote to appellee requesting information concerning Wilson. Soon after this date, Wilson became the agent of appellant. Appellant furnished the printed letter heads used by Wilson in his correspondence, but Wilson had put on the letter heads the words "From Southern Office, 44 Bull Block, Louisville, Ky." These letter heads Wilson used in his correspondence with appellant, and it knew that he was in the habit of signing its name by him as manager of its southern office, that he was holding himself out as manager of its southern office, and this state of affairs continued until the latter part of December, 1899, when Wilson removed from Louisville. It also appears that appellant advertised extensively in trade journals, and always mentioned in the advertisement the fact that its southern office was at 44 Bull Block, Louisville, Ky. Wilson also held himself out to the public generally as the agent of appellant, and testifies that in the libelous letter complained of the word "we" refers to the Pennsylvania Iron Works Company. The letter complained of fell into the hands of Dr. Satterwhite, who, as president of the board of commissioners for the Lakeland Asylum, was negotiating with different parties for the erection of an ice plant at the institution, and was delivered by Satterwhite to the president of appellee. It does not appear that appellant ever repudiated the letter written by Wilson, except in its answer, and only there by denying that it wrote or authorized the writing of the letter by Wilson. A corporation is liable in damages for the publication of a libel, as it is for other torts. To establish its liability, the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. And a corporation may sue for libel upon it as distinct from the libel upon its individual members. *Newell on Slander & Libel*, p. 361; *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; *Townsend on Libel & Slander*, §§ 261-265; *Peterson v. Western Union Telegraph Co.*, 75 Minn. 368, 77 N. W. 985, 43 L. R. A. 581, 74 Am. St. Rep. 502. The evidence shows very clearly that Wilson was the duly authorized agent of appellant and in charge of its southern office at the time he wrote the letter. That it was written in the course of his business for appellant, and was within the scope of his employment is made plain by the fact that it was written



for the purpose of obtaining for the appellant the contract to build the ice machine for the Northern Lake Ice Company and to take this business away from appellee. This being the sole purpose of the letter, and, Wilson being at the time the general agent of appellant, it cannot be doubted that in writing it he was acting within the scope of his employment, and therefore appellant is liable for his acts. It may be true that appellant did not authorize Wilson to insert in this letter the libelous statements it contained, and it may be conceded that they were written without its knowledge or consent, but this will not exonerate it from liability for the wrong perpetrated by him in an effort to obtain business for it. If the appellant is not responsible for this conduct of Wilson, it would be difficult to find a case in which a corporation could be held liable for the acts of its agents in the publication of libelous matter. Corporations transact all of their business through agents; and when the agent is acting in the course of his business and within the scope of his employment, the corporation will be held accountable for his acts and doings in the same degree as an individual will be held answerable for torts perpetrated by him in his individual capacity. Where an action will lie against an individual for a tort, it will lie against a corporation if the tort was committed by its agent or servant in the scope of his employment.

It is argued that the petition does not state a cause of action because the words and statements contained in the letter are not per se libelous, and it is said that if they are not per se libelous they can only be made actionable by an averment of injury to plaintiff's business and special damage occasioned thereby. "Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office, or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special damages." Newell on Slander & Libel, p. 168; Am. & Eng. Encl. of Law, Vol. 18, p. 954. "Next to imputations which tend to deprive a man of his life or liberty, or to exclude him from the comforts of society, may be ranked those which affect him in his office, profession, or means of livelihood. To enumerate the different decisions upon this subject would be tedious, and to reconcile them impossible; yet they seem to yield to a general rule sufficiently simple and unembarrassed, namely, that words are actionable which directly tend to prejudice any one in his office, profession, trade, or business. So, if a person carry on any trade recognized by law, or be engaged in any lawful employment, however humble, an action lies when any words prejudice him in the way of such trade or employment; but the words must relate to his trade or employment and

touch him therein. It is not necessary to prove special damages in any action for libel whenever the words are spoken of the plaintiff in the way of his profession or trade. Such words, from their natural and immediate tendency to prejudice and injure, the law judges to be defamatory, although no special damage or loss is or can be proved." Newell on Libel & Slander, p. 856. To the same effect is Townsend on Libel & Slander, § 146; Manire v. Hubbard, 61 S. W. 466, 22 Ky. Law Rep. 1753. The statements in this letter that appellee was a secondhand dealer, that it put in a class of inferior work, that it was a scab establishment, that it did not have a mechanic in its establishment, come fully up to the rule announced in these authorities, that an allegation of special damages is not necessary where the charges have a tendency to injure a person in his trade or business, and such charges are actionable per se.

The court instructed the jury that if they believed from the evidence that the letter was written with express malice against the plaintiff, they might in addition to compensating plaintiff for any damage or injury, find punitive or exemplary damages against the defendant. In Courier Journal Printing Co. v. Sallee, 104 Ky. 335, 47 S. W. 226, it is said: "It must be remembered that the law always presumes that in the publication of an article which is libelous on its face, it was published with malicious intent, and this presumption remains throughout the entire case until it is rebutted by proof of the contrary motive. In this state, in all actions for torts, punitive damages are allowed where the injury is a result of a wanton or grossly negligent act. The intent or purpose is not a necessary ingredient. This is especially true where the words published are actionable per se." Newell on Slander & Libel, p. 843. The letter in this case being libelous per se, the presumption is that it was published with malicious intent, and, this question having been submitted to the jury under proper instructions, they had the right in their discretion to find punitive damages against appellant.

The court also instructed the jury that although they might believe that Wilson was not the agent of the company at the time the letter was written, yet if the company subsequently ratified or approved the letter and the statements therein contained, they should find for plaintiff. Of this instruction appellant complains. There is no affirmative evidence in the record of the express ratification of this letter by appellant, but, Wilson having written it within the scope of his employment, appellant, as we have held, was liable for the consequences of its publication, and therefore ratified it by its failure to disapprove or repudiate the letter after obtaining knowledge of its publication, which it did long before the trial took place. Its

failure, under the circumstances of this case, to disavow the letter must be taken to be a ratification and approval of its contents.

After a careful examination of this record, we have been unable to find any error that would authorize a reversal, and the judgment is affirmed.

### ROBERTS v. ADAMS.

(Court of Appeals of Kentucky. Oct. 4, 1906.)

#### 1. HOMESTEAD—LAND ACQUIRED BY DESCENT—EXEMPTION AGAINST PRE-EXISTING DEBTS.

A debtor inheriting land is entitled to a homestead therein against pre-existing debts, and has a reasonable time in which to convert the inheritance into a homestead, and what is a reasonable time, where the intention to convert exists, is a matter of fact.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 78, 138.]

#### 2. SAME.

A debtor inherited an undivided interest in land, which was not divisible without materially depreciating its value, rendering a sale as a whole necessary. The land was unimproved and unsuitable for a home. Held, that the reasonable time within which the debtor could convert his interest into a homestead against pre-existing debts was such time within which the land could be sold by judicial procedure and the proceeds divided among the owners.

Appeal from Circuit Court, Henry County.

"Not to be officially reported."

Suit in equity by D. P. Adams and others for a sale of land in which they were tenants in coparcenary. James H. Roberts filed a petition to be made a party. From a judgment against the petitioner, he appeals. Affirmed.

Turner & Turner, for appellant. H. K. Bourne, for appellees.

**BARKER, J.** The appellant, J. H. Roberts, is the judgment creditor of D. P. Adams, who, prior to inheriting the land involved in this litigation, had no property subject to execution. Upon the death of his mother and father, who resided in Henry county, Ky., a small tract of land descended to the appellee and his three brothers and sisters. These tenants in coparcenary instituted this action in equity in the Henry circuit court to sell the land because of its indivisibility and for a division of the proceeds among its owners. About this time the appellant caused an execution to issue upon his judgment and to be levied upon the interest of appellee in the land in question. Afterwards he filed his petition to be made a party to this action, in which he sets forth his judgment, the issue of the execution, the levy thereof upon the undivided interest of his debtor, and praying that whatever sum should become due to appellee should be paid over to him in part payment of the judgment. Appellee filed an answer to this petition, alleging, among other things, that he was a bona fide housekeeper with a fam-

ily, a resident of Fayette county, Ky., and that he owned no homestead, but that it was his intention to at once invest whatever sum might come to him out of the proceeds of the sale of the land in a homestead for himself and family.

The question for adjudication arising upon the record is whether or not the appellee is entitled to a homestead against the claim of his creditor, which accrued prior to the inheritance of the land. This court has uniformly maintained a distinction, in construing the homestead statute, between land acquired by purchase, and that acquired by descent. As to the first the statute is not available as against debts arising before the purchase; but the contrary rule applies with reference to land acquired by descent. As to this the debtor is given a reasonable time in which to convert his inheritance into a homestead. What is a reasonable time, where the intention to convert is present, is a matter of fact. In the case under consideration the debtor could not occupy the land as a homestead for two reasons: First, it was unimproved and rough land, unsuitable for a home; and, second, he only owned an undivided interest in the tract, which not being divisible without materially depreciating its value, its sale as a whole was necessary. Therefore we conclude that a reasonable time, within the meaning of the rule under discussion, was such time as the land could be sold by judicial procedure and the price divided among the owners. The principle we have here is fully discussed in the case of *Spratt v. Allen*, 106 Ky. 275, 50 S. W. 270. All of the former decisions of this court on this question are there reviewed, and the rule here stated announced. The opinion in that case is conclusive of this. Judgment affirmed.

### CHOATS et al. v. LONG.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

#### INFANTS—JUDGMENT AGAINST INFANTS—PROOF OF CAUSE OF ACTION—NECESSITY.

Under Civ. Code Prac. § 126, providing that the allegations of a petition against a defendant who is under disability, must be proved though not traversed, it is error to render judgment against infant defendants under 14 years of age, adjudging that a conveyance to their deceased ancestor was fraudulent, unless the allegations of the petition alleging fraud are proved, though the petition was not answered.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 280, 286.]

Appeal from Circuit Court, Clinton County.

"Not to be officially reported."

Action by A. G. Long, agent, against J. P. Choats and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

S. G. Smith, for appellants. E. Burtram, for appellee.

**CARROLL, C.** The appellee brought this suit against the appellants W. A. Hicks and

his five infant children, to set aside a conveyance of land to Francis J. Hicks, the wife of W. A. Hicks and her children, the infant appellants. The deed conveyed the life estate in the property to Francis J. Hicks, with remainder to her children, charging that the conveyance was fraudulent and made for the purpose of cheating and hindering the appellant in the collection of a debt due to him by J. P. Choats, the father of Francis J. Hicks, and who as alleged paid the purchase price for the land, and sought to subject the land to the payment of his debt. Francis J. Hicks died before the institution of the action, and upon her death her children the infant appellants, became the owner of the fee in the land.

A special and general demurrer filed to the petition by the defendants was overruled, and judgment rendered declaring the conveyance fraudulent and void in so far as it affects appellee's right to have the land subjected to the payment of his debt, and a sufficiency of the land was ordered sold to pay the debt. This judgment was executed by a sale and conveyance of the land to satisfy the debt of appellant. No answer was filed by appellants, nor was any evidence taken in support of the allegations of the petition. The infant appellants ask a reversal of the judgment because section 126 of the Civil Code of Practice provides that the allegations of a petition against a defendant who is under any disability except coverture must be proved, though not traversed. The infant defendants, as shown by the record, were all under the age of 14 years when the judgment was rendered, and as it was necessary to prove the allegations of the petition, it follows that the judgment of the court was erroneous. *Dever v. Dever*, 44 S. W. 986, 19 Ky. Law Rep. 1988.

The judgment is reversed, for further proceedings in conformity to this opinion.

#### MORRIS v. MARTIN et al.

(Court of Appeals of Kentucky. Oct. 10, 1906.)

**PARTIES — DEFENDANTS — DEFENDING FOR CLASS.**

A motion that certain parties defend for the heirs of a certain decedent will be overruled where such persons are not shown to be among the heirs of the decedent.

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

Suit between J. B. Morris and J. T. Martin and other, and from the judgment the former appeals. Motion that certain appellees defend for the heirs of a decedent overruled.

J. P. Thompson, for appellant.

HOBSON, C. J. The amended statement is filed but the motion that the other appellees defend for the heirs of Eliza Nesbitt's overruled, there being nothing to show they are among the heirs at law of the de-

cedent. The rule is that an order will not be made for certain persons to defend for a class unless they are shown to belong to the class and are fairly representatives of it.

#### HALL et al. v. ROBERTS.

(Court of Appeals of Kentucky. Oct. 4, 1906.)

**NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—DILIGENCE.**

In a suit to quiet title the question of adverse possession was raised and litigated and evidence introduced on both sides by depositions. After plaintiff's depositions were taken, defendants took their proof and voluntarily submitted the case, and, after a judgment for plaintiff had been affirmed, sued to set aside the judgment and for a new trial for newly discovered cumulative evidence on such issue to be given by witnesses whose evidence could easily have been obtained before trial. *Held*, that defendants were guilty of a lack of diligence and that the action was properly dismissed.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 210-214.]

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action for new trial by Nancy A. Roberts against Daniel Hall and others. A judgment dismissing the petition was entered, and defendants appeal. Affirmed.

S. P. Stamper and Sutton & Hurst, for appellants. J. B. White, Wm. S. Pryor, and Hazelrigg, Chenault & Hazelrigg, for appellee.

HOBSON, C. J. On January 17, 1901, appellee, Nancy A. Roberts, instituted an action in equity against Daniel Hall and others, alleging that she was the owner of a certain boundary of land in Lee county, which she and those under whom she claimed had held by adverse possession for more than 26 years; that the defendants were destroying the timber on the land and setting up claim to it. She prayed that her title to the land be quieted and that the defendants be restrained from further cutting the timber. Issue was joined in the action, and on final hearing the circuit court adjudged the plaintiff the relief sought. The defendants appealed to this court. The judgment was affirmed. See *Hall v. Roberts*, 74 S. W. 199, 24 Ky. Law Rep. 2362. After the decision of that case, appellants, the defendants in that case, in June, 1903, brought this suit against her seeking to set aside the judgment and to obtain a new trial of the action on the ground of newly discovered evidence. They alleged that they could prove by Arch Brandenburg and Grant Smith that C. A. Jones under whom Mrs. Roberts held did not claim the land in controversy but attempted to buy it from Samuel Brandenburg under whom they claimed. They also alleged that they could prove by Daniel Brandenburg and Stephen Roach that neither Mrs. Roberts nor her vendor had ever been in possession of the land, and that all this evidence had

been discovered since the trial of the case. Issue was joined upon the petition, proof was taken, and on final hearing the court dismissed the petition. From this judgment the appeal before us is prosecuted.

The witness Arch Brandenburg is the son of Samuel Brandenburg, the main party in interest, and was also a defendant to the original action. The witness Grant Smith is his nephew. Daniel Brandenburg is also a kinsman and Roach is a neighbor. In fact, all these witnesses resided in the vicinity, and from all that appears the slightest diligence would have obtained their evidence in the original action. The question of adverse possession was litigated in that case. Evidence was given on the question on both sides by depositions. After the depositions for the plaintiff were taken and the defendants were apprised of just what evidence the plaintiff relied on in that action, they took their proof and voluntarily submitted the action for trial. The evidence which is now offered is purely cumulative. A litigant is never allowed to take his chances with the court on a part of his proof, and then, if he is beaten, ask a new trial on account of evidence, since discovered, which by ordinary diligence should have been discovered and produced on the trial. If this were so, there would be no end to litigation, and litigants would be encouraged to be careless in the preparation of their cases. It is incumbent upon the litigant to present his whole case to the court. He is not allowed to conclude that he can win the case with the proof he has, and voluntarily go into a trial, and then, if he is beaten, obtain a new trial because he had not obtained all the evidence which might have been had.

In addition to the witnesses named, the appellants took in this action the deposition of C. A. Jones, and proved by him that he had never claimed the land and was never in possession of it. But the appellants knew very well the importance of this evidence when they submitted their original action, and they should then have looked up Jones and obtained his deposition. There is nothing in this case to take it out of the familiar rule that a new trial will not be granted on account of the discovery of cumulative oral evidence on a point in issue and litigated in the original action.

Judgment affirmed.

#### BRITTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 4, 1906.)

##### 1. INDICTMENT—COUNTS—ELECTION.

Where an indictment contained two counts, one charging that defendant shot and wounded C., and the other alleging that C. was shot and wounded by other persons, and that accused was present aiding, abetting, counseling, and advising them when the shots were fired, the indictment charged but a single offense, so that it was not error for the court to refuse to com-

pel the state to elect on which it would rely for a conviction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 438-444.]

##### 2. CRIMINAL LAW—VENUE.

Where deceased was shot and fatally wounded in B. county and the same day he was conveyed to F. county, where he died on the following day from the effects of his wounds, accused was properly prosecuted for the homicide in F. county.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 230.]

##### 3. WITNESSES—CREDIBILITY—OTHER OFFENSES.

Civ. Code Prac. § 597, declares that a witness may be impeached by evidence as to his general reputation for untruthfulness or immorality, but not by evidence of particular wrongful acts, except that it may be shown that he has been convicted of a felony. *Held*, that the credibility of accused in a prosecution for murder as a witness in his own behalf could not be affected by evidence that he had previously killed a man in another state and had fled to Kentucky before his arrest.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1125-1127.]

##### 4. CRIMINAL LAW—APPEAL—PREJUDICE—CURING ERROR.

Such evidence was prejudicial to accused, within Cr. Code Prac. § 340, providing that a conviction shall be reversed for any error of law appearing on the record, when, on consideration of the whole case, the court is satisfied that the substantial rights of defendant have been prejudiced, though the court admonished the jury that such evidence should only be considered by them for the purpose of affecting defendant's credibility as a witness.

Appeal from Circuit Court, Fayette County.

"To be officially reported."

William Britton was convicted of murder, and he appeals. Reversed.

Chas. W. Miller and Pollard & Redwine, for appellant. Byrd & Jouett, C. J. Bronston, N. B. Hays, and C. H. Morris, for appellee.

CARROLL, C. On a July afternoon in 1902, James Cockrill, while standing on the main street of the town of Jackson, in Breathitt county, was shot and fatally wounded. The same afternoon he was conveyed from Jackson to the city of Lexington, in Fayette county, where he died on the following day from the effects of the wounds. The fatal shots were fired from a window in the second story of the courthouse. In 1904, the grand jury of Fayette county returned an indictment against the appellant, charging him with the murder of Cockrill. The indictment contains two counts. The first count charges appellant with willfully, feloniously, and maliciously shooting at and wounding Cockrill, from the effects of which shooting and wounding he died. The second count charges the appellant with having entered into a conspiracy with one Curtis Jett and others unknown to the grand jury, the purpose of which conspiracy was

to murder Cockrill, and while said conspiracy existed, pursuant to and as a result of same, the said Jett and others unknown to the grand jury did willfully, feloniously, and maliciously murder said Cockrill, and further charges that the appellant, who was at said time a member of said conspiracy, and while same existed, and pursuant to same, was present and conveniently near at the time of said shooting and wounding, and did unlawfully, willfully, feloniously, and with malice aforethought, aid, abet, counsel, advise, and encourage said Jett and others to do said shooting.

Under this indictment, the appellant was tried in Fayette county, and his punishment fixed by the jury at imprisonment for life. From a judgment on this verdict he prosecutes this appeal, and urges as grounds for reversal the following alleged errors: First, the refusal of the court to require the commonwealth to elect which charge in the indictment it would prosecute; second, misconduct of the commonwealth's attorney in arguing the case; third, the grand jury of Fayette county had no jurisdiction of the offense; fourth, that the verdict is contrary to the evidence; fifth, that incompetent evidence was allowed to go to the jury.

The court properly refused to require the commonwealth to elect upon which count in the indictment it would prosecute the appellant. The indictment only charges a single offense, because, if appellant himself shot and wounded Cockrill, or if he was shot and wounded by other persons, and appellant was present, aiding, abetting, counseling and advising the persons who fired the fatal shots, he was equally guilty of the murder of Cockrill; and the commonwealth had the right to describe the offense in two counts. *Cupp v. Com.*, 87 Ky. 35, 7 S. W. 405; *Howard v. Com.*, 110 Ky. 356, 61 S. W. 756. That Fayette county had jurisdiction of the offense is fully settled by the opinions of this court in *Commonwealth v. Jones*, 82 S. W. 643, 26 Ky. Law Rep. 867; *Hargis v. Parker*, 85 S. W. 704, 27 Ky. Law Rep. 441.

In view of the fact that this case must be reversed, we refrain from discussing the evidence or expressing any opinion concerning it, except to say that it was amply sufficient to authorize a submission of the case to the jury; and this court has frequently held that, where there is any evidence to sustain the verdict, it will not be disturbed, because it may appear to be contrary to the weight of the evidence.

In respect to the admission of incompetent evidence prejudicial to appellant, the record shows that the following took place during the examination of the accused: "Q. Why did you leave Virginia? A. Well, I came out for one reason to see my kin-folks. Q. Well, that is one reason. Give

us a second. A. I got into a little trouble there. Q. What kind of trouble? A. Killed a fellow. Q. How long after that occurred did you leave Virginia? A. How soon after the killing? Q. Yes. A. Well, about nine months after the killing. Q. Where had you remained during that time? A. Right there in the county where I was raised. Q. Had you been indicted for it? A. Yes, sir. Q. Do you remember, had you appeared to answer that indictment? A. No, sir, I had not. Q. How long before you left had the indictment been made? A. Why, it was a short time after the killing. Q. And why hadn't you appeared to answer the charge? A. Well, I wasn't ready for trial at that time. Q. That was the reason you didn't appear? A. Yes, sir. Q. Did you come to Kentucky to get ready? A. No, sir. Q. You answered me that you hadn't appeared to answer that indictment because you weren't ready? A. No, the reason I didn't there was right smart excitement over the killing. Q. Over that killing? A. Yes, sir. Q. Did you hide out? A. No, sir; I stayed around with my friends in the country around. Q. Around with your friends? A. Yes, sir. Q. Was the sheriff hunting for you? A. If he did, I didn't know it. Q. He never found you? A. No, sir. Q. Was there anything else that caused you to leave Virginia? A. No, sir. Q. Wasn't there any other charge against you? A. No, sir. Q. Are you sure of that? A. There was no other charge against me that I know of. Q. Were you not charged with killing a man? A. No, sir." All of this evidence was properly excepted and objected to by appellant, and, upon its conclusion, the court said to the jury that the evidence of this witness, either to the effect that he did kill a man in Virginia, or that he left there because he had killed a man, was permitted to be introduced solely for the purpose of affecting his credibility, if it did affect it, and for no other purpose; and the jury were instructed to let it have no other effect upon their minds, if it had that effect.

Section 597 of the Civil Code of Practice, which applies to criminal as well as civil cases, provides that: "A witness may be impeached by the party against whom he is produced \* \* \* by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony." This section of the Code has been construed in a number of cases; and, in accordance with its provisions, it has been held in *Farmer v. Com.*, 91 S. W. 682, 28 Ky. Law Rep. 1169; *Henderson v. Com.*, 91 S. W. 1141, 28 Ky. Law Rep. 1212; *Wilson v. Com.*, 64 S. W. 457, 23 Ky. Law Rep. 1044—that it is competent to show by a witness

that he has been convicted of a felony, but it is not competent to show any particular wrongful act that the witness has been guilty of, or that he has been indicted for an offense. To illustrate: In *Welch v. Com.*, 110 Ky. 105, 60 S. W. 185, 948, 1118, 63 S. W. 984, 64 S. W. 262, *Commonwealth v. Welch*, 111 Ky. 530, 63 S. W. 602, the question of the competency of evidence of this character was elaborately investigated, and it was held reversible error to allow the commonwealth to prove by a deputy sheriff that he had a warrant for the arrest of an important witness for the accused who had testified in his behalf, charging him with detaining a female with intent to have carnal knowledge of her. That case was before this court three times for the consideration of this single question, and instructive opinions concerning it will be found in 110 and 111 Ky., 60 S. W., 63 S. W., 64 S. W. In *Howard v. Com.*, 110 Ky. 357, 61 S. W. 736, it was held reversible error to inquire of him about his indictment for killing one George Baker, and Judge Hobson, in his dissenting opinion, said: "I concur in the opinion of the court in a reversal of the judgment in this case, on the ground that the particulars of the shooting of Baker by appellant should not have been admitted in evidence. Appellant cannot be convicted in this case because he may have committed another crime of like character; and proof that he had done so, or such an impression, might seriously prejudice him before the jury, who might consider that such proof shows that he was a character of person who would commit such a deed as that charged here." In *Pennington v. Com.*, 51 S. W. 818, 21 Ky. Law Rep. 542, the court held that it was incompetent to ask the accused concerning any offense for which he had been indicted. The rule announced in these cases is the settled law in this state, and evidence of particular wrongful acts is not competent, with the single exception that it may be shown that the witness has been convicted of a felony. It is also well established that the rules of evidence applicable to witnesses generally govern the examination of the defendant when he takes the stand in his own behalf. *Burdette v. Com.*, 93 Ky. 76, 18 S. W. 1011; *Saylor v. Com.*, 97 Ky. 184, 30 S. W. 987.

Counsel for appellee do not insist that this evidence was competent, but they say that it was not prejudicial to the substantial rights of the accused, because the evidence in the record is conclusive of his guilt. Section 340 of the Criminal Code of Practice provides that "a judgment of conviction shall be reversed for any error of law appearing on the record, when upon consideration of the whole case the court is satisfied that the substantial rights of the defendant have been prejudiced thereby." Under this provision, it is not every error, however patent it may be, that will authorize a reversal. In hotly

contested cases, technical errors will creep into the record in spite of the vigilance of the court, and the efforts of counsel to exclude them; but, unless the error is such as violates some constitutional guaranty of the accused, or it appears from an investigation of the entire record that his substantial rights have been prejudiced, it will not avail him in this court. The question then narrows down to whether or not this evidence was prejudicial to the substantial rights of the accused. The accused was on trial for the murder of a man in Kentucky. There was evidence introduced in his behalf tending to show that he was not guilty of this crime, and also evidence conducing to show his guilt. In view of this conflict in the testimony, it cannot be doubted that the admission of the evidence showing that he had killed a man in another state, and had fled from that state to escape a trial for the crime, was highly prejudicial. The commission of the murder in Virginia threw no light upon the crime for which he was being tried. It had no connection whatever with it, remotely or indirectly. The only possible effect it could have on the minds of the jury was to prejudice them against the accused, in convincing them by his own admission that he had previously killed a man; nor did the admonition of the court to the jury cure this error.

It is also urged that the attorney for the commonwealth, in his closing argument, indulged in improper comments and remarks. The improper argument complained of was a comment upon the incompetent evidence admitted. If the evidence had been competent, his remarks would not have been improper, but, as the evidence was incompetent, his remarks were improper.

For the error in the admission of this evidence, the judgment of the lower court must be reversed, with directions for a new trial in conformity to this opinion.

#### LEXINGTON RY. CO. v. HERRING.

(Court of Appeals of Kentucky. Sept. 27, 1906.)

##### 1. APPEAL—VERDICT—CONFLICTING EVIDENCE.

A verdict will not be interfered with on appeal, unless it is palpably against the evidence.

##### 2. CARRIERS—INJURY TO PASSENGER—EVIDENCE—CHARACTER—CONTRIBUTORY NEGLIGENCE.

Where, in an action for injuries to a street car passenger, defendant claimed that she attempted to get on the car while in motion, evidence that plaintiff had been frequently seen to get off and on street cars while in motion was inadmissible.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1302½, 1400; vol. 20, Cent. Dig. Evidence, § 414½; vol. 37, Cent. Dig. Negligence, § 263.]

##### 3. SAME—INJURIES TO PASSENGERS—ACTIONS—EVIDENCE.

Where, in an action for injuries to a street car passenger while attempting to board a car at a point other than that marked for the stop-

ping of cars, whether the car in fact stopped to permit plaintiff to get aboard was disputed, evidence that defendant's cars stopped at points on the line other than the place indicated by a sign in question was admissible.

#### 4. SAME.

Where, in an action for injuries to a street car passenger while attempting to board a car at a point other than that marked as a stopping place by a sign, plaintiff claimed that the car stopped to receive her as a passenger which was denied, evidence concerning the propriety and necessity of stopping defendant's cars at regular stopping places indicated by signs was inadmissible.

#### 5. TRIAL—INSTRUCTIONS—REFUSAL.

Where, in an action for injuries to a passenger by the sudden starting of a car as she was attempting to board the same, the instructions given clearly presented the only issue in the case, which was whether the car did or did not stop to receive plaintiff as a passenger, it was not error for the court to refuse to charge that defendant's liability would attach only in the event its employees in charge of the car started the same when they knew that plaintiff was endeavoring to board it.

#### 6. CARRIERS—INJURY TO PASSENGER—COMMENCEMENT OF RELATION.

A carrier owes no duty whatever to a person intending to become a passenger, until she has become a passenger by either getting on, or attempting to get on, the car after it has stopped for the purpose of permitting her to board it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 984–993, 973.]

#### 7. SAME—CONTRIBUTORY NEGLIGENCE.

It is in general not negligence per se for a passenger to attempt to board or alight from a moving street car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1386.]

#### 8. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, an instruction that plaintiff, if entitled to recover, should receive such sum as should fairly compensate her for her injury, and that, in estimating the injury done, the jury should allow plaintiff compensation for any pain suffered by her, mental and physical, and any further sum which would fairly compensate her for the loss of her foot, was erroneous; the jury being confined to such a sum as would fairly compensate plaintiff for the value of time lost, for reasonable expenses incurred, for physical and mental suffering caused by the injury, and for any reduction of her power to earn money.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 222–229.]

Appeal from Circuit Court, Fayette County.  
"Not to be officially reported."

Action by Allee Herring against the Lexington Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Stoll & Bush, R. C. Stoll, Morton, Webb & Wilson, and Allen & Duncan, for appellant. C. J. Bronston and Wallace Muir, for appellee.

**CARROLL, C.** The appellee, a young lady living in Lexington, brought this action against the appellant to recover damages for personal injuries sustained by her, and caused, as she alleged, by the sudden starting of a car that she was in the act of getting on. The injury sustained by appellee resulted in

the loss of one foot, and there is no serious complaint about the amount of the verdict in her favor, which was for \$7,000, if she was entitled to recover at all.

The appellant has a double-track line of road, running out of South Broadway, and it crosses Water, Vine, and High streets in the order named, and passes on, crossing other streets to the southern limits of the city. There is a gradual ascent beginning at Water street and continuing to a point about 179 feet beyond High street, and at this point, which may be called the top of the grade, appellant had posted at the time of the injury a sign "cars stop here." About 10 o'clock in the evening of October 10, 1903, the appellee and her mother and sister walked on High street to Broadway, and started south on Broadway toward her home. For the purpose of getting on the car that was coming up the grade and going south on Broadway, appellee walked out in the middle of the street, and continued to walk south on Broadway until she reached a point a short distance south of High street, but not opposite the sign. When she arrived at this point the car going south came up to where she was, and, as she testified, stopped. She then placed her right foot on the running board of the car, near the middle, and, while in the act of raising her hands to seize the handle bar of the car in order to lift herself up to a seat on the car, it suddenly started, and she was thrown to the ground; the rear wheel of the car passing over her left foot. The main question, as manifested by the record, is whether or not the car stopped. Both sides directed all their evidence to this issue. Four witnesses, including appellee, testified that the car did stop. Eight witnesses for appellant, including the motorman, conductor, and inspector, of the company, testified that the car did not stop. The witnesses who testified on this point were all in such position that they could see whether or not the car stopped. Appellee's theory is that the car stopped for the purpose of permitting her to get on, and that, while in the act of getting on, it suddenly started. Appellant's theory is that the car did not stop, and that appellee was injured by her own negligence in attempting to board the car while it was in motion.

Counsel for appellant concede that there was sufficient evidence to take the case to the jury; but they earnestly insist that the verdict is flagrantly against the evidence, and that the trial court for this reason should have granted a new trial, and that this court should reverse the case and order a retrial. The evidence for appellant and appellee upon the controlling question is directly and sharply in conflict. Four witnesses testified to one state of fact, and eight witnesses to another; and it is insisted that, aside from the number of witnesses who testified, the car did not stop; that their opportunity of knowing whether it stopped or not was so much greater than that of the witnesses for appellee

that the verdict cannot be sustained; and that the jury, influenced by their sympathy for the misfortune of the appellee, disregarded the testimony. The purpose of jury trials in controverted questions of fact is to get the judgment of 12 impartial men selected for the purpose by both parties to the litigation. These triors of facts see the witnesses, observe their manner of testifying, notice their demeanor on the witness stand. In their presence witnesses are subject to a rigid examination, every competent detail within their knowledge is produced, they have a perfect right in the exercise of the power vested in them to disregard all or any part of the testimony of any witness, to accept as true all that other witnesses state. They have the right to weigh and consider the evidence, and to arrive in their own way at a conclusion concerning it. It is entirely proper that the courts and judges should be reluctant to disturb the findings of a jury upon a question of fact. Juries are clearly as competent and well qualified in ordinary cases to determine correctly simple questions of fact as are judges, and the average judgment of 12 good men—or 9, if less than the whole jury make the verdict—is not a thing to be lightly set aside. In giving deference to the conclusion arrived at by a jury, the judge does not surrender any of his power, or lessen in any degree the importance of his office. He simply yields his opinion to that of the men whom the parties have selected to ascertain the truth as it falls from the lips of the witnesses. If the judge was so authorized, and undertook to set aside the verdict of a jury in every case where it did not comport with his conclusion, trial by jury would be a mockery, and the opinion of the court would be substituted for that of a tribunal established by law for the purpose of arriving at the facts. There are, of course, cases in which juries are so carried away by either sympathy or passion or prejudice, that they lose sight of the testimony, and the weight it is entitled to, and base their conclusion upon their personal conviction of the right or wrong of the case. When this condition of affairs presents itself, the courts do not hesitate to interfere; but the mere fact that a great number of witnesses are introduced to prove a certain state of facts, and a lesser number to disprove it, is not sufficient to authorize a court to disturb the conclusion reached by the jury. The rule that a verdict of a properly instructed jury will not be interfered with, unless it is palpably and flagrantly against the evidence, is as firmly fixed in the jurisprudence of this state as any principle of law resting on judicial deliverance can be, and has been announced in repeated decisions of this court, beginning with its earliest history. *Outen v. Merrill*, 2 Litt. 305; *Hughes v. McGee*, 1 A. K. Marsh. 29; *L. & N. R. Co. v. Graves' Assignee*, 78 Ky. 74; *Standard Oil Co. v. Eiler*, 61 S. W. 8, 22 Ky. Law Rep. 1643; *Thomson v. Thomson*,

93 Ky. 437, 20 S. W. 373; *Young v. Young*, 39 S. W. 23, 19 Ky. Law Rep. 51. In obedience to this uniform ruling by this court, the trial judge properly declined to set the verdict of the jury aside.

Appellant offered to prove by a number of witnesses, including appellee, that they had frequently seen appellee getting on and off street cars while in motion. The court rejected this evidence, and of this ruling the appellant complains. Whether it is competent or not in the trial of negligence cases to prove the personal habits of a party, the authorities are conflicting. Our attention has been called to several cases, decided by courts of other states, holding such evidence competent. *Wigmore*, in his work on Evidence (section 199), says that: "In a few jurisdictions the character of a defendant or of an employé or of a plaintiff for negligence or prudence may be used to show that he probably was not, or was, careful on a given occasion." And, in stating the objection to the admission of this testimony, he says: "The reason of unfair surprise is also applicable; for the party charged cannot even guess the time, place, and occasion that may be predicated for his supposed act, and has no means of showing the testimony to be fabricated. The reason of confusion of issues always operates, for disputes over carelessness would soon obscure the main issue. Add to this that a careless act or two may be done by the most prudent person, and that particular instances, unless repeated and emphatic, throw little light on the general disposition. For these reasons almost all courts exclude such testimony." *Greenleaf*, in his work on Evidence (volume 1, § 14), says: "Because of the usual slight probative value of the party's character and of its confusion of issues of little purpose, and for other reasons variously stated by different judges, not easy to disentangle or define, it has come to be generally accepted that the character of a party in a civil case cannot be looked to as evidence that he did or did not do an act charged. It is sometimes said that there is an exception where an act of negligence is in issue, and there were no eyewitnesses to the occurrence, and that here the person's character for negligence or prudence is admissible; but this exception does not generally prevail."

This court, in *L. & N. R. Co. v. Berry*, 88 Ky. 223, 10 S. W. 472, 21 Am. St. Rep. 329, which was an action for negligence, and an effort on the part of the railroad company to prove previous similar acts showing contributory negligence on the part of *Berry*, in discussing this question, said: "The appellant, in making out its defense, insisted on proving by the appellee and others that he was in the habit of jumping on the cars when they stopped at the station, and had been warned of the danger, and hence the jury had the right to infer that it was the boy's negligence that caused the injury, and



not the defect in the platform. If the habit of the boy had been established as appellant offered to prove, it would not have authorized the jury to say that he was stealing a ride on the cars, and in getting off caused the injury. That he was at this particular spot, and was injured by reason of the defective and rotten plank, is sworn to positively by the boy, and the statement is corroborated by circumstances that are convincing, and the mere fact that he had been in the habit of exposing himself to danger on former occasions, or had theretofore placed himself in a position where he might have been injured in the same manner, was not only insufficient to contradict the testimony on that subject offered by plaintiff, but was incompetent for any purpose. Neither the boy's habit nor his bad character constituted a defense to a recovery." In *C. & O. R. Co. v. Riddle's*, Adm'x, 72 S. W. 22, 24 Ky. Law Rep. 1687, in an action for negligence resulting in the death of Riddle, evidence was introduced by plaintiff to show that the decedent was a sober man. In discussing the competency of this evidence, this court said: "We do not think it was competent for appellee to introduce any evidence tending to show the general reputation of her decedent for sobriety. This evidence would not meet or elucidate the question as to whether or not the decedent was sober at the time he was killed, as a man may generally keep sober, and yet at some particular time in his life be drunk or under the influence of whisky." These cases are directly in point, and the reason of the rule in rejecting, in cases of this character, evidence of the plaintiffs' habits is supported by both reason and authority. Nearly every person is at times guilty of some negligent act, and frequently a person prompted by entirely different motives and moved by dissimilar influences will do the same thing, and, if evidence of previous similar acts was admitted, the plaintiff should be permitted to explain, if possible, the reasons or the motives prompting him to do each particular act. This would inject into the trial of the case numerous collateral and irrelevant issues and would result in, not only confusing the mind of the jury, but in diverting their attention from the issues presented by the pleadings that they were called on to try. Therefore the lower court properly excluded this evidence.

Appellee was permitted to prove that the cars of the appellant stopped at points on this line other than the place indicated by the sign before mentioned. This evidence was competent to illustrate the fact that appellant had different places at which its cars stopped for patrons to get on and off. Railroad companies have stations at which their trains make regular stops, and there are also points on the road at which there are no stations where they stop for passengers; and if the company authorizes or permits its employees

in charge of its trains, or cars, to stop them at other points than those designated on its time-tables or schedule, it is competent to prove the fact, in cases where the evidence throws light on the subject of the investigation; the principal question in this case being whether or not the car stopped at the point where appellee attempted to get on. It was entirely competent and pertinent to the issue to permit evidence showing that appellant's cars did stop at this point: The refusal of the court to permit appellant to prove the propriety and necessity of stopping the cars at regular stopping places, indicated by the sign, was not prejudicial, nor was this evidence relevant to the issue.

Counsel for appellant earnestly insist that the court erred in giving to the jury instruction No. 1. Aside from the instruction defining the measure of damages, the court gave to the jury only two instructions: "(1) If the jury believe from the evidence that the defendant's car was stopped, and that after it was stopped, and while said plaintiff, Allee Herring, was attempting to get on said car, said car was put in motion, and said Herring by reason of said motion fell from said car, the jury should find for the plaintiff. (2) The jury should find for the defendant, unless the jury believe from the evidence that the defendant's car was stopped, and that after it was stopped, and while the plaintiff, Allee Herring, was attempting to get on said car, said car was put in motion, and by reason of said motion said Allee Herring fell from said car." And complained that the court refused to give the following instruction asked by it: "Before the jury can find for the plaintiff, they must believe from the evidence that the defendant's car had stopped, and while stationary plaintiff attempted to board the same, and before the plaintiff could secure a seat in said car, or safely board the same, the employees of defendant in charge of said car suddenly started the same, knowing that the plaintiff was endeavoring to board the car, and by reason thereof the plaintiff was thrown to the ground and received her injuries." The only substantial difference between the instructions given and refused is that, in instruction No. 1 that was refused, the liability of appellant only attached in the event its employees in charge of the car started the same when they knew that the plaintiff was endeavoring to board the car. The instruction given to the jury presented with admirable brevity and clearness the only issue in the case, which was whether the car did, or did not, stop. If it did stop, it is very evident that it stopped for the purpose of letting the appellant get on, and, in starting before she got on, appellant was guilty of actionable negligence. If the car did not stop, then appellee in attempting to board it was guilty of such contributory negligence as to defeat a recovery on her part. The

instruction presented squarely and sharply to the jury the issue tried out by the parties and made by the pleadings. It is true, as urged by counsel, that under the facts of this case appellant owed no duty whatever to appellee until she had become a passenger by either getting on, or attempting to get on, the car after it had stopped for the purpose of permitting her to board it. Although, generally, and under the rule announced and followed by this court in many cases, it is not negligence per se to attempt to get on or off a moving car, the rule is that a question of negligence in such cases is one of fact for the jury. *Dasle Ford v. Paducah City Ry.*, 96 S. W. 441, 29 Ky. L. R. 752. But this general rule has no application to this case because of the issue made by the parties, which, we repeat, was whether or not the car stopped.

Counsel also complain of error in the instruction fixing the measure of damage. This instruction reads as follows: "If the jury find for the plaintiff, they should find for her in such sum in damages, not exceeding \$20,000, as will fairly compensate the plaintiff for any injury done her by reason of her fall from said car. In estimating the injury done the plaintiff, if the jury find for the plaintiff, the jury should allow the plaintiff compensation for any pain suffered by her, mental and physical, and such further sum as will fairly compensate her for the loss of her foot." In *L. & N. R. Co. v. Logsdon*, 114 Ky. 746, 71 S. W. 905, *South Covington & Cincinnati R. Co. v. Nelson*, 89 S. W. 200, 28 Ky. Law Rep. 287, *L. & N. R. Co. v. Hall*, 115 Ky. 579, 74 S. W. 280, and in many other cases decided by this court, an instruction similar to the one given in this case has been disapproved, and it was held that the jury should have been instructed that, in estimating the damage plaintiff was entitled to recover, they were confined to such a sum as would fairly compensate her for the value of time lost, reasonable expense incurred, and for physical and mental suffering caused by the injury, and for any reduction of her power to earn money. In obedience to the rule announced by this court, and adhered to in many cases, defining the character of instruction that should be given in cases for personal injuries where death does not ensue, we feel constrained to reverse this judgment for the error of the lower court in giving this instruction.

Judgment reversed.

#### **SOUTH COVINGTON & C. ST. RY. CO. v. CORE.**

(Court of Appeals of Kentucky. Oct. 3, 1906.)

#### **1. APPEAL—VERDICT—CONFLICTING EVIDENCE—REVIEW.**

Where there was a conflict of evidence on practically all the controverted points in a case, a judgment for plaintiff would not be reversed

for the reason that the verdict was contrary to the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3935.]

#### **2. CARRIERS—STREET CARS—INJURIES TO PASSENGER—TIME TO ALIGHT—STOPPING PLACES.**

Where the servants of a street car company in charge of a car, saw plaintiff in the act of alighting when the car had stopped at a switch, it was their duty not to start the car until plaintiff alighted in safety, though a regular stopping place had been established only a short distance further on.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1224, 1223, 1228½.]

#### **3. SAME—CONTRIBUTORY NEGLIGENCE.**

Where a passenger, on the stopping of a street car at a switch, left her seat intending to alight, but before she reached the platform or steps for that purpose the car was again in motion, and she persisted in getting off while the car was in motion, and was injured, she was guilty of contributory negligence, precluding a recovery, unless the peril in which she placed herself was known to those in charge of the car, and they might have stopped it in time to have prevented her injuries.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1385, 1391, 1393.]

#### **4. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS—NERVOUS SHOCK.**

In an action for personal injuries, an instruction that, in estimating the damages, the jury may consider plaintiff's physical pain and mental anguish suffered in the past and which will probably be suffered in the future, and any disability, partial or permanent, in plaintiff's right arm, and expenses incurred for medical attendance and nursing, also the nervous shock occasioned by the injury, was erroneous in allowing for pain and mental anguish and also for nervous shock; but the jury should have been instructed to allow such sum as would reasonably compensate her for physical and mental suffering endured, or which she will probably endure, for loss of time, reasonable expenses, and for the permanent impairment of her ability to earn money, that may have been caused by the negligence of defendants, not to exceed the amount claimed in the petition.

#### **5. APPEAL—ERRONEOUS INSTRUCTIONS—NECESSITY OF REQUEST—RIGHT TO OBJECT.**

Where an instruction given on the measure of damages was incorrect, the fact that defendant did not request an instruction on such subject did not deprive it of the right to object to such instruction on appeal.

#### **6. TRIAL—INSTRUCTIONS—DUTY OF COURT.**

Though a trial judge is required by Civ. Code Prac. § 317, subsec. 5, only to give instructions when asked by the parties, if unasked he undertakes to do so, it is his duty to see that the instructions given are correct.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 627-641.]

#### **7. SAME.**

Where an instruction is offered by either party which is defective in form or substance, the court should prepare or direct the preparation of a proper instruction on the point covered by the instruction requested.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 671.]

#### **8. WITNESSES—EVIDENCE—ADMISSIBILITY—REBUTTAL.**

Plaintiff, after being injured while alighting from a street car, was taken to the store of K., and defendant, in an action for her injuries, proved by certain witnesses that they went into the store while plaintiff was there, and that she made to them or in their presence

certain statements that her injuries were caused by her own negligence in stepping from a moving car. *Held*, that evidence of K. that he did not hear plaintiff make such statements, but that he did hear her say she was attempting to get off the car when it was starting again, was admissible in rebuttal.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1276.]

#### 9. EVIDENCE—CONCLUSIONS.

In an action for injuries, a witness was asked if he heard plaintiff make certain statements attributed to her by witnesses for defendant, in a certain store. He answered that he did not, but did hear her say she was attempting to get off the car when it started again, "that would indicate that the car had stopped." *Held*, that the part of the answer quoted was objectionable as a conclusion of the witness, and was not responsive.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2150.]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Ella M. Core against the South Covington & Cincinnati Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

L. J. Crawford, for appellant. Thos. L. Michle and Greene & Van Winkle, for appellee.

SETTLE, J. Appellant complains of a verdict and judgment of \$7,500, damages recovered against it in the court below by appellee for injuries to her person, caused, as alleged in the petition, by the negligence of its employes in suddenly, and without notice to her, starting in motion an electric street car from which she was at the time in the act of alighting; the car having first been stopped to enable her and other passengers to leave it, but again put in motion before she had time or opportunity to do so, thereby making her fall to the street and sustain, in addition to other wounds, a fracture of the bones of her right shoulder, which caused her great physical and mental suffering, crippled the shoulder, and resulted in the permanent impairment of its use, and that of the arm. The answer denied the affirmative matter of the petition, and pleaded contributory negligence on the part of appellee, which was controverted by reply. A reversal of the judgment is asked by appellant upon the three grounds relied on in the circuit court for a new trial, viz., error in the instructions, the admission of incompetent evidence, and that the amount of the verdict is excessive.

According to the evidence, appellee entered appellant's car near her home in a suburb of Newport, to go to Cincinnati, and her injuries were received in the latter city, on Fourth street near its intersection with Walnut. It further appears from the evidence that the regular stopping place of this car for receiving and letting off passengers is on Walnut street, in front of the Mercantile Library building, which is only a short distance

from where appellee was injured. At the place of the injury, and before entering Walnut street, the car is always changed to another track which requires a brief stop to open the switch and change the trolley. When the car stops at the switch passengers frequently get off there, instead of riding the short intervening distance to the regular stopping place of the car. This custom of alighting at the switch was, according to the evidence, known to appellant's employes in charge of the car. When the car upon which appellee was a passenger stopped on Fourth street to change the switch and trolley, about 10 of its passengers, including appellee and her husband, alighted from it; appellee being among the last to do so. According to her testimony, and that of her witnesses, when she reached the last step of the platform of the car, and was in the act of stepping to the street, it was suddenly started by the motorman, which caused her to so lose her equilibrium that she could not regain it after reaching the street, but fell and thereby received the injuries to her shoulder. It is conceded by appellant's counsel that appellee fell in alighting from the car, but insisted that she did so because she got off at a point where passengers were not expected or allowed to alight, and when the car was in motion, in doing which she was guilty of negligence, which was the sole cause of her injuries. This contention finds support from much of the evidence introduced by appellant, while that of appellee supports her theory of how they were received. But all the witnesses agreed that the car did stop, and was accustomed to stop, at the place where she was hurt, indeed, that it was compelled to do so for the opening of the switch and transfer of the trolley in changing the car to the Walnut street track. As to whether it started when she was in the act of alighting, or without allowing time for appellee to get off in safety, and whether it was the usual or a proper place for passengers to alight from the car, there was a contrariety of testimony; but these questions, as was that of whether appellee was at the time guilty of contributory negligence, went to the jury under proper instructions. As there was conflicting evidence on practically all controverted points, appellant's claim that the verdict is contrary to the evidence is without support. The fact that appellant for its own convenience, or that of the public, had established a regular stopping place only a short distance away on Walnut street, where persons were expected to get on and off its cars, did not render incompetent the evidence introduced by appellee that they were also accustomed to get on or off the car at the switch, and that such a custom was known to, and allowed by, appellant; but though such were not the custom, if appellant's servants in charge of the car saw appellee in the act of alighting therefrom when it stopped at the

switch, it was their duty to see that the car was not permitted to start until she reached the street in safety, and if they failed to perform such duty, and thereby caused appellee's injuries, this was negligence, for which appellant is responsible in damages. On the other hand, though appellee, upon the stopping of the car, at the switch, may have left her seat therein intending to get off, if, when she reached the platform or steps for that purpose, the car was again in motion, and she nevertheless persisted in getting off while it was still in motion, and in that way was injured, the jury would have been authorized to find that her injuries resulted from her own negligence, unless the peril in which she placed herself by thus attempting to alight while the car was in motion was known to those in charge of the car, and they might have stopped it in time to have prevented her injuries.

Seven instructions were given by the trial judge. Objection was made by appellant to all of them, and its counsel yet insists that they do not correctly present the law of the case, though instruction No. 6 is the only one subjected to serious criticism. Our examination of the instructions leads to the conclusion that all, save No. 6, are free from prejudicial error. While the phraseology of several of the others might be improved, they do not, as contended, predicate appellee's right to recover upon a state of case at variance with the issues formed by the pleadings, but in substance and meaning conform to both the issues and proof. Instruction 6, which undertakes to define the measure of damages, is clearly erroneous. It is as follows: "The court instructs the jury, if they find for the plaintiff, that, in estimating the amount of her damages, they may take into consideration her physical pain and mental anguish which she has suffered in the past, and which she will probably suffer in the future, if any such has been proved; and also her disability, whether partial or permanent, to use her right arm, if any such has been proved; and also her expense incurred in and about her endeavor to be cured of her injuries, for medical attention and for nursing, not to exceed the amount claimed in her petition for such expenses, that is to say, the sum of \$1,000, if such has been proved; also the nervous and physical shock caused the plaintiff by her injuries, if such has been proved—in all not to exceed the sum of \$2,000, the amount claimed in her petition." An instruction similar to this one was condemned by this court in the following cases: *L. & N. R. R. Co. v. Logsdon*, 114 Ky. 746, 71 S. W. 905; *L. & N. R. Co. v. Hall*, 115 Ky. 579, 74 S. W. 280; *Covington & Cincinnati R. R. Co. v. Nelson*, 89 S. W. 200, 28 Ky. Law Rep. 237; *Lexington Ry. Co. v. Herring*, 96 S. W. 558, 29 Ky. Law Rep. 704, and other cases. As in *Covington & Cincinnati Railway Co. v. Nelson*, supra, instruction 6 authorized the jury in arriving at

a verdict to allow appellee damages for the nervous and physical shock, caused by her injuries, in addition to what they might give for physical and mental suffering and permanent disability, when the nervous and physical shock, if any, must be considered under one or both of these heads, and not as an independent element of damage. The instruction as to the measure of damages should have told the jury that, if they found for appellee, they should allow her such a sum in damages as they might believe from the evidence would reasonably compensate her for the physical and mental sufferings endured by her, or which it is reasonably certain she will endure, for loss of time, if any, the reasonable expense, if any, incurred in effecting her cure, and for the permanent impairment, if any, of her ability to earn money, that may have been caused by the negligence, if any, of appellant's employes, as predicated in the instructions; but the damages altogether should not exceed \$20,000, the amount claimed in the petition.

It is argued by counsel for appellee that, as appellant's counsel did not ask an instruction on the measure of damages, it cannot complain of the one given on that question, however erroneous this court may find it to be. We think this contention unsound. While section 317, subsec. 5, Civ. Code Prac., only requires a trial judge to give instructions if asked by the parties, it has been held by this court that if, unasked, he undertakes to do so, it is his duty to see that the instructions given are correct. Furthermore, it has also been held that, if an instruction is offered by either party which is defective in form or substance, the court "should prepare, or direct the preparation of, a proper instruction on this point." *L. & N. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233; *Swope v. Schafer*, 4 S. W. 300, 9 Ky. Law Rep. 160. This court has also held in many cases that the appellant cannot complain upon appeal of the failure of the trial court to give an instruction which was not asked by him in that court. *C. & N. O. & T. P. R. R. Co. v. Curd*, 60 S. W. 207, 22 Ky. Law Rep. 1222; *Owens v. Trotter*, 1 Bibb, 159; *Newport Street Ry. Co. v. Johnson*, 2 Ky. Law Rep. 225; *L. & N. R. Co. v. Bullins*, 15 Ky. Law Rep. 752. But this rule does not apply to an erroneous instruction, given on the court's own motion or that of the opposite party, over the objection of the party complaining of same, for in such case it is the duty of the court to "prepare or direct the preparation of a proper instruction on the point," and, if this be not done, the party prejudiced by the instruction, and objecting to same, is not estopped to complain thereof on appeal, because he failed to offer in the lower court an instruction on the same point. In the case at bar appellant is not complaining that the lower court failed to instruct the jury on a material point, but

that to the prejudice of its substantial rights it gave an erroneous instruction in respect to an important feature of the case, to which appellant at the time objected and excepted. This being true, it had the right on the motion for a new trial, and may in this court, complain of the error committed by the lower court in giving the instruction, although it failed to offer one on the same point.

We do not agree with counsel for appellee that Louisville Ry. Co. v. Blum, 89 S. W. 186, 28 Ky. Law Rep. 253, sustains his contention that appellant, by reason of its failure in the case at bar to offer in the court below an instruction as to the measure of damages, is now estopped to object to the erroneous one given on that point by the lower court. In Louisville Ry. Co. v. Blum, there was a trial of two actions at the same time, both growing out of the same accident; one plaintiff being Blum and the other Goodman. A recovery was sought by each plaintiff for personal injuries, without any claim for impairment of ability to earn money, and damages were also asked for injury to the clothing of each. One of the grounds urged on appeal for a reversal was that the lower court erred in instructing the jury as to the measure of damages; there being two instructions on this point, one in behalf of each plaintiff, but alike. In passing on the objection to these instructions, this court said: "While in some sort differing in form from the instructions usually given in such cases, we think these instructions substantially correct. They confine the recovery to compensatory damages. \* \* \*". Following this express approval of the instructions, the opinion proceeds to hold, in substance, that, if they were incorrect, the appellant could not complain in this court, as it had not offered instructions as to the measure of damages upon the trial in the lower court. Obviously, this conclusion was unnecessary and unwarranted, in view of the court's previous approval of the instruction, and, moreover, not in line with its construction of subsection 5, § 317, Civ. Code Prac., as decided in many other cases.

It is argued that the lower court should have excluded the testimony of the witness Kelly as incompetent. Kelly is a florist, whose store is near the place where appellee was injured. It appears that she was carried into Kelly's store immediately after the accident, and while there made, it is claimed, a statement as to the manner of receiving her injuries. Appellant proved by a policeman and one other witness that they went into Kelly's store while she was there, and that she then made to them, or in their presence, certain statements to the effect that her injuries were caused by her own negligence in stepping from a moving car. After the alleged statements made by appellee in Kelly's store had been brought out by appellant, Kelly was introduced by

appellee in rebuttal, and, upon being asked if he heard her make in the store the statements attributed to her by appellant's witnesses, he said he did not, but "did hear her say she was attempting to get off the car when it started again—that would indicate that the car had stopped." We think the last part of the answer was a mere conclusion or argument of the witness, and not responsive to the question. For these reasons it was incompetent, but no reason exists for excluding the remainder of the answer. While it was perhaps too remote to be accepted as a part of the *res gestæ*, and therefore not competent as original evidence, in view of the testimony of appellant's witnesses as to what she said in the store about the accident, it was properly admitted, as it tended to contradict them.

As there will be a retrial of the case, we refrain from passing on the question of whether the amount of the verdict is excessive.

Because of the error of the lower court in giving instruction No. 6, the judgment is reversed, and the cause remanded for a new trial, and other proceedings in conformity with the opinion.

#### LEAKE et al. v. GOODE et al.

(Court of Appeals of Kentucky. Sept. 27, 1906.)

#### PARENT AND CHILD—SUPPORT OF CHILD—PARENT ALSO GUARDIAN—CHARGES FOR BOARD.

A guardian, the mother of her ward, may not charge for the board of the ward, whose services are worth as much as her support.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 52; vol. 25, Cent. Dig. Guardian and Ward, §§ 119, 122.]

Appeal from Circuit Court, Lincoln County.  
"Not to be officially reported."

Action by Cora Z. Goode and others against Lucy H. Leake and others. From an adverse judgment, defendants appeal. Affirmed.

J. P. Thompson and J. W. Alcorn, for appellants. M. C. Saufey and Breckinridge & Breckinridge, for appellees.

NUNN, J. This action was instituted by appellee to surcharge her guardian's settlements made in the county court. Lucy H. Leake, when she was appointed guardian for her children, Cyprian Rhodes and appellee Cora Z. Goode, was the widow of Rhodes, deceased. The appellant, in her settlement, charged the appellee, and was allowed a credit, for board for the years 1892 to 1900, inclusive; the whole sum amounting to over \$500. The court on the trial sustained appellee's contention in part, and surcharged the settlement to the extent of something over \$400. The appellee Goode is a daughter of the appellant Leake. The preponderance of the evidence shows that the daughter was a very bright and healthy girl, and that

the value of her labor was worth equally as much and more than her support. In addition to this there are no peculiar facts or circumstances in the record to show why it would be inequitable for the mother, appellant Leake, to furnish her child board without charge.

For these reasons, the judgment of the lower court is affirmed.

**LEAKE et al. v. RHODES et al.**

(Court of Appeals of Kentucky. Sept. 27, 1906.)

Appeal from Circuit Court, Lincoln County.  
"Not to be officially reported."

Action by Cyprian Rhodes and others against Lucy H. Leake and others. From an adverse judgment, defendants appeal. Affirmed.

J. P. Thompson and J. W. Alcorn, for appellants. M. C. Saufley and Breckinridge & Breckinridge, for appellees.

**NUNN, J.** This case and that of Leake v. Goode, 96 S. W. 565, are similar; the only difference being the amounts involved and the appellees. What we have said in the opinion in that case, this day delivered, applies to this.

For the reasons therein stated, the judgment in this case is affirmed.

**SMITH et al. v. GOWDY et al.**

(Court of Appeals of Kentucky. Oct. 3, 1906.)

**1. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.**

Plaintiff sued to recover certain real estate alleging ownership thereto under a will, and that a grantee of testator in a deed constituting a mortgage claimed an interest therein, and asking that he be required to show what claim he had. The grantee answered asserting ownership. Proof was heard, and the court dismissed the action. *Held*, that the judgment of dismissal, being in effect a decision that plaintiff was not entitled to recover, was a bar to a subsequent action by him for the property, until vacated or reversed.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1031, 1032.]

**2. SAME—COLLATERAL ATTACK—FRAUD—EVIDENCE—SUFFICIENCY.**

Evidence examined, and *held* not to show that a judgment set up in bar to an action was procured by fraud.

**3. EVIDENCE—SECONDARY EVIDENCE—ADMISSIBILITY.**

The original papers in a suit in the circuit court were lost. A copy of the transcript of the record was in the office of the clerk of the court of appeals. The persons who made the record were dead. *Held*, that a certified copy of the record in the clerk's office was admissible in evidence under Rev. St. c. 35, § 4, making a copy of any record properly filed in the clerk's office of any court competent evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 583-585.]

Appeal from Circuit Court Taylor County.  
"To be officially reported."

Action by Newton Smith and others against

G. H. Gowdy and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

John W. Lewis, W. L. Young, and Greene & Van Winkle, for appellants. T. L. Edelen and J. T. Moss, for appellees.

**NUNN, J.** This action was instituted in the Taylor circuit court on the 26th day of February, 1904, by the devisees of Truman Case, against G. H. Gowdy and others, to recover certain real estate, to wit, lots 13 and 14, situated on Main street in the city of Campbellsville, Ky. Truman Case became the owner of this property in the year 1844, and resided on it until the house was destroyed by fire in about the year 1853, when he moved to a farm about two miles in the country, and there resided until his death in the year 1865. On the 26th day of July, 1864, he made his will, which is as follows:

"In the name of God, I, Truman Case, of Taylor county, Kentucky, do hereby make and establish the following disposition of my property as my true last will and testament.

"(1) It is my will that all my just debts be paid.

"(2) My daughter, Permella Colvin, being in good circumstances, and having a plenty of property to secure her a comfortable living, it is my will that she shall have only one dollar of my estate, and I here will that sum to her.

"(3) The balance of my property and effects of every kind, real, personal and mixed, I give to my beloved wife, Thankful Case, during her natural life, and at her death the whole of it to go to and belong to my beloved daughter, Fidelity Smith, wife of Newton Smith, if she shall survive myself and my wife, but if she shall die before myself or my wife, the property and effects willed to her I give to my son-in-law, Newton Smith, in trust for and for the use and benefit of my said Fidelity's children.

"(4) It is my wish that after my death that my son-in-law, Newton Smith, shall manage and control the property herein given to my wife, including the farm on which I now live, for the use and benefit of my wife, but this is not to prevent my wife from enjoying the said property as she may desire during her life.

"(5) It is my will that my son-in-law, Newton Smith, act as my executor and carry into effect the provisions of this will."

The appellants, the children of Fidelity Smith, claim the lots in controversy under and by virtue of the provisions of this will. The appellees deny that appellants own any interest in the lots, and claim title in themselves under an alleged deed from Truman Case to his son-in-law, Robert Colvin, made in 1847, and a deed from Colvin to his son-in-law, J. M. Wood, dated in 1880, and deeds from the latter to them or their grantors. It appears that the alleged deed from Case to Colvin is only a mortgage to secure Colvin

in the payment of several notes, amounting to about \$1,700. Appellees also rely upon the plea of the statute of limitations, alleging adverse possession of the property in controversy in themselves and those under whom they claim, for the period of 15 years, and also for the period of 30 years, and more. In addition to this they plead a former judgment, dismissing an old action brought by the same appellants for the same property, against Robert Colvin and others in the year 1874, in which the judgment was rendered in the year 1878, as *res adjudicata*, and constituting a bar to their right of recovery in this action. Appellants, by reply, denied the title of appellees, or that their right to recover the property was barred by the statute of limitations. They alleged that appellants and their vendors first took possession of the lots in the year 1880, and have only held them adversely since that date, and at the time the appellants were all laboring under the disabilities of marriage and infancy, except W. A. Smith, who was an imbecile, and consequently incapable of transacting any business. They denied that they brought the action referred to, in 1874, or that they prosecuted the same, and alleged that it was brought and prosecuted without their knowledge or consent, and charged that it was all done in pursuance of collusion between Colvin, J. M. Wood, and the three attorneys who professedly represented them (appellants) in that action. The issues were completed, proof taken, and the case tried, which resulted in a judgment in favor of appellees.

The appellant should have succeeded in this action, unless the appellees sustained their plea of the statute of limitations, or the judgment in the former action operates as a bar to this suit. Their claim of title by deed of conveyance, fails for the reason that no conveyance was shown to exist from Truman Case to Robert Colvin. We will first consider the question with reference to whether the judgment in the former action is a bar to the right of appellants to maintain this action. In their petition the appellants alleged ownership of the lots in themselves, under and by virtue of the will of Truman Case, and that Colvin was setting up a claim to the lots, or some interest therein, and asked that he be required to answer and show what claim or interest he had, if any. They also alleged that the lots were indivisible, and asked a sale and a division of the proceeds. Robert Colvin answered, and set up his notes and mortgage referred to, and alleged in substance that after the houses, which were situated on the lots, were destroyed by fire, Case, being insolvent and knowing that he would never be able to pay him the notes, turned over to him the two lots in satisfaction of the notes, and thereupon he took possession of and fenced them up, and used the stables situated thereon from that time, 1853, and had listed them for taxation as his own, and paid the taxes

thereon, and had held them adversely, and as his own, to the time of filing his answer in that action, and plead the 15-year statute of limitations in bar of that action. This was denied by a reply, and it was alleged by appellants that Newton Smith, the trustee named in Case's will and who was a party plaintiff in that action, as in this, had taken possession of the lots as trustee under the will, after the death of Case in 1865, and managed and controlled them under, and as directed by, the will. That case was first decided in favor of the defendants in that action (the vendors of the appellees herein) in the year 1875; the case was appealed, and this court reversed the judgment on account of defect in the pleadings. Upon return of the mandate the case was prepared and proof by both parties taken in support of their claims, and, upon trial in October, 1878, the court dismissed the action and gave Colvin a judgment for costs. From that judgment the appellants again appealed, which appeal was dismissed by written order of appellants, by their counsel, in June, 1880. Appellants seek to avoid the effect of that judgment upon the following grounds: (1) That the case was not tried upon its merits. (2) That it was obtained by collusion between Colvin and the counsel who professed to represent them in that action, in which they (appellants) did not authorize the action to be brought, nor did they even know of, or hear that such an action even existed, until 1902. (3) That appellees did not prove that such action was ever instituted, or prosecuted to judgment. We will dispose of these propositions in the order named.

It seems to us that the case must have been tried on its merits. The appellants made Colvin a defendant and required him to show by what right he claimed the lots. He answered and denied appellants' ownership, and asserted ownership and possession in himself. Proof was heard, and the court adjudged that the action be dismissed, which, in effect decided that the appellants were not entitled to recover the property. It was a complete bar to their recovery of the property until vacated by the court rendering it, or reversed upon appeal. *Cain v. Union Central Life Insurance Company*, 93 S. W. 622, 29 Ky. Law Rep. 475. The appellants established, by the husbands of at least two of the daughters of Fidelity Smith, that they had never heard of such an action until 1902, and that their wives and the other appellants were also ignorant of the institution and pendency of that action until that date. They also proved that they did not authorize counsel to bring or prosecute it, and in general terms stated that Colvin and his son-in-law, Wood, colluded with the attorneys, who professed to represent appellants, and had them bring the action with the view and purpose of allowing Colvin to win the suit. These witnesses did not state a fact or circumstance upon which to base

such a charge; they merely alleged that they colluded for such a purpose, without stating how they knew it. It is remarkable that they waited nearly 30 years after the collusion to make the charge, and then made it after Colvin, Wood, and the counsel who represented appellants in that action, had all died. It appears from the proof that the counsel referred to were during the pendency of that action, gentlemen, and reputable lawyers; that their reputations in these respects were excellent. It is almost inconceivable how that action could have been brought and permitted to remain on the docket for over four years, both parties taking depositions of many witnesses from time to time, the case appealed twice to this court, without the appellants having heard of it. It is certain that Newton Smith, who was a plaintiff in that action, and also in this, knew of its pendency, for he gave a deposition in their behalf; and it also appears that Jonathan L. Bridgewater, who is the husband of Annie Smith, knew of the pendency thereof, for the record shows that he accepted the services of a notice to take depositions therein. It further appears that a number of the appellants, during the pendency of that action, resided in an adjoining county; the balance resided in Taylor county, and not far from the courthouse. In view of all these facts and circumstances, we are of the opinion that appellants' claim of fraud and collusion is not sustained by the proof.

The third proposition of appellants, that appellees did not prove that such an action was ever pending in the Taylor circuit court, is based upon the following facts: It was proved by the clerk of the Taylor circuit court that the original papers of the suit referred to, were lost and could not be found. Appellees then obtained a copy of the transcript of the record of that case, which was filed by appellants, from the clerk of the Court of Appeals. The lower court rejected this record as evidence, because it was a copy of a copy. In this we are of opinion the court erred. It was the best evidence obtainable; the parties who made the record were all dead; and therefore oral proof of the contents of the record could not be made. The only copy of the original was a public record in the clerk's office of the Court of Appeals, and the clerk was not authorized to permit that to be carried to Taylor county and made a part of the record there. Therefore, the only means possible for appellees to get the benefit of that evidence was to obtain a copy of that record, which had been copied under the direction of appellants, and filed in the clerk's office of the Court of Appeals. This court, in two cases prior to the Revised Statutes, held that a copy of a paper on file in a clerk's office could not be introduced in lieu of the original; that it was necessary for the clerk having the custody of the original to be called as a witness and produce it as evidence.

The inconvenience of having the clerk leave his official duties and go to a distant court for the purpose of proving a paper on file in his office, in our opinion, caused the General Assembly to enact section 4, chapter 35, Revised Statutes, which is in this language: "A copy of any record or paper, properly filed or lodged in the clerk's office of any court, or of the Secretary of State, Treasurer, Register or Auditor, or the surveyor of the county, or assessor's books, attested by the person having the legal custody thereof, shall, upon proof of the execution of the original, be admitted as evidence in lieu thereof." The clerk of the Taylor circuit court and others showed that the original record in his office had been lost, and that he made diligent search for it; and thereupon the appellees introduced the next best evidence—a certified copy from the clerk of this court of a transcript on file in that case. This is not contrary to the rule known as the "best evidence rule," which has been repeatedly enunciated by the courts, to the effect that the highest degree of proof of which the case, from its nature, is susceptible, must, if accessible, be produced. Having arrived at this conclusion, it is not necessary to consider the question, whether the matter presented by appellants, in avoidance of the plea of the statute of limitations, interposed by appellees, can avail them.

For the reason stated, the judgment is affirmed.

#### LOUISVILLE & N. R. CO. v. FOWLER.

(Court of Appeals of Kentucky. Oct. 10, 1906.)

##### 1. ACTION—SINGLE CAUSE OF ACTION—EJECTION OF PASSENGER—PLEADING—AMENDMENT.

The petition alleged that plaintiff purchased a ticket entitling her to ride on defendant's train; that, after taking passage, the conductor, in a rude, boisterous, and insulting manner, demanded of her her ticket; that she was so excited that she could not find it and told him she had lost it; and that thereupon he refused to permit her to ride, and in a rude, insulting, and rough manner ejected her, without giving her a reasonable opportunity to search for the ticket. The amended petition alleged that the conductor rudely and roughly grabbed plaintiff by the arm and jerked her from the seat, and rudely and roughly ordered her from the train, and refused to permit her to ride further, and, though others offered to pay her fare, ejected her. *Held*, that but one cause of action, attempted to be set up in the petition, and merely more fully set up in the amendment, was stated; so that motions to strike the amendment, and to require plaintiff to elect between causes of action for ejection and for assault and battery were properly denied.

##### 2. TRIAL—PEREMPTORY INSTRUCTIONS.

Where there is any evidence in support of the allegations of the petition, defendant is properly denied a peremptory instruction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 331-333.]

##### 3. CARRIERS—EJECTION OF PASSENGER—RIGHT TO RECOVER—INSTRUCTIONS.

Plaintiff's right to recover not being based on her ejection from defendant's train, she hav-



ing lost her ticket and money, but on undue force, if any, of the conductor in ejecting her, and for any insult or indignity offered her by him in ejecting her, an instruction that if the conductor was insulting in manner, word, or tone towards her, or rudely or roughly grabbed her, or used more force than necessary to put her off, the jury should find for her damages not exceeding the amount claimed for ejecting her, is confusing and misleading, to the prejudice of defendant; and in place thereof the jury should have been told that, under the proof, defendant had the right to eject her, if she produced no ticket, or tendered no fare, and that she could recover nothing for being so ejected; but that her right of recovery, if any, was based on some injury to her by the conductor, or because of some insult or indignity to her by him, while he was expelling her.

#### 4. TRIAL—INSTRUCTIONS—FAILURE TO OFFER.

Though an instruction defining compensatory damages should have been given, omission thereof may not be complained of, no such instruction having been offered.

#### 5. CARRIERS—EJECTION OF PASSENGER—DAMAGES.

Compensatory damages for the manner of ejecting a passenger, there being no question of the right to eject, is such sum as will compensate the passenger for any loss of time and for any pain and suffering by reason of any undue and unnecessary force used by the conductor in ejecting her, and for any humiliation and mortification suffered by her because of any abusive or insulting language used by him towards her while ejecting her.

[Ed. Note.—For cases in point, see vol. 9. Cent. Dig. Carriers, §§ 1483-1490.]

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Action by Annie Elizabeth Fowler against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Benjamin D. Warfield and John S. Kelley, for appellant. Nat W. Halstead, Morgan Yewell, and F. E. Dougherty, for appellee.

LASSING, J. This is an appeal from a judgment of the Nelson circuit court rendered on the verdict of a jury, October 30, 1905, against appellant for \$1,000. The petition alleges that the plaintiff, Annie Elizabeth Fowler, purchased a ticket from appellant's agent at Bardstown, Nelson county, Ky., which ticket entitled her to passage on appellant's trains to Hunter's Depot, in said county; that she paid the price charged for said ticket, 11 cents, and boarded the train; that shortly after taking passage on said train the conductor in charge of the train, in a rude and bolsterous and insulting manner, demanded of plaintiff her ticket; that plaintiff was at the time so excited that she could not find her ticket, and that she told the conductor she had lost it; that thereupon he refused to permit her to ride further, and in a rude, insulting, and rough manner ejected her from the train, without giving her a reasonable opportunity to search for her ticket, to her damage in the sum of \$3,000. By an amended petition, plaintiff alleges that the conductor rudely and roughly grabbed her by the arm, and jerked her from

the seat, and rudely and roughly ordered her from the train, and refused to permit her to ride further, and, although other persons offered then and there to pay her fare for her, he ejected her from said train. Appellant moved the court to strike the amended petition from the record, to require plaintiff to elect whether she would prosecute her action for being ejected from the train, or for assault and battery, and to make her petition more specific. All of these motions were overruled, as was defendant's demurrer to the petition as amended. Defendant answered denying every allegation of the petition as amended, and pleading affirmatively that plaintiff rode upon its car without producing a ticket, or tendering her fare; that at the time and place specified in the petition the conductor demanded of plaintiff her ticket or payment of her fare, and upon her refusal to produce her ticket or pay her fare he stopped the train, and helped her off. The affirmative allegations of the answer were, by agreement, contravened of record.

On the trial of the case the plaintiff proved that in October, 1904, she bought a ticket, for which she paid 11 cents, entitling her to passage on defendant's train from Bardstown to Hunter's, a distance of about 5 miles, and that she boarded the morning train about 6 o'clock in the morning at Bardstown; that shortly thereafter she discovered that she had lost her ticket and her purse containing 14 cents, all the money she had with her; that when the train had passed Nazareth Station the conductor came to her and demanded her ticket; that his tone of voice was harsh and his manner abrupt, so much so that she became excited and told him that she had lost her ticket, and had no money; that she was going to Hunter's, and that she would borrow the necessary money from an acquaintance at Hunter's and pay him, but that he told her she must either pay or get off; that she being unable to pay, he stopped the train, and put her off. That the conductor took hold of her arm roughly, and pulled her from the seat; that she walked to the door, and the brakeman helped her off the car; that she was so worried and excited by the treatment of the conductor, and so humiliated at being ejected from the train, that she was sick for some time, and could not sleep for three or four days. Several other witnesses testify that the conductor, in taking hold of the plaintiff, seemed rough in his treatment of her, and that his talk was abrupt. A gentleman passenger testified that when the conductor was about to put the plaintiff off the car he offered to pay her fare, but neither the plaintiff nor the conductor acted like they heard him. A lady passenger, about the time plaintiff was put off the car—just before or just after—told the conductor that she would pay the fare, but the conductor said she was "already off." One witness testified that the conductor said to the plaintiff he would put her off and let

her hunt her pocketbook. The pocketbook and ticket were afterwards found in the seat occupied by plaintiff. The conductor denied that he was rough or rude in his treatment of plaintiff; said that he took hold of her arm gently, for the purpose of assisting her up out of the seat; that he did not jerk her or pull her, and that he only spoke in a moderate tone of voice to her; and his testimony is corroborated by the brakeman and one gentleman passenger.

At the conclusion of the testimony the defendant moved for a peremptory instruction, which motion was overruled, and the court gave the following instructions to the jury: "(1) Although you may believe from the evidence that defendant's conductor demanded plaintiff's ticket, and that when said demand was made plaintiff failed or refused to produce her ticket or pay her fare; yet if you further believe from the evidence that said conductor was insulting in manner, words, or tone towards her, or that he rudely and roughly grabbed her by the arm while she was sitting in her seat, or used more force than was necessary to put her from the train (if any force was necessary for that purpose), you should find for the plaintiff damages in any sum not exceeding \$3,000, the amount sued for. (2) If the jury believe from the evidence that the defendant's conductor demanded of plaintiff her ticket, and that on said demand being made the plaintiff failed, or refused, to produce her ticket or pay her fare, then said conductor had the right to eject her from the train, using no more force than was necessary to eject her from the train; and unless you believe from the evidence he used more force than was necessary to eject her from the train, or that he was rude, insulting, rough or boisterous in manner towards her, you should find for defendant. (3) If you believe from the evidence that defendant's conductor in charge of its train was insulting in his manner, words, or tone towards plaintiff, or that he rudely and roughly grabbed her by the arm, while she was sitting in her seat, then you may, in addition to compensatory damages, award her punitive damages in any sum you may deem proper, not exceeding in all more than \$3,000. (4) Nine or more jurors concurring may render a verdict, but if a verdict is rendered by any less number than the entire jury, all concurring in the verdict must sign the verdict."

The defendant objected to the giving of each of these instructions, and offered certain other instructions, which were refused by the court. The jury returned a verdict of \$1,000 for plaintiff. Judgment was entered, and this appeal is prosecuted from that judgment.

Many errors are complained of in the motion and grounds for a new trial and in the bill of evidence. The court properly overruled defendant's motion to strike from the record the amended petition, for in it

plaintiff merely set out more fully her cause of action attempted to be set up in her petition; and as the petition as amended set up but one cause of action, the several motions by defendant to require plaintiff to elect which cause of action she would prosecute, and to make her petition more specific in naming persons who offered to pay her fare, should have been overruled. The facts set out in the petition as amended constituted a cause of action, and the demurrer should have been overruled, as it was. Where there is any evidence in support of the allegations of the petition, a peremptory instruction will not be given. In this case there was evidence to support the allegations of the petition, and the defendant was not entitled to a peremptory instruction.

The first instruction given by the court was confusing and misleading. In this instruction, if the jury should find that the conductor was insulting in manner, word, or tone toward plaintiff, or rudely or roughly grabbed plaintiff by the arm, or used more force than was necessary to put her off the train, then they should find for plaintiff damages in any sum not exceeding \$3,000 for ejecting plaintiff from the train. This is error highly prejudicial to the rights of the defendant company. Plaintiff's right to recover is based, not upon her being ejected from the train of defendant, but for the undue force, if any, used by defendant's conductor while ejecting her, and for any insult or indignity offered her by the conductor while ejecting her. The jury should have been told that, under the proof, defendant had the right to eject plaintiff from its train, if she produced no ticket, or tendered no fare, and that in no event could she recover anything for being so ejected; but that her right of recovery, if any, was based upon some injury received by her at the hands of the conductor while he was expelling her from the train, or because of some insult or indignity offered her by the conductor while being expelled from the train.

Appellant urges with much earnestness that it was entitled to an instruction defining compensatory damages. We are of opinion that such an instruction should have been given; but as appellant offered no such instruction, it cannot now be complained of that it was not given. Compensatory damages in this case is such sum as will compensate plaintiff for the loss of time, if any, and for the pain and suffering she endured, if any, by reason of undue and unnecessary force, if any, used by the conductor in ejecting her from the train; or the humiliation and mortification, if any, which she suffered because of the use of abusive or insulting language toward her by the conductor while ejecting her from the train.

We are further of opinion that the damages awarded in this case are excessive, due, perhaps, to the fact that the jury was not

properly instructed as to plaintiff's right of recovery.

For the reasons given, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

# SPIOER et al. v. HOLBROOK.

(Court of Appeals of Kentucky. Oct. 5, 1906.)

## 1. INSANE PERSON—DEED—REMOVAL OF DISABILITY—RATIFICATION.

The deed of a lunatic is binding on him, if not disaffirmed when his disability is removed.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, §§ 100-105.]

## 2. DEEDS—ACTION TO SET ASIDE—MENTAL INCAPACITY—EVIDENCE.

In a suit by the heirs of a decedent to set aside a deed executed by her on the ground of lack of mental capacity, evidence held to sustain a finding that decedent was of sound mind.

Appeal from Circuit Court, Owen County.  
"Not to be officially reported."

Suit by Bettie Spicer and others against Jesse Holbrook. From a decree in favor of defendant, complainants appeal. Affirmed.

H. K. Bourne, J. R. Fears, and W. S. Pryor, for appellants. H. G. Botts and Strother & Gaunt, for appellee.

HOBSON, C. J. About the year 1868 Mrs. F. A. Quisenberry purchased of D. S. Adams a tract of land in Owen county for \$1,530. She then paid Adams \$1,000 on the price and executed her note for the remainder; he executing her a title bond. In the year 1873 she assigned the title bond to J. A. Holbrook, and Adams executed a deed to Holbrook for the land; Holbrook at the same time executing to Mrs. Quisenberry a writing by which he agreed to convey the land to her upon the payment of \$1,100. In January, 1883, she and her husband executed to Holbrook a quitclaim deed to the land. The consideration of this deed is recited to be \$1,530. On the next day she bought another piece of land near by for \$400 or \$500, on which she paid \$300. This tract she held until her death. Her husband died about the year 1887, and she died in 1892. This action was filed by her heirs at law on May 24, 1897, in which they charged that Mrs. Quisenberry was of unsound mind in 1873 when she made the assignment of the title bond, and in 1883 when she executed the deed, and that she continued to be of unsound mind from that time until her death. They prayed the cancellation of the deeds and the recovery of the land. The defendant relied upon limitation. The circuit court overruled the demurrer to the plea of limitation, and the plaintiffs appealed to this court. The judgment was reversed. See *Spicer v. Holbrook*, 66 S. W. 180, 23 Ky. Law Rep. 1812. Upon the return of the case to the circuit court it was tried out upon the issue of fact as to the in-

capacity of F. A. Quisenberry, and, the circuit court having decided in favor of the defendant, the plaintiffs appeal.

It was held, when the case was here before, that the transaction had in 1873, by which the property was conveyed to Holbrook and he gave to Mrs. Quisenberry a writing agreeing to reconvey it to her upon the payment of \$1,100, was in effect a mortgage of the land by her to him for \$1,100. What is said in that opinion as to the effect of the deed made in 1883 is based upon the facts as there presented to the court; it being there alleged that Mrs. Quisenberry was of unsound mind when that deed was made and continued so until her death. The language used in the opinion about the deed's being void without a subsequent ratification, either actual or constructive, is based upon the allegation, which then stood admitted upon the demurrer, that Mrs. Holbrook continued insane until her death. The general rule is that the deed of a lunatic is like the deed of an infant, and is binding on him if not disaffirmed when his disability is removed. *Logan v. Vanarsdall*, 86 S. W. 981, 27 Ky. Law Rep. 822; *Smith's Committee v. Forsythe*, 90 S. W. 1075, 28 Ky. Law Rep. 1034. A grantor cannot, after 10 years from his arrival at age, maintain an action to set aside a deed executed by him while an infant. *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447. If a deed is executed by a lunatic, and he, with knowledge of the transaction, does not disaffirm it after his disability is removed, upon principle, it would seem that the same rule should be applied to him where more than 10 years is allowed to elapse after the cause of action accrued.

In the case at bar the proof shows that Mrs. Quisenberry had occasional spells, especially in hot weather, when she was insane; but when these spells had passed away she was a woman of ordinary capacity. She attended to her household duties. She reared a large family. Her husband was not thrifty, and she seems to have been the mainstay of the family. It is not questioned that she was sane when she bought the other tract on the day after she conveyed this tract to Holbrook. Her husband was present; also her son, 28 years old, who lived with her, and a married daughter. The son was the youngest child. Her husband and all her family evidently knew well of the transaction and understood all about it, and yet no complaint was made about it, and no effort made to set it aside, for something like 14 years, and long after the death of both her husband and herself. It is our rule not to disturb the judgment of the chancellor on the facts, where the evidence is conflicting and the mind is left in doubt as to the truth. The circumstances here all sustain the chancellor's conclusion.

Judgment affirmed.

BELL et al. v. LOUISVILLE WATER CO.  
et al.

(Court of Appeals of Kentucky. Oct. 5, 1906.)

1. WATERS AND WATER COURSES — ACQUISITION OF RIGHT OF WAY FOR WATER COMPANY—CONTRACT.

A water company desired to lay a main through the lands of others. A contract binding the company to grade the strip sought, as a public highway, was signed by a majority of the owners, two of whom made deeds of the strip, reciting that they were made in consideration of the contract. The others who signed the contract made deeds in consideration of \$1 and of the advantage to be derived from the laying of the main. The company recorded the contract and the deeds, and opened the strip as a public way for a part of the distance. *Held*, that the contract was binding on the company, and required it, on acquiring the land through which the way was not opened, to open it.

2. EQUITY—LACHES.

A water company received conveyances to a strip of land in consideration of its opening a way over it. Part of the way was opened. Several years thereafter the grantors, on learning that the company was preparing to construct a permanent structure at a place where the way was not opened brought suit against the company. *Held*, that the right of the grantors was not barred by laches.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 191, 192.]

3. EASEMENTS—OBSTRUCTION—RELIEF.

A water company receiving conveyances to a strip of land for a water main, in consideration of it opening the strip as a way, erected on the way a permanent structure obstructing travel thereon. *Held*, in a suit by the grantors, that equity would not require the removal of the structure, but would require the company to pay to the grantors the difference in the value of the property with the way closed, and the value of the property if the way was opened.

Appeal from Circuit Court, Jefferson County. Chancery Branch, First Division.

"Not to be officially reported."

Action by James E. Bell and others against the Louisville Water Company and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Chas. H. Shield and Benj. F. Washer, for appellants. Burnett & Burnett, for appellees.

HOBSON, C. J. In the year 1891 the Louisville Water Company proposed to lay a 48-inch main from its reservoir east of the city, to the city, and it was proposed that for this purpose a strip of land 60 feet wide should be opened as a public way. Several routes were canvassed. Finally, on March 18, 1892, the route having been selected, an agreement in writing was drawn up to be signed by the property owners along the route, whereby, in consideration of \$1, and the advantages to be derived from the pipe line and the opening of the public way, the owners of the land agreed to convey the 60-foot strip through their property, to the water company. This agreement, after reciting for what purpose the strip 60 feet wide is to be conveyed, concludes with these words, the water company being the party of the first part: "The party of the first part agrees and binds itself to inclose the said space on either side with a plain

board fence, with such gates as may be necessary for ingress and egress to and from the property as now owned, to grade this strip of land as a public road to a width of 30 feet, or for the entire width as said first party may elect, and also erect such bridges and culverts along said strip of land as may be necessary for a public road, and for accommodating the natural drainage of the water courses which said strip of land crosses, as the same now exist, and to finally throw open to the public as a highway said strip of land; always provided, however, that the water company's business of occupying, laying, maintaining, repairing, and operating its lines of pipe on the strip of land for supplying the city and citizens of Louisville with water, and also the citizens along the strip of land, shall have precedence of any and all other rights on said strip of land, and that no right, grant or franchise for any railroad, railway, or street cars to be operated by electricity, steam, or animal power shall be exercised, except by and with the formal consent of the Louisville Water Company."

Six of the 18 property holders refused to sign the contract. Of those that signed the contract, two made deeds to the water company, reciting that they were made in consideration of the terms and stipulations of the contract. The other 10 who signed the contract, and 1 who had not signed it, and 1 property owner who was not referred to in it, made deeds to the company for the right of way in consideration of \$1 in hand paid, and of the advantages to be derived from the laying of the water pipe. While these deeds do not refer to the contract, we think it reasonably clear from the language of the deeds, the circumstances attending their execution, and the subsequent conduct of the parties, that they were made pursuant to the contract of March 18th, and for the purpose of carrying it into effect. Four persons who refused to sign the contract were paid for the right of way, by the water company, sums aggregating about \$6,000, and executed deeds to it conveying with warranty, the 60-foot strip through their property. The other owner, D. W. C. Rowland, who owned a 25-acre tract next to the land of the water company, executed a deed to it for the right of way through his land for the same consideration of \$1, and the advantages to be obtained from the laying of the water main as the other deeds above referred to. But this deed in addition stipulated that the strip was not to be opened through his land as a public way until the grantor so demanded. All the deeds were accepted by the water company, and were put to record by it. The contract of March 18th was recorded too about the same time. The water company paid S. S. Meddlis, who secured the deeds for the right of way, \$300. It then went on and laid its main upon the strip, graded it, and complied in all respects with the contract.

The road was opened as a public way from its western terminus within the city of Louisville out to the Roland land, and has since been so used by the public without interruption; but, in accordance with the terms of the Roland deed, it was not opened through his place, and was, therefore, not opened through the land of the water company out to the Shelbyville pike as provided in the contract of March 18th. When the road reached the land of Roland, it there crossed another macadamized way known as "Stiltz's Lane," and the travel over it could go upon this way to the Shelbyville pike. The part of the way which was not opened was something over a quarter of a mile long. Roland died in 1894 without ever having requested that the way should be opened over his land, although he had required the fences to be built through, and trees to be planted. After his death in 1897, the water company bought this 25-acre tract, and so it now owns all the land east of Stiltz's Lane through which the way runs. After this it began building a standpipe and coagulant house on the ground over which the proposed way would run near the end at the Shelbyville pike, and the property owners along the line brought this suit to enjoin the erection of these structures in the right of way, and to enforce the opening of the way pursuant to the contract. Smith Crabb and Harriet Ewing, who owned a tract of land adjoining that of the water company, conveyed a corner of their land to it for the purposes of the way.

In the contract between them and the water company there is this stipulation: "It is further mutually agreed that the first party will open through this tract of land conveyed to it by the second party, and through its own Williams tract of land, an avenue 60 feet in width, and extend the same to the avenue opened through Mr. Rowland's land. The alignment thereof is to be an extension of the alignment of the road in front of Crescent Hill reservoir, and that line numbered 2 of tract No. 1 and line No. 3 of tract No. 2 shall constitute a right line, and be parallel with the center line of the aforesaid extension and 30 feet eastwardly therefrom, and thereby secure to the second parties a frontage upon the avenue thus opened equal to the length of line No. 2 of tract No. 1, and line No. 3 of tract No. 2, a map of which is attached hereto, and made part of this deed." It is insisted for the water company that the contract of March 18th, not having been signed by all the landowners, was abandoned. We cannot concur in this conclusion. This contract is not only expressly referred to and made the consideration of the deeds from two of the landowners, but is plainly the foundation of the deeds from the other 10 landowners who conveyed their property to the water company for no other consideration, so far as the record shows, than that expressed in this instrument. If there could be any doubt about this, the

subsequent conduct of the parties sets it at rest, for the public way was, in fact, opened from the city out to Stiltz's Lane, and no part of it was left not opened, except that through the land of D. W. C. Rowland and the water company. It is perfectly apparent that it was contemplated by the parties that the strip throughout should be conveyed for one purpose, and it cannot be supposed that the contract of March 18th was in force west of Stiltz's Lane, and not east of it. The water company had the contract of March 18th recorded with its deeds, and it could not accept deeds based upon this contract without assuming the burdens secured by it. The only reasonable conclusion from all the facts is that Roland died before he got ready for the way to be opened through his property, as there was not sufficient demand in the market for lots at that time. But the company, having become the owner of the Roland property, cannot now rely on the fact that Roland did not request the opening of the way. As it now owns the property, it should have carried out its contract and opened the way through its property.

So far as the question of diligence is concerned, the plaintiffs have acted with all the diligence the law requires. As soon as they learned that the water company was proposing to put a permanent obstruction in the way, so that it could never be opened, they promptly brought the action. It is true that the evidence does not show that the proposed way from Stiltz's Lane to the Shelbyville pike has ever been accepted by the city. While there is evidence that the way has been open and used since Roland's death, there is much contrary evidence, and, on this question of fact, we are not inclined to disturb the chancellor's conclusion. Mere use of a way will not amount to a dedication, and there has not been such a use of the way perhaps that the dedication should be presumed. But there is no question that the water company agreed to open this way, and the proof for the plaintiffs is that it is a valuable right to them, as it enables the travel to avoid the Shelbyville turnpike, along which runs both the tracks of the Louisville & Nashville Railroad, and a line of electric cars. The water company, having contracted with the plaintiffs to open this way over its ground, had no right to build upon the ground its standpipe and coagulant house, thus permanently destroying it, so that the way can never be opened. But while this is so, the water company is supplying the city of Louisville with water. It is performing an important public service, and the chancellor will not grant the remedy of specific performance against it by requiring these structures to be removed, when the proper discharge of the duties, which the water company owes the public, requires that the structures should stand. While this is true, equity will not leave the plaintiffs without remedy, and, though it will not require the structures to

be removed, it will require the water company to do justice to the property owners by paying them such damages as they have sustained by its breach of its contract. Ordinarily, under the facts shown, the chancellor would decree specific performance, and would by injunction require the structures to be removed. But in the case at hand, the health of a great city, and its well being, must not be sacrificed; and, as the public service requires the structures to stand, equity will not require their removal, but it will lay hold upon the conscience of the water company and compel it to do justice to the plaintiffs. The distinguishing feature of equity jurisdiction is the elasticity of its remedies. The chancellor has a broad discretion in granting specific performance, and he will modify the remedy in each case as the needs of justice and equity require. In the case at bar, the measure of recovery to the property holder is the difference in the value of his property with the way closed from Stiltz's Lane to the Shelbyville pike, and the value of his property, if the way was open from Stiltz's Lane to the Shelbyville pike, as provided in the contract. *L. & N. R. Co. v. Smith*, 117 Ky. 364, 78 S. W. 160.

The substance of the contract is that, the way shall have an outlet on the Shelbyville pike opposite or near the reservoir entrance. If the way were opened out to the Shelbyville pike, though not directly opposite the entrance to the reservoir, yet so near by as to amount to practically the same thing, nominal damages should be awarded all the property owners except Crabb. Upon the return of the case to the circuit court, the plaintiffs will be allowed to amend their petition, and if either party so desires, the case will be transferred to the common-law docket for a jury trial on the question of damages.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### HEMINGRAY v. HEMINGRAY et al.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

#### PARTITION—ATTORNEY'S FEES—LIABILITY OF PARTIES.

Where certain joint owners of realty, suing for partition, obtained a judgment before the title papers were filed, which did not include all the property, and the other owners, having selected another attorney to represent them, had the judgment set aside and procured another free from error, the owners instituting the suit were not entitled to have the fee of their attorney paid out of the proceeds of the property.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 447.]

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Robert Hemingray against Ralph C. Hemingray and others. From an order refusing to allow plaintiff's counsel fees, he appeals. Affirmed.

James P. Tarvin, B. A. Frazer, and Thos. H. Towers, for appellant. Ernst, Cussatt &

McDougal and Green & VanWinkle, for appellees.

HOBSON, C. J. Appellants instituted this action to have certain real property sold and a division of the proceeds, making the other joint owners defendants to the action. Appellants owned two-fifteenths of the property; the defendants owned thirteen-fifteenths. No answer having been filed for the defendants a judgment was entered for the sale of the property as prayed in the petition. A week later this judgment was set aside. The defendants by their attorney filed answer. The case was resubmitted, the property sold, and the sale confirmed. With their answer the defendants filed the title papers which had not theretofore been filed in the action. They also brought in two lots which had been omitted from the petition. After the sale was confirmed, the plaintiffs moved the court to allow them a counsel fee of \$500, to be paid out of the entire fund. To this the defendants objected as they had been represented by attorneys of their own employment. The circuit court refused to make the allowance, and the plaintiffs appeal.

The attorneys each filed affidavit as to the cause for setting aside the judgment which was first entered, but, as there was only one witness on a side, we do not deem it proper to disturb the chancellor's conclusion on the facts. The case in substance comes to this: The owners of two-fifteenths of the property brought a suit by their attorney to have the property sold and the proceeds divided. Judgment was entered in the case which did not include all the property and the title papers had not been filed. The owners of thirteen-fifteenths of the property, not desiring to employ the attorney whom the plaintiff had selected, employed another to represent them in the action. He did represent them. Finding that the judgment was erroneous, he had it set aside and procured a judgment to be entered that was free from error. The owners of thirteen-fifteenths of the property had a right to select their own attorney to look after their interests and see that a sale of the property was ordered which was free from error and would not involve them in any litigation. They were interested in having the property so ordered sold that prospective buyers would have no doubt of the title and so would feel free to bid. To this end they had the right to employ counsel of their own choice, and when they are liable to their own attorney for his fee they should not be required to contribute to the payment of the fee of an attorney whom they did not employ and may have been unwilling to employ. In such a case a litigant is not placed in the dilemma of having to trust his interests to an attorney selected by another or bear the burden of paying two attorneys. One of the parties secures no advantage over the others by being ahead of

them in instituting the proceeding. It is not a question of diligence in suing. When the defendant has employed counsel of his own to represent him in the action, as he has a right to do, and is represented by such counsel, he should not be made to contribute anything to pay the fee of the attorney of the party who brings the suit. In *Thirlwell v. Campbell*, 74 Ky. 168, this court held that, under the statute, the party who was first to commence an action was not entitled to have his counsel fees paid out of the common fund when he was the only one who desired the services of the attorney he employed and the other parties were in fact represented by attorneys of their own choosing. "The statute is only intended to apply to that class of cases where the parties have a common interest and a part, without objection from the others, prosecute suits for their joint benefit, and only to such parties as are not represented in the case by attorneys selected by themselves. One jointly interested cannot be compelled to pay for counsel employed by others when he has himself employed counsel to represent his interest." *Bailey v. Barclay*, 60 S. W. 377, 22 Ky. Law Rep. 1246; *Fristoe v. Gillen*, 80 S. W. 826, 28 Ky. Law Rep. 151.

Judgment affirmed.

## PARKER v. DRAKESBORO COAL, COKE & MINING CO.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

### 1. MASTER AND SERVANT—INJURIES TO SERVANT — ASSUMPTION OF RISK — PROMISE TO REMEDY DEFECT.

If a master's promise to remedy a defect is not fulfilled in such time as would ordinarily and reasonably be required to remedy it, the servant, by remaining in the employment, assumes the risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 583, 638-640.]

### 2. SAME—ACTION—PLEADING—PETITION.

In an action for injuries to a servant, a petition alleging a promise to remedy the defect complained of, but failing to state that a reasonable time to make the repairs had not elapsed, was demurrable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 847.]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by Ed J. Parker against the Drakesboro Coal, Coke & Mining Company. Judgment for defendant. Plaintiff appeals. Affirmed.

R. Y. Thomas, Jr., and Greene & Van Winkle, for appellant. Gordon, Gordon & Cox, for appellee.

SETTLE, J. This is an appeal from a judgment of the Muhlenberg circuit court

sustaining a general demurrer to appellant's petition and dismissing his action.

The action was one to recover damages for personal injuries sustained by appellant in appellee's mine in handling coal cars or trucks near the bottom of the shaft. The alleged cause of his injuries was the defective and unsafe condition of appellee's track, ties, and switches, and accumulation of coal thereat, in the mine, and the latter's negligence in permitting them to remain in such condition. These facts were specifically alleged in the petition with the further averment: "Plaintiff says that the condition of said track and switch and cross-ties, and the accumulation of said coal at said point as aforesaid, were well known to the defendant, and that defendant, prior to said injury, had, by its agents and servants whose business it was to look after said track and coal, promised plaintiff to relay said track and remove said coal, and plaintiff relied upon said promise and continued to work, and was injured while at work relying upon said promise as aforesaid." It will be observed that there is no averment here as to the time of the promise to repair; whether it was made within a reasonable time—that is whether the injuries of appellant were received within or beyond such time as was reasonably sufficient for the making of the promised repairs by appellee—is not stated. A pleading is to be construed most strongly against the pleader. If the promise to make the repairs was not complied with in a reasonable time—that is, such time as would ordinarily and reasonably be required to make the repairs—appellant had no right to rely upon it, and ought to have quit work, and failing to do so will be presumed to have assumed the risk of continuing in appellee's employ under such circumstances. The omitted averment is a fact essential to the right of recovery. It would not, as contended by counsel for appellant, be a mere conclusion if pleaded, nor is it a matter of defense to be set up affirmatively by answer. It cannot be told from the petition in this case whether the promise to repair was one upon which appellant had a right to rely. It might have been made a year, or other reasonable time, before the happening of the accident to appellant. The fact that, by intentment and without objection from the defendant, the petition might be sufficient to support a judgment, if obtained, does not relieve the petition of the defect arising from the failure to state the necessary fact, where the defect is exposed, as in this case, by demurrer.

We are of opinion that the demurrer was properly sustained, and, as the appellant refused to amend, it necessarily followed that the action had to be dismissed at his cost. Judgment affirmed.

**DAUGHERTY et al. v. BAZELL.**

(Court of Appeals of Kentucky. Oct. 9, 1906.)

**TAXATION—ASSESSORS—LIABILITY ON BONDS.**

Ky. St. 1903, § 4056, makes it the duty of a taxpayer to list his property with the assessor. By section 4064, the taxpayer who fails so to do, is required to list his property before the county clerk, and, by section 4053, the assessor in valuing property may have recourse to sources of information other than the taxpayer's statement, including the testimony of witnesses. *Held*, that where a taxpayer failed to give in a list of his property for assessment, and the same was valued by the assessor, he, in the absence of any corruption or malice, was not liable, on his official bond, for the taxpayer's costs in having the assessment corrected, however erroneous the assessor's valuation.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 540, 543.]

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by J. B. Bazell against F. M. Daugherty and others. From a judgment in favor of plaintiff, defendants appeal. Reversed and remanded, for proceedings consistent with the opinion.

J. S. Cline, N. J. Auxler, and J. M. York, for appellants. Van Over & Butler, for appellee.

O'REAR, J. Appellee, a taxpayer of Pike county, sued appellant, Daugherty, assessor of Pike county, on his official bond for damages because the assessor erroneously and, it is said, negligently assessed appellee for taxes with about \$70,000 more of property than he owned, whereby appellee was put to loss and costs, to have the assessment corrected, in the court having jurisdiction of the matter. The question presented for decision on this appeal is the sufficiency of the petition, which stakes the plaintiff's (appellee's) case on the negligence of the county assessor in the matter. The petition admits that the taxpayer did not himself list his own property for taxation. Nor does it disclose what evidence the assessor had before him concerning the quantity and value of the plaintiff's property. The petition only shows that the property assessed was sawed lumber, which it avers was worth not exceeding \$6,000, but that the assessor negligently failed to make diligent and proper inquiry thereof, whereby he failed to get the truth, and erroneously and wrongfully overvalued plaintiff's property, as stated. The petition does not show why the taxpayer failed to himself give in the list of his property for assessment. While the statute makes it the duty of the county assessor to call upon each taxpayer in the county in person, or by deputy, and to obtain from him a correct list and valuation of all his taxable property, it is equally the duty of the taxpayer to list his property with the assessor (section 4056, Ky. St. 1903), and, if by any reason this is not done, he is required by statute to go before the county court clerk

and list his property. Section 4064, Ky. St. 1903. Nor is the assessor confined to the statements of the taxpayer. He may have recourse to other sources of information, including the testimony of witnesses (section 4053, Ky. St. 1903) in ascertaining the value of the taxpayer's property. In this he exercises his judgment as well as his discretion as to what evidence he will call for and consider. The act of valuation partakes of a judicial quality. If the assessor could be held personally liable for every error of judgment in valuing property, which the statute requires him to value, not alone from the taxpayer's oath, but from his own information and any other evidence which may be adduced, his position would be a most hazardous one. The fear of such accountability would tend to make him place the lowest valuation on the property, as in that way only could he surely escape the displeasure of the exacting taxpayer. On the other hand, if the taxpayer had the right to hold the assessor legally liable for an erroneous judgment in valuing the property too high, the people, the state and county, could upon the same principle hold him liable if he erroneously valued it too low. The main ingredient of the quality of judgment is independence. One called upon to exercise his judgment as a public official, when acting honestly, should feel immune from personal responsibility. Else his act would not be judgment, but in some degree self-serving and to that extent likely to be biased. Hence it is universally held that for erroneous judgment no public official shall be called to account in a law suit, so long as he acts honestly. Sound public policy dictates the course as the one most likely to secure fearless and efficient judgment, where the exercise of judgment and discretion are vested. This is deemed to more than compensate, and we have no doubt it does, for the incidental loss and inconvenience sometimes suffered by those whose interests are prejudiced by an erroneous exercise of the judgment. Indeed, any other rule would be impossible of execution. For, after all, every disputed proposition must be settled by the exercise of somebody's judgment. And the one passing on it last might also be in error. So where would be the ultimate appeal for a settlement of the matter? The only limitation set on the rule is that the officer shall not act from an improper or corrupt motive. There is no charge in the petition in this case that the assessor acted corruptly or maliciously. His act was, for aught that appears, within his jurisdiction, and, however erroneous, is not the subject of a demand at law against him for the consequences to the complainant. The demurrer should have been sustained to the petition as amended.

Judgment reversed, and cause remanded for proceedings not inconsistent herewith.



## DUFF v. BAILEY et al.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

## 1. TROVER AND CONVERSION—ACTS CONSTITUTING CONVERSION.

A lease to explore for oil and gas by drilling a well stipulated that the lessee might abandon the lease and remove the buildings and machinery placed on the premises. The lessee erected a building and placed machinery on the premises, but did not drill a well. After a year the lessor cut up the woodwork of the building into stove wood, and sold the machinery. *Held*, that, though the lessee was a trespasser with his property, the lessor was guilty of conversion thereof.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 21-25.]

## 2. APPEAL—OBJECTIONS NOT MADE IN LOWER COURT—ADMISSIBILITY OF EVIDENCE.

An objection to the competency of evidence, made for the first time in the appellate court, is unavailing.

## 3. SET-OFF AND COUNTERCLAIMS ARISING OUT OF SAME TRANSACTION.

In an action by the lessee in a lease to explore for oil and gas by drilling a well for the conversion of a building and machinery placed on the premises, the lessor cannot set up as a counterclaim damages sustained because of the failure of the lessee to comply with the terms of the lease, the claim for damages not growing out of, nor being connected with, the cause of action sued on.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, §§ 48-51.]

## 4. MINES AND MINERALS—OIL AND GAS LEASE—BREACH—ALLEGATIONS—SUFFICIENCY.

A lessor in a lease to explore for oil and gas by drilling a well cannot recover damages for the lessee's failure to drill a well, without showing that there was oil and gas in the territory to be developed.

Appeal from Circuit Court, Barren County.  
"Not to be officially reported."

Action by J. A. Bailey and others against H. W. Duff. From a judgment for plaintiffs, defendant appeals. Affirmed.

George T. Duff, for appellant. Baird & Richardson, for appellees.

O'REAR, J. Appellant executed to H. G. Curran, who assigned it to Trinler and he to appellee Bailey, a contract to explore the land of appellant for oil and gas by drilling a well or wells thereon. The contract was in writing and provided that the work was to begin within three months and be diligently prosecuted. It also stipulated that the contractor might abandon his lease at any time, and when the contract was terminated he might remove all buildings and machinery from the leased premises. Within the three months the contractor did erect a derrick and building, and placed a drill and other machinery on the land, but did not drill the well. It seems he was drilling on adjacent lands and becoming satisfied that there was no oil or gas in that territory determined to abandon it. After something more than a year of such inactivity appellant became disgusted, and taking his ax chopped up the woodwork of the derrick and building into stove wood and sold the machinery for \$25. Appellee sued him to recover the value of the

destroyed property. The case was submitted to a jury who found a verdict for appellee for \$200.

We think the only question that should have been submitted to the jury was the value of the property taken and destroyed by appellant. After the lease had expired, as it had in this case, appellant could have compelled appellee to remove his building, derrick, and machinery; or, if appellee failed to do so within a reasonable time, appellant might have removed them, doing no more injury to them than was reasonably necessary, and at the cost of appellee. But, even though appellee was a trespasser with his property, appellant had not the right to destroy it, or to convert it to his own use.

Appellant by pleading put appellee's title to the derrick, building, etc., in issue. But the proof indubitably sustained appellee, although some of the evidence was incompetent in form, and doubtless would have been rejected, or supplied with better evidence, if objected to in the trial court. The objection made here for the first time is unavailing.

Appellant also attempted to set up a counterclaim for damages. This was denied by the circuit court. We think properly so, for these reasons. (1) The counterclaim was for damages which appellant claims he had sustained because appellee failed to keep his contract to bore the well for oil. We note that his alleged cause of action did not grow out of, nor was it connected with, the cause of action sued on by plaintiff, to wit, the conversion and destruction of plaintiff's chattels. (2) No cause of action was set up in the counterclaim. It was not averred that there was oil and gas in the property to be developed, and, as that was the only thing undertaken to be done by appellees by the contract, they would not be liable under it for damages for failure to perform it unless because of such failure they had not developed from the property what they would have developed had they performed it.

The record is without error, and the judgment is affirmed.

## COX v. BURGESS.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

## 1. SPECIFIC PERFORMANCE—LAND CONTRACT—FAIRNESS—VALUE OF LAND.

Defendant owned certain timber land farther up a branch between two mountains and on each side of complainant's land. The only practicable route for the hauling of timber from defendant's land, which was supposed to be valuable only for the timber thereon, was over complainant's land, and in order to obtain this defendant contracted to sell all his land and the timber remaining thereon at the expiration of four years to complainant at 50 cents per acre, in consideration for which complainant granted a right of way over his land for the hauling of logs. After the contract was executed the land became more valuable because of the development of mineral resources in the region and the extension of a railway. *Held*, that the contract

was not so unfair and unconscionable that equity would deny specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 154.]

**2. VENDOR AND PURCHASER — CONTRACT TO CONVEY—CONSTRUCTION—DESCRIPTION.**

A bond to convey land described it as all land owned by defendant, lying on the waters of Long Fork of Millers Creek in P. county, Ky., "which lies back of the land" of complainant. Held, that such description would be construed to include all the land owned by defendant on the waters and beneath the watershed of such branch or stream which lay back of and beyond the lines of complainant's land on the same branch.

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Suit by H. E. Burgess against George L. Cox, for specific performance of a contract for the sale of land. From a decree for plaintiff, defendant appeals. Affirmed.

J. M. York, for appellant. J. S. Cline, for appellee.

O'REAR, J. Appellee owned the land across and on both sides the mouth of Long Fork of Millers Creek in Pike county, extending from the side of the mountain on the side of the branch, to the side of the mountain on the other side of the branch. Appellant owned a larger boundary, about 1,000 acres, adjoining appellee's, but laying further up the branch, and on each side of appellee's land. The situation was such that to haul out of appellant's land it was necessary to cross appellee's farm, or to cross the mountains. The latter was impracticable, so that the route over appellee's land was the only one out for heavy hauling. Appellee lived on his land, and had it inclosed and in cultivation. The valley was narrow, affording a few small lots of bottom land which were either in fruit orchards, barn lots, or corn lots. Appellant's land was timber land, and uninclosed. Desiring to sell and remove the merchantable timber from it, he, by his agent, Means, approached appellee to procure a right of way out over appellee's land for transporting the saw logs when cut. The negotiations resulted in a contract between appellee and Means by which Means was to have the right of way over appellee's land for four years, and then was to sell, and did thereby purport to sell to appellee all the land "back of his land on the Long Fork of Millers Creek" at 50 cents an acre, reserving the oil. All timber not removed at the expiration of the four years was to pass with the land to appellee. This agreement embraces about 88 acres of land. Appellee contends that Means represented that he owned the Cox land, or an undivided interest in it. This Means denies. But the writing which he executed to appellee purports an ownership in Means. Means and Cox at once began cutting their trees into saw logs. Appellee learning that Means did not own the Cox land or any interest in it, refused to allow the use of the pass-

way unless Cox would sign the contract. Cox agreed to this, and executed with appellee the following agreement:

"This contract made and entered into by and between George L. Cox and H. E. Burgess, witnesseth: That the said Cox does hereby agree to make to the said Burgess a warranty deed for all the land owned by him which lies back of the land of said Burgess, on Long Fork of Millers Creek, in the county of Pike and state of Kentucky—said deed to be made four (4) years from this date, in consideration of the sum of fifty (50) cents per acre for said land, when the deed is made, the said Cox reserving the oil right and the privilege of taking off any timber on said land, which he wishes to do so, before the expiration of said four years. In consideration thereof the said Burgess hereby grants to the said Cox the right of way over his land for the purpose of removing said timber—said right of way to be used so as not to injure growing crops. Signed in duplicate, this 10th day of November, 1900. Geo. L. Cox, H. E. Burgess."

Whereupon appellee opened up the pass-way for Cox and his employés in removing the timber, and kept it open for them for the full period provided in the contract, four years. Appellant Cox refused to convey the land at 50 cents an acre at the expiration of the four years, and this suit was brought against him by appellee to compel the specific performance of the contract. Appellant defended on two grounds: One, that the contract was unfair and unconscionable; that the land was worth, when the suit was brought, \$20 an acre, and was worth \$10 when the contract was made; that appellee realizing the fix in which appellant was placed with reference to his timber, took advantage of him, and squeezed him into a bargain that is distortionate. He claims therefore that he executed the contract under duress. The other defense is that appellee did not furnish that passway he had agreed, but refused to allow its free use for the full term for the purposes of removing appellant's timber, by reason of which part of the timber was not taken off. The proof discloses that when the contract was entered into, appellant's land was regarded by him and others generally valuable mainly for its timber, and was worth then from \$1 to \$8 an acre with the timber all on it. But since then development of mineral resources of that region has added a considerable market value to such lands, and by reason of the extension of a railroad up the Big Sandy Valley to the vicinity of this land within the last year or two (but not undertaken when the contract was made), has added a great deal to the value of these and all other lands in that immediate locality.

Appellant, finding that his land has greatly appreciated in value since his contract was made, or that he was then mistaken as to its

real or probable value, so that to now comply with it would be to give greatly more for the right of way he has had and used, then it is or was worth, insists that to compel his specific performance of the contract would be unconscionable; that it would be to compel him to pay from \$800 to \$2,000 for that which was worth not over \$40 or \$50. Appellant relies on that principle of equity which refuses to decree the specific execution of a contract which is attended with hardship, oppression, or fraud. This principle is admitted. Whether it applies to the case presented is the question. While equity operates on fixed rules, as well defined as are the rules of law, it exercises a judicial discretion which may be likened to the civil conscience, and which will vary in the relief afforded according to the peculiar facts and circumstances of the particular case. This is not, as was formerly charged against the chancellor's exercise of prerogatives which were at variance with the rules of law, according to the individual conception of the judge in the case as to what was right between man and man. Or, as it was anciently put (*Table Talk*, tit. equity): "Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing as the chancellor's conscience."

Equity is now also the law. The case must fit itself to the law of equity. Equity will not change itself to fit the facts of the case. So, while the rule is that equity will withhold its sanction from and refuse to execute a contract which is founded upon fraud, imposition, mistake, undue advantage, or gross misapprehension; or where, from a change of circumstances, or otherwise, it would be unconscionable to enforce it (2 *Story's Equity*, § 750a), yet those broad terms have each been defined by the courts until they also have come to have a fixed legal meaning in their application by courts of equity. It was never intended to substitute the judgment or business sagacity of the chancellor for that of the contracting party, and to relieve one of his bad bargain, although fairly entered into. Nor was it intended to deprive one party of the gain which had accrued to him by the changing circumstances of the future which his foresight had anticipated, or which fortune had thrown in his way. No more was it intended that the chancellor should act as guardian for him who overestimates to himself the value of a dollar at present as compared to several dollars in the indefinite future, relieving such of the consequences of their errors of judgment, or sheltering them

behind the chancellor's grace from the performance of what they have in a fair trade been paid to do. Even though the consideration had been inadequate, if we had a way of truly measuring the consideration, that of itself is not enough to justify the chancellor's refusal to enforce the contract. *Pomeroy* states the rule correctly thus: (*Pomeroy's Equity Jurisprudence*, 926): "The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation."

Gross inadequacy of consideration is a ground for withholding the relief. But it must be such after all as amounts in law to a fraud. It must be as *Lord Thurlow* puts it in *Gwyne v. Heaton*, 1 Bro. Ch. 1, 9: "An inequality, so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." The contract should be viewed as of the time and under the circumstances when it was made. For the law is clear that increases, gains, rises in value, and other advantages happening to the property after the contract is entered into, belong to the purchaser, who also assumes the risks of depreciation in value, losses from fire, and the other elements, or other accidental causes not resulting from the fault of the seller. *Pom. Eq. Jur.* § 1406. If the timber was the main value of this land in 1900, and to get it out to market was therefore a valuable privilege to its owner, a convenient, cheaply operated right of way for hauling off his logs may fairly be regarded as a matter of considerable value to him, as he had no other. What he got for his logs is not shown. What the trees were then worth as they stood in the forest with no outlet to floatable water, is not shown. It may be, for aught the record discloses, that the right of way was a very valuable property to appellant. He has had its use for four years, and got out all or nearly all the timber, and could with proper diligence have got it all out to market. Shall he now measure the value of that consideration which he got from appellee, by proof of the inconvenience or damage it did appellee? Surely not.

Nor is there any feature of oppression in the transaction. Appellant was not bound to then sell or take out his timber. Appellee was under no sort of obligation, natural, moral, or otherwise, to facilitate appellant's timber operations, no more than were the

saw mill owners to buy his timber after he got it to market. Appellant was not unadvised of his rights; he was not imposed on by misrepresentation or deceit of appellee; he was not put in bodily fear; his mind was not overreached by appellee; he acted upon his own judgment, and was perfectly free and independent in the matter. He got what he bargained for. That subsequent events show that the bargain was not a good one for him does not alter the law which upholds every contract understandingly entered into by competent parties for a valuable consideration, and not illegal or immoral. There is no element of oppression in the case.

The claim that appellee did not furnish the passway is not sustained by the evidence.

Objection is also made to the description of the land in the bond. We think it sufficient. It designates it as all the land owned by appellant lying on the waters of Long Fork of Millers Creek in Pike county, Ky., "which lies back of the land of said Burgess." That should be construed to mean, as the lower court did construe it, all the land owned by Geo. T. Cox, on the waters, and beneath the watershed, of that branch or stream, which lay back of, that is, beyond, the lines of H. E. Burgess on that same branch. It could have no other meaning, and the parties themselves seem to have so understood it.

The judgment of the chancellor enforcing the specific performance of the contract is affirmed.

#### DRAKE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

#### CRIMINAL LAW—FORMER JEOPARDY—INDICTMENT.

Const. § 13, declares that no person shall be twice put in jeopardy for the same offense. Cr. Code Prac. § 178, provides that the dismissal of an indictment for variance between the indictment and proof shall not bar another prosecution for the same offense. *Held*, that where one was indicted for betting on the result as between opposing candidates for the office of county judge, and the indictment alleged that the name of one of the candidates was H. E. Knox, but the evidence showed that his name was A. T. Knox, and the jury were peremptorily instructed to acquit defendant on account of the variance, the acquittal was a bar to a subsequent prosecution, as the variance was immaterial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 345.]

Appeal from Circuit Court, Powell County.

"Not to be officially reported."

P. Y. Drake was convicted of betting on an election, and he appeals. Reversed and remanded.

C. F. Spencer, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

SETTLE, J. The appellant, P. Y. Drake, and Abner Vance were jointly indicted by the grand jury of Powell county for betting on an election held in that county; the charge in the indictment being that they wagered

\$10 upon the result of a race between G. M. Derickson and H. E. Knox, opposing candidates for the office of county judge. The indictment was returned at the November term, 1905, of the Powell circuit court. At the March term, 1906, of the court, and on the 19th day of that month, appellant was tried under the indictment in question. After the introduction of the commonwealth's evidence, the court, on appellant's motion, peremptorily instructed the jury to find him not guilty, and such was their verdict. Judgment was then entered in conformity with the verdict. On the following day, and during the same term of court, the commonwealth's attorney, by information filed therein, renewed the prosecution against appellant for the same offense charged in the indictment, the only practical difference between the language of the charge in the indictment and that contained in the information was in the initials of Knox, one of the candidates for county judge. In the indictment his name was given as "H. E. Knox," but in the information as "A. T. Knox." When brought to trial on the charge contained in the information, appellant entered a plea of not guilty, and also pleaded his trial and acquittal under indictment as a bar to the prosecution by information. The parties then waived the right of trial by jury and submitted the case to the court upon the questions of law involved and the following agreed facts: "It is agreed that the defendant, P. Y. Drake, was indicted in this court for betting on the race of county judge in Powell county, at the November election, 1905, in which indictment it was alleged that G. M. Derickson and H. E. Knox were candidates for said office at said election; that on the trial of said cause it was proven by the commonwealth that the defendant, Drake, did bet \$10 on the race for county judge at said election between the candidates, G. M. Derickson and A. T. Knox, they being the only candidates for said office, but that the candidates at said election were G. M. Derickson and A. T. Knox. Said trial resulted in a verdict for defendant, on peremptory instruction from the court on motion of defendant, which was given on account of variance in the name of 'H. E. Knox,' instead of 'A. T. Knox'; the jury finding the defendant not guilty. The statement of information was then filed against the defendant, which states the same facts as the indictment, except using the name of 'A. T. Knox' as one of the candidates, instead of 'H. E. Knox.' It is further agreed that the testimony in this cause will be the same as in that case, relating to the same transaction as was therein testified to. The case here submitted is whether the trial of that cause is a bar to this action; the defendant having been acquitted on the trial of the indictment." The court below, by the judgment rendered, rejected the appellant's plea in bar, found him guilty as charged in the

information and fixed his punishment at a fine of \$100. To that judgment appellant excepted, and the case has come to us by appeal.

It is manifest from the agreed facts appearing in the record, that the offense set forth in the information is the same for which appellant was previously indicted, for the betting with which appellant was charged, both in the indictment and information, and which was proved on the first and admitted on the second trial, was in respect to the race for county judge of Powell county between Derickson and Knox, the only candidates for that office, which was to be determined at the November election, 1905. The question we are asked to determine is, should the lower court, upon the state of case presented by the record, have sustained the plea in bar? Section 3, Bill of Rights (Constitution), declares that no person shall, for the same offense, be twice put in jeopardy, and as said in *Williams v. Commonwealth*, 78 Ky. 93, "A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon indictment or information, which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is said to be thus charged when they have been impaneled and sworn." It is true that section 178, Cr. Code Prac., provides: "The dismissal of the indictment by the court on demurrer, except as provided in section 169, or for objection to its form or substance taken on the trial, or for variance between the indictment and proof shall not bar another prosecution for the same offense." In construing that part of the section, *supra*, which provides that dismissal of an indictment for variance between the indictment and proof shall not bar another prosecution, this court in *Gaskins v. Commonwealth*, 97 Ky. 494, 30 S. W. 1017, said: "Having been put upon his trial on charge of murder by a jury sworn to decide the issue between the commonwealth and himself, defendant was entitled to a decision of that issue, which he could not have been arbitrarily deprived of by the court, nor was he in fact deprived of it; on the contrary, there was a decision by the jury, who, after hearing evidence and under instruction from the court, rendered in due form a verdict of not guilty. And the only question to be determined is whether the indictment, under which he was tried and acquitted, was sufficient in form and substance to sustain a conviction, if there had been a verdict to that effect. Though there may be two or more persons charged with a murder, only one of whom actually did the deed, while the others were present, aiding and abetting, there is, in legal contemplation, but one defense of which all or any one of them can be convicted as principals. *Benge v. Commonwealth*, 92 Ky. 1, 17 S. W. 146. It thus results that although appellant

was proved, on the first trial, not to have himself done the killing, but aided and abetted another, he might have been legally convicted of the crime of murder for which he was indicted, and there was really, in meaning of the Code, no variance between the indictment and proof. Moreover, there was no dismissal of the first indictment until after the trial was had and verdict of the jury was rendered, and then there was no pending indictment to be dismissed. It seems to us the former trial and acquittal is a bar to the present prosecution, and appellant's plea ought to have been sustained." *Colliver v. Commonwealth*, 90 Ky. 262, 13 S. W. 922; *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210; *Huff v. Commonwealth*, 42 S. W. 907, 19 Ky. Law Rep. 1064. The doctrine stated in the case, *supra*, is approved by Judge Cooley in these words: "If the first indictment or information were such that the accused might have been convicted under it, on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second." Cooley, *Const. Lim.* p. 328. Numerous cases can be found in which it has been held by this court that such a plea as is here relied on was not good, but an examination of these cases will show that it was so held because there could have been no legal conviction under the first indictment, and also, in perhaps every instance, that the first indictment was dismissed before verdict by the jury. *Turner v. Commonwealth*, 42 S. W. 1129, 19 Ky. Law Rep. 1161.

According to the admitted facts of the case at bar, the appellant was tried the second time for the same offense, consequently he has been twice put in jeopardy therefor. He might have been legally convicted under the indictment. The ground upon which the court instructed the jury to acquit him upon the trial had under the indictment was a supposed fatal variance between the indictment and proof, in that the indictment incorrectly gave the name of one of the candidates for county judge, upon whose race appellant had wagered money, as "H. E. Knox," when his true name, as developed by the evidence upon the trial, was "A. T. Knox." We do not think the variance was material. The mistake was merely as to the initials of the Christian or given name. The surname was "Knox." There were but two candidates for county judge in Powell county, to be voted for at the November election, 1905; one of these was Knox, and no other person of that name was a candidate. No question was made or could have been raised as to his identity; consequently, neither the commonwealth nor the appellant could have been misled, or the latter prevented from making his defense to the charge in the indictment, because of the error in the initials of Knox's name. The facts constituting the

offense charged were specifically and clearly alleged. That is, it was alleged that the wager of \$10 was made by appellant and Vance upon the result of the race for county judge of Powell county in the November election, 1905, and that there were but the two named candidates for the office. Manifestly, the indictment is not only direct and certain as to the parties charged, the offense charged, and the county in which the offense was committed, but also as to the particular circumstances of the offense charged. Cr. Code Prac. § 124.

Such a variance as that upon which the peremptory instruction was given on the trial, under the indictment, has been repeatedly held not material by this court. In *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210, the defendant was indicted for bigamy. In the trial it appeared that the first wife sometimes went by the name of "Mag Sharp," which was her real name, and sometimes by the name of "Mag White," the name given her in the indictment. Yet this was held not a fatal variance. In *Kriel v. Commonwealth*, 5 Bush, 362, an indictment for murder described the person murdered as "Barbara Kriel." The proof disclosed her name to be "Margaret Kriel." This variance was also held not material. In *Skelton v. Commonwealth*, 92 S. W. 298, 28 Ky. Law. Rep. 1352, the defendant was indicted and convicted of the offense of acting as agent in this state for a foreign insurance company, without license, it being charged in the indictment that "he did aid and assist said association in the transaction of its insurance business, in collecting and receiving dues and premiums from Mrs. Kate Harvey on a policy of insurance issued by said association. \* \* \*." It was complained on appeal that as the testimony on the trial showed the person from whom the defendant collected premiums was Mrs. A. M. Harvey, instead of Mrs. Kate Harvey, as charged in the indictment, the variance was fatal, but the court rejected the contention, and held that the variance was not material.

Being of opinion that the appellant's plea in bar should have been sustained, the judgment is reversed, and cause remanded for proceedings consistent with the opinion.

#### BUTLER COUNTY v. GARDNER.

(Court of Appeals of Kentucky. Oct. 10, 1906.)

##### 1. HEALTH — HEALTH OFFICERS — SALARY — ALLOWANCE.

Acts 1904, p. 106, c. 35, providing that the local board of health of each county shall appoint a competent practicing physician, who shall be the health officer of the county and secretary of the board, and receive a salary, the amount of which shall be fixed by the fiscal court, requires the court to make a reasonable allowance for the salary of a health officer commensurate to the character and quantity of the services performed.

##### 2. COUNTIES — FISCAL COURT — APPEALS.

Ky. St. 1903, § 978, provides that an appeal may be taken to the circuit court from all orders and judgments of the fiscal court of a county in civil cases, where the value in controversy, exclusive of interest and costs, is over \$25. *Held*, that where a county health officer applied for a yearly salary allowance of \$500 and the fiscal court fixed his salary at \$100, the circuit court had jurisdiction of the officer's appeal from such allowance.

Appeal from Circuit Court, Butler County. "Not to be officially reported."

Proceeding by E. A. Gardner against Butler county. From a judgment for plaintiff, defendant appeals. Affirmed.

A. Thatcher and J. W. Harrell, for appellant. W. A. Helm and N. T. Howard, for appellee.

LASSING, J. E. A. Gardner was appointed health officer for Butler county on the 14th of November, 1904, and on the 5th day of April, 1905, he came before the fiscal court of Butler county and asked an allowance of \$500 per year for his services as health officer for said county; the court having considered the matter entered an order fixing his salary at \$100 per year, commencing with the date of his appointment. From that order the said Gardner appealed to the circuit court of Butler county, and the case was docketed and stood for trial at the May term of said court. The defendant, Butler county, by the county attorney, entered a general demurrer to the statement on appeal. The court overruled the demurrer, and, on a trial before a jury, plaintiff was given a verdict and judgment for \$300 and from that judgment this appeal is taken.

There is no bill of evidence or exceptions before us, and the only question for consideration, therefore, is, did the circuit court have jurisdiction of the appeal from the order of the fiscal court? If it did, then the demurrer should have been overruled; if not, the demurrer should have been sustained and the appeal dismissed. Chapter 35, p. 106, Acts of the Legislature of 1904, provides that the local board of health shall appoint a competent practicing physician, who shall be the health officer of the county and secretary of the board; whose duty shall be to see that the rules and regulations provided for in this act and the rules and regulations of the state board of health are enforced, and who shall hold his office at the pleasure of said board; and he shall receive a salary, the amount of which is to be fixed by the fiscal court at the time or immediately after his election and in no state of case shall he claim or receive from the county any compensation for his services other than the salary fixed by the fiscal court. Appellant contends that the order of the fiscal court is final, and that no appeal lies therefrom. This court, in the case of *Ohio County v. Newton*,

79 Ky. 267, held "an appeal lies to the circuit court from a judgment of a court of claims (which is the fiscal court) making a county judge an allowance for his services as such." Section 11, art. 17, c. 28, Gen. St., provides that "the court, at the court of claims, shall make an allowance to the presiding judge, out of the county levy, for his services in holding the county courts." In construing this section the court said: "We think this can mean nothing else than a reasonable allowance—an allowance commensurate to the character and quantity of the services performed." The fiscal court of to-day has taken the place of the court of claims. Section 1072, Ky. St. 1903, re-enacting the section of the General Statutes above referred to, reads as follows: "The county judge shall receive an annual salary to be fixed at a reasonable amount by the fiscal court and paid in quarterly installments by the county." It will thus be seen that in re-enacting this statute the words "reasonable salary" or "reasonable amount," rather, have been substituted for the word "allowance" in the General Statutes and which was construed by this court to mean "reasonable allowance." And it was clearly the intention of the law makers in the draft of chapter 35, p. 106, Acts 1904, that the fiscal court, in fixing the salary of the health officer, should fix it at a "reasonable amount"—an amount commensurate with the services, estimated from past experience and present conditions which he would be required to perform during the year, and this is the construction which this court placed upon this act in the case of Center's Adm'r v. Breathitt County, 90 S. W. 1054, 28 Ky. Law Rep. 1003. In this case Dr. Center presented his claim to the Breathitt fiscal court for \$650, and, being allowed \$200, refused to accept it and prayed an appeal to the circuit court, crediting his claim with \$200, and, on the trial of the case in the circuit court, the jury was instructed peremptorily to find for the defendant. On appeal to this court the jurisdiction of the circuit court to try the case and review the action of the fiscal court, while not directly raised, was tacitly recognized. Section 978, Ky. St. 1903, which regulates appeals, provides that an appeal may be taken to a circuit court from all orders and judgments of the fiscal court in civil cases where the value in controversy, exclusive of interest and costs, is over \$25. It makes no distinction or difference as to the kind or character of judgment, but provides in broad and comprehensive language for an appeal in all cases where the amount of the judgment, exclusive of interest and costs, exceeds \$25. We are of the opinion that this case was clearly one in which the party feeling himself aggrieved had the right to an appeal, and the trial court, therefore, properly overruled the demurrer.

The judgment is affirmed.

## HATFIELD v. ADAMS.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

### 1. MASTER AND SERVANT—INJURIES TO SERVANT—SCOPE OF EMPLOYMENT.

Where a minor, employed by the proprietor of a newspaper as a carrier, worked under the foreman of the distribution department, who had nothing to do with the machinery, and the foreman ordered the minor to remove papers from a folding machine, in doing which he was injured, he was a volunteer, and the master was not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 153, 155.]

### 2. APPEAL AND ERROR—QUESTIONS REVIEWABLE — NECESSITY OF MOTION FOR NEW TRIAL.

Rulings excepted to on trial are not reviewable unless presented on a motion for a new trial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1673.]

Appeal from Circuit Court, Daviess County.  
"To be officially reported."

Action by Mike Hatfield by his next friend against W. Q. Adams. Judgment for defendant. Plaintiff appeals. Affirmed.

W. Scott Morrison and W. T. Owen, for appellant. Miller & Todd and Glenn & Ringo, for appellee.

SETTLE, J. The appellant, Mike Hatfield, an infant, by his father and next friend, brought this action in the court below to recover of the appellee, W. Q. Adams, damages for personal injuries alleged to have been sustained through the negligence of the latter's employé. It was alleged in the petition that appellee is the publisher of a newspaper in the city of Owensboro, called the "Owensboro Daily Inquirer," and owner of an office, printing presses, and machinery for publishing the same and doing other printing; that the paraphernalia of the printing office includes a machine known as a "folder," which contains many wheels, cogs, and knives and is used for folding and trimming papers after they are printed. That one Edward Pendleton, was the foreman of appellee's distributing department at the time the infant appellant received the injuries complained of, and the latter was in the employ of appellee as a paper carrier in the city of Owensboro; that on the occasion referred to, while in appellee's printing office waiting to receive, for delivery in the city, his share of the papers of that day's issue, appellant was ordered by Pendleton to remove from the folding machine papers and trimmings, in attempting to obey which order his right hand was caught in the revolving cogs and thereby cut, mangled, and permanently injured. It was further averred in the petition that the folder is a dangerous machine which was well known to appellee's servant, Pendleton, but not to appellant, and that Pendleton was guilty of negligence in ordering one of his youth and inexperience to perform the duty of removing the papers and cuttings there-

from, and in no event should he have been ordered to perform the service in question without being warned of the danger attending the same, and instructed how to avoid it.

Appellee's answer contains a traverse of all the material averments of the petition and averred the following facts: "For further answer said defendant states that at the time and place mentioned in the petition the said plaintiff, Mike Hatfield, against the will and in defiance of the orders of the defendant, plaintiff voluntarily placed his hand in contact with the revolving cogs of said folding machine and thereby sustained all the injury that he did sustain on that occasion, being the same injuries complained of in the petition. At the time of said injury the said plaintiff knew of the cogs, wheels, and belts of said machine, which were plainly visible to him, and knew of the danger of allowing his hand to come in contact with them, but without the knowledge or consent of the defendant, he suddenly and voluntarily reached his hand to said cogs, and placed it in contact therewith as aforesaid." The answer closed with a plea of contributory negligence on the part of the appellant. The reply to the answer contains a simple traverse of its affirmative statements.

At the conclusion of appellant's evidence introduced on the trial in the court below, appellee asked the court for a peremptory instruction, but the same was refused, thereupon appellee introduced his evidence, which was followed by that of appellant's in rebuttal. At the conclusion of all the evidence, appellee renewed the motion for a peremptory instruction which the court sustained, and the jury returned a verdict in behalf of appellee in obedience to the peremptory instruction. Upon this verdict judgment was entered dismissing the action and allowing appellee his costs, to which, as well as the ruling of the court in granting the peremptory instruction, appellant at the time excepted, and his motion for a new trial having been overruled, by this appeal he seeks a reversal of the judgment.

The only ground relied on by appellant for a new trial was alleged error of the lower court in giving the peremptory instruction, consequently other rulings excepted to in the lower court, but not presented on the motion for a new trial, will not be considered on appeal. *McLain v. Dibble & Co.*, 13 Bush, 298; *Commonwealth, for Use, etc. v. Williams, etc.*, 14 Bush, 297; *American Insurance Co. of N. Y. v. Austin*, 37 S. W. 678, 18 Ky. Law Rep. 632; *Green v. Culver*, 39 S. W. 426, 19 Ky. Law Rep. 186.

It is apparent from the evidence that the appellant, Mike Hatfield, was not a regular employé of appellee, but he worked for him as a carrier of papers at times, covering a period of three or more months, in the place of Leon Marion, a regular carrier, who was so ill for a while as to be unable to perform

his duties. Appellant's name was never on appellee's books as a carrier, though he was paid by the latter for such work as he did. Appellant testified that he was in appellee's employ when hurt, but appellee, Goodman, the foreman, of his printing department, and Pendleton in charge of the carrier department, say he was not.

It was also claimed by appellant that when injured he was undertaking to remove papers and clippings from the folding machine by direction of Pendleton. Pendleton not only testified that he gave him no such direction, but also that he did not in fact know appellant was at the folding machine until he heard him cry out when hurt. Goodman, who was only a few feet away, and at least two carrier boys who were present when he was hurt, did not hear Pendleton tell him to remove the papers and trimmings from the machine, and the two boys also testified, as did Pendleton, that he was not in the building when appellant went to the folding machine, and did not enter it until immediately before his injuries were received. Though flatly contradicted by the witnesses named, in respect to his having been ordered to the folding machine by Pendleton, still on his own testimony appellant would have been entitled to go to the jury with his case, had the determination of this single question of fact been decisive of the case. But it was not. Yet other questions fully as material, arose upon the trial about which there was no conflict of evidence; that is to say, the fact that appellant knew the dangerous character of the folding machine, was clearly established by the evidence. Goodman, appellee's foreman, in charge of the printing room and machinery of the office, had repeatedly warned him of the danger of going about the folder and other machinery, and driven him from the room where it was situated. Similar warnings were also given him by Pendleton and others about the printing establishment and they too had ordered him to keep out of that part of the building containing the printing presses, folder, and other machinery. He was even bodily picked up and carried away from that room on one occasion by an employé of appellee.

It is also patent from the evidence that Pendleton had no control of the folding machine, and was never in charge thereof. There is absolutely no contrariety of testimony on this point. The folding machine and all other machinery of the establishment was in charge of Goodman, foreman of the printing and mechanical department. He alone had the right to appoint, or direct employés of the office, or others, to operate the folding machine and to control them in that work. It was in fact operated by Porter and Rogers under Goodman's supervision. Rogers, in the performance of some other necessary duty, had temporarily left it and gone to the room from which the papers were distributed, only a few minutes before appel-



lant was injured and the latter, according to all the testimony on that point but his own, noting his absence, voluntarily put himself at the machine in disobedience of the warning repeatedly given him theretofore, to stay away from it.

According to all the evidence, Pendleton's sole duty as an employé of appellee, was to distribute the papers. In the performance of this duty he controlled the carriers in their work of delivering papers in the city of Owensboro. They received from him the papers to be distributed, and by him the territory in which each of them was to do his work was prescribed. Pendleton's work was performed in a room or department wholly distinct from that occupied by the presses and machinery of the establishment. So, in view of the foregoing undisputed facts, though it be conceded that appellant was an employé of appellee at the time of receiving his injuries, it would necessarily follow that he and Pendleton were serving appellee in the distributing, or circulating department of the printing establishment, and to that department their duties were confined.

In respect to the distributing department, Pendleton was appellee's foreman and appellant's superior, if the latter was then in appellee's employ. His duties and those of the persons under him, did not extend to the printing department, or operation of the folding machine, but were simply to receive the papers after they were folded, trimmed, and ready for delivery, and to deliver them to the subscribers. Therefore, as to any other or separate department of appellee's business, such as the mechanical department of the printing establishment, Pendleton was not the agent of appellee, or the superior of appellant, and if, as claimed by the latter, he was ordered by Pendleton to remove the papers and trimmings from the folding machine and was injured in doing that work, appellee is not liable therefor, as the act of Pendleton in thus directing him was unauthorized because beyond the scope of his employment. Appellant was not required to obey the order of Pendleton and if he did so, he was a mere fellow servant of Pendleton, or a volunteer in the performance of a service unauthorized by his employment. In all cases, the principle upon which the employer is held liable for the act of an employé, is that of agency—what he does through another he does himself. So, to hold the master liable for an injury to one employé caused by the negligence of another, it must be made to appear that the injury was received in the performance of a service for the master within the scope of the employment of the person injured, and that in requiring that particular service, the servant through whose negligence the injury resulted had authority to represent the master, and by reason thereof, was the superior of the person injured. Otherwise, in the per-

formance of such service the negligent servant and one injured must be regarded as fellow servants, or the latter as a mere volunteer in doing an act not required by his employment. *Volz v. C. & O. Ry. Co.*, 95 Ky. 188, 24 S. W. 119. *Labatt on Master and Servant*, § 470. In *Labatt on Master and Servant*, § 631, it is said: "The position of the person undertaking work which he was not authorized to undertake, is in no wise strengthened by the fact that his intervention therein was induced by the order of his own superior."

The most that can be claimed for appellant under the facts of this case, is the rights of a volunteer, and Labatt says on that subject in the section supra, (page 1858): "A person suing for injuries received in the performance of work undertaken by him as a volunteer, is placed in this dilemma—that if the evidence shows that he was not authorized to perform, as a servant, the work in question, the party for whom the work was done owed him no obligation as a master; while, on the other hand, if his claim to be put on the footing of a servant is admitted, the doctrine of common employment operates as a bar to his recovery. The latter alternative arises where the injured person was an emergency assistant, hired by an employé who had, under such circumstances, authority to engage him, although ordinarily he was not invested with any such power; or where the services, although voluntarily offered in the first instance, were accepted by the master's agent." On the same subject the author tells us that the minority or youthfulness of the appellant does not affect the question. "For the purposes of this doctrine it is assumed that, in cases where the injury is alleged to have been received while the servant was engaged in work undertaken *proprio motu*, or in compliance with the unauthorized request of an employé of the defendant, the controlling question is simply whether the defendant owed such complainant any of those duties imposed by the law upon employers for the benefit of their servants, and not whether such complainant was a trespasser, or negligent. In this point of view it is clear that the fact of the complainant being of immature age is a wholly immaterial element." In the light of the foregoing authorities and under the facts of this case, the appellant did not show himself entitled to recover. Therefore, the lower court did not err in granting the peremptory instruction.

Wherefore the judgment is affirmed.

#### BEVINS v. J. A. COATES & SONS.

(Court of Appeals of Kentucky. Oct. 10, 1906.)

##### 1. SALES—CONTRACT—OFFER AND ACCEPTANCE—MISTAKE.

Defendant ordered from plaintiff five great gross of pins arranged on papers with his advertisement printed at the head of the papers and between the rows of pins, and two great

gross of needles similarly arranged. On receipt of the order, plaintiff wrote defendant, repeating the order back, and requesting defendant to check it over carefully, so as to be sure there was no mistake. Defendant replied that it was correct in every particular, whereupon it was filed; but plaintiff refused to accept because of a mistake in ordering "great gross" instead of "gross," as he had intended. *Held*, that in the absence of evidence that plaintiff was guilty of any fraud or sharp practice in obtaining the order, or that it knowingly took advantage of defendant's mistake, such mistake was no defense to an action for the price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 63.]

## 2. SAME—BREACH OF CONTRACT—REMEDIES OF SELLER—ACTION FOR PRICE.

Where a contract of sale provided that the goods should be billed to W., which was the buyer's nearest railroad shipping point, the seller performed his whole duty when he shipped the goods to the buyer at that point and notified him of their arrival, after which the seller was entitled to leave the goods at the place of delivery, as the property of the buyer, and sue him for the price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 377, 378, 380.]

## 3. SAME—DELIVERY—TIME.

Where an order for the sale of pins and needles plainly recited that it required from 40 to 90 days to obtain them from the factory, and the buyer knew his advertisement had to be printed on the papers before the pins and needles could be arranged thereon, he was not entitled to defend an action for the price, on the ground that he understood the goods were to be shipped at once, and because of delay he was forced to purchase elsewhere.

## 4. SAME—CANCELLATION OF ORDER.

Where an offer for the purchase of goods has been accepted, the buyer cannot cancel it without the seller's consent.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 286.]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by J. A. Coates & Sons against J. Mont Bevins. From a judgment for plaintiff, defendant appeals. Affirmed.

N. J. Auxler, E. D. Stephenson, and F. W. Stowers, for appellant. Harman & Auxler, for appellee.

**BARKER, J.** The appellant, J. Mont Bevins, is the owner of three country stores which are located at Bent Branch, Canady, and Meta, Pike county, Ky. The appellee corporation is a wholesale dealer in needles and pins, located in New York City, handling goods manufactured in Redditch, Eng. The litigation involved in this record arose in this way: The appellee mailed to appellant a circular by which it proposed to sell him a bill of needles and pins arranged on papers displaying an advertisement of his business; the advertisement to be placed at the head of the paper and distributed along between the rows of pins and needles. He responded to this proposal, with the result that the appellee sent him blanks on which he ordered from it 5 great gross of pins—300 pins in a paper—with advertisements printed at the head of each paper and between the rows, and two great gross of needles put up in papers simi-

lar to those containing the pins. In this order it was stipulated that it required from 40 to 90 days to obtain the goods from the factory, and that appellant's shipping point was Williamson, W. Va. The goods were shipped to him at Williamson, W. Va., the point named in the order, and within the maximum time (90 days) named therein; but appellant refused to receive or pay for them, claiming, at first, there were more goods than he ordered, but subsequently advancing other defenses which will be hereafter noticed. Upon being notified of appellant's position with reference to the goods, this action was instituted against him in the Pike circuit court, and, on motion of the appellant, was transferred to the equity side of the docket, where a trial resulted in a judgment for the appellee for the full amount claimed, \$406.80.

Appellant's main defense is that the order of great gross, instead of gross, of pins and needles, was a mistake on his part, and so out of proportion to his needs and ability to handle that appellee was bound to know he had made a mistake, and that he meant gross, instead of great gross; in other words, that he thought he was ordering \$32.50 worth of pins and needles, when in reality he was ordering \$406.80 worth; that the mercantile agencies showed that he only did about \$5,000 of business per annum, and appellee, when it ascertained his financial rating, was informed as to the amount of business he did, and in this way knew that the order was a mistake. This might be sufficiently plausible to warrant refutation, except for the fact that, after appellant forwarded his order to appellee, the latter in a letter repeated it back to him, and requested that he check it over carefully, so as to be sure there was no mistake in it, in answer to which he responded that he had checked it over, and found it correct in every particular. Thereupon appellee placed the order with the manufacturer in England, where it was filled, and forwarded to appellant as above stated. Appellee had a right to assume that appellant knew what he wanted, and its examination into his financial standing, if made at all, was for its own protection, and, being satisfied upon this point, it was under no obligation to constitute itself the guardian of its customer. It seems to me that appellee did in the matter more than is usually done to prevent a mistake in an order for goods. As said before, the order shows that the goods were to be billed to Williamson, W. Va., that being the appellant's nearest railroad shipping point, and appellee did its full duty under the contract when it shipped the goods to appellant at that point, and had him notified of their arrival. After that it had a right to do as was done in this case—leave them at the place of delivery as the property of appellant, and sue him for the purchase price.

There is no evidence that appellee was guilty of any fraud or sharp practice in obtaining the order, or that it knowingly took

advantage of the mistake of appellant. If there was, we might reach a different conclusion. We have no doubt that appellant honestly made the mistake he claims, and that the quantity of goods ordered was very far beyond his needs as a merchant; but the rule is elementary that, when one of two innocent parties must suffer because of a mistake, if it has resulted from the negligence of one of them, he must bear the consequences. The words "great gross," instead of "gross," were plainly written in the order. Appellant, himself, testified that he knew the difference between gross and great gross, and that when he read over the order, if he had noticed the word "great" therein, he would have appreciated the difference. His misfortune, therefore, was the result of his own negligence, and not from any wrong on the part of appellee.

We are not impressed with appellant's claim that he understood the goods were to be shipped to him at once, and that, in default of their coming immediately, he was forced to purchase elsewhere. The order plainly states that it required from 40 to 90 days to obtain them from the factory, and in addition thereto appellant knew his advertisement had to be printed on the papers before the pins and needles could be arranged thereon, and, if there was nothing else before us, a consideration of this fact would constrain to the conclusion that he knew the goods were not to be shipped, except as was done.

There was no evidence to show that appellee received the letter by which appellant undertook to cancel his order, if it was written; nor could he, after it had accepted the order, cancel it without its consent.

The judgment of the chancellor in favor of appellee for the full amount of its claim, being in accord with the views herein expressed, is affirmed.

### LANDRUM v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

#### HOMICIDE—PRINCIPAL AND ACCESSORIES—INSTRUCTIONS.

An indictment charged defendant with aiding and abetting others in the killing of deceased. It appeared that defendant, after the shooting commenced, and without any communication with parties on the outside who were doing it, ran into the room where deceased was and began firing, and supposed he had killed deceased, but he was in fact killed by a shot from outside the building. *Held*, that an instruction that defendant was guilty as a principal if he was present and willfully and feloniously aided and abetted those who killed deceased, was misleading as an aider or abettor must be present, participating in the crime and sharing the criminal intent of the principal.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 637.]

Appeal from Circuit Court, Laurel County.

"To be officially reported."

Joe Landrum was convicted of manslaughter, and he appeals. Reversed.

Geo. C. Moore, Walker Moren, Sam C. Hardin, and B. B. Golden, for appellant. N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

O'REAR, J. Appellant was convicted of manslaughter under an indictment charging him and George Ward and Frank Ward with the murder of Jeff Goff. In view of the conclusion we have reached in the case, and of the grounds of this decision, it becomes necessary to detail the particulars of the homicide. Appellant conducted a grocery store and restaurant in the little mining town of Pittsburg, Laurel county. About 11 o'clock at night of April 15, 1906, some parties, particularly Bill Miller, Frank Ward, and possibly George Ward, engaged in a shooting affray in and about appellant's place. At the time the shooting began appellant was asleep in a rear room, sitting in his chair, and had been for some hours before. We think the proof shows he was more or less drunk at the time. There were some words passed between Bill Miller and the Wards, all more or less drunk, between whom there was also some feeling owing to a brother of Miller's having, about a month previous, shot and killed a brother of the Wards. Frank Ward was armed with a 45-calibre pistol. Bill Miller was armed with a 38-calibre pistol, and George Ward with a 38-calibre, or smaller. Frank or George Ward opened the fight by firing upon and wounding Bill Miller, who, though desperately wounded, returned their fire vigorously. They all passed out of the building where the fight began, onto the street, where the firing was kept up for a while. Both Bill Miller and Frank Ward fired into the room after they went out. Some one, we think the proof shows satisfactorily it was Frank Ward, fired through a window into the room where Jeff Goff was staggering about drunk, unarmed and harmless. There is no pretense that either of the Wards or Miller was attempting to injure Goff, or even knew of his presence. During the mêlée appellant, awakened from his slumber, rushed into the store room where Goff was, and into which somebody was shooting, grabbed a 32-calibre pistol from behind his counter and began to return the fire being directed into the room. He saw Jeff Goff staggering about the room, and probably shot at him, and we think the proof shows, struck him in the hands and lower arm with several bullets from his pistol. But none of these wounds were serious—certainly none a mortal wound. While appellant was blazing away into the fight indiscriminately, or even it may be, for the purposes of this decision, he said, firing at Goff, a pistol shot from the outside came through the window of that room and entered Goff's body from behind, pierced his heart and came out in front. This bullet was a 45-calibre. He fell forward, dead of

course, and was not removed till next morning, after a number of witnesses had examined his position and wounds. There is no evidence of any previous agreement or conspiracy between appellant and the Wards to shoot or injure either Goff or Bill Miller, or anybody else. There is no evidence that they had been together, or communicated with each other. There is no evidence that appellant knew Frank Ward was shooting at anybody, or was outside the building, or about it. Whatever may have been the purpose or motive of the Wards towards Bill Miller, or any other person present, there was not a scintilla of proof that appellant knew of it or shared it to any extent. After the shooting was all over, appellant said that he had killed Goff. In this there is no sort of doubt but that he was mistaken. He was still drunk, and may have then thought that he had killed him, and, for aught we know, may have intended to kill him while shooting at him. Still, he did not kill him. Nor did the wound inflicted by him upon Goff contribute to the latter's death. The shot that killed Goff beyond all possibility of dispute or doubt, so far as the evidence in this record stands, was the one fired from the outside of the building from a 45-calibre pistol. Appellant was not outside the building, and did not have a 45-calibre pistol, or any other weapon except the 32-calibre pistol. At least the record now before us shows none other. Let it be admitted that appellant shot at Goff and wounded him, intending to kill him, and shot not in his own or another's defense; that he not only intended to kill Goff but believed that he had done so, and said so. Still he is not being tried for shooting and wounding, but for killing, or for aiding or abetting the one who did kill Goff.

The indictment contained several counts. It charged the three men, George Ward, Frank Ward, and Joe Landrum (appellant) with having shot and killed and murdered Jeff Goff; it then charged that Frank Ward, as principal, shot and killed him, while Joe Landrum and George Ward aided and abetted it; it charged alternately George Ward and Joe Landrum as principals, and the others as aiders and abettors. The court in the instructions, submitted to the jury all these phases of the case, except the conspiracy charge. The instructions submitted, too, that they were guilty if either shot at Bill Miller feloniously and without real or probable cause, in their own defense or the defense of another, and thereby shot and killed Jeff Goff, and that the one or ones aiding and abetting were also guilty according to their motives. Not only is there no evidence in this record tending to show that appellant killed Jeff Goff, but there is none tending to show that he, in contemplation of law, aided or abetted the person who did kill him.

The court told the jury in the instructions that if Frank Ward or George Ward shot and killed Jeff Goff, whether shooting at him, or while shooting at Bill Miller, if such shooting was not in their own or another's defense, and if appellant was present, and willfully and feloniously aided, abetted, assisted, encouraged, counseled, advised, or commanded them, or either of them, to so shoot, that the appellant was guilty as principal, and directed the manner of fixing his punishment. We give only the substance of the instructions, the aiding and abetting feature being the one under examination. Technically, and as far as it goes, the instructions as to the aider and abettor are correct. But to the lay mind it is apt to mislead. Would not the jury suppose that to engage on the same side, shooting at the same man or men, and apparently making a common fight with the principal, Frank Ward, would satisfy at least so much of the instruction as said if he aided, assisted, or encouraged the principal in the shooting he was guilty as an aider or abettor? Yet that is not enough. For to aid and abet another in a crime one must share the intent or purpose of the principal. If two or more acting independently assault another, and one of them inflicts a mortal wound, the other is not guilty as an aider and abettor. An aider and abettor is a partner in the crime, the chief ingredient of which is always intent. There can be no partnership in the act where there is no community of purpose or intent. In *Ward v. Commonwealth*, 14 Bush, 233, the defendant was charged as an aider and abettor to John Biggs, in a robbery. The instruction was, if Ward was sufficiently near to the broken house with the felonious intent to render aid and assistance to the parties who did enter, if needed, he was in law a principal in the commission of the offense. And so he would have been if his intent was to render assistance to Biggs. The court reversing the judgment said the instruction should have been modified so as to inform the jury that the accused should not be convicted as an aider and abettor unless the felonious intent was to render assistance in the offense charged. In *Omer v. Commonwealth*, 95 Ky. 353, 25 S. W. 594, appellant was one of a posse who went to rescue a young man from the custody of others, not officers. Some of the posse shot and killed one of the other party, not in self-defense. The appellant was tried and convicted as an aider and abettor. The court said that the appellant had said nothing and did nothing at the time of the immediate killing. Nevertheless, if by his presence he gave aid or encouragement to the others engaged in the fight he is guilty of murder, if they were so guilty, provided he was there in pursuance of a mutual understanding to carry out some unlawful purpose. His presence alone, with-

out such an understanding, did not make him responsible for the acts of the others. "Therefore," the court concluded, "the case against him rests upon the intent with which he was present, to be gathered from the proof and all the circumstances in the case." To constitute one an aider and abettor, sometimes called a principal in the second degree, it is essential that he be present, actually or constructively, at the commission of the crime, and participate in it, sharing the criminal intent of the principal in the first degree. *Burrell v. State*, 18 Tex. 713; *Martin v. State*, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91; *Adams v. State*, 65 Ind. 565; *Commonwealth v. Ryan*, 154 Mass. 422, 28 N. E. 289; *State v. Hildreth*, 31 N. C. 440, 51 Am. Dec. 369, note. The aider and abettor may be guilty in a different degree from the principal, each to be held to account according to the turpitude of his own motive.

Judgment reversed, and cause remanded for a new trial, under proceedings consistent herewith.

### COMBS v. COMBS.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

#### 1. APPEAL — FINDINGS OF TRIAL COURT ON CONFLICTING EVIDENCE—CONCLUSIVENESS.

The finding of the chancellor, where the evidence is conflicting and the mind is left in doubt as to the truth, will not be disturbed on appeal.

#### 2. SAME—PRESUMPTIONS—VERDICT.

Where, in a suit for the settlement of a partnership, the account books of the partnership produced in the lower court were not brought up on appeal, the court could not disturb the judgment; the presumption being that the trial court reached the correct conclusion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3673-3678.]

Appeal from Circuit Court, Perry County.  
"Not to be officially reported."

Action by G. P. Combs against D. Y. Combs. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Cromwell and Bach & Miller, for appellant. Fitzpatrick & Salyer, for appellee.

HOBSON, C. J. Appellee sued appellant on an account, and in a separate suit in equity sued for a settlement of an alleged partnership between them. Appellee pleaded as a counterclaim an account which he held against the plaintiff. The two cases were consolidated and referred to the commissioner to report a settlement between the parties. He reported a balance of \$254.74 in favor of the plaintiff. Numerous exceptions were filed to the report, which were all overruled by the circuit court, and judgment was entered in favor of the plaintiff upon the report. The defendant appeals.

The case involves nothing but questions of fact. Our rule is not to disturb the chancellor's conclusion on a question of fact, where the evidence is conflicting and the mind is left in doubt as to the truth. The evidence

here is very conflicting and leaves the mind in doubt on the litigated questions of fact. The books containing the accounts, which were produced before the commissioner and which are made the basis of his report, are not brought up upon the appeal. Without the books we cannot form any intelligent idea of the state of the account. The presumption is that the commissioner and the circuit judge, with the books before them, reached the right conclusion. We cannot disturb their judgment when the books upon which they acted are not before us.

Judgment affirmed.

### HOBBS v. RAY.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

#### 1. TRIAL — PEREMPTORY INSTRUCTION — REQUEST—EFFECT.

A request for a peremptory instruction being in the nature of a demurrer to the evidence concedes the evidence to be true.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 399.]

#### 2. TENDER—CERTIFIED CHECK.

A certified check is not ordinarily the equivalent of money for the purposes of a tender.

#### 3. PARTNERSHIP—CONTRACT—BREACH.

Where defendant agreed to enter a partnership with plaintiff on plaintiff's payment of a certain sum of money on January 15, 1905, which time was later extended to February 1st, and on that day plaintiff presented himself and offered to carry out the contract, but defendant refused, plaintiff had a cause of action for whatever damage he sustained.

#### 4. CONTRACTS — TENDER OF PERFORMANCE — WAIVER.

Where an agreement to form a partnership required plaintiff to pay \$800 for certain land on a specified date, but before the date, as extended, arrived, defendant informed plaintiff that he would not perform his part of the contract, plaintiff was absolved from making a formal tender as a condition to his right to recover damages for breach of contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1238.]

#### 5. PLEADING—AMENDMENT TO CONFORM TO PROOFS.

Where plaintiff's testimony made a case for the jury, though somewhat different from that alleged, the court should have allowed an amendment of the petition to conform to the proof.

Appeal from Circuit Court, Shelby County.  
"Not to be officially reported."

Action by P. A. Hobbs against W. R. Ray. From a judgment for defendant, plaintiff appeals. Reversed.

Willis & Todd, for appellant. Gilbert & Gilbert, for appellee.

BARKER, J. This action was instituted by the appellant in the Shelby circuit court to recover damages for a breach of the following agreement:

"This contract made and entered into by and between Dr. W. R. Ray, of Shelby county, Kentucky, of the first part, and Dr. P. A. Hobbs, of Jefferson county, Kentucky, of the second part, witnesseth:

"That first party has this day sold to sec-

ond party a lot of ground in Shelby Co., Ky., on the south side of the Simpsonville and Antioch Turnpike, about 7½ miles from Shelbyville, and what is known as the Toll House property, and bounded as follows:

"On the north by pike; on the east by Willis Williams, and on the south and west by first party's land, and the strip so contracted for has been staked off and is to be surveyed; supposed to contain about two (2) acres more or less. Second party agrees to pay \$800.00 cash on or before January 15th, 1905, at which time a deed is to be made by first party to second party, and a further condition of this contract is that on January 1st, 1905, a joint and equal partnership is to be formed between said first and second parties, and to continue until May 1st, 1905, in the practice of medicine, and at which time said partnership ceases and the accounts of the partnership to be divided and first party obligates himself to cease the practice of medicine at his present location and not to resume the practice of his profession within seven (7) miles of his present location.

Witness hands of first and second parties this December 20th, 1904.

"[Signed]

W. R. Ray,  
"P. A. Hobbs."

Upon the trial in the circuit court, after the evidence of the appellant was all in, the court peremptorily instructed the jury to find a verdict for the appellee; and the propriety of this ruling is the question involved on this appeal. The peremptory instruction being in the nature of a demurrer to the evidence, concedes it to be true. All of the evidence for the appellant, which is material for consideration at this time, is contained in his testimony given in his own behalf. He did not himself comply with the stipulations required of him by the terms of the contract. He was not ready with his money on the 15th of January, 1905, and made no tender either before or at that time; but he states that the time for compliance with the contract was extended by mutual agreement to the 1st of February, and that before that time the appellee declared he would not carry it out, although the appellant was then ready and willing to perform his part of the terms as extended. It is true, that a certified check is not, ordinarily, the equivalent of money for the purposes of a tender, but appellant states that appellee agreed to accept it and to prepare a deed for the property to be conveyed, and to take it to Willis and Todd, appellant's attorneys, who held the certified check, and who were to give it to appellee upon the delivery of the deed. If Hobbs is to be believed, Ray agreed to all this.

Before the 1st day of February, 1905, the appellant says he presented himself and offered to carry out the contract by going into partnership with the appellee in the practice of medicine according to the terms of the

agreement between them. If this was true, he had a cause of action against the appellee for whatever damage he sustained. It was not necessary to tender the certified check after appellee had refused to carry out the contract. The law does not require a vain and useless thing; and, where one party advises the other that he does not intend to perform his part of a contract, the second party is absolved from any obligation to go on further with the agreement, and may recover whatever damages he has sustained by reason of the wrongful breach. Assuming appellant's testimony to be true, a case for the jury was made out, and the trial court should have allowed the amended petition tendered to make the pleadings conform to the proof to be filed.

Wherefore the judgment is reversed for a new trial consistent herewith.

#### EVERSOLE v. HOLLIDAY.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

##### 1. ELECTIONS—NOMINATIONS—NOMINATION BY PETITION.

A candidate for nomination for a county office received a certificate of nomination at the primary. The party authority canceled the certificate, and declared a competitor the party nominee. Thereafter the candidate filed an independent nomination by petition. *Held*, that as the revocation of the certificate of nomination dated back to the primary and left the candidate in the same attitude he would have been if no certificate had been issued to him, he was entitled to have his name on the ballot by petition without complying with Ky. St. 1903, § 1454, providing that where any person has been nominated as a party candidate for any office and also as a candidate by petition, his name shall be placed on the ballot in the list of candidates nominated, unless he shall request that his name be printed as nominated by petition, the purpose of the statute being to prevent the same person from being placed on the ballot as a party nominee and also by petition.

##### 2. SAME.

A candidate for nomination for a county office at a primary received a certificate of nomination which was revoked by party authority and a certificate issued to a competitor. The candidate attempted to appeal to a higher party organization, and obtained an injunction preventing the acceptance of the certificate issued to the competitor, which injunction was dissolved. The candidate filed a nomination by petition prior to the dissolution of the injunction. *Held*, that as, at the time the petition was filed, he was not the nominee of the party, he was entitled to get on the ballot by petition.

##### 3. SAME—PETITION—SUFFICIENCY.

A petition nominating an independent candidate for sheriff, which requests that the picture of the candidate shall be the device by which he shall be designated on the ballot, is a sufficient compliance with Ky. St. 1903, § 1453, requiring a petition for nomination to designate a device by which the candidate nominated thereby shall be designated on the ballot.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 126.]

##### 4. SAME.

Under Ky. St. 1903, § 1453, providing that a petition for the nomination of a candidate shall designate the brief name or title of the party or principle which the candidate represents, together with a device by which he shall be

designated on the ballot, it is not necessary that the petition nominating an independent candidate shall designate either a party title or principle.

**5. SAME—BALLOTS—ARRANGEMENT OF CANDIDATES.**

The device and name of an independent nominee for sheriff was placed at the head of the independent column, and at the end of the column was the device and name of an independent candidate for representative. The clerk was not influenced by fraud. *Held*, that as the statute does not provide in what position on the ballot or in the column a device of an independent candidate shall be placed, the regular party nominee for sheriff could not complain of the arrangement of the ballot.

Appeal from Circuit Court, Perry County.  
"To be officially reported."

Election contest by S. B. Holliday against M. C. Eversole. From a judgment for the former, the latter appeals. Reversed with directions.

Wm. Cromwell, Miller & Fitzpatrick, J. C. Eversole, F. E. Hogg, F. J. Eversole, P. T. Wheeler, and Hogg & Williams, for appellant. Greene & Vanwinkle, Wootton & Morgan, and W. E. Eversole, for appellee.

**CARROLL, C.** The parties to this appeal were contending candidates for the office of sheriff of Perry county before a primary election held in August, 1905. On the face of the returns the appellant, Eversole, received a majority of 50 votes and was awarded the certificate of nomination, which he filed in the office of the county court clerk. In due time, the appellee, Holliday, contested appellant's right to the nomination before the Republican county committee, which committee on October 21, 1905, rendered a judgment canceling the certificate of nomination which had previously been issued to appellant, and declared appellee the nominee of the party. Appellant appealed from the decision of the county committee to the committee for the congressional district, and also attempted to have his case heard by the state executive committee, but he was not successful in obtaining a hearing before either of these committees. On the day the judgment was rendered by the county committee, appellant also instituted an action in the Perry circuit court, enjoining appellee and the county clerk of Perry county from filing or offering to file, the certificate of nomination granted to appellee by the county committee. A temporary restraining order was issued by the circuit clerk, but this was dissolved by the circuit judge, on October 23d. Appellant, evidently anticipating an adverse decision in the contest proceedings before the county committee, had prepared a petition in the manner provided in section 1453 of the Kentucky Statutes of 1903, signed by the requisite number of voters, requesting the county clerk to have printed on the ballots his name as a candidate for the office of sheriff—the petition stating that "the picture of himself, M. C. Eversole, shall be the figure, or device by which said M. C. Eversole shall

be designated on said ballots." This petition was filed with the county clerk on the night of October 21, 1905. The county clerk, in arranging the ballot, made four columns—the first being the Democratic ticket, under the device of a rooster, the second the Republican ticket, under the device of a log cabin, at the head of the third column he placed the name of M. C. Eversole as a candidate for sheriff, under the device of his picture, and in the same column under Eversole's name was placed the name of Green B. Morris, candidate for jailer, under the device of a barefooted boy, and under this in the same column was placed the name of Hiram Fee, candidate for representative, under the device of his picture, and in the fourth column was placed the names of James Eversole and H. M. Begley as candidates for assessor, and the name of Fish Napier as candidate for sheriff—each of these names being under a different device. John Gross was a candidate for sheriff in the Democratic column, but it appears that neither Gross nor Napier desired their names placed on the ballot, although they failed to notify the clerk of this fact in proper time, and as a result of their disinclination to run, which was generally understood, they only received a few votes each. On the face of the returns, appellant received 851 votes and appellee 679, and the election commissioners awarded a certificate to appellant. Appellee in the manner provided in the statutes, contested the election, chiefly upon the ground that appellant's name was improperly and unlawfully placed upon the ballots, and that none of the votes cast for him should be counted. His election was also contested upon the ground of fraud and irregularity in several precincts in the county. And appellant likewise contested a number of votes cast for appellee, upon the ground that they were fraudulent and illegal. The circuit court in an opinion adjudged that the name of appellant was not legally placed and printed on the official ballots and that all the votes cast and counted for him were illegal and should not be counted for any candidate, basing his opinion upon the ground that as appellant has filed with the county clerk the certificate of nomination issued to him by the governing authority of the Republican Party in Perry county, and had not filed any statement waiving his right to the certificate of nomination, that his petition to be placed on the ballot as an independent candidate was not filed in good faith and was void, and did not entitle him to a place on the ballot. The circuit court did not pass on the question of the legality of the votes cast either for appellant or appellee, nor do we deem it necessary to go into this question. Irregularities, and, in some instances, fraud, was perpetrated in the interest of both candidates, but not in a sufficient degree to affect the result, or to overcome the majority received by appellant if he is entitled to the votes re-

ceived by him. Therefore, in disposing of the case we will consider the question passed on by the lower court, and mainly relied on by counsel in this court, and a few minor irregularities in the preparation of the ballot to which our attention is directed.

Section 1453 of the Kentucky Statutes of 1903 in so far as the same is pertinent, provides that, "The county clerk in each county shall cause to be printed on the respective ballots \* \* \* the names of any candidate for any office when petitioned so to do by electors qualified to vote for such candidates. Such petition shall state the names and residences of each of such candidates that is legally qualified to hold such office; that the subscribers desire and are legally qualified to vote for such candidates, and shall designate a brief name or title of the party or principle which said candidates represent, together with any simple figure or device by which they shall be designated on the ballot."

Section 1454 of the Kentucky Statutes of 1908 reads in part: "If any person has been nominated as candidate for any office by convention, and also as a candidate for the same office by petition, his name shall be placed on the ballot but once, to wit: in the list for candidates nominated by such convention, and the place occupied by his name in such petition shall be left blank; provided, that if such candidate shall in writing prior to the last day for filing nominations request that his name be printed as nominated by petition, it shall be so printed, and shall be omitted from the list nominated by convention."

Section 1460, Kentucky Statutes of 1908 provides that: "the county clerks of the several counties shall cause the name of all candidates of their respective jurisdictions, where nominations for any office specified on the ballot have been duly made and not withdrawn in accordance herewith, to be printed on one ballot, all nominations of any party or group of petitioners as designated by them in their certificate or petitions, or if none, be designated under some suitable title or device."

Appellant did not, as provided in section 1454, request that his name be printed as nominated by petition, or that it be omitted from the list nominated by the primary, and it is insisted by appellee that as appellant had filed with the clerk the certificate of nomination issued to him by the governing authority of the party, that he could not have his name placed on the ballot by petition until he had in writing requested the clerk to print his name as nominated by petition, and that failing to file this written request, the clerk had no authority to place his name on the ballot by petition. It is true that the governing authority of the party had issued to appellant a certificate of nomination and that he had filed this with the clerk, but it is also true that subsequently the same governing authority of the party canceled and revoked the certificate of nomination issued

to appellant, and declared that appellee was the nominee of the party for the office of sheriff. This revocation of the certificate issued to appellant dated back to the primary, and had the effect of annulling as of the date of its issuance the certificate given to appellant, and left him in the same attitude as he would have been if no certificate had been issued to him at all. At the time his petition was filed with the clerk, he was not the nominee of the party under the primary election. It would have been idle for him to have filed a written statement with the clerk renouncing the nomination when the party that gave it to him had taken it back, and he had no nomination to decline. The purpose of the statute as made manifest by its reading was to prevent the same person from being placed on the ballot in two places—as nominee of the party and by petition—hence, it declares that if any person has been nominated as a candidate by convention and also as a candidate for the same office by petition, his name shall be placed on the ballot but once, namely, in the list of candidates nominated by such convention, unless he renounces the nomination, and requests that his name be printed as nominated by petition. Nor was his petition filed until after appellee had tendered to the clerk the certificate of nomination to him. It is said, however, for appellee, that although the certificate of nomination issued to appellant had been revoked by the governing authority in the county, that he obtained an injunction preventing the clerk from accepting the certificate of appellee, and also prosecuted an appeal from the decision of the county committee to a higher party organization having the right to reverse and set aside the action of the county committee. These efforts on the part of appellant to prevent the action of the county committee in giving a certificate to appellee from becoming effective, did not change the status of affairs at the time his petition was filed, nor was it as the record shows subsequently changed. At the time his petition was filed he was not the nominee of the governing authority in the county for the office of sheriff, and at that time the only way in which he could get on the ballot was by petition. If any other rule were adopted, a hostile and unfair party committee might on the last day in which to file petitions and certificates of nomination annul a certificate previously issued and give the nomination to another party, and thereby prevent the person who had first obtained it from becoming a candidate by petition. When the certificate to appellant was revoked, he had at once the right to file his petition with the county clerk, and this right existed irrespective of any attempt on his part to have restored to him the certificate of nomination. If afterwards the courts or the governing authority of the party had declared him to be the nominee of the primary election, his name could only go on



the ballot once, as such nominee, unless after he received the nomination he renounced it in the manner pointed out in the statute.

It is further urged that the petition of appellant is not sufficient because it fails to designate a brief party name or title of the party or principle which appellant represented, together with a devise or figure by which he should be designated on the ballot. The petition requests that "the picture of himself, M. C. Eversole, shall be the figure or device by which he shall be designated on the ballot," and in this respect the petition was a sufficient and substantial compliance with the statute, as it does not point out or describe the character of the figure or device which the candidate shall designate, and under this provision the candidate has a right to designate any figure or device he sees proper to select, except that he may not designate "the coat of arms or seal of the state or of the United States, the national flag, or any other emblem common to the people at large." Nor is it necessary that a candidate by petition who does not seek to have his name placed on the ballot under the device and title of a political party shall designate the name or title of the party or principle which the candidate represents. The Ky. St. 1903, § 1453, provides in part that "If any political party entitled to nomination by convention shall in any case fail to do so, the names of all nominees by petition for any office who shall be described in that petition as members of and candidates of such party shall be placed under the device and title on the ballots as if nominated by convention." But, if a candidate desires to make the race independent of any political party, and not as the champion or advocate of any particular principle, it is not necessary that the petition shall designate either a party title or principle. Any other construction would prevent an independent candidate from being placed on the ballot by petition, and would practically annul so much of the statute as allows persons to be placed on the ballot by petition, as it usually happens that those candidates who are placed on the ballot by petition are making the race entirely independent of any political party, and the statute gives to the people the right when a requisite number so desire to have placed on the ballot a person for whom they can vote without any reference as to whether or not he represents or is a candidate of any party, or is a champion or advocate of any particular principle. When this is the case, it is only necessary that the petition shall designate a figure or device by which the candidate shall be known on the ballot. The action of the county clerk is severely criticized by counsel, but a careful reading of the record satisfies us that the county clerk was not guilty of any improper or fraudulent conduct; on the contrary, he seems to have been actuated by a purpose to discharge his duty impartially.

Appellee was placed on the ballot in the Republican column as the nominee and under

the device of that party; nor was he deceived by the failure of appellant to file a written renunciation of the nomination received by him, and which had been revoked, nor ignorant of the fact that appellee did intend to have his name placed on the ballot by petition. There is filed in the record the certificate of the deputy clerk of the Perry county court, dated October 26, 1905, reciting that the petition of appellant asking that his name be placed on the ballot under an independent device as a candidate for sheriff of Perry county was filed with the county clerk on October 21, 1905, and on October 26th, was in the possession of the county clerk who was then absent from the county for the purpose of having the ballots prepared. The clerk placed the device and name of appellant at the head of the third column, and at the foot of the column the device and name of the independent candidate for representative, and of this arrangement appellant complains insisting that the name of the candidate for representative should have been placed at the head of the column and the name of the appellant under it. The statute does not provide in what position on the ballot or in the column the name and device of an independent candidate shall be placed. Nor is there anything in the record to show that the clerk was influenced by any improper or fraudulent purpose in placing the name and device at the head of the column, nor does the independent candidate for representative complain that his name was placed at the foot of the column. Carrying out the purpose of the statute, it is proper when candidates for various offices are nominated either by convention or petition, that the candidates shall be placed on the ballot in the order of the importance of the office for which they are candidates, placing the most important office at the head of the column, but this rule cannot obtain where a single independent candidate is nominated by petition.

Appellant having received a majority of the votes cast, and there being no fraud practiced by any person connected with the election that would authorize us to disfranchise the voters who cast their votes for appellant, the judgment of the lower court is reversed with directions to award the office to appellant, and for proceedings consistent with this opinion.

#### ADAMS EXPRESS CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 10, 1906.)

#### INTOXICATING LIQUORS—SALES—PLACE—INTERSTATE COMMERCE.

Where a package of liquor was shipped C. O. D. from without the state by means of defendant express company to a consignee, within the state, to whom it was delivered on payment of the price with the cost of transportation added, the liquor having been ordered by the consignee in the state from which it was

shipped, the shipment constituted interstate commerce, and was not a violation of the local option law of the district to which the liquor was consigned.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 162; vol. 10, Cent. Dig. Commerce, § 30.]

Appeal from Circuit Court, Laurel County.  
"Not to be officially reported."

The Adams Express Company was convicted of violating the local option law, and it appeals. Reversed.

Lawrence Maxwell, Jr., Joseph S. Graydon, and W. L. Brown, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

**BARKER, J.** The appellant, the Adams Express Company, was indicted by the grand jury of Laurel county, charged with the offense of retailing liquor in that county, contrary to the local option law prevailing therein. A trial resulted in the appellant's being found guilty and a fine inflicted. From this judgment it appeals.

The evidence showed that the whisky in question was shipped C. O. D. from Cincinnati to East Bernstadt, in Laurel county, through the agency of the Adams Express Company. The package contained one gallon of whisky put up in four quart bottles, and was delivered to the consignee, William Caudell, upon the payment by him of the price of the liquor with the cost of transportation added. The evidence for the commonwealth conclusively shows that the whisky was ordered by Caudell in Cincinnati, Ohio, and was shipped to him C. O. D. as before stated. The fact that the goods were ordered in Cincinnati takes this case from without the principle enunciated in *Adams Express Company v. Commonwealth*, 92 S. W. 932, 29 Ky. Law Rep. 224, and brings it within the purview of the opinion of the Supreme Court of the United States in *American Express Company v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; and *Adams Express Company v. Iowa*, 196 U. S. 147, 25 Sup. Ct. 185, 49 L. Ed. 424. There, upon facts in all essential particulars similar to those involved here, the Supreme Court, through Mr. Justice White, held that the shipment of the spirits was interstate commerce, and not subject to the control of prohibition statutes prevailing in Iowa.

Upon the authority of these opinions, the judgment in this case must be reversed, with directions to dismiss the indictment; and it is so ordered.

#### WESTERN UNION TELEGRAPH CO. v. COX.

(Court of Appeals of Kentucky. Oct. 12, 1906.)  
**TELEGRAPHS AND TELEPHONES—DELAY IN DELIVERY OF TELEGRAM—LIABILITY.**

There was no evidence of delay on the part of a telegraph company in the transmission of a message announcing the death of the father

of the sendee. The delay in the delivery to the sendee, after receipt of the message at the city in which he resided, did not prevent him from taking the first train that left after the message was received to the place where his father died. *Held*, that there could be no recovery of damages for delay in the delivery of the message.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 49.]

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Action by G. M. Cox against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Bennett, Robbins & Thomas and Richards & Ronald, for appellant. Jno. R. Evans and Bullock & Flatt, for appellee.

**CARROLL, C.** Appellee resides in the city of Clinton, in Hickman county, and brought this action against appellant to recover damages for its failure to transmit and deliver to him within a reasonable time a telegram sent from Mt. Sterling, Ill., informing him of the death of his father. He recovered judgment for \$250, to reverse which this appeal is prosecuted.

It is alleged in the petition that the telegram was delivered to appellant at 7 a. m. on January 2, 1905, and was not delivered until 1:30 p. m. of that day, when, if it had been transmitted and delivered with reasonable diligence, he would have received it in ample time to take the train leaving Clinton at 10:53 a. m., which would have enabled him to reach his father's residence at Mt. Sterling, Ill., at 9:30 that evening, but that on account of the delay he could not leave Clinton until the afternoon of January 2d, and did not reach his father's residence until noon the following day, and in addition to the delay was required to take a circuitous route at considerable more expense than would have been necessary if he had left on the morning train. It appears that there are two trains leaving Clinton each day—one at 10:35 a. m., and one in the afternoon; that appellee's father was not buried until 2 o'clock the following day, after appellee reached his father's residence. There is some conflict in the evidence as to whether the telegram arrived at Clinton at 11:30 or 12:30; but it is not material which of those hours it was received, because the morning train had left before 11:30, and it was delivered in time to enable appellee to take the afternoon train, although he could not have done so after receiving the telegram, except for the fact that it was about an hour late.

The principal question in the case is, was there failure on the part of appellant to transmit the telegram within a reasonable time after its reception? There is no evidence in the record disclosing when the telegram was received by appellant. The telegram shows the following: "No. 5 H sent

by M. Received by D. Checked 7 paid. Received at 12:30 p. m. 1—2—05, dated Mt. Sterling, Ill., 1—2." Appellee was asked the following: "Q. What time does it show it was started from the starting point? A. It doesn't show. It says: 'Sent by M. Received by D.' It doesn't show the time. Q. There is '7' up there. A. That's '7 paid.' Q. Does that mean the words or time of day? A. It says: 'Checked 7 Paid.' I don't understand. I presume that means that it was received at 7. However, that was the time the message was received—12:30. Q. That shows 'received 7' don't it; 'checked'—ain't that what it says on the blank? A. Yes. Q. And you received the message here at 12 something? A. No; it arrived at this office at 12:30." He also testified that he did not know when his father died, except from what the family told him. The telegraph operator at Clinton was asked: "Q. Explain here what that figure '7' there is, followed by the word 'paid'. A. It means that there are seven words in the message and, followed by the word 'paid,' means paid for. Q. Count the words and see if there ain't seven words in it. A. Yes. Q. And followed immediately by the word 'paid'? A. Yes, sir." He also said that this was the usual and customary way of designating how a telegram was paid and how many words are in it.

It will thus be seen that there is a total failure to show any delay in the transmission of the telegram, because there is no evidence as to the time it was received; and, if there was no unreasonable delay in its transmission, the appellee, under the evidence exhibited in this record, cannot recover for the short delay in its delivery after its reception at the Clinton office, as this delay did not prevent appellee from taking the first train that left after the telegram was received, whether it was received at 11:30 or 12:30. There being no evidence to support the averment in the petition that there was negligence in failing to transmit the telegram within a reasonable time after its reception, it was error in the court to submit this issue to the jury; and under the evidence as it appears in this record the motion of appellant for a peremptory instruction should have been sustained.

The judgment of the lower court is reversed, with directions for a new trial in conformity to this opinion.

### JUNG BREWING CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

**NUISANCES—INTOXICATING LIQUORS—LIQUOR NUISANCE — MAINTENANCE — ACTS WITHIN TERMS OF LICENSE.**

Defendant brewing company rented a house near the center of a small mining town not far from the church and schoolhouse on one of the main thoroughfares. Defendant there kept beer for sale by the case or keg, and also kept a

wagon to deliver the goods. Groups of men would collect in the street in front of the house when some one would purchase a case of beer and bring it out into the street, or on adjoining property, where, in view of the house in which it was purchased, it would be divided among those who had made up the money, and the beer would be drunk. The crowd would then get intoxicated, become disorderly and detrimental to public peace. These occurrences became so frequent that women avoided the street and the public use thereof was interfered with. *Held*, that defendant was guilty of maintaining a public nuisance on the rented premises.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 159.]

Appeal from Circuit Court, Laurel County.

"To be officially reported."

The Jung Brewing Company was convicted of maintaining a nuisance, and it appeals. Affirmed.

J. W. Alcorn, for appellant. N. B. Hays, Att'y Gen., and Loraine Mix, for the Commonwealth.

**BARKER, J.** The appellant corporation, Jung Brewing Company, was indicted by the grand jury of Laurel county, charged with maintaining a public nuisance on its premises in the town of Pittsburg, Laurel county, Ky. Upon trial appellant was found guilty by the jury, and a fine of \$500 inflicted by the verdict.

The evidence on the trial showed that Pittsburg is a small mining town without police or town authorities, situated in a local option district; that some months before the indictment herein was found, the Jung Brewing Company rented the house referred to, which is near the center of the town and not far from the church or schoolhouse on one of the main thoroughfares of the town; that it kept in the house beer for sale by the case or keg (one Hocker being the agent), and also kept a wagon to deliver the goods. A keg of beer was sold for \$2.00, and a case for \$3.30; the case consisting of 36 quart bottles, which were to be returned by the purchaser. Crowds of men, mostly miners, ranging from 10 to 25 or over in number, would collect in the street in front of the house; some one would go in and get a case of beer and bring it out in the street, or on the railroad property just across the street, where, in view of the house from which it was purchased, it would be divided among those who had made up the money, and the beer would then be drunk, the crowd getting intoxicated, boisterous, and disorderly, and continuing in the street and about the porch of the house for hours. This was a frequent occurrence, so that women avoided the street, and the public passing there was disturbed. The town post office was near by, and the schoolhouse was not far off. The crowd sometimes went in the house or on the porch. The agent, Hocker, to get rid of them, on some occasions closed up the house. Sometimes the beer was

carried off in sacks and sometimes in the original case. The disorderly crowd could be seen from the house dividing the beer. One witness testified to a division made in the house, and other divisions were made in the street within 10 feet of the house. The sales were not made to retail dealers, but to miners who could not afford to buy so much beer individually. At other times the beer was taken further away. Sometimes it was sent by a wagon to a grove some distance off, and there divided. Such was in substance the evidence for the commonwealth. The evidence for the defendant was to the effect that there was no disorder in the house, and that Hocker sold the beer by the wholesale, in quantities not less than five gallons; also that the crowd about the house and in the street was not drunk or disorderly or profane. But the evidence for the commonwealth tended to show that for some months the selling of beer in this way at the house had caused this disorderly crowd to collect, and that instead of a local option community, where intoxicants could not lawfully be sold, beer was sold freely, and in a more objectionable manner than if the local option law had not been in force, causing a serious public nuisance.

The question involved on the trial of this case was not whether the defendant violated the local option law. It is not charged with that offense, but whether or not, within the time mentioned in the indictment, it had maintained a common nuisance at the place named therein. The evidence of the commonwealth upon the trial, if true, established the offense with which the defendant was charged beyond doubt. Conceding that it had a right to sell liquor by wholesale, or even that it was an authorized retailer, it had no right to allow the assembling around its premises of noisy, drunken, boisterous crowds, whose "swilled insolence" and profanity made the use of the highway in that neighborhood, by women, always unpleasant and sometimes dangerous. The saturnalian orgies described by the women who testified for the commonwealth upon the trial below accentuates the great importance to the public peace and safety that the laws regulating the sale of liquor in mining towns should be enforced with a firm hand and the strictest integrity. The sale of liquor in a community such as is involved here is almost as dangerous as the handling of fire in the neighborhood of powder, and, therefore, it is incumbent upon those who sell it in such localities to see that the business is conducted in a lawful manner, and to exercise the utmost watchfulness that the public peace be not endangered.

A careful reading of this record convinces us that the appellant had a fair and impartial trial, and that no injury was done it, either in the rulings of the court, or by the verdict of the jury.

Judgment affirmed.

# STANDARD OIL CO. v. COMMONWEALTH. (Court of Appeals of Kentucky. Oct. 10, 1906.)

## INDICTMENT — SEPARATE OFFENSES — AMENDMENTS.

An indictment charged accused with unlawfully selling petroleum, etc., by retail, by transporting and retailing the same by means of wagons without a license to do so, committed as follows, etc., "that on March 21, 1904, before the finding of the indictment, accused, being a corporation created under the laws of the United States, did unlawfully sell and deliver to F. and various other persons in S. county, by retail, petroleum, lubricating and other oils, by transporting and retailing such oils, by means of wagons, and without a license so to do." After demurrer the commonwealth dismissed so much of the indictment as charged the defendant with having sold lubricating and other oils to F. and transporting the same in a wagon without a license. *Held*, that the indictment as amended properly charged a single offense, viz. the selling by retail of petroleum, etc., by transporting and retailing the same in S. county by means of wagons without a license.

Appeal from Circuit Court, Spencer County.  
"Not to be officially reported."

The Standard Oil Company was convicted of selling petroleum and other oils, at retail by transporting and retailing the same in Spencer county by means of a wagon or wagons, without a license, and it appeals. Affirmed.

Humphrey and Hines & Humphrey, for appellant. Chas. Sanford, N. B. Hays, and Chas. H. Morris, for the Commonwealth.

LASSING, J. This is an appeal from the judgment of the Spencer circuit court imposing a fine of \$500 upon appellant for violating section 4224 of the Kentucky Statutes. The only question before us is the sufficiency of the indictment, which is as follows: "Commonwealth of Kentucky v. Standard Oil Company, indictment. The grand jurors of the county of Spencer, in the name and by the authority of the commonwealth of Kentucky, accuse the Standard Oil Company of the offense of unlawfully selling by retail petroleum, lubricating and other oils, by transporting and retailing such oils by means of wagons without any license so to do, committed in manner and form as follows, to wit: The said Standard Oil Company, in the county of Spencer, on the 21st day of March, 1904, and before the finding of this indictment, being a corporation created and incorporated under and by the laws of the United States, the particular state being unknown to the grand jury, did unlawfully sell and deliver to W. T. Froman and various persons in said county, by retail, petroleum, lubricating and other oils, by transporting and retailing such oils through and in said county by means of a wagon or wagons, and this without having any license so to do, against the peace and dignity of the commonwealth of Kentucky." Said indictment was signed by the commonwealth's attorney and indorsed a true bill, and signed by the foreman of the grand jury.

Appellant filed a demurrer to the indictment, and thereupon the attorney for the commonwealth dismissed so much of the indictment as charges the defendant with having sold petroleum, lubricating and other oils to W. T. Froman, and transporting same in a wagon without a license so to do, and thereupon the court overruled the demurrer to the indictment; and upon trial before a jury on a plea of not guilty, the defendant was fined \$500.

After the words indicted had been stricken from the indictment, it charged defendant with but one offense, viz.: The selling by retail to various persons in Spencer county, petroleum, lubricating and other oils, by transporting and retailing such oils through and in said county by means of a wagon or wagons, without having license so to do. We find upon an examination of the record in the cases of *Standard Oil Company v. Commonwealth*, 82 S. W. 970, 26 Ky. Law Rep. 927, and *Id.*, 87 S. W. 1092, 27 Ky. Law Rep. 1181, that the indictment in this case is a copy of the indictment in each of those cases, and as this court has, within the past 18 months, twice passed upon the sufficiency of an indictment of which this is a copy, and held it to be good, we deem a further consideration of it unnecessary.

The judgment is affirmed.

#### LEAVELL et al. v. CARTER.

(Court of Appeals of Kentucky. Oct. 10, 1906.)

#### INFANTS — JUDGMENTS — VACATION AFTER ATTAINING MAJORITY.

Proceedings by an infant after attaining majority to vacate a judgment against him must be by petition, as provided by Code Civ. Prac. §§ 391, 518, subsec. 8, and section 520, and, being by motion to redocket the case, a denial thereof is proper.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 318.]

Appeal from Circuit Court, Garrard County.

"To be officially reported."

Action by J. B. Carter against Susie Leavell and others. From a judgment denying a motion to redocket the case, defendants appeal. Affirmed.

R. H. Tomlinson and W. B. Smith, for appellants. Herndon & Swinebroad, for appellee.

LASSING, J. B. F. Leavell died in the year 1891, leaving a will which reads as follows: "After the payment of my just debts, I give and bequeath to my wife, Susie K. Leavell, any property I own at the time of my death, said property to be used in procuring a home for her and her children. I hereby appoint W. L. and A. W. Kavanaugh my executors, to see that the same is carried out." There was realized out of the estate of B. F. Leavell the sum of \$4,000. Susie K. Leavell, his wife, with the consent

of the executors of her husband's will, invested this \$4,000 in the J. B. Carter farm of 131 acres; the price agreed upon for said farm being \$4,913.25. Mrs. Leavell gave her note to Carter, due January 1, 1899, with interest, for the balance of \$913.25. On the 1st day of January, 1894, a sum was paid on this note sufficient to reduce it to \$848.40, and on that day said Carter loaned to Mrs. Leavell the sum of \$551.60, and for these two sums, making \$1,400, Mrs. Leavell executed a new note and mortgage to Carter on the 131 acres of land, and he surrendered to her the old note for \$913.25. In 1897 J. B. Carter instituted his suit in the Garrard circuit court to collect this \$1,400 note and interest, and to sell the mortgaged property to pay the judgment. In the course of time judgment was obtained, the land was advertised for sale and sold, and J. B. Carter became the purchaser thereof for \$3,668.50. At the time this action was instituted, W. K. Leavell, John Y. Leavell, Dorcas Leavell, Susie Leavell, Ben. F. Leavell, and Arch Leavell were all infants, and three of these infants were under 14 years of age, and three of them over 14, but under 21. Summons was served on the infants over 14 years of age, and the court appointed a regular practicing attorney of that bar guardian ad litem for the three infants under 14 years of age, and summons was served upon him, and later the same attorney was appointed guardian ad litem for the infants over 14 years of age. Throughout the litigation the infants were represented by their guardian ad litem. The court found that the wife, Susie K. Leavell, and her six children (naming them), took equally, share and share alike, and that they were the joint tenants on the land, each one holding one-seventh in fee simple, and further adjudged that Carter recover of Susie K. Leavell the sum of \$840.40, with interest from the date of the \$1,400 note, and the costs of the action, and that to secure this sum the entire 131 acres was in lien. The court further adjudged that the undivided one-seventh interest of Susie K. Leavell was in lien to secure the sum of \$551.60, with interest from the date of the \$1,400 note. After paying the debts adjudged against the proceeds of the sale of the land, there remained for reinvestment the sum of \$2,140, and this sum was invested, under an order of the court, in a tract of 125 acres of land in Garrard county, and the said Susie K. Leavell and her children placed in possession of same. On the 27th day of March, 1905, a notice signed by Susie K. Leavell and all of her children was served upon J. B. Carter, notifying him that on the 15th day of the March term, 1905, of the Garrard circuit court, they would move to redocket the old suit of Carter v. Leavell, which had been off the docket for some years, and on the 15th day of said term they offered to file their said notice, and moved the court to reinstate

the case on the docket. On the 18th day of the term the court permitted the notice to be filed, to which the plaintiff excepted. The motion to redocket the case was renewed, and the defendants were permitted to file a written motion to set aside the judgment of sale rendered in the case. Thereafter the court overruled said motion, and refused to have the case redocketed, or to set aside, vacate, or modify the judgment in the case of *J. B. Carter v. Susie K. Leavell et al.*, and from the judgment of the court refusing this motion, and refusing to set aside or modify the judgment in *Carter v. Leavell*, the defendants excepted and objected, and pray this appeal.

Section 391 of the Code of Civil Practice provides that an infant, other than a married woman, may, within 12 months after attaining the age of 21 years, show cause why a judgment against him should be vacated or modified. By this section of the Code the right is given to the infant to show cause, if any he can, why a judgment rendered against him during infancy should be modified or vacated. Subsection 8 of section 518 of the Code of Civil Practice provides that the court in which the judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it for errors in the judgment shown by an infant within 12 months after arriving at full age; and section 520 provides that proceedings to vacate or modify a judgment on the grounds mentioned in subsection 8 of section 518 above quoted shall be by petition, verified by affidavit, setting forth the judgment, the grounds relied upon to vacate or modify, and the defense to the action if the party applying was defendant, and on the petition proceedings shall be the same as those in the action in which the judgment was rendered. Thus it will be seen that these three sections of the Code give to the infant the right to seek a modification or vacation of the judgment, directing in what court he shall proceed, and, lastly, defining the mode of procedure. Section 519 of the Code of Civil Practice provides that a clerical misprision may be corrected by a motion upon notice; but, as the relief sought here is not to correct a clerical misprision, clearly section 519 does not apply. The Code, which gives the infant the right, also provides the manner in which he may exercise that right, and it plainly provides that, if he wishes to modify or vacate a judgment, he must proceed by petition, and not by motion.

While it has been held that he may proceed by an amended pleading in a pending action, this court, in the case of *Henry Voght Co. v. Penna. Iron Works*, 68 S. W. 734, 23 Ky. Law Rep. 2163, held that the proper practice is to make application by an independent action; and, appellants not having proceeded as the Code directs, the court properly refused to redocket their case, and the judgment is affirmed.

## JAGOE v. AETNA LIFE INS. CO.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

### 1. INSURANCE—LIFE POLICY—STIPULATIONS—EXTENDED INSURANCE.

A life policy stipulated for extended insurance on default of payment of premiums after the payment of two or more premiums provided there was no indebtedness to the company against the policy, and provided that if the premiums had been paid for two years or more a paid-up policy might be applied for, and that, at the expiration of three years from the date of the policy, the premiums having been paid, the company would lend thereon an amount shown in a table. The insured paid four premiums, then borrowed from the insured the full amount specified in the table. He failed to pay any further premiums or the indebtedness. *Held*, that he was not entitled to extended insurance, he being entitled only to one of three options, of extended insurance, or a paid-up policy, or a loan.

### 2. SAME.

A life policy stipulated for extended insurance in case of default in the payment of premiums after two or more premiums had been paid, provided no indebtedness against it existed, or for a paid-up policy, or for a loan thereon to an amount specified in a table. The insured paid four premiums and borrowed the amount shown by the table and executed therefor a note which stipulated that if it remained unpaid after maturity or if any premium should become due and unpaid the insurer might issue a paid-up policy in the amount provided for by the terms of the policy. *Held*, that the note was consistent with the terms of the policy within Ky. St. 1903, § 656, prohibiting an insurance company from making any contract of insurance other than is expressed in the policy.

### 3. SAME—CONTRACT—STATUTES.

Ky. St. 1903, § 656, prohibiting an insurer from making any contract of insurance other than such as is expressed in the policy, does not apply to a note given by an insured for money borrowed thereon pursuant to the provisions of the policy.

Nunn, J., dissenting.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by Courtney D. Jagoe against the Aetna Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Browder & Browder, for appellant. Thum & Clark, for appellee.

CARROLL, C. On the 3d day of May, 1900, the appellee issued to M. H. Jagoe a policy of insurance for \$1,500 payable to appellant. He paid the first premium of \$69.80, and on the 3d day of May, 1901, 1902, and 1903, paid the annual premium. He failed to pay the premium which became due May 3, 1904, and on September 6, 1904, died. The policy issued to him provides in section 3 that "when the premiums on this policy have been duly paid for two years or more, and default thereof occurs in the payment of any premium, this policy shall cease as to the right to pay further premiums; but shall, if there is no indebtedness to the company against it, continue in force as temporary life insurance for the full amount during the time specified in the following table A, at

the expiration of which time this policy shall wholly cease and be void. Should the death of the insured occur within three years from the first default in the payment of premiums, and while this policy is in force for the full amount, there shall be deducted from the amounts otherwise due the premiums that would have been paid had there been no default in the payment of premium, with interest thereon." It further provided that if the premiums have been paid for two years or more, and the policy be surrendered to the company, and a paid-up policy applied for within three months, a participating stock policy would be issued for the amount stated in table B. And in another clause it provided that at the expiration of three years from the date of this policy, the premiums having been paid, the company would lend upon the same the amount shown in table C. There is a further provision as to the cash surrender value of the policy, but this did not become effective until five premiums had been paid. It further provided that "any indebtedness to the company on account of this policy shall first be deducted, provided that the title to the policy is unincumbered and that loan or surrender papers are first executed under such regulations as are prescribed by the company." On March 8, 1904, M. H. Jagoe and the appellant borrowed from appellee \$124. The note executed to it for this sum provided that they acknowledged "the amount of this note, with any interest that may accrue thereon, to be an indebtedness to said Ætna Life Insurance Company on account of policy 288,848, issued by said company on the life of M. H. Jagoe, which policy, with all right, title and interest therein, and all benefit and advantage to be derived therefrom, is hereby assigned to and deposited with said company as security; and further agree that if this note shall remain unpaid sixty days after it becomes due, or if any premium under said policy shall become due and unpaid for sixty days or more, said company is hereby authorized to issue a paid-up policy in the amount provided for by the terms of said original policy, after deducting therefrom such a proportion as the indebtedness on account of the original policy bears to the net single premium for said paid-up policy." At the time of his death, Jagoe was in default in the payment of the premium due May 3, 1904, and in the payment of the note. On August 22, 1904, appellee wrote to M. F. Jagoe, informing him that the policy had lapsed for nonpayment of premium due on the 3d day of May, 1904; and that because of the indebtedness to the company under the policy there would be no extension of the insurance; and that he was only entitled to a paid-up policy for \$91, which was tendered to him upon the execution of proper receipts. It does not appear that this offer was accepted by Jagoe, and after his death the appellee offered to pay to the beneficiary the amount specified in the paid-up policy, which she declined to

accept, and brought this action against the appellee to recover from it the sum of \$1,500, less the amount of the note and the premium that was due on May 3, 1904. If Jagoe had not borrowed from the company in March, 1904, the sum mentioned, the premiums therefore paid on the policy would have carried the full amount of the insurance under the option in table A for a period of something more than six years from May 3, 1904, without the payment by him of any further premium.

It is the contention of appellant that M. H. Jagoe, when he executed to it the note mentioned, was entitled to what may be termed paid-up temporary insurance for \$1,500, which would continue in force until July, 1910, without the payment of any additional premium, and that he also had the right under his contract of insurance to demand of the company a loan on its policy of the amount specified in table C, upon the execution by him of proper loan papers; that the company could not, in the loan papers, insert stipulations not in the policy that operated to forfeit the insurance he was entitled to if he failed to comply with the obligations of the note; and that Jagoe, having died within the term of his extended insurance, and while the same, according to the contract of insurance, was in force, has a right to exact from the company the full amount of the insurance less the amount of the note and premiums due. Appellee insists that on March 8, 1904, Jagoe, under the terms of the policy, had tendered to him three options, either of which he might elect to receive the benefit of, that is to say, if he declined to pay the premium due in May, 1904, he had the right to extended insurance for the full amount of \$1,500 for the term of six years without the payment of additional premiums as provided in table A, or the right to a paid-up policy for the amounts specified in table B; or the right to obtain a loan for the amount specified in table C; and that, having before him these several options, he could exercise his own pleasure as to which of them he would accept, but he could not accept or take advantage of but one of them; and that, having elected to avail himself of the right to obtain a loan in the amount specified in table C, he surrendered his right to retain the benefit of or avail himself of the advantage of the options specified in tables A or B. Forfeitures are looked on with disfavor by the law, and this court has been as reluctant as any court in the country to enforce them. *N. Y. Life Ins. Co. v. Curry*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297; *Montgomery v. Mutual Life Ins. Co.*, 14 Bush, 51; *Mutual Life Ins. Co. v. Twyman*, 92 S. W. 335, 28 Ky. Law Rep. 1153.

But the question of forfeiture is not presented in this case. A forfeiture is a penalty for doing or omitting to do a certain

required act, and the appellee has not attempted to impose upon the insured any penalty, nor are the provisions of the contract harsh, unreasonable, or oppressive. Here the insured had the right to elect which of the three options he would accept, and, generally speaking, where a forfeiture is attempted there is no election, and there is a wide difference between a regulation established as a matter of business, and a forfeiture imposed as a penalty upon a person in default. In this case the company provided in its contract of insurance that certain regulations prescribed by it should be performed by the insured, leaving to him the right to determine whether he would perform them or not. It advanced to the insured all that he was entitled to under the contract of insurance, and took as security for the note the policy, which at that time had no cash surrender value, as the cash surrender value of the policy did not attach until five premiums had been paid. When the note was executed the insured was not in default in the payment of any premium, and therefore under the contract of insurance was not entitled at that time to any extended insurance, because his right to extended insurance only became effective when he was in default in the payment of a premium. There is no provision in this policy for the deduction of any indebtedness from extended insurance, as the policy provides that when there is an indebtedness there can be no extended insurance. It is stated in the contract of insurance, in section 3, that "if there is no indebtedness to the company against it, the policy shall continue in force for the full amount during the time specified in table A," and at the head of the tables we find this: "The figures given in the table are based on the assumption that there is no indebtedness to the company against the policy," and that loan or surrender papers are to be executed under such regulations as may be prescribed by the company. If the view advanced by counsel for appellant was accepted as correct, it would follow that the insured would have the unreasonable advantage of having the full amount of insurance in force for a period of six years, at the same time being indebted to the company in the full amount of the loan value of his policy without the payment of either premiums on the policy or interest on his note during the period for which the extended insurance would run. To put it in another way, if he had outlived the period of extended insurance, the policy that the company accepted as security for the note would have lapsed entirely, and be of no value, and consequently the company would have no security for the money advanced on it if the insured was insolvent, and yet the insured during this time would have had in his pocket practically the full value of his policy, and on his life insurance for the full amount of policy.

Counsel further contend that he was entitled to extended insurance at the time the loan was made, in the face of the provision in the policy: First, that no extended insurance would be granted until there was a default in the payment of premium; second, that no extended insurance would be granted when there was any indebtedness against the policy; and if their theory is correct, it would follow that the insured was entitled to extended insurance for six years, and at any time during that period—even in the last month of it—he was entitled to demand from the company the full loan value of his policy. Policies of insurance, like other contracts, should be given a fair construction, and one in harmony with the meaning and intention of the contract when it is plain and unambiguous, and neither unreasonable or against public policy, and it cannot be said that the contract upon which appellee relies is either doubtful in meaning or against public policy. In *Dreury's Adm'r v. N. Y. Life Ins. Co.*, 115 Ky. 681, 74 S. W. 663, 61 L. R. A. 714, 103 Am. St. Rep. 351, relied on by appellant, *Dreury*, after having paid three premiums, executed a note for the fourth premium, the note stipulating that unless it was paid when due the policy and its accumulations should be forfeited except as to the right to the surrender value of a paid-up policy, and that in the settlement of the claim or benefit under the policy the amount owing should be deducted from the sum otherwise payable by the company. The court in the construction of the contract of insurance, and stipulations of the note, held that, under a reasonable construction, the failure to pay the note only forfeited the right of the insured to participate in certain benefits otherwise allowed by the policy, but did not surrender his right to extended insurance for the term earned by the premiums paid. In the *Dreury Case*, as in this, the question was the proper construction of the policy, and the language of the policy here involved being free from uncertainty, we have found no difficulty in giving it a construction fair and reasonable to the parties concerned, nor do we doubt that under the contract the insured was bound by his election and must stand by the terms imposed when he made it. There is a marked difference between the right to elect between privileges coupled with a reasonable provision that when the election is made the conditions imposed by the contract of election shall be performed, and a forfeiture, that is in the nature of a penalty, imposed for the nonpayment of money. *N. Y. Life Ins. Co. v. Curry*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297. While forfeitures have been condemned, or very reluctantly upheld, contracts involving the validity of elections with conditions imposed similar to those in this case have been approved and sustained. *Mutual Benefit Ass'n v. Harvey*, 79 S. W. 218, 25



Ky. Law Rep. 1892; N. Y. Life Ins. Co. v. Meinke, 80 S. W. 175, 25 Ky. Law Rep. 2113; Mutual Benefit Life Ins. Co. v. First National Bank, 74 S. W. 1066, 25 Ky. Law Rep. 172.

It is further urged that the stipulations in the note executed by the insured are inconsistent with or in derogation of the terms of the original contract of insurance, and that therefore under section 856 of the Kentucky Statutes of 1903 the conditions in the note must yield to the terms of the policy. The stipulations in the note are not inconsistent with the terms of the policy, but merely elaborate its meaning and carry out its purpose; and aside from this, the statute does not apply to the note. *Fidelity Mutual Life Ins. Co. v. Price*, 77 S. W. 384, 25 Ky. Law Rep. 1148.

The judgment of the lower court is affirmed.

NUNN, J., dissents.

#### CITIZENS' INS. CO. OF MISSOURI v. HENDERSON ELEVATOR CO.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

##### 1. INSURANCE — FIRE POLICY — CANCELLATION.

Where a policy provided that it might be canceled by the insurer on five days' notice, and the insurer wrote its local agent having power to write insurance and issue policies instructing him to take up the policy, and the agent told insured that the company had ordered the policy canceled, and that the agent wanted the policy whereupon insured said that he would get the policy, the policy stood canceled within five days from that time.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 504, 519.]

##### 2. SAME—IMPLIED AUTHORITY OF AGENT.

Where a fire policy provided that it might be canceled by the insurer on five days' notice, and the insurer wrote a local agent having authority to write and issue policies instructing him to take up the policy, and the agent thereupon told insured that the policy should hold good until the agent procured insured a policy in another company, insured not knowing that the agent had been instructed to cancel the policy immediately, the agreement of the agent was binding on the company for a reasonable time.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 120.]

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by the Henderson Elevator Company against the Citizens' Insurance Company of Missouri. From a judgment in favor of plaintiff, defendant appeals. Reversed, and remanded for a new trial.

See 84 S. W. 580.

Lockett & Worsham, for appellant. Clay & Clay, for appellee.

HOBSON, C. J. On October 8, 1903, appellant's local agent issued to appellee a policy of insurance for \$1,200 on hay and grain in

its warehouse at Janesville, Ill. The policy, among other things, contained this clause: "This policy shall be canceled at any time at the request of the insured or by the company by five days' notice of such cancellation." On October 18th the company wrote its local agent the following letter: "We are obliged to recall this policy as we are not writing hay, or buildings containing the same, under any condition. Kindly take up, and return policy for cancellation immediately." The local agent, Cox, received the letter on the 17th, and on that day submitted the risk to another company. The risk was declined. On the 19th he submitted it to a second company, and on the same day he went to Janesville to get the policy he had issued for appellant. He there met Gordon, the agent of appellee. What Cox says took place between them is as follows: "Q. Just tell as near as you can what passed between you and him in respect to the policy on that day? A. I stated to him the order from the Citizens Insurance Company to cancel, and also that we had submitted it to the Northern, and that I had come down to get the policy, and he said he couldn't give it to me because it had been sent to the Henderson Company. I went with him around the building, and made a diagram of the building, and used it afterwards with the other insurance companies. He asked then if he wasn't entitled to some time—five days' notice. I said: 'Yes, I can give you the five days' notice right now.' 'But,' I said, 'I have submitted it to the Northern.' 'Well,' he said, 'I will waive that; that is, I won't require that; I will write to the company and get the policy.' Q. That was in response to your request to deliver to you? A. Yes, sir; I went for the policy, and asked him for it." Gordon says that the conversation between them after the diagram of the building was made was as follows: "He says: 'The company is dissatisfied with this insurance; they are going to cancel it.' 'Well,' I spoke up, 'they have a right to cancel it, but the Henderson Elevator Company don't want to be without insurance, and there are plenty of companies that will carry it.' Mr. Cox said: 'We want this; we don't want it to leave our agency, and this policy holds good until I send you another policy.' And then we separated on those terms, about; that is my recollection about all that was said about the insurance. We may have passed some compliments after that. Q. Did he say until you got another policy; for how much—was anything said about how much the other policy would be? A. It was to be the same amount as the one we had, \$1,200."

The company to which application had been made to take the risk declined to take it. Cox then applied to a third company to take the risk. This company agreed to take the risk for \$600, but declined to take it for \$1,200. On October 30th a policy for \$600 in this company was issued, and mailed to

appellee. That night the property burned. The next morning Gordon brought the policy issued by appellant to Cox's office and delivered it, saying nothing about the fire. He was told that the policy that had been sent him was for only \$800, and that they were trying to place the other \$600, but had not been able to do so. He said that if it was placed, he would expect them to divide the commission with him as before. Gordon says he did not tell them about the fire because he thought they were trying to trick him, and did not know that the policy sent the day before was for only \$600 until after he delivered up the first policy. On this evidence the court instructed the jury as follows: "(1) Gentlemen of the jury: The court instructs you to find for the plaintiff the sum of \$1,200, with 6 per cent. interest thereon from the 23d day of February, 1904, unless you believe from the evidence that prior to the time of the fire that destroyed plaintiff's property covered by the policy of insurance sued on and mentioned in evidence, the agent or agents of the defendant canceled said policy of insurance and so notified the plaintiff's agent Gordon of its cancellation by giving said agent five days' notice before said fire of such cancellation; or if you believe from the evidence that defendant's agent or agents prior to the time said fire occurred canceled said policy, and also believe from the evidence that the said agent of plaintiff, upon being notified of such cancellation, if he were so notified, agreed to or did waive the said five days' notice of cancellation, then in either such event the law is for the defendant, and you will so find. (2) Although you may believe from the evidence that defendant ordered said policy to be taken up for cancellation more than five days before said fire, yet if you further believe from the evidence that before it was taken up or canceled by defendant or its agent it was agreed between plaintiff's agent Gordon and the defendant's agent Cox that said policy of insurance should be and remain in full force until defendant's said agent should obtain for said plaintiff another policy of insurance on said property so covered for the same amount in some other company or companies, and that the fire complained of occurred before such other insurance was so obtained for plaintiff, then in that event you will find for the plaintiff as heretofore indicated; otherwise, you will find for the defendant."

When the policy was brought in on the 31st an indorsement was made upon it as follows: "Canceled by order of the company, October 31, 1903." This notation was made by the bookkeeper of the local agent, and was read to the jury. The difficulty with the court's instructions to the jury is that the jury from the phraseology of the instructions were warranted in concluding that the policy was in force until it was taken up by the agent. On the contrary, the company

had the right to cancel it on five days' notice. No question arises in the case about the return of the premium because both parties agree that what had been paid was to be applied to the new insurance when obtained. If Cox told Gordon that the company had ordered the policy canceled, and that he had come down to get it, and Gordon said he would write and get the policy, it stood canceled within five days from that time, and the defendant is not liable. But if Cox undertook or agreed with Gordon that the policy should hold good until he sent him another policy of the same amount, and the fire occurred before such other insurance was obtained, the company was liable, unless Gordon knew or was informed that Cox had been instructed to cancel the policy immediately. In lieu of the instructions given, the court should have instructed the jury as above indicated.

Cox was an agent of the company with power to write insurance, and issue policies. It was within the apparent scope of his authority to determine how long the policy should be in force in the absence of some restrictions upon his authority, and Gordon had a right to deal with him upon the faith of his apparent authority, unless he had notice of the restrictions which had been placed upon him. If Cox had said to Gordon that he would have to cancel the policy, but that he would give him two weeks to get other insurance, Gordon would have had a right to suppose that as he had authority to issue policies, he had authority to make such an agreement. The agreement that the policy should remain in force until he had located the risk in another company was in effect only an agreement that it should remain in force a reasonable time for this purpose. The fact that Cox was to place the risk in some other company is not material. The contract would be essentially the same if it had been that the policy should continue until Gordon could place the risk in some other company. In placing the risk in another company Cox did not act for appellant. The arrangement would be in legal effect the same if some third person had been agreed upon to place the risk in another company, and Cox had agreed that the policy which he had issued should remain in force until the new insurance was obtained. Such an arrangement would be in effect an agreement not to cancel the policy then, but to wait and to give an opportunity for the procurement of other insurance before the cancellation would take effect. In the absence of some restrictions upon Cox's authority, of which Gordon had notice, such an agreement would be within the apparent authority of an agent authorized to make contracts of insurance. The company selects its own agents, and when third persons deal with them, without notice of restrictions upon their authority, the company should be held for the acts of the agent

within the scope of his apparent authority. We have examined the case of *Miller v. Insurance Co.*, 54 W. Va. 344, 46 S. E. 181, but the facts of that case are so different from the facts here, that it seems to have little application.

Judgment reversed, and cause remanded for a new trial.

### PROCTOR COAL CO. v. STRUNK.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

#### 1. MINES AND MINERALS—CONTRACTS—ANNULLMENT—EVIDENCE.

Evidence, in an action for breach of contract for mining coal, *held* to show that it was the intention of the parties that it should be superseded by a subsequent contract between them as to the same matter.

#### 2. CONTRACTS—CONSIDERATION.

There is a sufficient consideration for a contract superseding one for the mining of all the coal in certain land, 5 per cent. of the price per ton for mining to be retained till completion of the work, the second contract waiving the right to mine all the coal, being only for a year, unless renewed by mutual consent, but providing for payment at the end of the year for all work done.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 292.]

#### 3. SAME—FRAUD—EVIDENCE.

Evidence, in an action for breach of a contract, *held* insufficient to show that the execution of a subsequent contract, superseding the one sued on, was procured by fraud.

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by David Strunk against the Proctor Coal Company. Judgment for plaintiff. Defendant appeals. Reversed, with instructions.

T. L. Edelen and Sharp & Siler, for appellant. Tye & Denham, for appellee.

LASSING, J. On the 17th of December, 1900, the Proctor Coal Company, by A. Gatliff, its president, made a written contract with David Strunk, by the terms of which said Strunk was to mine the coal within a certain area for a definite sum of money per ton, and was to comply generally with certain restrictions and regulations imposed by the agreement for the benefit of the Proctor Coal Company. Subsequently one H. F. Fenley succeeded Gatliff as president of the company, and a new contract was entered into by and between the company and David Strunk, by the terms of which Strunk was to mine coal for the company in the same territory, but the contract was an annual contract. By the terms of the first contract 5 per cent. of the contract price for mining was reserved by the company until final settlement between the parties, which by the terms of the contract would have been when all the coal to be mined within the area specified in the contract had been taken out. By the terms of the second contract the same part of the cost of mining

per ton was retained, but the settlements were to be made at the end of each year while the contract was in force. This second contract required of the said Strunk a compliance with certain rules and regulations governing mining imposed for the mutual benefit of both parties to said contract. This second contract was entered into about the 9th of June, 1901. The defendant, Strunk, continued to operate the mine until about the 1st of July, 1902, when he quit, and brought his suit for damages against the company, and based his claim upon his rights as defined in the first contract. The company pleaded as a defense to this suit the execution of the second contract, and that the second contract superseded and annulled the first contract. The plaintiff by an amended pleading admitted the execution of the second contract, but claimed that there was no consideration for its execution, and that it was procured through fraud and misrepresentation. The allegations of the petition as amended and of the reply were traversed, and upon a trial before a jury a verdict for \$900 was returned for plaintiff. Judgment was entered upon this verdict, and defendant appeals.

Appellant company complains that the trial court should have given to the jury a peremptory instruction at the conclusion of plaintiff's testimony, as he entirely failed to establish either want of consideration for the second contract, or that the execution of it was procured through fraud and misrepresentations. Appellee contends that the execution of the second contract did not nullify the first contract, but was merely a modification of same. A careful examination of the two contracts discloses this fact, that the only material difference between the first and second contract is that the first contract provided for the mining of all the coal within a given area, and the retention by the company of 5 per cent. of the cost of the mining until the contract had been completed, be that 1, 5, or 10 years. The second contract provided that a settlement should be had at the end of each year, and that the contract might continue by mutual consent as an annual contract. Each contract contained certain stipulations and regulations as to the manner in which the mining should be done. In order to determine the question as to whether or not it was the intention of the parties that the second contract should do away with and annul or supersede the first contract, the testimony of the parties themselves is the best evidence. The company through its president testified that he told the plaintiff, Strunk, that the first contract was an unsatisfactory one, and not acceptable to the directors of the company, and that they wanted to enter into a new contract which would be more beneficial in its terms to both parties, and proposed the execution of the contract, showing plaintiff that by its terms he would be enabled to withdraw from

the hands of the company the 5 per cent. of his money which it had retained each year, and not have it withheld from him until the completion of the contract. Plaintiff himself testifies even stronger upon this point than did the president of the company, for he testified that the president of the company told him that Gatliff, the former president of the company, had no right to make the first contract, and that it had never been ratified or approved by the directors of the company. Thus, from the testimony of the two parties to this contract, it is clear that they each understood that the second contract was intended to take the place of the first contract, and plaintiff operated under it for a year or such a matter after he had signed it.

We come, then, to the two vital questions in the case: (1) Was there any consideration for the execution of the second contract? (2) Was there any fraud practiced by the company upon the plaintiff in procuring its execution? By the terms of the second contract the company agreed to make an annual settlement with plaintiff, and to pay to him the amount of money which it had retained in its hands, to wit, 5 per cent. of the cost of all coal mined by him during that year. This clause of the second contract was more favorable to the plaintiff than was the provisions regulating the payment of this retain in the original contract, and this was the chief consideration or benefit accruing to plaintiff in the execution of the second contract. By the execution of the second contract plaintiff waived his right to mine all the coal within the given area defined in the first contract, unless he should mine same within one year, or unless the contract should continue after the expiration of the first year by mutual consent. This was of benefit to the company, as it gave it the right to take charge of and mine the coal in such portion of said area as plaintiff should fail to mine within the year, if it desired to do so. In the case of *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370, the Supreme Court of Rhode Island held that where a contract remained executory it might be annulled by agreement, and the agreement to annul on one side was a consideration for an agreement to annul on the other. We are of the opinion that the second contract of itself shows there was a consideration sufficient to support its execution. In *Parish, etc., v. U. S.*, 8 Wall. (U. S.) 489, 19 L. Ed. 472, the Supreme Court held that, if a party to a contract had any objections to the provisions of the contract, he should have objected before signing it, and that, having signed it, his mouth was closed against any denial that it superseded all previous arrangements upon the same subject. And in the case of *U. S., etc., v. Lamont, Secretary of War*, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160, where the plaintiff in error had made a contract for certain work at a given price, and subsequently the parties had executed a con-

tract at a lower price, and an attempt was made to compel the Secretary of War to execute the former contract, the court said: "We cannot perceive any duty which under those circumstances rested upon the Secretary of War to sign such a contract with the relator as would be required by the mandamus which is prayed. It cannot be reasonably contended that he is under any obligation to sign two contracts with the same parties for the same work at a different price and under different conditions. Nor can it be urged with any greater reason that the relator was entitled to have signed a contract to do work for 19<sup>7</sup>/<sub>10</sub> cents per cubic yard which he had subsequently made a voluntary contract to do for 17<sup>7</sup>/<sub>10</sub> cents per cubic yard, and upon conditions different from those mentioned in the first proposition. In order to justify the issuance of the writ, it would be necessary to hold that the second contract was void, and thereby relieve the relator from obligations which he has assumed, and release him from the binding force of terms and stipulations to which he has subjected himself. Inasmuch as no such duty as that which the granting of this writ would seek to enforce exists, and no right subsists in the relator which this writ could secure him, there is no ground for issuing it." The court then referred with approval to the case of *Gilbert v. United States*, 8 Wall. (U. S.) 358, 19 L. Ed. 308, quoting with approval the language of Justice Miller, who said: "If the claimants had any objection to the provisions of the contract they signed, they should have refused to make it. Having made it and executed it, their mouths are closed against any denial that it superseded all previous arrangements." Following the rule laid down in these cases, it is plain that plaintiff having signed the second contract, and operated under it for almost a year, he cannot now complain that the second contract did not take the place of and supersede the first.

The only remaining question is, was the execution of the second contract procured through fraud? We have carefully examined the testimony in this case, and fail to discover wherein, even in the slightest degree, it tends to support the contention of the appellee that the execution of the second contract was obtained through fraud or misrepresentation. The company's president testifies that he talked the matter over fully with appellee, and that they agreed upon the terms of the second contract, and he directed the secretary of the company to reduce their agreement to writing in duplicate form, one copy of which, when signed, was to be retained by the company and the other by appellee. Upon this point appellee says that he did not want to sign the second contract as prepared and submitted to him by the secretary of the company, but that thereafter he did sign it. He does not claim, nor is there any testimony tending to show, that

the president of the company, or any one else, made any statement to him that was untrue, or that induced him to enter into the second contract. And while the proof shows appellee to be a man of moderate means, in the humble walks of life, there is nothing in either the proof or the provisions of the second contract indicating that he was overreached, or that any advantage was taken of him or his condition in the execution of the second contract. Nor does he claim that he did not thoroughly understand the second contract when it was prepared by the secretary and presented to him for his signature. Hence his contention that the second contract was procured through fraud and misrepresentation is not supported by any evidence whatever. And, this being true, he is bound by the terms and provisions of the second contract, which (bearing evidence that there was ample consideration for its execution, and no fraud being perpetrated on appellee in its execution) annulled and superseded the first contract. Appellee's cause of action, if any he had, was upon the second contract. He sought by the pleas of no consideration and fraud to avoid the force and effect of the second contract, and, having failed to support his pleadings by any proof, the trial court should, at the conclusion of appellee's testimony and at the conclusion of all the testimony offered, have given a peremptory instruction to find for appellant company.

For this reason the judgment is reversed, with instructions to the trial court to dismiss the petition.

**CITY OF FRANKLIN v. CALDWELL et al.**  
(Court of Appeals of Kentucky. Oct. 12, 1906.)

**BANKS AND BANKING—INSOLVENCY—DECLARATION OF DIVIDEND—LIABILITY OF DIRECTORS—STATUTES—CONSTRUCTION.**

Ky. St. 1903, § 548, declares that if the directors of any corporation shall declare and pay any dividend when the corporation is insolvent, they shall be individually liable for all debts of the corporation existing or thereafter incurred. Section 596 declares that the directors of a bank may declare a dividend after deducting expenses, losses, bad and suspended debts, interest and taxes, etc., and section 598 provides that if the directors of a bank shall "knowingly" violate any of the provisions of the law relating to banks, the directors so offending shall be jointly and severally individually liable to the creditors and stockholders for any loss or damage not made good within a reasonable time. *Held*, that where the directors of a bank innocently declared a dividend while the bank was insolvent, such directors were not liable under section 548 for all existing and subsequent debts of the bank but were only liable under section 598 for the amount of the dividend so declared.

Appeal from Circuit Court, Simpson County.

"To be officially reported."

Action by the city of Franklin against J. K. Caldwell and others. From a judgment in favor of plaintiff for less than the relief demanded, it appeals. Affirmed.

Roark & Finn, for appellants. Geo. C. Harris and Sims & Grider, for appellees.

CARROLL, C. The J. A. McGoodwin Banking Company, a corporation, made a general assignment for the benefit of creditors in December, 1904. At the time of the assignment the appellees were directors of the bank, having been elected in January, 1904. The capital stock of the bank was \$15,000, and, on April, 1904, the directors declared a dividend of 5 per cent. on the capital stock, payable to the stockholders. At the time the dividend was declared the bank was insolvent, and after deducting from its available assets the bad and suspended debts, its liability to the depositors were several thousand dollars more than the value of all its assets. The appellant, the city of Franklin, at the time the dividend was declared, had on deposit in the bank in the name of its treasurer \$3,000, and on the day the bank assigned had on deposit \$4,666, and to recover this sum from the directors this action was instituted by the city. An agreed statement of facts was made up, showing that at the time the dividend was declared the directors did not know the bank was insolvent, nor did they know the condition of the bank; and it may be conceded that they acted in good faith, and with ordinary care and prudence. Judgment was rendered against the directors for the amount of the dividend, and both parties appeal.

The appellant insists that it was entitled to the full amount claimed, while the appellees contend that judgment should have been rendered in their favor. The correct adjudication of this case depends upon the proper construction of sections 538, 548, 596 and 598 of the Kentucky Statutes of 1903. These sections are found in the chapter relating to private corporations. This chapter is divided into several articles; article 1 contains provisions relating to corporations generally, and article 2 contains the general statutory law relating to incorporated banks.

Section 538 of article 1 reads: "Any number of persons, not less than three, may associate to establish a corporation for the transaction of any lawful business, or to form or conduct any legitimate object or purpose under the provisions of and subject to the requirements of this article; but banking, building and loan, trust, insurance and railroad corporations shall, in addition to the provisions of this article, which are not inconsistent with the laws relating especially to them, be organized in the manner and subject to the provisions of such laws."

Section 548, also a part of article 1, provides: "If the directors of any incorporated company shall declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally individually liable for all debts of the corporation then existing,

and for all that shall thereafter be incurred while they or a majority of them continue in office."

Section 596, in article 2, provides: "The board of directors may declare a dividend of so much of the net profits of the bank, after deducting therefrom all expenses, losses, bad or suspended debts, interest and taxes created or due from the bank as they may deem expedient. And all debts due to the bank on which interest is due and unpaid for six months, unless the same be well secured, or in process of collection, shall be considered bad or suspended debts within the meaning of this section; but before any dividend is declared, not less than one-tenth of the net profits of the bank for the period covered by the dividend shall be carried to a surplus fund until such surplus amounts to twenty per cent. of its capital stock."

Section 598 of article 2 declared that: "If any director or directors of any bank shall knowingly violate or permit any officer or employé of the bank to violate any of the provisions of the law relating to banks, the directors so offending shall be jointly and severally individually liable to the creditors and stockholders for any loss or damage resulting from such violation; and if any such loss or damage be not made good within a reasonable time, it shall be the duty of the Secretary of State, with the consent of the Attorney General, to institute such proceedings as may be necessary to forfeit the charter of such bank."

The action of appellants is based on section 548 supra, and it is insisted for it that under this section the directors are liable not only for the amount of its deposits when the dividend was declared, but for the deposit thereafter placed in the bank; and that this liability attaches without reference to whether the directors knew the condition of the bank or not, as the word "knowingly" is omitted from this section, and their liability does not depend upon their knowledge of the condition of the bank, but results from the fact that they declared a dividend when the bank was insolvent. It is argued that although section 538, supra, provides "that banking corporations shall in addition to the provisions of this article, which are not inconsistent with the laws relating especially to them, be subject to the provisions of such laws," that section 598 of article 2, fixing the liability of the directors in the event they knowingly declare a dividend when the bank is insolvent, or without deducting bad or suspended debts, is not inconsistent with section 548, and therefore section 548 controls and fixes the liability of the directors in this case. Counsel say it was not contemplated by the Legislature that the directors of a bank should be subjected to less liability than the directors of ordinary business corporations; but that, on the contrary, they should be held to a stricter accountability, because of the opportunity afforded them to

misappropriate the money of the depositors by declaring dividends payable to them and other stockholders out of the funds of the bank.

For appellees it is said, that their liability is fixed by the provisions of the article relating to banks, and section 598 thereof, and that under this section the directors are not liable at all unless they "knowingly" declare a dividend in violation of section 596; and that, if they should declare a dividend in violation of this section, they are only liable for any loss or damage resulting from such violation; and that it being conceded by the agreed state of facts that the directors did not know the condition of the bank, they are not liable to the creditors in any sum. Previous to the enactment in 1893 of the chapter on private corporations, there was no general law regulating the liability of directors or officers of banks or other corporations, and it was held in *Brannin v. Loving*, 82 Ky. 370, 1884, that bank directors were only required to exercise the same care that an ordinarily prudent man would in his own business of like character, and were only personally liable when they failed to exercise this degree of care, or were guilty of gross neglect. In *Savings Bank v. Caperton*, 87 Ky. 306, 8 S. W. 835, 12 Am. St. Rep. 488, an action brought by depositors against the directors of a bank, to recover money deposited by them in the bank, and which was lost by reason of the embezzlement of the funds by the cashier, this court said: "The only question presented in this case is whether the directors acted in good faith and with ordinary care and diligence in the conduct of the affairs of the bank, or such diligence as ordinarily prudent men would have exercised with reference to the conduct of such moneyed institutions. It is not a question of how the fraud of the cashier might have been discovered, but were these directors guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised." So that, previous to the enactment of these statutes, directors of banks were only liable when they failed to exercise such care and diligence in the management and conduct of its affairs as ordinarily prudent men would have exercised.

In the management of corporations, and especially banks, it is important in the interests of both stockholders and depositors and all persons having business with the bank, or corporation, that the directors shall be good business men, solvent and responsible; and, generally speaking, the directors of corporations are composed of this class of our citizenship. In the management of small corporations, and especially small banking institutions, the directors are rarely either bookkeepers or accountants, and have little knowledge of the bookkeeping methods employed in these institutions.

More frequently than otherwise, they do not receive a compensation for their services, or devote much of their time to the affairs of the corporation, leaving the management of its details to the cashier and other salaried officers who are directly charged with the conduct of its business. When the directors, as in this case, select as they believe honest, faithful, and capable cashiers and clerks, they are obliged to rely largely upon the statements of these employes as to the condition and standing of the bank, and must trust to them the active management of its affairs. Whilst directors of banks and other corporations who voluntarily assume the duty of looking after the interests of the concern should be held to a reasonable accountability for the acts of the persons whom they employ, and have the right to discharge at any time, their liability should not be so burdensome as to prevent solvent and capable men from accepting these positions of trust. Directors of corporations give credit and character to the institution with which they are connected by reason of the fact that the public have confidence in their integrity and business qualifications, and when they accept these positions of trust, and hold themselves out as having charge of the affairs of the corporation, whether it be a bank or not, fairness to those dealing with the corporation demand that the directors should be held responsible for the direct loss that results from declaring dividends prohibited by the statute. A less measure of liability than this, would be unjust to the creditors and depositors, and a greater degree would result in depriving corporations, and especially banks, of the services of solvent and up-right directors.

Few responsible men could be induced to become directors in corporations if the position carried with it liability for all debts of the corporation, although the directors had exercised the highest degree of care in selecting the officers, and acted in good faith and with ordinary prudence in conducting its affairs. To fix the liability of directors of corporations by the strict letter of section 548, and make them liable for all debts of the corporation if they declare any dividend when it is insolvent, or which would render it insolvent, although in declaring the dividend they acted in good faith based on an honest belief in the correctness of the statements made by the cashier and other officer of the corporation, would be giving to this statute an interpre-

tation not intended by the legislative department in its enactment. This section of the statute should be so constructed as to limit the liability of directors to the amount of the dividend declared, when the facts show that in declaring it they have acted in good faith, and have used ordinary care and diligence in the conduct of the affairs of the institution. This section, when so construed, is not in conflict with, and should be read in connection with, section 598. There is no reason why directors of banks should be held to a less accountability than the directors of other corporations; but if section 598 is construed to meet the views of counsel for appellee, bank directors would be virtually exempt from liability, however careless they might be in the management of the affairs of the bank. The directors of banks are the only persons who can declare dividends, and section 596 before quoted provides when they may declare dividends; and if in violation of this statute a dividend is declared, the directors will not be permitted to shield themselves from liability upon the ground that they did not knowingly violate its provisions. It is the duty of bank directors to use ordinary care to acquaint themselves with the condition of the business of the bank, and to exercise reasonable control and supervision of its officers. That which they ought, by proper diligence, to have known, they will be presumed to have known in a contest between the corporation and those who do business with it, and have the right to believe that its directors have exercised ordinary care and prudence in the management of its affairs. *United Society of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49. In declaring and paying out dividends when the corporation is insolvent, or its finances are not up to the standard imposed by the statute, the directors take away from the creditors a fund they have a right to look to for the payment of their debts, and when this fund is restored by the directors, the creditors are placed in the same position they would have been if the fund had not been diverted. This construction of these statutes imposes a greater obligation on directors than was exacted of them under the law as it existed previous to these enactments, and is, in our judgment, fair and just to the directors and persons dealing with the corporation.

The judgment of the lower court conforms to these views, and is affirmed.

**CURETON v. CURETON.**

(Supreme Court of Tennessee. Sept. 29, 1906.)

**1. HUSBAND AND WIFE—SEPARATE MAINTENANCE—EQUITY JURISDICTION.**

A court of equity has inherent power, independent of statute, to grant a wife a separate maintenance out of her husband's estate because of his abandonment of her or for his failure to provide or other breach of marital duty, whereby she is forced to withdraw from his home, in cases where no application for divorce is made.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1078.]

**2. SAME—BILL—SUFFICIENCY.**

Where a bill by a wife for separate maintenance showed that she had been a resident of the state less than two years and disclaimed a purpose to sue for divorce, but only to claim a separate maintenance, it was immaterial that it stated facts which, if proved, would have justified the court in granting a divorce for cruel and inhuman treatment, as authorized by Shannon's Code, § 4202.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1089.]

**3. SAME—RESIDENCE.**

Where complainant in a suit for separate maintenance had formerly resided in Tennessee, where she was married, the fact that she had resided in Georgia for a year, when she was compelled to return to Tennessee because of defendant's ill treatment, and that she had resided there only 15 or 20 days when the bill was filed, did not disentitle her to relief.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1078.]

**4. SAME—CUSTODY OF CHILDREN.**

In a suit by a wife for separate maintenance because of cruel and inhuman treatment on the part of her husband it was proper for the court to give her the custody of two minor children, aged two and four years, respectively; proper provision being made to enable the husband to see the children at stated intervals.

**5. SAME—DECREE—PROVISIONS.**

A decree for separate maintenance of a wife, requiring the husband to pay monthly sums for her benefit, should provide for its continuance within the discretion of the chancellor only until a reconciliation could be effected between the husband and wife and until the husband should have returned to the discharge of his marital duties.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 1073, 1094.]

**6. SAME—REMOVAL OF CHILDREN.**

Where a decree for separate maintenance gave the custody of minor children to the wife, a provision in the decree authorizing the husband to take the children out of the state on executing a bond for their return was improper, as authorizing a removal of the children beyond the jurisdiction of the court.

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Action by Katherine Cureton, by next friend, against W. W. Cureton. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Watkins & Thompson, for appellant. Williams & Lancaster, for appellee.

NEIL, J. There is a conflict of authority upon the question whether a court of equity has inherent power to grant a wife a sepa-

rate maintenance out of her husband's estate, because of his abandonment of her, or his failure to provide, or his cruelty, or other breaches of marital duty, whereby she is forced to withdraw from his home and custody, in cases where no application for divorce is made (2 Am. & Eng. Encyc. of Law [2d Ed.] 93, 94; 14 Cyc. 744, 745); many of the authorities referred to in their notes holding that in the absence of statutes conferring the power it does not exist. However, there are other authorities, represented by decisions delivered by courts of last resort in Alabama, California, Colorado, Iowa, Kentucky, Maryland, Mississippi, North Carolina, Ohio, South Carolina, South Dakota, and Virginia, and also in the District of Columbia, which hold that the power exists. 2 Am. & Eng. Encyc. of Law (2d Ed.) 94, 95, note 2; 14 Cyc. pp. 744, 745, note 14. And with these latter courts must be ranked our own. Nicely v. Nicely, 3 Head, 184; Swan v. Harrison, 2 Cold. 543; Corley v. Corley, 8 Baxt. 7, 10.

In Nicely v. Nicely the court said:

"The argument against the jurisdiction of a court of equity to decree the relief sought by the bill is based upon the English authorities. The doctrine held there is that the obligation of the husband to provide a suitable maintenance for his wife is not a duty of which courts of equity will decree the specific performance, by requiring him to furnish a separate maintenance; that the remedy is in the courts of common law, by action against the husband, in favor of any one who may, under such circumstances, have supplied the wife with necessities suitable to her condition in life; that the jurisdiction of decreeing alimony belongs to the spiritual court, and can be properly exercised in that court as incidental to a decree of divorce only, and is not within the jurisdiction of a court of equity. Fonbl. Eq. 103, 104, note n; 2 Story's Eq. (5th Ed.) § 1422. Such seems to be the general doctrine of the English cases, though the cases upon this subject do not altogether agree. But in some of the American courts a more reasonable doctrine has prevailed; and the jurisdiction of a court of equity, in such cases, has been maintained upon general principles, and especially upon the ground of the utter inadequacy of the remedy at law. See 2 Story's Eq. § 1423, a, 4 Hen. & M. 507, and other American cases cited in Fonbl. Eq. 62, 63, and note; Id. 103, 104, and note. If it were necessary, we should incline to follow the latter authorities in the determination of this case."

The court, however, notwithstanding the strong expressions quoted, finally decided the special case in hand upon the language of our statute (Code 1858, §§ 2467, 2468; Shannon's Code, §§ 4220, 4221), and the authority of the case cannot therefore be considered conclusive upon the question. In Swan v. Harrison, the question is left in the



same predicament. 2 Cold. 541-544. But in *Corley v. Corley* the equitable jurisdiction is distinctly recognized, without reference to the terms of the statute.

Defendant's contention is that the relief can be granted only under the statute (Shannon's Code, 4202, 4220, 4221; Code 1858, §§ 2449, 2467, 2468), and that no relief can be applied for thereunder, for acts committed outside of the state, until the applicant has been a resident of the state two years (Shannon's Code, § 4203; Code 1858, § 2450). This section reads:

"A divorce may be granted for any of the aforesaid causes, though the acts complained of were committed out of the state, or the petitioner resided out of the state at the time, no matter where the other party resides, if the petitioner has resided in this state two years next preceding the filing of the petition."

The counsel for complainant contends that the two years condition precedent to action is placed upon the right of divorce merely, and that the right to apply for maintenance, simply, is left untouched thereby; the court having held in *Nicely v. Nicely*, supra, that such independent right did exist under sections 2467, 2468. We incline to the view of complainant's counsel, but it is perhaps unnecessary to decide the question, since the inherent power of the court of equity in the premises is recognized, and was availed of in *Corley v. Corley*, supra. So, in either view, the bill was not filed prematurely.

It appears that in many of the states where the inherent equity jurisdiction was denied statutes have been passed conferring upon the wife the right to file such independent bill for maintenance, so that now in the greater number of our states the right is recognized, and a body of law has grown up thereunder, defining and illustrating the mode and extent of its exercise. 2 Am. & Eng. Encyc. of Law (2d Ed.) 93, 94, note 1; 21 Cyc. 1598, 1599, note 79.

"Accordingly," it is said in the authority last cited, "the wife's right to an allowance for separate maintenance, as used in the present discussion, means that reasonable support for the wife which a court of equity or the statutes will compel the husband to provide for her where without just cause he deserts her, or where by his misconduct she is justified in living apart from him, when otherwise she would be without adequate means of support. \* \* \* In equity and under the statutes the generally recognized grounds for the wife's right to an allowance for separate maintenance are desertion or abandonment of the wife without just cause, cruelty, personal violence, and drunkenness. Other causes, such as ill treatment, neglect suitably to provide for the wife, fraudulently procuring a divorce, living separate and apart, and renunciation by the husband of the marriage covenant and refusal to live with the wife in the conjugal

relation by reason of joining himself to a sect whose doctrine requires a renunciation of the marriage covenant, are also recognized in some jurisdictions." 21 Cyc. 1599-1601, and notes.

It is said that, generally, to give jurisdiction, one of the parties must be a bona fide resident of the state in which the suit is brought. 21 Cyc. 1608, and note 23; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227. In the case cited it was held that where a wife who had left her husband for just cause returned to him on his promise of amendment, and they removed to another state where he continued his ill treatment, the wife might remove to her former domicile and sue there for maintenance.

In respect of the judgment to be entered in cases of this character, it has been held that "the decree should provide that the alimony continues until a dissolution of the marriage by the death of either party, or until the husband shall receive the wife and treat her in accordance with his marital duty. The allowance must be made to the wife in name. An alternative sum in lieu of annual payments has been made, and the custody of minor children may in the discretion of the court be awarded to the wife." 21 Cyc. 1608, 1609. It has also been held that a decree for separate maintenance may, upon due notice, be amended or modified, as justice and equity may require it. *Id.* note 86.

There are, of course, many other incidents of the relief granted in cases of this character; but, as they have no bearing upon the facts of the case before the court, they need not be now referred to.

We shall now proceed to apply the foregoing principles as far as may be necessary for a true solution to the case before the court.

1. We do not think it material that the complainant drew her bill stating facts which would have been sufficient, if proven, to have justified the court in granting a divorce from bed and board or absolutely, under Shannon's Code, § 4202—that is, charging cruel and inhuman treatment and failure to provide; nor is it material that the affidavit required in divorce cases was attached to the bill, concerning the truth of its allegations and the absence of levity or collusion. The bill showed upon its face that the complainant had been a resident of the state less than two years, and expressly disclaimed a purpose on the part of the complainant to sue for divorce, and as distinctly a purpose merely to claim a separate maintenance.

2. The complainant was not disentitled to relief on the ground that she had been a resident of this state only 15 or 20 days when the bill was filed. She had formerly resided in this state, and the defendant married her here. They removed to Georgia, and resided there about a year, when she was forced to return to her mother's home in Chattanooga because of ill treatment on

the part of her husband and of his failure to provide for her and his abandonment of her. Under these circumstances she had a right to return to her former domicile and present the present bill.

3. The chancellor and the Court of Chancery Appeals acted correctly in giving her the custody of the children. They were young—two and four years old—and needed their mother's care. Proper directions were embodied in the decree, enabling the husband and father to see the children at stated times, and to have them with him for certain periods fixed by the court; proper safeguards for their return to their mother being provided, as shown *infra*.

4. The chancellor decreed that the complainant was entitled to \$40 per month, as a suitable support for herself and the two children, and rendered judgment for the amount which had accrued at this rate from the filing of the bill to the date of the decree, \$640, and further decreed that the defendant should pay into court the further sum of \$40 per month on the 1st day of each month after the decree, beginning with the 1st day of May, 1906. The defendant was also taxed with the costs. The cause was likewise retained in court for the enforcement of the decree when necessary, with leave to either party to apply. On appeal, the decree of the chancellor was in all things affirmed by the Court of Chancery Appeals, and in that court a judgment was rendered against defendant and the surety on his appeal bond for the sum of \$800, the amount of the accrued monthly sums to August 1, 1906, less the sum of \$101.96, which had been paid into the court below. Execution was directed to issue for the balance so ascertained.

The Court of Chancery Appeals further decreed that the complainant should have the exclusive care and custody of the two children, Julia and Marlon, and the injunction originally granted in the cause against the defendant, restraining him from in any wise interfering with the care and custody of the children by the complainant was made perpetual, but the court directed that the defendant might visit the children once each week at some suitable place, to be agreed upon between complainant and himself, or to be designated by the chancellor presiding in Chattanooga, but the defendant was enjoined from tampering with or endeavoring to prejudice the children against their mother during such visits. The decree further provided that, inasmuch as the defendant had executed a proper bond for the purpose in the chancery court, he might, if he desired, take the children with him to the home of their grandfather in Dade county, Ga., for the period of one week each month, and that for this purpose the bond before executed should remain in full force and effect. For the purpose of carrying out and executing the foregoing decree, which included, of course, the future payment of \$40 each month pursuant

to the decree of the chancellor, which was affirmed, the cause was remanded to the chancery court at Chattanooga, except in so far as an execution was awarded for the amount found due, as above indicated.

This decree is correct in the main, but we think it should be modified in two or three particulars, as follows: The future monthly payments, beginning with that due the 1st day of August, 1906, should continue within the discretion of the chancellor only until a reconciliation shall have been effected between the husband and wife, and until the husband shall have returned to the discharge of his marital duties, of which return the chancellor shall be fully satisfied before discontinuing the payments. In the absence of such return to duty on the part of the husband, the payments should continue. There should also be a further reservation with respect to the custody of the children. The injunction was improperly rendered a perpetual one. It should be held within the control of the chancellor, to the end that he may hereafter make such orders as may be most conducive to the interests of the children. The clause permitting the husband to take the children out of the state or executing bond was an improper one. The children should not be taken from the state at all, but should be kept within the jurisdiction of the court.

There are some other questions made in the briefs of counsel, but in view of what has already been said these questions have become immaterial, and need not be more particularly referred to. A decree will be entered here, affirming the decree of the Court of Chancery Appeals, with the modification above indicated, and the cause will be remanded to the chancery court of Hamilton county for further proceedings.

The defendant will pay the costs of this cause accrued to the present time, both in this court and the court below. The costs that may hereafter accrue will be disposed of as the chancellor may direct.

#### SALE CREEK COAL & OKE CO. v. PRIDDY.

(Supreme Court of Tennessee. Oct. 6, 1906.)

MASTER AND SERVANT—OPERATION OF MINES—STATUTORY REGULATION—INJURIES TO EMPLOYEES.

Acts 1903, c. 237, regulates the operation of mines, and requires the employment of a certificated mine foreman under penalty, and confers on such foreman control of the mine with reference to the duties specified in the act, independent of the mine owner, securing the faithful discharge of such duties by the imposition of penalties. *Held*, that the relation of master and servant did not exist between the mine owner and his certificated foreman with reference to the duties imposed on such foreman by the statute, and that the master was therefore not liable for injuries to a miner, caused by the foreman's negligence in the performance of such duties.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 427-430.]

Appeal from Circuit Court, Hamilton County; T. M. McConnell, Judge

Action by Jesse Priddy against the Sale Creek Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed. Suit dismissed.

A. F. Frazier and Norris Headrick, for appellant. Smith & Carswell and J. H. Anderson, for appellee.

NEIL, J. This action was brought in the circuit court of Hamilton county to recover damages for an injury suffered by the defendant in error while in the discharge of his duties as a miner in the coal mine of the plaintiff in error, located in the said county of Hamilton. At the close of the evidence introduced by the plaintiff below, the defendant there asked the court for a peremptory instruction. This was refused, but was renewed at the close of all the evidence, and was again refused. The jury returned a verdict in favor of the plaintiff below for \$500 damages. A motion for a new trial was made and overruled, and thereupon judgment was rendered on the verdict. From this action of the court an appeal was prayed and prosecuted to this court.

Sundry errors have been assigned, based on the refusal of the circuit judge to grant the peremptory instruction; also upon certain paragraphs of his charge to the jury, and upon his refusal to give certain instructions asked by the plaintiff in error. We are of opinion, however, that the whole controversy may be settled upon a consideration of the action of the circuit judge in refusing to grant the peremptory instruction.

The facts disclosed by the record, taking the most favorable view of them for the defendant in error, are as follows:

The defendant in error was a young man in his twenty-first year and had been working in the mine of the plaintiff in error for about 18 months. He had been working about one month in the room wherein he was injured. This room was in the most dangerous part of the mine, owing to the fact that the roof was more insecure than in any other part. No special instructions had been given the defendant in error concerning the dangerous character of the roof. However, the injury seems not to have arisen on account of any want of instructions. The defendant in error had, along with his companion, called in mining parlance his "buddy," dug a considerable quantity of coal and had it ready for the cars. Owing to the narrowness of the vein, the defendant in error and his companion had to work in a kneeling position. The result of this was that the roof was not high enough to admit the entrance of a car and a mule to haul the coal out. According to the custom it became necessary to blast out about 1½ feet of the roof for a space wide enough to

admit the car and mule alongside the pillar of the room. This was done and the roof of the part of the room covering the track on which the car was run was propped by the propman. It was the duty of the defendant in error and his companion to prop the other portion of the roof. The increased height of the roof over the track was continued to within a few feet of the face of the coal at the end of the room. The defendant in error and his companion had loaded two cars with coal and these had already gone. Thereupon, the plaintiff in error sat down on the track near the face of the coal to rest. While he was in this position, about 250 pounds of slate fell from the roof over the track and brushed against the lower part of his leg injuring it badly. The defendant in error supposed that the roof over the track had been correctly propped and did not examine it or observe that anything was wrong with it, or that there was any danger of the slate slipping down. He testifies that probably he might have discovered the danger if he had tapped the roof with his pick, but further, that, even after such examination is made, the slate often falls without any assignable cause from the roofs that seem to be sound. The mine foreman, according to the testimony of the defendant in error, had not inspected the roof over the track to see whether it had been correctly propped, although this propping had been done the day before.

The negligence charged is the defective condition of the roof over the track, its want of correct propping, and the want of inspection on the part of the mine boss; that is, his negligence in not inspecting the roof after it had been propped.

In order to a correct solution of the question suggested, it is necessary to state the substance of the mining act of 1903, so far as it applies to the phase of mining presented by the record in the case now before the court. Before setting out the particular parts of the act referred to, bearing upon the case we now have under consideration, it is proper to say that the act is very broad in its scope. Its terms indicate a very minute and comprehensive knowledge of the business of mining and of all of its needs, and show a purpose to direct the conduct of the business with a view to securing the safety of miners by fixed regulations governing all mines and not subject to be varied by their owners.

The act referred to is chapter 237 of the acts of 1903. The terms of the act bearing upon the controversy now before us are as follows:

By section 12 it is provided: "It shall be unlawful for any person or persons to act as mine foremen, assistant mine foremen or fire bosses of any mine in this state, unless they are registered as holders of certificates of competency or qualification under this act."

Section 16 provides: "No coal mine shall be operated for a period longer than thirty days without such certificated mine foremen. For all Class 'A' and Class 'B' mines, the foremen shall hold Class 'A' certificates; the assistant foremen may be holders of Class 'B' certificates. In all mines of Class 'C' and Class 'D,' the foremen may be holders of Class 'B' certificates, and all gas bosses shall be holders of Class 'A' or Class 'B' certificates, which certificates shall state on the face of same that they are qualified to act as gas bosses. Any owner, operator or superintendent operating a coal mine in this state for thirty days without such certificated foreman shall, upon conviction of same, be subject to a fine of twenty-five dollars per day for each and every day operated without such foremen or foreman."

Section 19 provides: "That certificates granted under the laws of this state prior to the passage of this act shall be considered good and in full force as if issued under this act."

Section 20 contains the following provisions: "In order to better secure the proper ventilation of mines and promote the health and safety of the persons employed therein, the operator or superintendent shall employ a competent and practical inside overseer of each and every mine, to be called mine foreman. Said mine foreman shall be licensed as hereinbefore required by this act, and his license as such shall be sufficient evidence of his competency. He shall be a citizen of the United States, and he shall devote the whole of his time to the duties at the mine when in operation (or in case of his absence, an assistant chosen by him), and shall keep a careful watch over the ventilation apparatus, airways, entries, travelling ways, timbers, pumps and drainage, that as the miners advance their excavations all dangerous coal, slate or rock overhead is taken down or secured against falling, and that sufficient props, caps and timbers are kept at some convenient point near the mine entrance, which shall be selected and loaded on the cars by the miners, and shall then be hauled to the mouth of the room or face of the entry where he is working; \* \* \* provided further, that said mine foreman shall not be subject to the control of the operator or owner in the discharge of the duties required of said mine foreman by this act. It shall be the duty of the mine foreman, or foremen, to see that the provisions of this section and the other duties herein defined are faithfully discharged and carried out; and in case of his or their failure to comply with such provisions, and upon conviction, he or they shall be subject to a fine of one hundred dollars each and imprisonment for a period of not less than ninety days at the discretion of the court."

The omitted portions of the section indicated by the stars above apply to the ventilation of the mine.

The mine of the plaintiff in error was what is known as a "Class C" mine. Mr. Parry, the foreman, was duly certificated under the act, and was in charge of the mine thereunder. The act makes the possession of the certificate sufficient evidence of the competency of a foreman, but the evidence also shows in addition that he was a competent person. The facts stated show that the fall of the slate, so far as traceable to any known cause, resulted from the defective propping over the track. This negligence was that of the mine foreman, arising out of his failure to inspect the work of the propman and discover the existence of the defect, if any.

The question suggested by this statement, taken in connection with the act above referred to, is whether the owner of the mine was responsible for the negligence of the mine foreman. We are of opinion that he should not be held responsible, for the reason that the duty of the mine foreman, which was omitted, was one which was imposed upon him by the statute and concerning which the mine owner had no control of him under the express terms above quoted.

The relation of master and servant as to the duty referred to did not exist between the foreman and the owner. To the existence of that relation it is essential that the master shall not only have control of the thing to be done but also direction of the manner of its doing. It would be unreasonable and against conscience to hold him responsible for the consequences of an act, the doing of which had been, by express provision of law, placed beyond his control.

The principle is well stated in *Shearman & Redfield's* work on Negligence, in the following language: "Where a general manager of a department is appointed in obedience to a statute, making such appointment compulsory and making such manager expressly responsible and independent of his employer's control, such employer is not liable for anything more than due care in selecting him. He is not a vice principal, because he is not really the agent of the principal." *Id.* vol. 1, § 231. The same principle is stated in *De Forest v. Wright*, 2 Mich. 368, in the following language: "Where an employé is exercising a distinct and independent employment and is not under immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employé." It is also illustrated in cases which have arisen respecting the common-law liability for the negligence of pilots whom shipowners are compelled by law to employ. See *Homer Ramsdell Transportation Co. v. La Campagne Generale Transatlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155. In that case it was held that the shipowner was not liable on the ground that he had no control of the pilot. In discussing the question the court said:

"At common law no action can be maintain-

ed against the owner of a vessel for the fault of a compulsory pilot.

"In *Caruthers v. Sydebotham* (1815), 4 Maule & S. 77, 85, Lord Ellenborough, in holding that the act of the pilot was not the act of the master or mariners or owners of the ship, said: 'Now, to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must be shown that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other. But does the master appoint the pilot? Certainly not. The regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed. But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is that there is no privity between them.'

"\* \* \* In *Lucey v. Ingram* (1840) 6 Mees. & W. 302, 315, Baron Parke, delivering the judgment of the Court of Exchequer, spoke of the exemption of the master who was compelled to take a pilot, from liability by the common law, independent of statute, as follows: 'It may, indeed, be admitted that in many of the cases the judges in giving their judgments refer to the obligation of the master to take a pilot, as the ground on which his irresponsibility is founded; and no doubt that is the foundation, and probably the only foundation, on which it can rest independently of the statutes; but the language of the exempting clause in the last pilot act certainly carried the doctrine further, and it may well be conceived that this extension of the common-law doctrine was not accidental, but intentional. The object of the Legislature in establishing pilots has been to secure, as far as possible, protection to life and property by supplying a class of men better qualified than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common difficulty. To effect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound, under a penalty, in a great measure to divest himself of its control and to give up the charge to the pilot. As a necessary consequence, the master and owners are exempted from responsibility for acts

resulting from the mismanagement of the pilot.'

The foregoing authorities sufficiently illustrate and enforce the point above suggested.

The case of *Smith v. Coal & Iron Company*, 115 Tenn. 543, 92 S. W. 62, cited by counsel for defendant in error, does not apply. In that case the court was dealing with the act of 1881 which did not contain the following language appearing in the act of 1903, viz.: "That said mine foreman shall not be subject to the control of the operator or owner in the discharge of the duties required of said mine foreman by this act. It shall be the duty of the mine foreman or foremen to see that the provisions of this act and the other duties herein defined are faithfully discharged and carried out; and in case of his or their failure to comply with such provisions and upon conviction, he or they shall be subject to a fine of one hundred dollars each and imprisonment for a period of not less than ninety days, at the discretion of the court."

Not only is the employment of a certificated mine foreman made compulsory upon the owner under a penalty for failure to do so, but the control of the mine foreman, in respect of the duties set out in the act, is taken from the owner and the foreman's faithful discharge of duty secured by the imposition of penalties. Under such a statute there is no ground on which to place the liability of the owner for the negligence of the foreman in respect of his failure to discharge the duties referred to.

We are of opinion, therefore, that the circuit judge committed error in refusing to grant the peremptory instruction. The result is the judgment of the court below is reversed, and the suit dismissed.

#### AMERICAN BONDING CO. OF BALTIMORE v. MORROW.

(Supreme Court of Arkansas. July 23, 1906.)

##### 1. INSURANCE — INDEMNITY INSURANCE — DEFAULT OF EMPLOYÉ.

The bond of a surety company indemnifying an employer against the default of a servant is to be most strongly construed against the surety.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 292, 295.]

##### 2. SAME—CONSTRUCTION OF BOND—LIABILITY —AMOUNT.

Where a bond issued by a surety company indemnifying an employer against default of an employé for a certain amount provided that it should not lapse at the end of the term if renewed, but that the liability of the surety should not be cumulative, the total liability for the whole period represented by the original term and renewal periods was limited to the amount specified in the bond.

##### 3. SAME—APPLICATION — WARRANTIES—COMPLIANCE WITH PROMISSORY WARRANTY.

Where a surety company issued a bond indemnifying a bank against the default of its cashier, and the application made by the bank

warranted that the books of the cashier would be examined by the auditing committee monthly, an examination by the auditing committee once in each month, but not on any fixed monthly date, was sufficient.

4. SAME.

An examination by the auditing committee composed of certain directors of the bank was sufficient, though they were not expert accountants.

5. SAME.

Where a bank on applying to a surety company for a bond indemnifying it against default of its cashier warranted that he was not engaged or about to engage in any other business, the fact that he wrote a little fire insurance, and was secretary of a local board of directors of a building association, did not amount to a breach of the warranty.

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Action by W. H. Morrow, as receiver of the Bank of De Valls Bluff, against the American Bonding Company of Baltimore. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The American Bonding Company of Baltimore is a foreign corporation doing business in the state of Arkansas as a surety company, and, on August 31, 1900, executed to the Bank of De Valls Bluff, of De Valls Bluff, Ark., a surety bond in the sum of \$5,000, undertaking to indemnify said bank against any loss sustained on account of any larceny or embezzlement committed by its cashier, G. C. Strong, during a term of one year, commencing on the 1st day of September, 1900. The bond contained the following, among other conditions and stipulations, viz.: "This bond shall not lapse at the end of the above if it shall be continued in force by a renewal receipt or receipts, executed by the surety, but shall continue in force for the term or terms of such renewal. The liability of the surety, however, shall not be cumulative. That all the representations made by the employer, his or its officers, to the surety are warranted by the employer to be true. That the employé has not, to the knowledge of the employer, his or its officers, been in arrears or a defaulter in the position covered by this bond, or in any other position, and that the employer, his or its officers, upon becoming aware of the employé gambling, speculating or committing any disreputable, lewd or unlawful act will immediately notify the surety in writing. That the surety's liability hereunder shall cease immediately as subsequent acts of the employé from and after discovery by the employer, his or its officers, if any default hereunder on the part of the employé." This bond was issued upon a written application signed by officers of the bank, containing various statements in response to questions propounded; the truth of which were declared to be warranties by the applicant. Renewal receipts were subsequently issued by the surety, extending the period of the suretyship from September 1, 1901, for one year, and from September 1, 1902, for another year.

The renewal receipts were in the following form (omitting caption): "In consideration of the sum of \$25, the American Bonding & Trust Company of Baltimore City, hereby guarantees the fidelity of George C. Strong in favor of Bank of De Valls Bluff from the 1st day of September, 1901, to the 1st day of September, 1902, in the same amount, in the same position, and subject to all the covenants and conditions set forth and expressed in the surety bond No. 44,228 of this company, heretofore issued on the 1st day of September, 1900." The last renewal receipt extending the bond for one year from September 1, 1902, was issued upon a written application signed by the president of the bank, and containing the following, among other questions and answers, viz.: "4 (a) Has applicant uniformly given satisfaction in his personal conduct and habits?" Answer: "Yes." "(b) Has he kept his accounts correctly and made proper settlements of all cash and securities entrusted to his care?" Answer: "Yes." "(c) Have you any knowledge or any information or are you aware of any habit of the applicant or of any circumstances unfavorably affecting the risk to the surety on the bond applied for? If so, state particularly." Answer: "No." "5. Is he now or has he been from any cause indebted to the bank or its officers? If so, give particulars, stating amount, how incurred, and how payment is secured." Answer: "Does not owe the bank or its officers." "6. Is he now or about to be engaged or entrusted in any other business or employment than the bank's service?" Answer: "No." "11. In case of applicant handling cash or securities how often will the same be examined and compared with the books, accounts and vouchers and by whom?" Answer: "The auditing committee monthly." "12 (a) At what date and by whom were the applicant's books and accounts (including cash, securities and vouchers, if any) last inspected and examined?" Answer: "August 15, by auditing committee, W. J. Wilkins and J. I. Booe." "(b) Were they at that time in every respect correct and proper securities and funds on hand to balance?" Answer: "They were."

The plaintiff, W. H. Morrow as receiver of the bank of De Valls Bluff brought suit at law against said company to recover the sum of \$11,038.56, alleged to have been misappropriated and used by the cashier Strong (which said misappropriation, it is alleged, amounted to larceny or embezzlement) during the said three years covered by said bond and the several renewals thereof. The defendant answered, and the cause was transferred to the chancery court upon the motion of defendant alleging "that the transactions and defalcations, if any, as charged against said Strong in the complaint embraced money and various items of account extending over a period of three years and are of such an intricate nature, and so intermingled upon

the books and among the papers of the said bank that it is impossible to ascertain accurately the amount of defalcation, if any, or the amount due from said Strong to said bank without the aid of a master in chancery." Said defendant in its answer denied that Strong, by acts amounting to larceny or embezzlement, had appropriated the funds of the bank. Alleged untruthfulness of the answers to questions in the several applications for the bond and renewal receipts were set forth as breaches of the contract which released the surety from liability. It is also set forth as a defense that, according to the terms of the bond, the surety is in no event liable for an amount in excess of \$5,000. On final hearing the chancellor found that Strong's defalcation during the period named in the bond was \$1,150.50; during the period named in the first renewal receipt \$4,066.72; and during the period of the second renewal receipt \$5,851.34; and rendered a decree against the surety company for \$10,068.06, from which decree an appeal is prosecuted.

Ratliffe & Fletcher, for appellant. M. J. Manning, for appellee.

McOULLOUGH, J. (after stating the facts).

1. The initial question for determination is as to the amount of appellant's liability, if any, on the bond and the two renewal receipts—whether said writings constituted three separate obligations to indemnify the assured in the sum of \$5,000 each against loss accruing during the respective years, or whether they constituted a single liability for the sum of \$5,000 extending over the periods covered thereby, and indemnifying the assured against loss only to the extent of that sum for the whole period. It is now well settled that the bond of a surety company, like any other insurance policy, is to be most strongly construed against the insurer. The language of the bond is that selected and employed by the insurer, and, when doubtful or ambiguous, must be given the strongest interpretation against the insurer which it will reasonably bear. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Guarantee Co. v. Mechanics', etc., Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; *Supreme Council, etc., v. Fid. & Cas. Co.*, 63 Fed. 48, 11 C. C. A. 96; *Remington v. Fid. & Dep. Co.*, 27 Wash. 429, 67 Pac. 989. The language of these instruments are not susceptible of any reasonable interpretation other than that it was intended to extend the liability over the period of the renewal, but to limit the total liability for the whole period of the renewal contract to the amount named. It is so expressly stipulated in the bond. There is no ambiguity about it. It is plainly stipulated that the bond shall not lapse at the end of the time if renewed, but that "the liability of the surety, however, shall not be cumulative." What else can this stipulation mean? This construction is

strengthened when we consider all the other terms and conditions of the bond, and it is obvious that only a total liability of \$5,000 was contracted. The Supreme Court of Tennessee placed this construction upon a similar bond. *First Natl. Bank v. U. S. Fidelity & Guar. Co.*, 75 S. W. 1076. The learned chancellor held that the bond and renewal receipts constituted three separate bonds, covering three separate and distinct periods. In this he erred.

2. Was there a breach, on the part of the bank, of any of the conditions of the bond which released the surety? The application for the last renewal contained the following question and answer, viz.: "In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts, and vouchers, and by whom? Answer: "The auditing committee, monthly." It is claimed that this condition was not performed during the period covered by the renewal. We think the evidence is sufficient to sustain a finding that the examinations were made by the auditing committee, monthly, during that period. It is not claimed by the members of the committee that the examinations were made at precise intervals of one month. On the contrary, some of them state that it was deemed advisable to examine at irregular intervals, or rather upon irregular dates in each month. We do not think that the terms of the warranty, fairly and reasonably construed, required any more than that. Certainly, it was not meant that an examination should be made on precisely the same date of each succeeding month, but that an examination should be made at some time during each month. We think this is shown to have been done during the last year. It is argued that the examinations made by the auditing committee from time to time were not sufficiently searching and accurate to discover defalcations which ought to have been discovered, and that for this reason the surety company was released from liability. The members of the committee were not expert accountants, and appear to have made examinations in good faith with the purpose of fulfilling their duty to the bank. The terms of the bond and the alleged warranty in the application do not call for an examination to be made by a committee of expert accountants. It was only provided that the examinations should be made by the auditing committee of the bank directors. This provision contemplated no more than just what was done—an examination by a committee of men selected from the ordinary business avocations, reasonably capable of comprehending the condition of the accounts of the bank. It appears that the cashier, Strong, successfully secreted his defalcations from these men, notwithstanding the fact that they made a reasonably diligent investigation from month to month. The fact that he did succeed in thus hiding his

wrongdoing for a time, does not demonstrate that the members of the committee failed to perform their duty. If that process of reasoning should be followed out it would necessarily defeat the objects of the bond. It was from just such a condition of affairs that the bank sought indemnity. As has been well said, "An employer would need no insurance against that close and relentless vigilance which makes stealing impossible." Hammond, J., in *Guarantee Co. v. Mechanics Bank*, 80 Fed. 766, 26 C. C. A. 146.

It is shown by proof that during the life of the bond and renewals, Strong acted as secretary of a building and loan association, and, also, that he was engaged in the fire insurance business; and this is put forth by appellant as grounds of forfeiture on account of the negative answer to the question in the application whether the employé was "now or about to be engaged in any other business or employment than the bank's service." The proof shows that he wrote a little fire insurance, and was secretary of the local board of directors of a Little Rock building and loan association, doing business at De Valls Bluff, but that none of those engagements interfered with his work at the bank; that he attended to that work before or after banking hours. The parties to an insurance or indemnity contract may, by express stipulation, declare warranties of things apparently trivial and unimportant to be material, but such things will not be deemed to be material unless made so by express stipulation. Unless otherwise expressly provided, warranties will be deemed to refer to important and material matters calculated to affect the risk, not to unimportant ones which have no effect or bearing upon the risk. *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; *Providence Life Assurance Society v. Reutlinger*, 58 Ark. 528, 25 S. W. 835; *Home Mutual Life Ass'n v. Gillespie*, 110 Pa. 84, 1 Atl. 340; *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 72; *Wilkinson v. Connecticut Mutual Life Ins. Co.*, 30 Iowa. 119, 6 Am. Rep. 657. The question propounded in the application manifestly had reference to some business or employment calculated to interfere with Strong's duty to the bank or to increase the risk. It had no reference to the trivial or incidental duties of some other business or employment, which did not impose a tax upon the time due the bank or call for the investment of some capital. The other engagements of Strong were too trivial and unimportant to be deemed to have been in contemplation of the parties when the truth of the answers were warranted. Upon consideration of the whole case, we are of the opinion that the proof does not establish any grounds of forfeiture or breach of warranties or conditions on the part of the assured, and that the appellant is liable for the defalcation which occurred during the period of the last renewal to the extent of the amount of penalty of the bond. Those occurring during

the two preceding periods need not be discussed.

The decree is therefore reversed, and a decree will be entered here against appellant for the sum of \$5,000, with interest from August 21, 1903, together with the costs of the court below.

It is so ordered.

ST. LOUIS, I. M. & S. RY. CO. v. EVANS.  
(Supreme Court of Arkansas. July 23, 1906.)

1. RAILROADS—CROSSING ACCIDENT—EVIDENCE.

In an action for injuries to plaintiff in a collision with a railroad train at a crossing, evidence held to sustain a verdict for plaintiff.

2. SAME—PRIMA FACIE CASE—EVIDENCE.

Where, in an action for injuries to plaintiff in a collision with a railroad train at a crossing, the complainant charged negligence generally in running the train against plaintiff's wagon as well as a particular negligent act in failing to give the statutory signals before reaching the crossing, proof that plaintiff was injured by the operation of the train was sufficient to make out a prima facie case and shift the burden of proof on defendant.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1119.]

3. SAME—LIABILITIES OF LESSOR AND LESSEE.

Where, in an action for injuries at a crossing, no issue was presented that defendant was only the lessor and that a lessee company operated the road and inflicted the injuries, a contention that the presumption of negligence created by Kirby's Dig. § 6773, making railroads responsible for all damages to persons and property caused by the running of trains within the state, was only applicable against the corpus of the railroad property, and not against the railroad company, was unsustainable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 865.]

4. SAME—INSTRUCTIONS.

Where, in an action for injuries at a railroad crossing, an instruction was given that if defendant through its employes was negligent in operating its train which injured plaintiff, and there was no contributory negligence on his part as explained in former instructions, plaintiff was entitled to recover, such instruction was not objectionable for failure to confine the jury to the negligence alleged in the complaint; correct instructions having been given on the issue of negligence.

5. TRIAL—INSTRUCTIONS—ASSUMING FACTS.

Where the evidence required submission of plaintiff's contributory negligence to the jury in an action for injuries at a railroad crossing, a request to charge that, if a train could have been seen or heard for 300 yards by one about to cross the track, plaintiff was conclusively presumed to have seen or heard the train and assumed the risk in crossing, was properly denied.

6. APPEAL—RECORD—ABSTRACT OF EVIDENCE—AMOUNT OF VERDICT—REVIEW.

An objection that the verdict was grossly excessive would not be reviewed on appeal where appellant did not abstract the testimony on such issue.

Appeal from Circuit Court, Faulkner County; George M. Chapline, Judge.

Action by R. A. Evans against the St. Louis, Iron Mountain & Southern Railway



Company. From a judgment for plaintiff defendant appeals. Affirmed.

Oscar L. Miles, for appellant. Sam Frauenthal, for appellee.

HILL, C. J. This action is for personal injuries received by a traveler on a public road crossing a railroad track. The court has had numerous cases of the kind recently. The Hitt Cases (Railway v. Hitt [Ark.] 88 S. W. 908, and Id. [Ark.] 88 S. W. 911, 990) Railway v. Dillard (Ark.) 94 S. W. 617, and Railway v. Wyatt (Ark.) 96 S. W. 876, have called for discussion of the rules governing the respective conduct of the traveler and the operatives of the train at public crossings. This case is free of the difficulties presented in those cases. Briefly stated, appellee's evidence tended to prove: A string of wagons headed by one occupied by Puckett and appellee Evans left the town of Conway, traveling along the Conway and Quitman public road. About two miles from Conway the highway crossed the track of appellant railroad company at a place called "The Gap." The highway was upgrade to the railroad track from a branch, a distance of about 100 yards, until close to the track. For a short distance, some 15 or 20 steps, before reaching the track the highway is level. To the west the railroad curves around a hill, so that a train from that direction cannot be seen until the traveler is almost to the track, and then only to be seen a distance of 50 or 60 yards. Puckett and Evans drove up this grade slowly, stopped on the level ground close to the track, and looked and listened for approaching trains. Evans rose up from his seat and looked both ways, and both becoming satisfied that there was no train approaching, slowly drove on the crossing and continued to watch as they drove on, and were caught by a rapidly moving train from the west coming around the curve. The whistle sounded just before the engine struck the wagon. Evidence of appellee, also, tended to show that the whistle was sounded at Doty's field, a distance of 160 rods from the crossing; but this was not heard by appellee and his companion on the other side of the hill from that point, and there were no other signals given until the alarm whistle sounded an instant before the engine struck the wagon. Evans and Puckett only saw the train after they were on the track. Puckett was driving, and as soon as he saw the train whipped up his horses trying to get them across, but was unable to do so. The appellee and some of his witnesses were contradicted by statements in writing made to appellant's claim agent, and appellant's evidence put a different aspect to the case.

1. The first point made in the evidence does not support the verdict. Taking the appellee's evidence to be true, and the jury have so found it, it presents a clear case for recovery.

2. The appellant's next point is that the only allegation of negligence is in failing to sound a whistle or ring a bell or give proper warning at a crossing, and that it was error to give an instruction stating that, if the evidence showed that the appellee was injured by the operation of the train, the law presumes the railroad company was negligent, and a prima facie case is made out. That such an instruction is correct has been often decided. See numerous cases cited to that effect in *Barringer v. Railway*, 73 Ark. 548, 85 S. W. 94, 87 S. W. 814. Appellant attempts to take the case without the rule by insisting that the presumption cannot extend to the particular negligence charged in the complaint. The complaint here charges generally negligence in running the train into the wagon of appellee as well as the particular negligent act of failing to give the statutory signals before reaching the crossing. Hence the question is of no importance in this case, if in any.

3. Appellant contends that the presumption created by section 6773, Kirby's Digest, only reaches to a remedy against the corpus of the railroad property, and not against the railroad company, and appeals to *Railway v. Daniels*, 68 Ark. 171, 56 S. W. 874, to sustain this view. The *Daniels* Case only holds that the lessor company can escape liability for injuries by the lessee company, but the corpus of the property cannot escape the liability, and in an action to enforce the liability against the corpus the lessor road, who owned the property, and the lessee road, who caused the injury, should both be parties. No issues of that kind are presented here, and it was not error of the company to apply the rule to the company as well as the company's property until it is shown that the company sued is only the lessor company, and a lessee company inflicted the injury. Then the *Daniels* Case would be in point.

4. Appellant criticises this instruction: "If you believe from the evidence that the defendant through its employees was negligent in the running or operation of its train which injured the plaintiff, and that there was no contributory negligence on the part of the plaintiff as explained in the former instructions, then your verdict will be for the plaintiff." The objection urged is that the negligence of appellant was too broadly stated, and should have been confined to the negligence alleged in the complaint. The law of a case is usually given in many instructions, frequently too many, each presenting a particular phase of the case, and it is not expected to state the entire law of the case in one. When read with the other instructions, this would naturally be understood to be referable to the alleged acts of negligence, and not something foreign to the issues, and correct instructions were given on the negligence in issue.

5. The next point made is on the refusal of the court to give two instructions, putting

the burden of proof upon the plaintiff throughout the case. They should have been refused. When the plaintiff showed the injury was caused by the operation of the train of appellant, that made out a prima facie case and shifted the burden. See *Bar-ringer v. Railway*, 73 Ark. 548, 85 S. W. 94, 87 S. W. 814, and cases there cited.

6. Appellant complains of two instructions refused, which sought to have the jury told that, if the train could have been seen or heard for 300 yards by one about to cross the track, appellee was conclusively presumed to have seen or heard the train and assumed the risk in crossing. The court properly sent to the jury the duty resting upon travelers approaching the crossing, and instructed that a failure to discharge that duty was negligence barring their recovery. This is the proper way to dispose of this issue, except where the evidence leaves no question of fact or question about which reasonable men would differ as to the care exercised, in which event the case should be withdrawn from the jury; but this is far from such a case.

7. Appellant contends that the verdict was grossly excessive, but appellant did not abstract the testimony on that issue, and by the established practice of this court that precludes an exploration of the transcript to find the alleged error. *Shorter University v. Franklin*, 75 Ark. 571, 88 S. W. 587.

On the whole case the court is of opinion that there is no error in the record, and the judgment is affirmed.

### COOK v. ZIFF COLORED MASONIC LODGE, NO. 119.

(Supreme Court of Arkansas. July 23, 1906.)

#### 1. EJECTMENT — TITLE — PRESUMPTION — ANSWER.

The answer of defendant in ejectment, denying in general terms that plaintiff is the owner of and entitled to possession of the land, is sufficient, notwithstanding the complaint sets out a deed from the commissioner of state lands to plaintiff, which is prima facie evidence of title; defendant's possession being presumptive evidence of title, to the extent of requiring plaintiff to show title, and not merely prima facie title.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 181-187.]

#### 2. QUIETING TITLE—TITLE TO MAINTAIN SUIT—PLEADING.

The cross-complaint of defendant in ejectment, seeking to have plaintiff's title canceled as a cloud, is insufficient, defendant's title not being shown; mere possession not being enough to authorize one to maintain a suit to remove cloud and quiet title.

#### 3. TAXATION—DELINQUENT TAX LIST—PUBLICATION—CERTIFICATE OF CLERK.

Kirby's Dig. § 7085, provides that the county clerk shall cause the delinquent tax list to be published weekly for two weeks, between the second Monday in May and the second Monday in June, in some newspaper in the county, if any be published there. Section 7086 provides that the clerk shall record the list, and shall certify at the foot of the record in what news-

paper the same was published, and the date of publication, and for what length of time the same was published before the second Monday in June. *Held*, that the statement at the foot of the record of the delinquent tax list of Chicot county, signed by the clerk, "Given to the Chicot Life on the 17th day of May for publication," and "Published in Chicot County Life for two issues, to wit, 21st day of May and 28th day of May, 1901," was a sufficient certificate.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1283.]

#### 4. SAME — RECORDING OF CERTIFICATE — PRESUMPTION AS TO TIME.

Though the certificate of the county clerk as to the publication of the delinquent tax, required by Kirby's Dig. § 7086, is not dated, it will be presumed, in the absence of proof to the contrary, that it was entered of record before the date of sale, as is necessary.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1283.]

Wood, J., dissenting.

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by A. F. Cook against the Ziff Colored Masonic Lodge, No. 119. From an adverse decree, plaintiff appeals. Reversed and remanded.

On June 9, 1902, lot No. 1 in block No. 2 of Finn's addition to the town of Dermott was sold by the collector of Chicot county for the nonpayment of taxes assessed against same for the year 1901, and was struck off to the state for the want of bidders. After the expiration of time for redemption the clerk certified the lot to the state, where it remained till the 28th day of June, 1904, when it was purchased by the appellant, A. F. Cook, who received a commissioner's deed in regular form for it. On the 9th of September the appellant brought suit in the circuit court of Chicot county for the possession of the lot against the "Ziff Colored Masonic Lodge, No. 119." The complaint is in regular form in ejectment, setting out and making exhibit of appellant's title from commissioner of state lands. On October 5, 1904, the defendant filed an answer, cross-complaint, and motion to transfer to chancery. The answer simply denies in general terms "that plaintiff, A. F. Cook, is the owner of, and entitled to the possession of, the land and lot set out in said complaint." Then by way of cross-complaint it stated that the state of Arkansas, appellant's grantor, "had title based upon an irregular tax forfeiture of said lot upon a pretended void tax sale for the nonpayment of taxes for the year 1901," and "the said deed conveyed no title to plaintiff for reason that the state of Arkansas had none; the said tax forfeiture being void and of no effect for the following reasons, viz.: That the said land was not returned delinquent by the 'sheriff' at the time and in the manner prescribed by law. Second. That the collector and the clerk charged more costs than the law allowed upon his making sale of said land." Third. That the list of delinquent lands as returned by the "sheriff"

had not been published for two weeks, as required by law. Fourth. That "said clerk of the county court, after making a list of said land returned delinquent for year 1901 by the 'sheriff,' and after entering upon the record following said lists a notice of said sale intended for publication, wholly failed to make any certificate, as required by law, at the foot of said record, stating in what newspaper said list was published," etc. Fifth. That "said clerk wholly failed and neglected to make and enter upon the said record required to be kept for entering the list of delinquent lands any certificate, or to file any certificate and attach to said record at the foot thereof, or at any other place, stating that said list of lands and notice of said sale had been published in any newspaper," etc. Sixth. That "the only certificate said county clerk ever made of publication of said list and notice was made and attached to record on which he kept sale of delinquent lands." Seventh. That "there was more and a greater sum charged against said land than was due thereon, and that said lot was sold for more taxes than was allowed by law." Claimed that the title of plaintiff was void and a cloud, and moved to transfer to chancery to have it canceled. A demurrer was interposed to answer and cross-complaint, and to the motion to transfer to chancery, on the ground that the answer did not state a defense, or state facts sufficient to entitle defendant to transfer. The demurrer was overruled, and the cause transferred to chancery court; and on the 17th day of November, 1904, the cause was heard "upon the complaint and exhibit, the answer and cross-complaint of the defendant, the record of the delinquent list of the year 1901, notice of sale and certificate thereto attached," and the chancery court decreed the sale to the state void, and canceled plaintiff's title. At the same time and on the same issues three other cases, viz., *A. F. Cook v. Isabella Williams*, 96 S. W. 622, *A. F. Cook v. Pauline Hunter*, 96 S. W. 620, and *A. F. Cook v. Eliza Slay*, 96 S. W. 620, for other lots were submitted, to abide decree in this. Plaintiff has appealed in all four of the cases, and by agreement of counsel in the other three an order was made in this court for them to abide the decision here in this; the issues being the same.

Baldy Vinson, for appellant. Scipio A. Jones and P. C. Dooley, for appellee.

WOOD, J. (after stating the facts). First The court did not err in overruling the demurrer to the answer. The appellee being in possession, the presumption is he was the owner or a tenant of the owner. It will not be presumed that his possession was wrongful. Possession is evidence of title at least to the extent of requiring one who would oust it to show title in himself. The requirement of the law is not met simply by showing prima facie title. The old rule in ejectment

that the plaintiff must rely upon the strength of his own title applies here. The burden is upon the plaintiff to show title, not merely prima facie title. The answer presents a good defense to the action of ejectment. The authorities cited by appellant do not apply, for in resisting the assault made upon its possession appellee is not attacking the prima facie title of appellant. The case is different, however, when appellee by cross-complaint asks the cancellation of appellant's prima facie title. This is an affirmative attack upon appellant's prima facie title. The commissioner's deed is prima facie evidence of title, and, in order to have it canceled and removed as a cloud, the burden is upon the appellee to show that the deed conveyed no title. *Scott v. Mills*, 49 Ark. 266, 4 S. W. 908. The argument and authorities of appellant to show that appellee's answer does not state a good defense to the action of ejectment are in point to show that appellee is not entitled to relief on his cross-complaint, and that the court erred in not sustaining the demurrer as to this, and in transferring the case to the chancery court. Possession is not title, and possession alone without any other evidence of title is not sufficient to enable one to maintain a suit to remove cloud and quiet title. By mere possession one does not show that he has any title to quiet. One must have a title before he can maintain suit to have his title quieted by canceling a deed that is a cloud upon his title.

Second. The chancellor found "that the record fails to show that R. D. Chotard, the clerk, made a proper certificate and attached it at the foot of the delinquent list filed by the sheriff, showing that said list had been published as required by law, or that said certificate was made and attached thereto before the day of sale." The law requires the clerk of the county court to record the delinquent list filed with him by the collector in a book kept by him for that purpose, and that he shall certify at the foot of said record, stating in what newspaper said list was published, and the date of publication, and for what length of time the same was published before the second Monday in June then next ensuing. The statute provides that this "record so certified shall be evidence of the facts in said list and certificate contained." Section 7086, Kirby's Digest. This court has often held that this certificate must be recorded before the day of sale, and that the record, when so made up, is the only evidence of what it should contain. *Hunt v. Gardner* (Ark.) 86 S. W. 426; *Logan v. Eastern Land Co.*, 68 Ark. 248, 57 S. W. 798; *Taylor v. State*, 65 Ark. 593, 47 S. W. 1055; *Cooper v. Freeman Lumber Co.*, 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; *Martin v. Alland*, 55 Ark. 218, 17 S. W. 378; see, also, *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. 944, 35 L. Ed. 546. What purports to be the certificate of the clerk made in compliance with the statute is as follows: "Given to the

Chicot Life on the 17th day of May for publication. R. D. Chotard, Clerk." "Published in Chicot County Life for two issues, to wit, 21st day of May and 28th day of May, 1901. R. D. Chotard, Clerk. [Seal.]" A certificate is "a writing giving assurance that a thing has or has not been done; \* \* \* that a fact exists or does not exist. To certify is to testify to in writing; to make known or establish as a fact. The word is not essential to a certificate." Anderson's Law Dictionary, "Certificate." A majority of the court is of the opinion that the statement supra, recorded at the foot of the delinquent list and signed by the clerk, meets the requirements of the law. Sections 7085, 7086, Kirby's Digest. It was given to the Chicot Life on the 17th day of May, and was "published" in the Chicot Life for two issues, to wit, 21st day of May, and 28th day of May, 1901. "Chicot Life" indicates the name of the newspaper, and "Chicot" shows with reasonable certainty that it was a county publication. The word "published" shows that it was printed, and the "two issues," "May 20 and May 27, 1902," indicates that it was a "weekly newspaper," and published weekly for two weeks, showing the length of time it was published before the second Monday in June. Thus every requirement of the statute is met and shown by the certificate. True, the certificate is not dated, showing that it was entered of record before the day of sale. But in the absence of a date, and in the absence of proof to the contrary, it follows that it was entered of record before, and not after, the day of the sale; for the law requires it to be so entered, and the presumption is that the clerk did his duty. This is not a case of substituting other proof for that required by the record, and different proof. It is a case where, in the absence of any proof, the law by a well-established presumption supplies it.

(Note.—The writer does not concur in the view that the certificate can be aided by presumption as to date, and thinks it fatally defective because it does not bear date showing that it was entered of record before the day of sale.)

The court erred, therefore, in finding that the clerk did not make a proper certificate. For the errors indicated, the decree is reversed, and the cause is remanded, with directions to transfer to the law court, and with leave to amend pleadings, if so desired, and for further proceedings not inconsistent with this opinion.

#### COOK v. HUNTER.

(Supreme Court of Arkansas. July 23, 1906.)

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by A. F. Cook against Pauline Hunter. From an adverse decree, plaintiff appeals. Reversed and remanded.

Baldy Vinson, for appellant. E. A. Bolton, for appellee.

WOOD, J. The issues in this case being similar to those in *A. F. Cook v. Ziff Colored Masonic Lodge, No. 119* (opinion just rendered) 96 S. W. 618, this case is ruled by that.

The decree is reversed, and the cause is remanded, with directions to transfer to the law court, with leave to amend pleadings and to proceed further in a manner not inconsistent with this opinion.

#### COOK v. SLAY.

(Supreme Court of Arkansas. July 23, 1906.)

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by A. F. Cook against Eliza Slay. From an adverse decree, plaintiff appeals. Reversed and remanded.

Baldy Vinson, for appellant. E. A. Bolton, for appellee.

WOOD, J. The issues in this case are similar to those in *A. F. Cook v. Ziff Colored Masonic Lodge, No. 119*, 96 S. W. 618, and this case is ruled by that.

The decree is reversed, and the cause is remanded, with directions to transfer to law court, with leave to amend pleadings, if so advised, and to proceed further in a manner not inconsistent with this opinion.

#### COOK v. JONES.

(Supreme Court of Arkansas. July 23, 1906.)

##### 1. APPEAL—HARMLESS ERROR.

Sustaining a demurrer, treating it as a motion to make more specific, to paragraphs of a cross-complaint, which, while not technically demurrable, are defective in stating merely general conclusions, is harmless; defendant having refused to make them more specific.

##### 2. TAXATION—REDEMPTION FROM TAX SALE.

There is no valid redemption, though the provisions of the statutes for redemption from tax sale are complied with, except that no receipt of the treasurer is filed with the county clerk, as required by Kirby's Dig. § 7099, which provides that when so filed it shall operate as an extinguishment of all rights conferred by the sale, and without which receipt the clerk cannot note such redemption or deposit, the date thereof, and by whom made on his record of tax sales, and sign his name officially thereto, as required by sections 7100, 7102.

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by A. F. Cook against Jack Jones. From an adverse decree, plaintiff appeals. Reversed and remanded.

This suit was begun by appellant against appellee in ejectment in the Chicot circuit court for the E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 1, township 14 S., range 3 W. The plaintiff claimed title and right of possession by virtue of a tax deed made by the state land

commissioner, conveying the land to him, upon a sale made to the state for the alleged nonpayment of taxes for the year 1900. This cause was transferred to the Chicot chancery court upon motion of the defendant, who alleged in his answer and cross-complaint that the land had been redeemed from this sale for the taxes of 1900 before the expiration of the two years for redemption, and exhibited his redemption certificate, and further alleged that the sale for the nonpayment of taxes was void for several reasons. These reasons are the same as in *Cook v. Ziff Colored Masonic Lodge No. 119* (opinion just handed down) 96 S. W. 618. Therefore defendant alleged that the deed of the commissioner of state lands conveyed no title to plaintiff, and that it was a cloud upon defendant's title, and defendant prayed that the same be canceled. The court sustained a demurrer to the first, second, and seventh grounds of objection to the sale, and appellee was given permission to amend his answer, but refused to do so, and excepted to the ruling of the court, and prayed a cross-appeal here. The cause was heard upon proof taken before the chancellor. We will state and comment upon so much of it as may be necessary to determine whether or not the court erred in rendering a decree in favor of appellee.

Baldy Vinson, for appellant. E. A. Bolton, for appellee.

WOOD, J. (after stating the facts). First. Appellee in his cross-appeal does not urge in his brief a reversal of the lower court for its ruling in sustaining the demurrer to the first, second, and seventh paragraphs of appellee's cross-complaint. These paragraphs were probably not technically demurrable; but, if the court erred in sustaining a demurrer to these, appellee is not prejudiced because he refused to make more specific, and it is obvious that the paragraphs were defective in stating general conclusions without setting out any of the facts upon which they were based. Treating the demurrer as a motion to make more specific, the court did not err in sustaining it, and, as appellee refused to amend, he cannot complain.

Second. The sufficiency of the certificate of the clerk in evidence to establish the record of the certificate required by section 7086 of Kirby's Digest is decided in *A. F. Cook v. Ziff Colored Masonic Lodge No. 119* (Ark.) 96 S. W. 618. The statement made by the clerk on the record is the same in this case as in that.

Third. The appellee contends that the land in controversy was redeemed. The statutes prescribing the method of redeeming land sold for taxes are found in Kirby's Digest, §§ 7095-7102, inclusive. Section 7095 grants the privilege of redeeming "within two years from and after the sale." Section 7096 provides that when lands are redeemed it shall be the duty of the clerk of the county court

to insert a minute of such redemption on the record of lands sold for taxes, the date thereof, and by whom made, and sign the same officially. The next section provides that all applications for redemption of lands sold for taxes to the state or individuals shall be made to the county clerk of the county court of the county, etc., in which the land was sold. The next section provides for the deposit with the treasurer of the county of the amount required to redeem according to the certificate of the county clerk showing the amount, and provides that the treasurer shall notify the purchaser that the amount is in the treasury subject to his order. Sections 7099, 7100, 7101, and 7102, are as follows:

"Sec. 7099. Upon the presentation of such certificate of the clerk of the county court to the county treasurer, and upon the payment of the money to the treasurer as aforesaid, he shall give the person making such payment duplicate receipts therefor, describing the land, town or city lot, or part thereof, as the same is described in or upon the certificate of the clerk of the county court aforesaid, one of which receipts shall be registered by the treasurer and immediately filed with the clerk of the county court by the person receiving the same, and thereupon the clerk of the county court shall forthwith cancel the sale and transfer of such land, city or town lot, and such receipt when so filed shall operate as an extinguishment of all rights, either in law or equity, conferred in any way or manner by such sale.

"Sec. 7100. In all cases where such deposit shall be made within two years from the time of the sale of such lands, town or city lots, or any part thereof, for delinquent taxes, the clerk of the county court shall, at the request of the person presenting the receipt of the county treasurer for such deposit, note such fact on the back of said certificate, and sign his name thereto. When any tract, town or city lot, or any portion thereof, is thus redeemed, or any deposit with the county treasurer is thus made, it shall be the duty of the clerk of the county court to note such redemption or deposit, the date thereof, and by whom made, on his record of tax sales, and sign his name officially thereto.

"Sec. 7101. When any joint tenants, tenants in common, or coparceners, shall be entitled to redeem any land, or lot or part thereof, sold for taxes, and any person so entitled shall refuse or neglect to join in the application for the certificate of redemption, or from any cause cannot be joined in such application, the clerk of the county court may entertain the application of any one of such persons or as many as shall join therein, and may make a certificate for the redemption of such portion of said land or lot, or part thereof, as the person making such application shall be entitled to redeem.

"Sec. 7102. Lands sold to the state may be redeemed within two years after sale, subject to the same restrictions, conditions

and regulations as hereinbefore described in relation to the redemption of lands sold for taxes, by the application to the clerk of the county court, and payment of the same amount and penalty hereinbefore mentioned, and the taxes which would have accrued thereon if such land or lot had been continued on the tax books and the taxes extended to the county treasurer, and the amount due the state shall be paid by the county treasurer to the county collector, who shall give duplicate receipts therefor, stating in such receipts the amount belonging to each fund separately, one of which shall be immediately forwarded by the treasurer to the auditor, and the other to the clerk of the county court, who shall make quarterly reports to the auditor of the amounts due the state on account of redemption of any land sold to the state as herein provided. It shall be the duty of the clerk of the county court to make a note thereof on the record book of such sale provided for in this act."

Without setting out the evidence in detail, it suffices to say that it shows that the requirements of the statute have been complied with, except that no receipt of the treasurer, to be filed with the county clerk as required by sections 7099 and 7102, showing that the amount necessary for redemption had been paid into the treasury, was filed with the clerk, as required by section 7099. It appears from this section that such receipt, when so filed, shall operate as an extinguishment of all rights, either in law or equity, conferred by the sale. The clerk, not having the receipt, did not note such redemption or deposit, the date thereof, and by whom made, on his record of tax sales, and sign his name officially thereto, as required by sections 7100 and 7102 of the Digest. Redemption is a privilege conferred by statute. It does not exist independent of it. *Thompson v. Sherrill*, 51 Ark. 458, 11 S. W. 689; *Craig v. Flannagin et al.*, 21 Ark. 322. The requirements of the statute ought to be substantially complied with by those entitled and seeking to avail themselves of the privilege. The court erred in holding that there was a redemption.

Fourth. The court did not err in transferring this case to the equity court. Appellee alleged and showed title, and if the tax sale was void, and the deed of the commissioner of state lands a nullity, as he claims, he had the right to have it canceled as a cloud on his title.

Fifth. The contention of appellee that the land was sold for more taxes than the law requires, in that there was levied upon the land a tax of 10 mills for compromise indebtedness, for which it was sold, does not appear to have been presented specifically to the trial court. Appellee refused to amend the general allegation of his cross-complaint under which it could have been presented, had he so amended it. But, inasmuch as he did not give the trial court an opportunity to pass upon that question, no error is pre-

sented in the ruling of the trial court concerning it, for no ruling was made.

For the errors indicated, the judgment is reversed, and the cause is remanded, with leave to amend pleadings, take further proof, if so desired, and to proceed in a manner not inconsistent with this opinion.

### COOK v. WILLIAMS.

(Supreme Court of Arkansas. July 23, 1906.)

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by A. F. Cook against Isabelle Williams. From an adverse decree, plaintiff appeals. Reversed and remanded.

Baldy Vinson, for appellant. E. A. Bolton, for appellee.

WOOD, J. The issues in this case are the same as in the case of *A. F. Cook v. Ziff Colored Masonic Lodge, No. 119* (opinion just handed down) 96 S. W. 618. This case is ruled by that.

Judgment reversed, and cause remanded, with directions to transfer to law court, with leave to amend pleadings if desired, and to proceed in accordance with this opinion.

### LACKEY et al. v. FAYETTEVILLE WATER CO. et al.

(Supreme Court of Arkansas. July 23, 1906.)

#### 1. MUNICIPAL CORPORATIONS—CONTRACTS—PUBLIC WATER SUPPLY.

Under the express provisions of Kirby's Dig. §§ 5442-5448, a city has authority to contract with any person for the construction and operation of a plant for supplying water to the city.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 726.]

#### 2. SAME—ORDINANCE AS CONTRACT.

A city ordinance under which a corporation is to supply water to a city constitutes a contract.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 679, 697.]

#### 3. SAME—VALIDITY OF CONTRACT.

Where a city ordinance contracting for a municipal water supply shows on its face that it is unreasonable and oppressive, and indicates that it was passed in the interest of the grantee of the franchise, it will be set aside.

#### 4. SAME—FRAUD.

The courts will inquire at the suit of a taxpayer as to whether there has been any actual or intentional fraud in the passage of an ordinance contracting for a municipal water supply.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 2151-2155.]

#### 5. SAME—EVIDENCE.

The fact that the president of a corporation seeking to obtain a contract for furnishing a municipal water supply, held various interviews with members of the city council; that he endeavored to procure a contract as advantageous to his company as possible; that he employed counsel, and told the members of the council

that he did not think they needed legal advice, was not sufficient to show fraud invalidating the contract subsequently made.

**6. SAME—VALIDITY OF CONTRACT—CONSTITUTIONAL PROVISIONS.**

An ordinance whereby a city contracted for a water supply, provided that the city should have the right to purchase the plant at the expiration of a certain period at a reasonable price, subject to any bona fide indebtedness; authority was given the corporation to encumber the plant; it was provided that the money due from the city to the corporation for hydrant rentals should be retained by the city treasurer as net earnings of the water company and held by him in trust for the payment of the indebtedness of the water company and that should the city fail to pay its water rentals deferred payments should bear a specified interest. *Held*, that such provisions were not violative of Const. art. 16, § 1, prohibiting cities from issuing interest-bearing evidences of indebtedness.

**7. WATERS AND WATER COURSES—PUBLIC WATER SUPPLY—RATES—REASONABLENESS—REGULATION.**

Kirby's Dig. §§ 5445-5447, authorizes a city council on complaint of five or more citizens that a water company is charging an exorbitant rate to investigate the matter and to fix a reasonable price if an exorbitant charge is found, which price the corporation is required to adopt. *Held*, that an ordinance whereby a city contracted for a water supply, and fixing the rate of hydrant rentals to the city for a specified term of years, and the minimum charge to consumers, was not violative of the statute in that it attempted to bind future councils by fixing the rates to be paid, the ordinance having been passed after the taking effect of the statute.

**8. SAME—SUFFICIENCY OF MUNICIPAL REVENUES.**

The fact that the amount a city contracted to pay for hydrant rentals in connection with other expenses which it had incurred would absorb all the revenues at the time the contract was made did not render it objectionable on the ground that it appropriated all the revenue of the city in advance of its levy and collection.

**9. SAME—VALIDITY OF CONTRACT—OPPRESSIVE CONDITIONS—TERM OF FRANCHISE.**

An ordinance whereby a city contracted for a municipal water supply was not unreasonable, unjust, and oppressive on account of the term of the franchise, where the ordinance merely extended the previous franchise for about nine years.

**10. MUNICIPAL CORPORATIONS—SUIT BY TAXPAYERS—RESTRAINING ENFORCEMENT OF ORDINANCE—PRESUMPTION.**

In a suit by taxpayers to restrain the enforcement of an ordinance whereby a city contracted for a municipal water supply it would be presumed, in the absence of any evidence, that the council made a proper investigation to determine what would be the reasonable value of hydrant rentals.

**11. WATERS AND WATER COURSES—MUNICIPAL WATER SUPPLY—CONTRACT FOR WATER SUPPLY CHARGES—REASONABLENESS.**

The fact that a contract whereby a city provided for a water supply netted the water company a profit of \$25 for furnishing and placing additional hydrants, did not show the charge so exorbitant as to avoid the contract.

**12. SAME.**

In a suit by taxpayers to restrain the enforcement of an ordinance whereby a city contracted for a water supply, it appearing that the city was of a population of about 6,000, in the absence of evidence an annual hydrant rental of \$35 per hydrant will not be held such an excessive charge as to invalidate the contract.

**13. SAME—VALIDITY OF CONTRACT—PROTECTION TO CITY.**

Where a contract between a city and a water company for a municipal water supply provided that the company should supply the streets, alleys, and public squares with water and enlarge the capacity of the plant to such an extent as might be necessary to meet the growing demands of the city, that the water should be of the purest quality obtainable, and various provisions were made as to the pressure which should be furnished, there was ample protection to the city, both as to the quantity and quality of water.

**14. SAME.**

Where a contract between a water company and a city for a municipal water supply provided that if at any time the supply of water should cease, or there should be any default or neglect on the part of the company, the city might take charge of the works temporarily and operate the same, the expense incurred to be a lien on the earnings of the works until paid, a contention that the city was at the mercy of the water company as to the amount of water to be supplied was untenable.

**15. MUNICIPAL CORPORATIONS—WATER SUPPLY—CONTRACT WITH WATER COMPANY—VALIDITY.**

A suit by taxpayers to restrain the enforcement of an ordinance whereby a city contracted for a municipal water supply could not be maintained on the ground that the ordinance required the water company to construct a dam and that no right of way having been obtained the provisions would result in flooding farms for which the city would be liable, as the city would not be under any liability for injuries to third parties caused by the performance of the contract.

**16. SAME—ORDINANCES—PASSAGE—PROCEEDINGS—SUFFICIENCY.**

Under Kirby's Dig. § 5473, providing that all ordinances as soon as may be after their passage shall be recorded in a book kept and authenticated by the signatures of the presiding officer of the council and the clerk, an authentication by the acting mayor and acting recorder was sufficient.

**17. SAME—VALIDITY OF CONTRACTS—CONTRACT INVALID IN PART.**

In a suit by taxpayers to restrain the enforcement of an ordinance whereby a city contracted with a water company for a municipal water supply, invalid provisions of the ordinance easily separable from the main provisions, and conserving only the interests of the water company were no ground for holding other portions of the ordinance unenforceable.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 248-251.]

**18. COSTS—PERSON ENTITLED—PREVAILING PARTY.**

Where, in a suit by taxpayers to enjoin the enforcement of an ordinance, whereby a city contracted for a water supply, certain provisions of the ordinance were held invalid, but the cancellation of the contract was denied, there was no abuse of discretion in awarding all costs to defendant.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 108-114.]

Appeal from Washington Chancery Court; Jas. A. Rice, Special Chancellor.

Suit by J. S. Lackey and others against the Fayetteville Water Company and another. From a decree in favor of defendants, complainants appeal. Affirmed.

J. S. Lackey and 18 other taxpayers of the city of Fayetteville brought this suit

in their own behalf and on behalf of all other taxpayers in the city to enjoin the appellee and the city from enforcing Ordinance No. 135 of the city of Fayetteville, alleging among other things:

"That the passage of said ordinance was procured by undue influence of the said water company in that J. H. McIlroy, the president thereof, unduly influenced J. H. Atha, a member of the council to vote therefor by making him believe that the legal effect of the instrument prepared would be to only require the city to pay at the stated periods at which it could purchase, the actual value of its physical property, if it desired to purchase and induced him to believe that the pressure was greater than required under the old ordinance, when in fact the city could not purchase at such prices, and when said pressure was in effect, less than required under the old ordinance. That he induced W. W. Chapman to vote therefor by making him believe that under the new ordinance the pressure would be guaranteed at the university greater under the new ordinance than was required by the old ordinance. That he induced C. W. Phillips, a member of the council, to vote for said ordinance by inducing him to believe that the opposition to it on the part of many citizens was on account of revenge, and that he induced each and every member of the council who voted for it to believe that under this ordinance which they passed the water company guaranteed to the city a greater pressure and the power to raise water to a greater elevation at the university than was required of the company under the old ordinance. That it is not true that under the new ordinance a greater pressure was guaranteed at the university than under the old. By the terms of this new ordinance, a stream was required to be raised 65 feet at some point south of the university on Dickson street to be selected by the council, while in fact the highest point on Dickson street south of the university was 56 feet lower than the lowest point of the basement of the university building which fact was unknown to the members of the council and the required pressure would only require the water to be raised 9 feet above the lowest point of the foundation of the building. That the said J. H. McIlroy, president of the water company devoted the most of his time from the time the ordinance was introduced before the council in August until the final passage of Ordinance 137 on the 9th day of November in preparing the ordinance so as to protect the interests of the water company, and in persuading the individual members of the council to vote for it. That each and every one of the members of the council who voted for said ordinance was induced to believe that the legal effect of the said Ordinance No. 135 was that the city could purchase at the expiration of the periods named,

the water plant by paying simply for the physical property a fair and reasonable value and had it not been that they so believed none of the said members would have voted for the same. That none of said councilmen were lawyers or versed in matters of this character, that the president of the water company with the aid of his counsel wrote out the report of the chairman of the committee having in charge the consideration of said ordinance and wrote out all of the amendments that he and his counsel prepared, and shaped the language of each and every one of said amendments. That the said chairman, W. W. Chapman, received the same from the hands of the president of the water company on Friday the 23d day of October, 1903. That he received at the same time, said Ordinance 135 which had been prepared by the water company and his counsel. That on Monday night, October 26th, said W. W. Chapman and C. W. Phillips signed the report so prepared by the president of the water company and his counsel, the other members of the committee refusing to sign the same. That through the influence of the president of the water company and his representations aforesaid and divers other representations, a majority of the council believing the same, were induced to vote for said ordinance and to pass the same by putting it upon its third reading the same night it was introduced, that the same had never been submitted to Hon. R. J. Wilson, attorney for the city, and he had no opportunity to examine into the report or the ordinance so amended, and that no citizen outside of the council had any knowledge or information that there would be no attempt to pass this ordinance at this time, and no one had an opportunity to point out and call attention to the council to the objectionable features of the ordinance so passed.

That the ordinance passed is void for the following reasons:

"First. Because it was procured by the undue influence aforesaid, and was passed without the members of the council voting therefor understanding the legal effect thereof, and the same is a fraud on the rights of plaintiff and other taxpayers.

"Second. Said ordinance is void for the reason that it seeks to fasten upon the city a bonded indebtedness as the only means by which it can be relieved of this ordinance when the city has no legal right to issue or create a bonded indebtedness.

"Third. Said ordinance is void because it seeks to make the city liable for interest-bearing indebtedness.

"Fourth. Said ordinance is void because it is unreasonable in this: (a) It is an attempt to grant to the water company an exclusive franchise for an unreasonable length of time, to wit, 20 years. (b) It seeks to bind the city for the payment of hydrant rental at a fixed price for an unreasonable length of time. (c) It gives no assurance to



the city to furnish a necessary or sufficient amount of water for domestic and manufacturing purposes and fire protection. (d) It gives no assurance of any definite pressure in case of fire. (e) The city council had prior to the passage of this act granted to an electric light company a 25-year franchise, by which it had agreed to pay certain sums annually and after having paid said sums there is not sufficient revenue from the taxation of all said city property to the constitutional limit of 5 mills to pay the amount that is contracted for under this ordinance for hydrant rental, and if all of the revenue of the city should be used for that purpose there would be an annual deficit during the continuance of this franchise. (f) It makes an arrangement for the payment of 5 cents per thousand gallons for water for sewers when the city is absolutely deprived of means to pay for same. (g) It provides no penalty whatever for a failure on the part of the water company to comply with any of its undertakings. (h) By section 19 of said ordinance it is attempted to provide a special rate of 10 cents per thousand gallons to manufacturing industries that use an average of 10,000 gallons per day and that use hydrant exclusively, which in effect is oppressive, aimed at subdivision of a class and by its terms is exclusive of 2 or 3 industries within the city limits. (i) It is unreasonable in that it approximates a minimum rate to water consumers. (j) It is unreasonable in that the rates so fixed are exorbitant. (k) It is unreasonable in that it makes it impossible for the city under its terms to require the water company to make any future extensions.

"Fifth. Said ordinance is void because it is contrary to the Constitution, the laws, and policy of the state. (a) It attempts to bind the city to pay a bonded indebtedness when under the Constitution and laws of the state it has no power to issue bonds. (b) It attempts to bind the city to pay interest on indebtedness when the Constitution and laws of the state forbid the same. (c) It attempts to fix the hydrant rental for a long and unreasonable length of time which hydrant rentals amount to more than the amount derived from the legal assessment of all the property within the city limits. (d) It attempts to delegate the legislative functions of the council to a board of arbitration for the purpose of determining the terms and conditions upon which the charter may be continued. (e) It imposes conditions for future extensions which are unreasonable and cannot be complied with in order to obtain the same. (f) It imposes the condition of allowing the water company to mortgage its property for an additional sum of \$1,250 for each hydrant that might be added under order of the council, the effect of which would be to prevent the council ordering fire hydrants where they are necessary and is contrary to public policy. (g)

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It creates a monopoly contrary to public policy. (h) And in divers other respects it is contrary to the Constitution and statute laws of the state.

"Sixth. Said ordinance is void for uncertainty in the following and other respects: (a) The various terms employed in sections 7, 17, and 21 leave it indefinite and uncertain as to what pressure is required from the water company. (b) It is impossible to determine from the language of section 7 whether the 'altitude \* \* \* shall have the capacity' for supplying a population of 15,000, whether the reservoir, the mains, the plant or what it is that shall have a capacity. (c) It is impossible to determine from section 14 how much water is to be consumed by each consumer, and how it is to be ascertained, what the surplus is, for which the consumer shall be charged regular meter rate heretofore established. (d) That section 17 is uncertain in that it fails to show what is necessary to call for the opening or closing of the valves; that it is not made the duty of any one, either of the water company or the fire department to open or close these valves and in that it is impossible to determine how this pressure can with certainty be obtained in case of fire. (e) Section 22 is uncertain and indefinite in that attempting to define the bona fide indebtedness referred to in the ordinance says: 'That it shall, if necessary, be fixed on the basis of \$1,250 for each and every hydrant contracted for by the city as provided for in this ordinance,' etc., without defining what the necessity shall be, when it shall be determined, in what manner, and by whom the necessity shall be determined and also it is uncertain in that it takes for a standard that which is uncertain and indefinite, and offers no means whatever of determining the value of the property."

There is an allegation that the ordinance as engrossed was never passed by the city council. The complaint alleged "that for the reasons above and divers other reasons, said ordinance is oppressive, unreasonable, unjust, and arbitrary, and is a fraud upon the rights of the taxpayers." The prayer was for an injunction restraining the enforcement of the ordinance.

A supplemental complaint was filed alleging:

"That since the filing of the original complaint, to wit: On the 4th of November, 1903, the said council met together and confederating to make their constituents, the taxpayers of Fayetteville, pay more than double the value of the water plant, and more than double the value of the water service, and in the interest of said water company, claimed to have passed the following ordinance and caused the same to be published, to wit: [Here Ordinance 137 is inserted. Ordinance 137 is the same as Ordinance 135, excepting section 12, which was amended as follows: 'Sec. 12. Said city, or improvement district embracing the entire city, shall

have the right to purchase said waterworks at the expiration of ten years, fourteen years, and eighteen years, from the date of passage of this ordinance, including all extensions and appurtenances thereof by paying therefor the fair and equitable value thereof, which shall be fixed at the actual value of said waterworks, its lands, buildings, machinery and equipments, subject to any bona fide indebtedness that may exist thereon,' etc.] That the majority of the council in passing this ordinance were actuated by a desire to further the interest of the water company, and were wholly disregarding the interest of their constituents, and that a majority of said council well knew that they were compelling the city to pay more than double what the property was worth; more than double what the service of the water was worth. That no concessions of value were obtained for the city, and that it was oppressing the people, without any consideration therefor. That said council got together without any notice or information to the citizens at large, and in the absence of the attorney employed to represent the city's interest, and without letting him know anything about such meeting, and passed said ordinance without submitting the same to the city attorney or without advising him regarding same. That in passing the ordinance it was done at the instance and request of water company, and not at the instance and request of any of the citizens. That the same was procured by undue influence of said water company upon the individual members of the council. That they did not confer with or consult any of the petitioners, but consulted and conferred with those interested with the water company. That two of the city council, C. W. Phillips and W. W. Chapman, have openly stated to the citizens of Fayetteville that the franchise they had granted to the water company was worth \$50,000 or more. That the ordinance and franchise granted thereunder, are a fraud upon the rights of the citizens, and are unreasonable and unjust. \* \* \* That all the allegations made as to Ordinance 135 are true as to Ordinance 137. It adopts these and prays as in original complaint."

The answer of the water company after various admissions and statements by way of explanation which we deem immaterial, denied all the material allegations of the original complaint. It "denied that the ordinance was procured by undue influence as alleged by plaintiff; denied that the ordinance was prepared or passed in the interest of the company and not in the interest of the citizens of the city as in the complaint alleged. Denied that at the time of the passage of the ordinance the value of the property of the water company did not exceed \$25,000 and denied that the city was required to spend annually for water privileges a sum largely in excess of its total revenue as alleged in the complaint; denied that the franchise in itself was worth \$100,000 or any other con-

siderable sum, and denied that the ordinance constituted a fraud upon the rights of the citizens, or taxpayers, or that it was unreasonable or unjust. And, answering specifically the supplemental complaint, the water company denied that on the 4th of November, 1903, that the city council confederated together to make their constituents, the taxpayers, pay more than double the value of the water plant and pay more than double the value of the water service, and that in pursuance of such purpose passed "Ordinance No. 137 referred to in the supplemental complaint. The water company admitted that the provisions of Ordinance No. 137 set forth in the supplemental complaint are substantially the same as those set forth in Ordinance No. 135, approved October 28, 1903, and appended as exhibit to the original complaint; but it denied that the majority of the council or any member thereof in passing the ordinance was actuated by a desire to further the interest of the water company and disregarded the interest of their constituents, and denied that the council met without notice or information to the citizens and passed the ordinance, but, on the contrary, alleged that the ordinance was introduced and passed at a regular meeting of the council with the usual notice usually given of other business coming before the body. It denied that the ordinance was procured by undue influence of the water company, or its agents, upon the individual members of the council, but alleged that after the passage of Ordinance No. 135 that the plaintiffs had instituted their suit against the water company and members of the council, alleging among other things in their complaint, that ordinance No. 135 was irregularly passed by the council, and alleged that the water company was advised that the plaintiffs were relying upon some technicality or irregularity in the passage of the ordinance and that in order to remove any technical question as to the regularity of the proceedings and passage of Ordinance No. 135, that the council, at the request of the defendant, passed Ordinance No. 137, which is substantially the same in its provisions as Ordinance No. 135.

The defendants J. T. Eason, mayor, and J. P. Hight, W. W. Chapman, J. H. Atha, C. W. Phillips and Chas. O. Hansard, members of the city council, answered and adopted the answer of the water company in so far as the allegations and denials therein contained are applicable, and denied that they, or either of them, were prompted or induced in any manner as members of the council, or otherwise, by undue or improper influence of the water company, its officers, or agents, to vote for Ordinance No. 135 or Ordinance No. 137. They alleged that they acted with due deliberation in the passage of said ordinances and at the time of the passage of the same, they believed, and still believe, that the provisions of the ordinances were as favorable to the city as could be obtained; that the conditions and

wants of the city demanded a more extensive service and better fire protection than could be procured under the original contract between the city and W. B. Rees and Chas. A. Rees; that their conduct in and about the passage of the ordinance was prompted solely by their best judgment of the necessities of said city and its inhabitants and not by any improper influences brought to bear upon them.

The facts are substantially as follows: On the 8th day of October, 1894, the city of Fayetteville contracted with Wm. B. and Chas. A. Rees for the construction of a waterworks system and for that purpose granted to them the exclusive right to operate waterworks in the city of Fayetteville for 20 years. The works were constructed and put in operation under the ordinance, accepted by the city and operated by the Reeses and their successors, the Fayetteville Water Company, until July, 1903. The contract with the Reeses as evidenced by the ordinance is made an exhibit to the complaint. It is not necessary to set out its provisions. It was a contract whereby the Reeses upon certain terms and conditions specified therein, undertook to supply with water the city of Fayetteville. In July, 1903, the stock of the Fayetteville Water Company passed into the hands of J. H. McIlroy and others who owned the stock at the time the ordinances in controversy were passed. At the time McIlroy and his associates acquired the waterworks, the franchise under the Rees contract had something more than 11 years to run. When the waterworks was first constructed Fayetteville was a town of some 3,500 inhabitants. It had grown to be a city of some 5,000 or 6,000 inhabitants. There was evidence tending to show that during the time the system was operated by its former owners, much dissatisfaction had arisen among the patrons of the water company and with the service afforded the city, and its inhabitants, on account of the failure to supply a sufficient amount of water at times, and also the failure to furnish the desired and required quality of water. The mains and pipes had become impaired to a great extent, as well as the machinery and pumping facilities at the pumping station, and the reservoir located upon East Mountain in the city of Fayetteville, had become defective and incapacitated for storing the amount of water required for the purposes of the city and its inhabitants, and contracted for by Rees Bros. under their original contract with the city. In March, 1903, the Fayetteville Water Company, doubtless recognizing the necessity therefor, and realizing too that it might be required to make extensions under the provisions of the Rees contract, made a proposition to the city council to replace its four-inch line on Dickson street with a six-inch line, to make certain extensions and to build an additional reservoir to contain 750,000 gallons. The

only condition imposed was that the city should locate a hydrant every 450 feet on the new line. They did not ask for an extension of their franchise when they proposed to make these extensions and improvements in their plant. As shown by the city records, this proposition was unanimously adopted. But notwithstanding this proposition had been made and accepted, nothing was done under it and the conditions described remained and existed as they were when McIlroy and his associates became the owners of the system. The testimony shows that in order to bring about the improvements demanded and meet the requirements of the situation, an expenditure of a very large amount of money, estimated by McIlroy to be \$25,000, was necessary. Rees estimated the amount of the cost of the extensions proposed by him at \$14,000 and they were not as great as those proposed by McIlroy. The plant had cost McIlroy and his associates \$55,000 and he was not willing to make the required improvements without an extension of the franchise and said he could not finance it without such extension. There was no disposition on the part of the council to compel him to make the extensions under the Rees ordinance. They were unanimously in favor of extending the franchise provided a satisfactory contract with the water company could be obtained. McIlroy was anxious for the extension and the council was willing to grant it on satisfactory terms. So, negotiations were begun between them to see if the terms could be made satisfactory, which resulted, after about two or three months in the ordinance here assailed. Any other facts deemed necessary stated in the opinion.

The court declared the ordinances valid, except as to certain parts of sections, and found and decreed as follows: The court found that part of section 10 which reads as follows: "Said city hereby agrees to pay a rental of \$35.00 per annum for every such hydrant so rented and supplied additional to the 65 hydrants, hereinbefore provided for"—is unreasonable and for that reason void, and for the reason that it binds future councils. And that part of section 12 of said ordinance which reads as follows: "And in case the parties in interest should be unable to agree as to such value of such water company works, the same may be determined by experts one to be selected by each of the parties in interest, and if they fail to agree on such value they shall select a third person, also an expert, and the decision of any two of said experts shall be binding on all parties"—is void as it attempts to delegate the power of the council to a board of arbitration and binds the council to the award. Also that part of section 12 which reads as follows: "And in case the said water company, its successors and assigns, and the city council cannot agree on the terms of such extension, then it shall be de-

terminated by three persons, selected one by the water company, its successors and assigns, and one by the city council, and the two so chosen shall select a third"—is void for the reason that it is an attempt to delegate the powers of the council to arbitration. That part of section 14 of Ordinance 137, which reads as follows: "Water rent shall be due and payable monthly in advance from the owner of the property"—is unreasonable and void. That part of section 18 which reads as follows: "On the same terms as provided by section 10 of this ordinance and where there shall be on an average of at least one water consumer for each 100 feet of such extension who will contract and pay as much as \$15 per annum as rental"—is void, because the same is unreasonable, and attempts to bind future council. That part of section 19 which reads as follows: "That use an average of 10,000 gallons per day and that use hydrant water exclusively"—is unreasonable and void. The court finds that there is no specific limitation in said ordinance, limiting the amount of incumbrances that might be placed on the defendant's waterworks plant, and the court finds all other issues in favor of the defendant. The court decreed the parts of sections above referred to to be void and held the remainder of the ordinances valid, and the water company are perpetually enjoined from enforcing the void sections. The court perpetually enjoined the water company from bonding or mortgaging the plant for a sum exceeding \$1,250 per hydrant installed by said company at the request of the council, and adjudged all cost to defendants.

L. W. Gregg and B. R. Davidson, for appellants. E. S. McDaniel and Walker & Walker, for appellees.

WOOD, J. (after stating the facts). The passage of the ordinances in question was within the express powers of the city council. Sections 5442, 5448, Kirby's Dig. The ordinances when passed and accepted by the water company became contracts, and binding on the parties thereto. Smith, Modern L. Municipal Cor. 1396, § 532. While the members of the council are trustees for the people of the municipality they represent and as public agents are held to a stricter account than a mere private agent, yet when they act within the scope of their authority, and make contracts which they are expressly authorized to make, these contracts must be governed by the same rules as other contracts. They cannot be set aside upon other and different principles than those that control other contracts. 1 Smith, Mod. Law, Munic. Cor.; Huldekoper's Lessee v. Douglass, 8 Cranch, 1-70, 2 L. Ed. 347; 1 Rose Notes, and authorities cited; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 84 L. R. A. 588, and many authorities there cited;

Little Falls Electric & Water Company v. City of Little Falls (O. C.) 102 Fed. 663; Jewitt v. Town of Alton, 7 N. H. 257; Western Sav. Society v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Prather v. New Orleans, 24 La. Ann. 41; Davenport Gas. Co. v. Davenport, 13 Iowa, 233. In the passing of an ordinance contracting for the supply of water to the city, the council must have in mind the interest of the public it represents, and if the ordinance upon its face is so unreasonable and oppressive as to indicate that it was passed solely in the interest of the grantee of the franchise, it will be set aside. In fixing the terms of such an ordinance the council is acting in a proprietary and ministerial or business capacity rather than legislative, and while the courts will not interfere to control its discretion to determine whether waterworks is necessary, and its discretion as to whether or not it will grant the franchise to private individuals to furnish same, which is a legislative discretion, they will interfere to inquire whether the contract by its terms, is so unreasonable and oppressive as to indicate that the council has transcended its authority and abused its powers, in ignoring the rights of the people of the municipality affected by the contract. City of Valparaiso v. Gardner, 49 Am. Dec. 416. Such a contract would be a fraud upon the taxpayers affected thereby whether the council were guilty of any intentional fraud or not.

The courts will also inquire as to whether there has been actual or intentional fraud in the making of such contracts. The proof does not show any actual or intentional fraud upon the part of the city council, or any member thereof, in making this contract with the appellee. Nor was there any fraud, or undue influence which would be equivalent to it upon the part of McIlroy in relation to the passage of the ordinances. The various things which appellant alleges that McIlroy said and did, conceding that they are established by the proof, fall far short of constituting fraud or undue influence. Appellants make the mistake all the way in treating McIlroy as if he occupied some superior and controlling position over the aldermen of the city that would enable him to impose upon them, or to exert some undue influence upon them. Nothing is brought forward to establish this except frequent interviews "on the curb stone, in the streets behind the corners of buildings and in stairways." But these do not constitute that undue influence that will avoid a contract. McIlroy was not the guardian of the aldermen. They were trusted public servants, and are presumed to be fitted morally and intellectually for their responsible duties. Surely they were not mere puppets to be moved only by the will of McIlroy. They were dealing at arms' length with him. McIlroy had the right to talk with them as much as he pleased about the

passage of the ordinances in which he was so vitally interested, and to make the best contract with them he could. They were supposed to be able to take care of the city's side of the case. The law must so treat them. No charge of corruption on the part of the aldermen or McIlroy is made and none is shown. On the contrary, the testimony of the aldermen shows that McIlroy did not attempt to improperly influence them to vote in favor of the ordinances. McIlroy had the right to employ counsel for himself, and he had the right to say to the other side that he did not think it needed any counsel. He was not responsible for the failure of the city council to get all the help it could and all the information it wanted. Appellants cannot say that McIlroy made misrepresentations, and was guilty of concealments that induced them to pass the ordinances. McIlroy is not to be censured, nor to lose any of his legal rights because he had prepared a draft of the ordinances and submitted it to the council. It was for the council to adopt or reject them as they saw proper. When they passed them they adopted them and it was the work of their hands not of McIlroy's. The burden of proof was upon the appellants to sustain the charge of fraud and undue influence and this is not done by fragmentary acts and desultory conversations that might as well be attributed to innocent as evil motive. But to review in detail the evidence upon which appellants rely to show fraud and undue influence would unnecessarily lengthen this opinion. It is all of a kind. It shows acts upon the part of the council, its attorney, its members, committees, or citizens, for which McIlroy is in no wise responsible. And it shows acts upon the part of McIlroy that do not offend legitimate business methods. We are therefore of the opinion that the charge of fraud and undue influence is not sustained.

Second. Are the ordinances contrary to the Constitution, the laws, and policy of the state? Section 12 of Ordinance 135 provides that the city "shall have the right to purchase said waterworks at the expiration of ten, fourteen, and eighteen years at the fair and reasonable price thereof subject to any bona fide indebtedness that may exist thereon." By section 13 authority is given the water company to "incumber the works by mortgage or otherwise, and it is provided that the money due from the city to the water company for hydrant rental, shall be retained by the city treasurer as net earnings of the water company, and shall be held by him in trust for the payment of the rental of the indebtedness of the water company. It is also stipulated in this section that should the city fail to pay its water rentals when due the deferred payments shall bear 8 per cent. annual interest. It is contended that these provisions are in violation of the Constitution prohibiting cities from issuing interest-bearing evidences of indebtedness,

etc. Const. Art. 16, § 1. But the provisions named are susceptible of no such construction. The city is not compelled to purchase the water plant. It may do so, if it desires. In case it should, inasmuch as its purchase would be subject to any bona fide existing indebtedness to a limited amount, it has provided that such indebtedness should not be unnecessarily increased by accumulations of unpaid interest. In other words, it has provided a method of requiring the water company to pay its interest. The ordinances as construed by the chancellor limit the bona fide indebtedness which the water company may incur at an amount not exceeding \$1,250 for each hydrant erected and such additional ones as the city might order. Were the city compelled to purchase, at an amount limited by the ordinance, but bearing interest, there would be more plausibility in appellant's contention, but such is not the case. The contract on the part of the city to pay interest on the amount for hydrant rentals, in case same was not paid when due, is not issuing interest-bearing evidences of indebtedness. See Smith, Mod. Law of Munic. Cor. § 733; *City of Valparaiso v. Gardner*, supra. It is not to be presumed or assumed that the city will not meet its obligations when due.

It is contended that the ordinances contravene sections 5445-5447 of Kirby's Digest, "in that they attempted to tie the hands of future councils by fixing the rates to be paid by the city and a minimum rate to be paid by the consumers for twenty years in the future, and contracts for a renewal in the event the city did not buy." The ordinances fix the rate of hydrant rentals to the city for 20 years and the minimum charge to consumers, but we find nothing in the ordinances fixing the minimum charge to consumers for any specified time. Sections 5445 to 5447 of Kirby's Digest authorize the city council upon the complaint of five or more citizens of the town that the water company "is charging an exorbitant rate for the supply of water," to make investigation, and if they find that "the citizens or any number thereof, are being charged an unreasonable price for water" it shall be their duty to fix a reasonable price, and the water company is required "to adopt such rates." These sections embody the provisions of an act passed April 21, 1903. Ordinance 135 was passed October 26, 1903, and Ordinance 137 was passed after that. If there were any conflicts between the provisions of the ordinances and the statute, of course, the statute would prevail, as the requirements of the statute must be read into every contract entered into after its enactment. *Western Sav. Society v. Philadelphia*, supra. But we fail to see any conflicts. There is no inhibition on fixing a rate that the city shall pay for its hydrants, and if there were, and the ordinances were violative of it, the city council could correct it in the mode pointed out by the statute. Likewise as to the rates for consumers.

There is no proof in the record that the rates fixed by the ordinances are exorbitant, but if they were, the matter is entirely within the control of the council under the plain provisions of the statute. See *City of Carlyle v. Carlyle Water L. & P. Co.*, 52 Ill. App. 577. In *Danville v. Danville Water Company*, 178 Ill. 299, 53 N. E. 118, 89 Am. St. Rep. 304, in which is a statute similar to the one under consideration it was held: "Although a city has been empowered by statute to authorize a private corporation to construct waterworks and to contract for a supply of water for a period not to exceed 30 years, a subsequent statute empowering any city in which a private corporation has been, or may be authorized to supply water for public use, or fix reasonable water rates, is constitutional and an ordinance passed under a later statute reducing existing water rates, and fixing them at a reasonable price, is valid, although the city enacting it has, under the earlier statute, attempted by ordinance, to fix water rates at certain figures for the unexpired period of 30 years. See, also, *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363.

The contention that the ordinances "appropriated all of the revenue of the city for years to come in advance of its levy and collection" is not sustained by the proof. True the proof tends to show that the amount contracted to be paid for hydrant rentals, in connection with the other expenses which the city had incurred would absorb all the revenues at the time the contract was made. But there was no proof and could be none, of what the revenues of the city would be in the future. No one could tell, of course, with certainty, what its wealth and population would be and what would be its sources of revenue. It had grown rapidly in the past and might continue to do so. We see nothing in the ordinance in conflict with article 16, sections 10-12 of the Constitution. A contract by the city with the water company to pay a stipulated amount for hydrant rentals, is not an appropriation of the revenue by the city, in advance of that levied and collected. It is simply a contract to pay and not an appropriation of specific funds to the purpose. Moreover, the amount agreed to be paid for hydrant rentals was not an amount equal to all the revenues of the city.

Third. In assignments numbered from 8 to 19 inclusive, learned council in their able and exhaustive brief, urge that the ordinances are unjust, unreasonable, and oppressive, and that for these and various other reasons are void. We will treat these as numbered, and in the order named in appellant's brief:

(3) The appellee had about 11 years of unexpired term to operate its system under the Rees contract when Ordinance 135 was passed. That ordinance granted a franchise for 20 years beginning from the day of its passage. So in reality it was an extension of the franchise for only about 9 years. But

the power to determine how long such privileges shall be exercised is a discretion lodged in the city council, or governing boards, which some courts have been unwilling to disturb under grants of 30 or even 50 years. *Little Falls Electric Co. v. City (C. C.)* 102 Fed. 663, *supra*; *Reduction Co. v. Sanitary Works*, 199 U. S. 317, 28 Sup. Ct. 100, 50 L. Ed. 204.

(4) There is nothing in the face of the ordinances, or in the extraneous proof to show that the amount agreed to be paid as rental per annum for hydrants was unreasonable. We could not determine, without some evidence upon the subject, what hydrants should rent for in a city of the population of Fayetteville, under a system of waterworks such as has been installed there. The presumption is that the council did its duty and investigated to determine what would be the reasonable value of such rental before fixing the amount. The length of time as we have shown was in the discretion of the council primarily and no abuse of such discretion has been proved.

(5) Appellants contend that the condition for the extension of the mains under the ordinances in controversy is unreasonable, and say that under the old (Rees) ordinance extensions could have been compelled without expense to the city. The proof showed that it cost about \$50 to put in a fire hydrant. Prior to McIlroy's purchase, a proposition had been made to the city by Rees for certain extensions, upon condition that the city locate a hydrant every 450 feet and pay not exceeding \$75 each for putting in the hydrants. This proposition had been accepted by the city. Under the Rees contract extensions could have been compelled, but only where there was "an average of one consumer to every 100 feet of pipes." While the hydrants were only to be put in when ordered by resolution of the city council, they were to cost not exceeding \$75 each, and the city was to pay an annual rent therefor of \$35. Now, had the extension been made under the Rees ordinance and the proposition for extension which Rees had made and the city had accepted, the additional hydrants might have cost the city \$75 each, and the hydrant rental would have been the same as it is under the ordinances in controversy. It is clear from this that the city council either did not consider that extensions could be compelled under the Rees contract without expense to the city, or else they concluded that it would be unjust to have extensions made without ordering and paying for hydrants. There is no complaint or showing that this contract with Rees was unreasonable or oppressive. A priori, would the contract with appellee for the extension of mains not be unreasonable and oppressive, for, under it, the city was to secure 18 additional hydrants without any charge for furnishing or placing same, thus saving the city in this particular \$1,350. The extension could have been compelled under the contract with ap-

pellee as well as under the contract with Rees. The purpose of both was to supply "with water, the streets, lanes, alleys, squares and public places" in the city of Fayetteville. But the extension could only be compelled upon the terms of the contracts which were the same in the particular of requiring an extension only where there was "an average of at least one consumer to every 100 feet of pipes." This was not an unreasonable requirement. It was expensive to extend the water system, and the water company could not be expected or required to do so where there was no prospect for reasonable remuneration. If the amount the consumers had to pay was found to be unreasonable, they have their remedy under the statute as we have shown. But the court held this part of the ordinance void and we need not consider it further. The council under the Rees ordinance thought it proper to require the city to locate a hydrant for every 450 feet of main and to pay therefor not exceeding \$75 per hydrant. The contract with appellee for the extension of mains is more favorable than that. Since the hydrants cost \$50 each, we do not consider that a profit of \$25 each to appellee for furnishing and placing same would be exorbitant, at least not so much so as to avoid the contract.

(6) The contract for main extension was not unreasonable.

(7) The city is amply protected under the various provisions of the ordinances for its water supply both as to quantity and quality. Appellee contracted on its part in consideration of the "rights, privileges and franchises" granted it by the city, to supply "with water, the streets, lanes, alleys, squares, and public places in the city of Fayetteville," and to "enlarge the capacity of the waterworks plant to such an extent" as "is necessary to meet the growing demands of said city for such water supply." Appellee has the exclusive right to supply water for "extinguishing fires in said city," "and for domestic, manufacturing or industrial uses." These are the uses named, others would be implied if necessary to give the city water, for that was the evident and expressed purpose of the contract. The "water shall be supplied from West Fork of White river, and be of the purest quality obtainable, either directly from the stream or from wells adjacent thereto, or from any source from which the said company may desire to procure same except from below the mouth of the town branch." The terms of the ordinances carefully and specifically provide that the pipes shall be large enough and the pressure great enough to supply water for "all domestic, manufacturing and industrial uses in every part of the city" where appellee under the terms of the ordinance could be compelled to extend its pipes. Said ordinances provide in the way of fire protection the following: "Sec. 17. The said Water Company, its successors and assigns, are to supply and maintain

sufficient pressure to discharge through fifty feet of two and a half (2½) inch hose, one (1) inch smooth bore nozzle, four streams simultaneously to a height of sixty-five (65) feet on the public square from the four hydrants located thereon; and sufficient to discharge through a like hose and nozzle from a hydrant to be located by the city council on Dickson street at a point south of the university, a stream to the height of sixty-five (65) feet. Said water company further agrees, after receiving forty-five minutes notice given by the chief of the fire department of said city to its engineer at its pumping station, and upon the opening and closing by said fire department, or by the agents of said water company of the necessary valves at the reservoir, to give direct pressure from the pumping station (provided the opening and closing of said valves be required), to furnish sufficient pressure to throw three streams simultaneously on the public square through such hose and nozzle to a height of seventy (70) feet, or two streams to a height of eighty (80) feet, or one stream at said hydrant south of the university to a height of seventy-five (75) feet." Section 11 is as follows: "Sec. 11. For the full term of twenty (20) years provided for in this contract the said, Fayetteville Water Company, its successors and assigns, shall continue and furnish without default, a constant and uninterrupted supply of water to said city for the various uses as hereinbefore set forth, provided if at any time the supply of water shall cease or make default from any cause of neglect on the part of said Fayetteville Water Company, its successors and assigns, for five days at any time, then the city may take charge temporarily of said works, machinery and appliances, and operate the same until by sureties or otherwise said works will be efficiently operated and the expense incurred by said city in operating the same shall be a lien upon the earnings of said works until paid. In case the water company fails to supply water then all hydrant rentals shall cease until such time as the same is supplied." Under these provisions, the apprehension that the city will be "at the mercy of the water company for all time as to the amount of water to be supplied" is groundless. Likewise the fear that the contract does not require "pure, clear or wholesome water to be furnished." The contract calls for the "purest water obtainable," and for a bountiful supply, and if the water company neglects to comply with its contract for five days, its property under section 11 is practically confiscated to the city, during the time of such neglect. This is the remedy provided by the contract itself for its enforcement and it is cogent. But if there were a substantial and continued breach of contract in this or any other respect, the city would have the usual remedy in a court of chancery.

(8) The proof tends strongly to show that

better protection of the university buildings from fire, than had obtained under the Rees ordinance, was one of the objects in contemplation of both parties in the passage of the ordinances in controversy. If it shall be demonstrated that the contract fails to carry out one of the purposes that the parties had in view, to give protection from fire to the university buildings, it will be time enough then to seek to set aside the contract on that ground. There is no proof in this record, showing that the waterworks system when fully installed, as contemplated by the contract with appellee, will not afford ample protection to the university buildings. No tests have been made, and no proof offered showing to what height water can be thrown under the improvements to be made by appellee.

(9) The ninth assignment has been disposed of under another head.

(10) The chancery court held with appellants on the objection raised in this assignment and the water company has not appealed.

(11) The chancery court enjoined the water company from mortgaging or bonding its plant for more than \$1,250 per hydrant. The appellee has not appealed from this. So, under the decree of the court the bona fide bonded indebtedness of the water company cannot exceed \$1,250 for each hydrant. It may be less. Learned counsel for appellants argue that the contract is unjust and oppressive, and that unless it is declared void the only way the city can secure relief is to purchase for the full value of the property subject to any indebtedness that the water company may have bonded the plant for. If the city were required absolutely to purchase the waterworks, after a stated period, for its full value and subject to an unlimited indebtedness or even to an indebtedness equal to \$1,250 for each hydrant the city might order, the contract would probably be unreasonable as showing a disposition upon the part of the city council to allow the waterworks an exorbitant profit and to thus ignore the rights of the city. But such is not the case. As we have shown, the city is not required to purchase at all, but has the option to do so, in 10, 14, and 18 years. If the city should not desire or be in condition to purchase, it is but just to the company that its franchise be extended for a reasonable time, for otherwise its property would be valueless and confiscate. We do not agree with the counsel that the contract giving the city the option to purchase or else binding it to extend the franchise, places an unreasonable burden upon the city which it can only remove by purchase of the property. The contract is comprehensive enough in its general scope, and yet, specific enough in details, to assure the city an excellent water supply. But if it is found by actual experience that the contract was an improvident one the city is not "left at the mercy" of

the appellee "for all time" as counsel assert, for its water supply. In case the city does not exercise its option to purchase, it is only required to extend the franchise "on fair and reasonable terms." Again, while the language of the contract to the effect that the appellee shall have the exclusive right to maintain and operate waterworks, etc., is doubtless sufficient to inhibit the city from granting the privilege to any other corporation, company, or individual, we doubt whether it is sufficient to prevent the city from maintaining its own water plant. "It is," says the Supreme Court of the United States, "important that the court should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrine of the adjudged cases, that grants of special privileges affecting the general interest are to be liberally construed in favor of the public and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers." See, also, *Joplin v. S. M. Light Co.*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127; *Stein v. B. Water Co.*, 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622. These authorities at least leave it an open question, and we need not and do not decide it, for we are of the opinion that the ordinances are valid, regardless of whether or not the city could own and maintain its own water plant.

Assignments 12, 13, and 14 have been disposed of in what we have already said.

(15) The court held that those provisions of the ordinances allowing arbitrators, in case of disagreement by the parties, to fix the value of the waterworks plant, and to stipulate the terms of extension were void. Therefore appellants cannot complain.

(16) The contention that the ordinances are void on account of ambiguities of expression in certain sections of the contract is not well taken. The meaning of these terms and sections, is easily discoverable from the context, and can readily be made certain when considered in connection with other parts of the contract and the subject-matter thereof. The rule of "*id certum est quod certum potest*," would apply to the uncertainties of which appellants complain, and the contract should not be avoided on account of these.

(17) The contract requires the appellee "to construct and maintain a dam four or five feet high at the river near pumping station for impounding water." It is contended that no right of way had been obtained, and that this provision would result in flooding farms for which the city would be liable. The securing territory for the dam, and the damages that might result to property owners by reason of its construction are matters that do not concern the city under the contract. The city could not be held responsible in any way for the failure of the appellee to carry out its contract in this respect with the city,



nor could the city be held liable for any damages to third parties caused by the performance of the contract by appellee. These are questions for the appellee to settle, not the city. Not until appellee fails or refuses to comply with its contract in these particulars can the contract be avoided for that reason. It suffices that the question is not for decision now.

(18) It is contended that Ordinance 137, which is brought in question by the supplemental complaint, is void for the reason "that it was not signed by the presiding officer." The record of the passing of this ordinance is as follows: "Regular meeting of the city council, Nov. 9th, 1903. Present—J. T. Eason, mayor; Fred Jones, recorder; Aldermen Atha, Chapman, Hansard, Hight, Phillips, Conner. After which said ordinance was by Fred Jones, acting mayor (J. T. Eason, mayor, having been excused on account of sickness), declared adopted and finally passed. Said ordinance as amended and finally passed and adopted is as follows: (Here follows ordinance.) There being no further business, on motion of Chapman, seconded by Hansard, council adjourned. Fred Jones, acting mayor. C. O. Hansard, Acting Recorder." The statute provides: "All by-laws or ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council and the clerk. Section 5473, Kirby's Dig. The record shows a compliance with the statute, as to authentication. Jones was the presiding officer at the time of the passage of the ordinance, and Hansard was the acting clerk or recorder. They signed the record containing the ordinances. But the proof shows that Ordinance 137 was passed because it was feared that 135 had not been passed, and 137 was intended as a substitute for 135, in the event 135 had not been legally passed. The proof shows that Ordinance 135 was legally passed. Indeed the complaint and the contention of appellants all the way are bottomed on the fact that the ordinances were passed. Assuming and alleging that they were passed, appellants seek to set them aside for the various reasons set up in the complaint.

(19) It is not the law, that "if the ordinance was void in part it was void in toto."

Judge Dillon says: "If part of a by-law be void, another essential and connected part of the same by-law is also void, but it must be essential and connected to have this effect. 1 Dillon, Mun. Cor. § 421; 1 Smith, Mod. Law of Mun. Cor. § 542. This is the well-settled doctrine and has been more than once announced by this court. *Rau v. Little Rock*, 34 Ark. 303; *Eureka Springs v. O'Neal*, 56 Ark. 351, 19 S. W. 969. See, also, *State v. Marsh*, 37 Ark. 356; *Railway v. Worthen*, 46 Ark. 312; *State v. Deschamp*, 53 Ark. 490, 14 S. W. 653; *Leep v. Railway*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030. It should be remarked that, in the cases in our own court recognizing the principle, the ordinance or act under review was an expression of the will of the state or municipality in its governmental, rather than proprietary or business, capacity. But we do not see why there should be any distinction as to the parts of acts or ordinances that are prejudicial to the interest of the state or city, and that were no part of the consideration or inducement for the contract so far as the state or municipality is concerned, but were ingrafted solely for the benefit of the other party to the contract. So long as the party for whose benefit these provisions were made is not complaining, the other side should not be heard to complain if such provisions are removed. The parts of the ordinance which the lower court declared void were easily severable and made independent of the other portions, declared valid, and there can be no doubt that the city council would have passed the ordinance with these portions omitted, for they conserved the interest of the appellee and not the city, and its inhabitants and taxpayers. Appellee does not complain at the ruling of the court in canceling these provisions, and appellants should not.

(20) The adjustment of costs was largely in the discretion of the lower court.

The chancellor, doubtless, concluded that appellants obtained no substantial relief inasmuch as the avowed object of the litigation (the cancellation of the contract) was decided in appellee's favor; and, as we find no error in this ruling, the judgment of the court will be in all things affirmed.

**DAVIDSON v. WILLS.**

(Court of Civil Appeals of Texas. June 6, 1906.  
On Rehearing, June 23, 1906.)

**1. BROKERS—COMMISSIONS—WHEN EARNED.**

A broker employed to procure an exchange of land for a stock of merchandise earns his commission when the owner of the stock and the owner of the land procured by the broker agree on the terms of exchange; the owner of the stock having the right to reject the proposition for exchange if acting in good faith.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 73.]

**2. SAME—COMPENSATION—AMOUNT.**

A broker employed to procure an exchange of land for a stock of merchandise for a commission of 5 per cent. on a trade that may be made, is entitled to a commission of 5 per cent. on the value of the land received in exchange, regardless of the value of the merchandise, and regardless of the valuation placed on the land in making the exchange.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 55, 56.]

**3. SAME.**

In an action by a broker employed to procure an exchange of land for a stock of merchandise, it appeared that the owner of the merchandise received in exchange therefor a tract of land which was worth a specified sum. The owner of the merchandise testified that he had paid money for and assumed indebtedness on the land obtained in exchange. Held that, as the broker's compensation was based on a commission on the amount realized by the trade, the value of the land, after deducting the money paid therefor and the indebtedness assumed thereon, must be taken as the basis for the computation.

Appeal from Nacogdoches County Court; Robert Berger, Judge.

Action by J. E. Wills against John P. Davidson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Ingraham, Middlebrook & Hodges, for appellant. J. M. Wagstaff and Blount & Garrison, for appellee.

**JAMES, C. J.** Plaintiff's petition and trial amendment stated a case against appellant substantially as follows: That Davidson placed with plaintiff, Wills, a real estate broker, a stock of goods of about \$20,000 in value, listing same at the sum of \$20,000, for the purpose of sale or exchange, and that, in pursuance of said agreement, plaintiff found a purchaser in the person of J. W. Davis, and that plaintiff having so found a purchaser for said stock, by calling the attention of said Davis to the proposition of said Davidson to sell or exchange and the character, value, and location of same, caused the said Davidson and Davis to come together, and, as a result thereof and subsequent negotiations between them, Davidson succeeded in making a sale of said property, and that the trade was closed about January 1, 1903, whereby said Davidson became liable to pay plaintiff for his services 5 per cent. on the amount of said goods so sold to said Davis. Defendant demurred to plaintiff's pleadings, because there was no allegation of the time when plaintiff caused Davis and defendant to come together, and because

of the allegation as to the time when they finally consummated a trade. The point intended by these demurrers is that defendant became liable to plaintiff, if at all, when he brought the parties together, regardless of the time the trade was consummated. This matter will be considered in connection with the plea of limitations. Defendant interposed also a general denial.

Appellant assigns as error that the court erred in not rendering judgment for defendant under his plea of two years' limitation; his proposition being that "when a broker furnishes a purchaser, who is ready, willing, and able to buy, his commissions are then earned, although his principal may refuse to make the trade." This is the idea involved in the demurrers above referred to; the fact being that the parties were introduced about December 12, 1902, and this action was not brought until December 22, 1904. Of course there was no error committed, if, under the facts of this case, plaintiff did not become entitled to compensation for his services unless the parties arrived at an agreement. Plaintiff did not claim there was an agreement that he would be paid for merely bringing together Mr. Davidson and a person who contemplated or proposed trading, nor was there any such proof. He alleged that the stock of goods was placed with him for the purpose of effecting a sale or exchange thereof, and such was the proof. How can it be claimed that when he found Davis, who was ready, able, and willing to exchange certain real property he had for the stock of goods, and presented him to Davidson that he had performed the services contemplated, when Davidson undoubtedly had the right to be satisfied with the land offered, its value, and the title thereof? It is very clear to our minds that Davidson, if acting in good faith with reference to plaintiff, had a right to reject the proposition, and, in order to determine whether he would accept or reject it, was entitled to time for a proper consideration of it. It was shown by the evidence, and such must have been the court's finding, that it led to an exchange, but that the minds of Davis and Davidson did not meet on the subject until January, less than two years before the action was commenced; and, in our opinion, it was not until then that plaintiff's right to compensation accrued. The rule on this subject deduced from the cases is expressed in Clark & Skyles on Agency, § 771, as follows: But "in all cases, under all the varying forms of expression, the fundamental and correct doctrine is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale and the price and terms on which it is made, and, until this is done, his right to commissions does not accrue." The assignment, and all assignments referring to the same question, are overruled.

We also overrule assignments 5, 6, 8, 9, and 15, because there certainly was evidence

that plaintiff was defendant's agent. The testimony did not conclusively establish, if it even tended that way, that plaintiff was agent in this matter for parties interested adversely to defendant's interests.

The fourth assignment is that the court erred in refusing to permit defendant to prove the actual value of the stock of goods at the time of the exchange in their then condition and location. It is contended that, in a case like the present one, showing an exchange of lands for goods, and that the price of both under the evidence was greatly exaggerated, and plaintiff suing for 5 per cent. commission on the trade made, it was error not to let defendant prove the true value of the goods in money, and to hold that he could not do so on account of the price placed on the land and on the goods in making the exchange. The goods had been listed with plaintiff at the value of \$19,480, and, as the judgment was for \$974, it is evident that the court allowed him compensation on the basis of 5 per cent. on the listed value. It was proved that defendant exchanged his goods for two tracts of land aggregating 1,201 acres, which a witness valued at \$10 an acre, which is all the evidence we find on that subject. In the exchange these lands were valued at \$20,000, and the stock of goods at substantially the same figure.

It is evident from the proof that plaintiff did not find a purchaser who was ready and willing to give \$19,480 for the stock of goods, and that he did not produce a purchaser who gave it, but one who was willing to give, and who gave for it, lands of the value of \$12,010. It appears from plaintiff's own testimony that what he did in the matter had reference to Davidson taking these very lands in exchange for the stock of goods. He testified that: "After I had been trying to work up a deal with J. W. Davis for these lands, as agent for Mr. Davidson, I did go to Mr. Sutphen and tell him that I thought this would be a good deal for Mr. Davidson." Also: "I finally struck John W. Davis and exchanged the stock of goods belonging to Mr. Davidson, which deal was finally closed and finally consummated about February, 1903. In this deal Mr. Davis got the stock of goods and Mr. Davidson got the lands mentioned." So it conclusively appears that the stock of goods, whatever its value, went for the very lands which plaintiff procured Davis to offer in exchange for the goods. This being so, it seems to us immaterial in this case what the goods were really worth, and that there was, therefore, no error in rejecting the testimony concerning its real value. We think, however, from the above statement of the evidence, that plaintiff was clearly not entitled to commissions on more than the value of the land which he had procured in exchange for the goods. If the lands were worth no more than \$12,010, we utterly fail to see how the case would be different from a case in which he

had found a purchaser for the stock of goods for that amount in cash and Davidson had accepted it. In such a case, it would seem hardly possible to contend that he would have been entitled to commission except on the sum obtained for the goods, regardless of its value, or what it had originally been listed at. Neither would the fact that the lands went into the trade at the nominal valuation of \$20,000 make that the basis of estimating the commission. As said in *Clark & Skyles on Agency*, § 768: "In estimating the commission, the actual, and not the market or trade or fictitious, value of the property bought or sold is to be taken into consideration."

In investigating the assignments of error in this case, we have necessarily had to consider the evidence, and it is apparent therefrom that the allowance of 5 per cent. on the listed price of the stock of goods as compensation for plaintiff's services applies the wrong rule for plaintiff's compensation, and is manifestly unjust, and should not receive sanction. The judgment shows that the court found the material issues of fact in favor of plaintiff, and upon this he was entitled to such compensation as the law allows in such a case. The evidence established the value of the property which, through plaintiff's procurement, defendant received for his stock of goods. Although plaintiff stated in a general way that his services were worth \$1,000, it is evident from his testimony that he arrived at this by means of the usual 5 per cent. commission rule. The trial judge applied this rule, and in this he was correct. The error is one which under the circumstances may and should be corrected here; therefore the judgment will be reformed as to the amount thereof, so that plaintiff will recover 5 per cent. of \$12,010, the value of what he secured to defendant by the exchange.

Reformed and affirmed.

#### On Rehearing.

It is pointed out that Davidson testified: "I let him [Davis] have a stock of goods that I owned here in Nacogdoches, paid a lot of money, and assumed a lot of indebtedness upon the land that I got in the deal." From this testimony, it would appear that he did not realize by the trade the value of the land, and, consequently, it appears that it would be error for us to render the judgment indicated in the former opinion. The motion is sustained, and the judgment will be reversed, and the cause remanded for another trial.

#### PIPKIN v. HAYWARD LUMBER CO.

(Court of Civil Appeals of Texas, June 14, 1906. On Rehearing, Oct. 6, 1906.)

#### APPEAL—BRIEFS—INSUFFICIENT STATEMENT OF CASE—AFFIRMANCE.

On appeal by plaintiff his brief contained a statement of the nature of the action as dis-

closed by the pleadings, showing it to be an action by a servant against the master for injuries. An assignment complained that the court erred in failing to charge that it devolved on the master to maintain the tools in proper condition, but neither the assignment nor proposition was followed by any statement showing that such a charge was given or that the evidence presented the issue of duty of keeping tools in repair. There were assignments complaining of the court's charge that it was the duty of plaintiff to exercise ordinary care to ascertain if the tool was safe, but no statement disclosing what character of tool was shown by the evidence to have caused the injury. The brief did not disclose the nature of the accident or that any evidence was adduced except to the effect that a person was working with plaintiff and that such person was a general superintendent and plaintiff subject to his orders, which was followed by an assignment complaining of the court's assumption that those working with plaintiff were his fellow servants. Another assignment assailed an instruction that, if an employé is hurt while at labor and the employer has failed in the exercise of ordinary care, the person injured "cannot recover," but the brief nowhere disclosed that the issue of negligence of the master was tendered by the evidence. *Held*, that, because of insufficiency of the brief to show the nature of the accident and the evidence, the judgment would be affirmed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3092, 4450.]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Action by E. E. Pipkin against the Hayward Lumber Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

See 94 S. W. 1068.

Blount & Garrison, for appellant. Ingraham, Middlebrook & Hodges, for appellee.

GILL, C. J. Plaintiff brought this suit against defendant lumber company to recover damages for personal injuries alleged to have been sustained by him through the negligence of defendant. From a judgment upon the verdict of a jury in favor of defendant, the plaintiff has appealed.

The assignments of error copied in the brief are all addressed to alleged defects in the court's charge. There is no statement in the brief disclosing either the nature and history of the alleged accident as shown by the record or the respects in which the charges complained of are harmful error.

The brief of appellant discloses no cause for reversal, and, there being no error apparent of record, the judgment is affirmed.

Affirmed.

On Rehearing.

At a former day of this term we refused to consider any of the assignment sought to be presented in appellant's brief, and affirmed the judgment of the trial court. Of this counsel for appellant complain in their motion for rehearing, and especially of the statement in the main opinion to the effect that "there is no statement in the brief disclosing either the nature or the history of the alleged accident as shown by the record." They claim, first, that no such statement is

required by the rules governing the briefing of cases and that the brief did contain a statement of the nature and result of the suit. The motion has received due consideration at our hands, but we have found no reason for receding from our former conclusion. We write this in order that counsel may more fully understand our views upon the question. The brief contains a statement of the nature of the suit as disclosed by the pleading, but not an assertion that any issue was presented by the evidence upon any point to which the assignments are addressed. For instance, the first assignment complains that the court erred in that portion of the charge covering the duty of the master in the furnishing of tools for the use of the employés in that the court failed to charge that it devolved on the master also to maintain the tools in proper condition. Neither the assignment nor proposition is followed by any statement disclosing either that such a charge was given, or that the evidence presented the issue of the duty of keeping the tools in repair. This court, if called upon to determine if the court erred in the respect complained of, must have read the entire statement of facts to find if there was any issue of failure to inspect and repair. Briefs are designed to aid the court, not only in the proper, but the speedy disposition of causes, and the rules contemplate that the brief on its face shall disclose reasons for reversal, reference to the record being necessary for the purpose of verification, and only in case the statement in the brief is questioned by opposing counsel.

There is no statement in the brief disclosing what character of tool or apparatus was shown by the evidence to have caused the alleged injury to plaintiff, and yet there are assignments complaining of the rule laid down by the court that it was the duty of plaintiff to exercise ordinary care to ascertain if the tool was safe and in good condition. Tools may be of such a nature or in such condition that the employé using them assumes the risk of their condition or unfitness for the task. This brief does not even disclose the nature of the accident or that any evidence was adduced except to the effect that one Aubitt was working with plaintiff and that Aubitt was general superintendent of the "raising crew" and plaintiff was subject to his orders. This followed an assignment complaining of the court's assumption that those working with plaintiff were his fellow servants. The statement as given does not show that Aubitt was other than a fellow servant, for it shows no more than that he was foreman of a gang, and does not disclose that he had power either to employ or discharge. *Young v. Hahn*, 70 S. W. 950, 6 Tex. Ct. Rep. 106.

One of the assignments assails, among other things, the following part of the main charge: "If an employé is hurt while at labor the inquiry first is, has the employer

failed in the exercise of the ordinary care devolving upon him in procuring the tools and instruments? If this is so, the person hurt cannot recover." It is contended that the proposition cannot be sound upon any state of facts and that therefore it was unnecessary to follow it with any statement from the evidence. Aside from the question whether or not from the entire section of the charge quoted in the brief, the error was manifestly clerical and harmless, counsel seem to forget that, unless there was such an issue for the jury presented by the evidence adduced, the erroneous abstract proposition of law would not be reversible error, and the brief nowhere discloses that the issue, either of the negligence of the master or any other issue, was tendered by the evidence. The facts may have authorized an instructed verdict on the issue of liability. Nor is it made to appear by any statement or any reference to the record that the court gave any such charges as are complained of. Appellee protested against the consideration of the assignments as presented, and this court, out of respect for the rules and the purposes they were designed to subserve, have sustained the protest. The motion is overruled.

Overruled.

#### MORRIS v. JACKS.\*

(Court of Civil Appeals of Texas. June 13, 1906. Rehearing Denied Oct. 10, 1906.)

##### 1. TRESPASS TO TRY TITLE—ACTION BETWEEN INTRUDERS—ADVERSE POSSESSION.

Where plaintiff and defendant each claimed title to land by limitations, introducing sufficient evidence to recover against the true owner, and each was in actual possession of a part only, claiming title as against the other to the whole by constructive possession, whatever may have been the rights of either as against the true owner, neither acquired title as against the other to any of the land which was not in his actual possession, and plaintiff could not maintain trespass against defendant showing the same character of title.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass to Try Title, § 10.]

##### 2. ADVERSE POSSESSION — INTRUDERS — CONSTRUCTIVE POSSESSION.

The principle that if an owner is in actual possession of a portion of the land claiming title to the whole he has the constructive possession of all land not in the actual possession of an intruder, though the owner's actual possession is not within the limits of the deed under which the intruder claims, is inapplicable where one intruder claims against another.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 591.]

##### 3. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In trespass to try title plaintiff was not prejudiced by the exclusion of deeds to his vendors where his claim of five years' limitations was not predicated on them, but on the deed to him admitted in evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4188.]

##### 4. SAME—INSTRUCTIONS.

Plaintiff in trespass to try title was not prejudiced by an erroneous instruction, where

he was not under the undisputed facts entitled to recover against defendant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4035, 4038, 4227.]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Trespass to try title by L. N. Morris against A. Jacks. From a judgment for defendant, the plaintiff appeals. Affirmed.

Goodrich & Synnott, for appellant. D. M. Short & Sons, for appellee.

NEILL, J. This is an action of trespass to try title brought on June 30, 1903, by appellant against appellee to recover 100 acres of the George English survey. The plaintiff pleaded specially title by limitation under the 5 and 10 years' statutes. The defendant, after disclaiming as to 20 acres known as the "Rice Old Field," pleaded not guilty and the 10 years' statute of limitation as to the remainder. The case was tried before the jury, and the trial resulted in a judgment in favor of the defendant, except as to the land covered by his disclaimer.

#### Conclusions of Fact.

A peculiar case is presented by the facts. Neither party claims or presents any evidence of title, save under the several statutes of limitation under which he claims. Each, were it not for the adverse possession and claim of the other, adduced sufficient evidence of acquisition of title under the statute of limitation to enable him to recover against him who would otherwise be the true owner. But such evidence shows hostile possession adverse on the part of the one to that of the other.

#### Conclusions of Law.

The question of law presented by the facts, the burden being upon the plaintiff to show title by limitation, not only against him who would, but for such title, be the true owner, is; Can he maintain his action against the defendant who shows the same character of title? Logically, it would seem not. But the plaintiff contends that, having been in actual possession of 20 acres of land under deed duly recorded which included all the land in controversy, his possession extended constructively to all the land described in such deed, and defendant's subsequent possession of a part of the land he (plaintiff) was in such constructive possession of was ineffective as against his prior constructive possession. This contention is without foundation to support it. It is true that when one enters upon unoccupied land under a deed and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in the deed, although his possession beyond the limits of his actual

\*Writ of error denied by Supreme Court Nov. 21, 1906.

occupancy is only constructive. But if the owner is at the same time in the actual possession of a part of the land, claiming title to the whole, he has the constructive possession of all land not in the actual possession of the intruder, and this, though the owner's actual possession is not within the limits of the deed under which the intruder claims. The reason for this is that both parties cannot be seised at the same time of the same land under different titles, and the law, therefore, holds all that is not in the actual occupancy of the adverse party to be in him who has the better title. But these principles apply only in cases between the owner and an intruder, and cannot be invoked by one intruder against another, as is sought to be done in this case.

It is shown by the facts in this case that the possession and adverse claim of the defendant were prior to that of the plaintiff, while, as between them, it should be restricted to the land occupied and not extended by construction. This follows necessarily, for when defendant's possession ripened into title, as against the true owner he was entitled as against him to 160 acres, though his actual occupancy covered only a small part of the land. This quota, as is shown from the facts, can only be made by taking the land in controversy. The plaintiff, as against the true owner, is, by reason of his possession having ripened into title, also entitled to the 100 acres described in his deed, though he was only in actual possession of 20 acres. But, as both plaintiff and defendant could not be seised at the same time of the same land under their several claims of limitation, the title that one acquired against the true owner to the part he was not in actual possession of was absolutely destroyed by the same character of title acquired against the other. So, whatever may have been the rights of either party against the real owner, as between themselves neither acquired title to any of the land which was not in his actual possession. It, therefore, necessarily follows that the question stated can only be answered in the negative.

This renders it unnecessary to discuss serially the assignments of error. We will remark, however, that the plaintiff was in no way prejudiced by the exclusion of the deeds to his vendors which he offered in evidence. His claim of five years' limitation was not predicated on either of them, but on the one to him which was admitted in evidence, and if he wished to tack his possession to that of those under whom he claimed he could do so as well without their deeds as with them. Nor could the charge of the court, should it be conceded erroneous, have prejudiced the plaintiff, for, under the undisputed facts, he was as a matter of law not entitled to recover against the defendant.

**Affirmed.**

## LECHENGER v. MERCHANTS' NAT. BANK OF HOUSTON.\*

(Court of Civil Appeals of Texas, June 28, 1906. Dissenting Opinion July 5, 1906. Rehearing Denied Oct. 4, 1906.)

### 1. FRAUDS, STATUTE OF — LEASE OF LANDS — IMPROVEMENTS — EQUITABLE RELIEF.

Defendant, being in possession of the lower story of a building under a written lease which did not expire until February, 1905, made a verbal lease of the entire building, valued at \$100,000, for five years from the latter date. After making the verbal lease, and prior to the expiration of the written lease, he made a small addition to the building, redecorated the store ceiling, and altered the fixtures, all costing about \$400. The owner, before the termination of the written lease, repudiated the oral lease. Defendant, relying on such oral lease, declined to rent another building, which he could have secured, and claimed that the surrender of the building would result in damage to his business for which he had no adequate remedy. *Held*, that such facts were inadequate to take the verbal lease out of the operation of the statute of frauds.

### 2. BANKS — CONTRACTS — ULTRA VIRES.

A lease of a building by a bank was not ultra vires, where it was leased to exchange the use of a part of it for a building suitable to its purposes, and which could not be procured otherwise.

### 3. SAME — VALIDITY OF LEASE — COLLATERAL ATTACK.

A person not a party to an executed lease by a bank cannot question its validity as ultra vires.

### 4. SAME — ACT OF OFFICER — RATIFICATION.

The institution by a bank of a suit based on a lease executed by its vice president being a ratification of his act, his authority to execute it cannot be assailed in the suit.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 280.]

### 5. TRESPASS TO TRY TITLE—RIGHT TO POSSESSION.

Where, in an action to recover realty, based on a written lease to a bank, the owner of the premises, being a party, prays for possession for the use of the bank, he is entitled to recover against a defendant claiming under an oral lease, though the lease to the bank was void.

### 6. FRAUDS, STATUTE OF—AFFIRMATIVE DEFENSE.

The provision of the statute of frauds that no action shall be brought, etc., applying to those who interpose an oral contract respecting lands as an affirmative defense, a defendant in possession of premises cannot interpose a verbal lease of five years in defense of his possession.

Reese, J., dissenting.

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Trespass to try title by the Merchants' National Bank of Houston against L. Lechenger and another. From a judgment for plaintiff, defendant Lechenger appeals. Affirmed.

Hogg, Watkins & Jones and Baker, Botts, Parker & Garwood, for appellants. Lane, Jackson & Higgins, for appellee bank. John W. Parker, for appellee Burns.

GILL, C. J. The Merchants' National Bank, of Houston, Tex., sued L. Lechenger

\*Writ of error denied by Supreme Court Nov. 14, 1906.

and Hugh Burns to recover the property known as the "Burns Building" in Houston, Tex. The action was in the form of trespass to try title. By amendment the bank disclosed that it based its right to the building upon a written lease from Hugh Burns, the owner, whereby it acquired the right to possession and the right to hold it for five years from February 1, 1905, in accordance with the terms of the lease. Hugh Burns answered, admitting the execution of the lease as alleged by the bank, set up his duty and obligation to make delivery, and prayed for judgment against his codefendant, Lechenger, for possession of the building for the use of the bank. The pleadings of Lechenger are very lengthy, and we shall undertake to state only their substance. After the general denial he alleged: That he was in possession of the building on the 10th of October, 1904, under a written lease for one year, which was to expire on February 1, 1905. That he was in the jewelry business, doing an annual business of \$75,000, and making a profit of about \$11,000. That shortly prior to October 10, 1904, he desired to arrange for a place of business for the succeeding year, and as the Burns Building suited him he had an interview with Burns, to whom he stated his situation and his purposes. He also told Burns that he (Lechenger) had an opportunity at that time to secure another suitable building in case Burns refused to extend the lease then current. That Burns expressed satisfaction with him as a tenant, whereupon he and Burns entered into a verbal agreement that Lechenger should have the entire building at a net rental of 6 per cent. on the value of the building, it being valued at \$100,000; Lechenger to pay for water, light, ordinary repairs, insurance, and taxes, and he should have the right to sublet. That this lease should extend from February 1, 1905, to February 1, 1910. Under the one-year lease for 1904, Lechenger occupied only the lower story of the building; the remainder being occupied by other tenants of Burns. It was understood in the alleged agreement that the other tenants should continue to pay their rent to Burns until February 1, 1905, and thereafter pay to Lechenger. The latter was to pay up to February 1, 1905, under the terms of his current lease, which covered only the lower story. Burns promised to reduce the agreement to writing. Relying upon the promise, Lechenger, with Burns' knowledge, declined to rent another building, which he could have rented at that time, and proceeded with his arrangements with reference to the five-year verbal lease. He erected a small addition at the rear of his store at a cost of \$300, and redecorated the ceiling of the store and made some alteration in the fixtures at a cost of \$100. On or prior to December 9, 1904, he learned that Burns had leased the building to the plaintiff bank and had repudiated his oral lease to

him (Lechenger), whereupon he notified the bank of his agreement with Burns. It is also alleged generally that the bank knew of the oral agreement prior to the agreement between the bank and Burns. He refused to vacate upon the demand of the bank, still has possession of the property, and on the 1st of February, 1905, and each month thereafter, tendered to Burns the agreed rent in cash. Upon his refusal to accept, the sum was deposited in bank to his credit, where it yet remains subject to his order. No money or other thing of value passed to Burns at the date of the alleged oral contract, nor was anything due thereunder until February 1, 1905. It is further averred: That Burns, the bank, and one Sweeney, a competitor of appellant, have conspired to exclude him from the building and thereby ruin his business. That his stock is of the value of \$60,000. That his fixtures are suitable to no other building. That his trade is largely among the ladies of Houston, who refuse to go on the opposite side of Main street, where the saloons and gambling houses are situated, and trade only on the side of Main street on which the Burns Building is situate. That the retail business district in Houston is restricted, and he cannot now procure any other building in or near that district, or on that side of Main street, nor any other suitable building in Houston, and that the building which he forbore to rent was on the same side of Main street, in the desirable district, and in every way suitable to his purposes. That the surrender of the building will result in loss and damage to him, in inconvenience and loss of trade, amounting to \$100,000, for which he will have no adequate remedy. Wherefore he says Burns and the bank (who leased with notice of his equities) are estopped to say that the oral lease is void under the statute of frauds, and he prays that the lease be upheld. To this answer both the bank and Burns demurred on the ground that the pleading disclosed that the alleged lease was not in writing, and set up no facts which, if true, would take the contract out of the statute of frauds. The demurrer was sustained, and, Lechenger refusing to amend, the court heard proof of the bank's lease from Burns and rendered judgment in favor of the bank and Burns against Lechenger. The latter has appealed, and his counsel present here with much force the contention that the equities alleged take the contract out of the statute.

Under the proposition which arises on the state of facts alleged, counsel for appellant contend that, even if it be held that the improvements are insufficient in character and value to take the contract out of the statute, the independent consequences which will flow from its repudiation are of a nature so grave and irremediable as to call for the interposition of a court of equity. Counsel for ap-

pellees contend that, as there was no possession referable to the oral contract and no payment of lease money until after its repudiation, the consequential damages which will flow from its repudiation cannot be considered in determining whether the statute of frauds shall be applied.

The authorities bearing upon the question, when the grounds upon which they proceed are considered, are peculiarly confusing and unsatisfactory. Our statute of frauds, in so far as it relates to the question before us, is as follows: "No action shall be brought in any of the courts in any of the following cases unless the promise or agreement upon which such action shall be brought or some memorandum thereof shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized. \* \* \* (4) Upon any contract for the sale of real estate or the lease thereof for a longer time than one year." The urgent necessity for such a statute has been universally recognized, but, on account of the hard consequences following its application in particular cases, courts of equity were induced at an early day to invent means for avoiding its harsh effects. In England and in most of the states of the Union the statute is avoided when the oral contract is followed by substantial part performance referable alone to the contract, such as entry into possession and payment of all or part of the consideration. Pomeroy's Equity, vol. 6, § 821. The English courts seem to have proceeded upon the theory that the overt act of the parties in delivering possession on the one part, and entry on the part of the other, admitted of such clear proof and was such conclusive evidence of the contract as would safely justify them in dispensing with the written evidence of the sale. Pomeroy's Equity, vol. 6, §§ 817, 819. While our statute is practically the same as the English statute, the Texas courts have steadfastly refused to allow mere part performance to dispense with written evidence in matters affecting the conveyance of lands. While Mr. Pomeroy (volume 6, § 823) states that the Texas doctrine is rested alone upon the ground of fraud, we think a careful review of our cases will show that, while the distinction has not always been made plain, the sum of their holdings amounts to this: That possession is not enough. That possession and payment of purchase money is not enough. That possession, payment of purchase money, followed by insignificant improvements, is not enough. Possession referable to the contract, followed by valuable improvements of such a nature as to raise an equity in favor of the vendee, which no action at law could satisfy, and which would render it fraudulent on the part of the vendor to repudiate the verbal contract, are all required to take the case out of the statute. In other words, our courts seem to have adopted the English doctrine that there must

be part performance as an earnest of certainty of proof, but have wisely required that in addition the situation of the vendee must have been so changed thereby that nothing short of specific performance will make him whole. Indeed, in practical application, there has been small difference between the course of the English courts proceeding upon the theory of part performance and those courts of this country, such as Texas and Massachusetts, who proceed upon the broad ground of equitable estoppel.

The wisdom of interposing in any case to suspend the application of the statute has been always gravely questioned, and courts of equity everywhere have justified their assumption of power on the ground that they ought not to permit the statute to work a worse fraud than it was designed to prevent. The care with which the courts have confined their interference only to such acts of part performance and the equities which grow out of it as are directly referable to the contract, and which in their very nature presuppose the contract, is well illustrated by the following language of the earl of Selborne in *Maddison v. Alderson*, quoted at length by Mr. Pomeroy at page 1345 of his work on Equity: "It is established both in law and equity that the fourth section of the statute of frauds does not avoid parol contracts, but establishes a rule of evidence. From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not, within the meaning of the statute, upon the contract itself. When the statute says that no action shall be brought to charge any person upon an oral contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from the *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract do not depend upon mere parol, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute. When, for example, the vendee has entered into possession, parol evidence of the contract is necessary to explain and excuse that possession, but the vendor is charged not upon the contract, but upon the equity arising from the receipt and delivery of the possession. The doctrine, however, so established, has been confined by judges of the greatest authority within limits designed to prevent a recurrence of the mischief which the statute was passed to suppress. \* \* \* It is, in general, of the essence of such act of part performance that the courts shall by reason of the act itself, without knowing whether there was an agreement or not, find



the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part performance taking the case out of the statute, as, for example, the payment of a sum alleged to be purchase money. The payment of a sum of money is an equivocal act. Not until the connection with the contract is established by parol is it an indication of a contract concerning land. Similarly, continuance in possession by a lessee after the expiration of his term is not in itself evidence of an agreement to renew, since the act may point to a tenancy at will." This according to the learned author, is the theory which explains all the English and most of the American cases; but, even in those states where the relief is predicated upon the broader ground of equitable estoppel, the equities, to be allowed, must have grown out of acts of part performance, and usually inuring wrongfully to the benefit of the party sought to be charged.

In many Texas cases down to *Lodge v. Leverton*, 42 Tex. 18, the courts followed the English rule and gave the English reason, and even as late as *Castleman v. Sherry*, 42 Tex. 61, Justice Reeves, who wrote the opinion, predicated the judgment upon part performance, though citing *Lodge v. Leverton*, and in every Texas case which we have been able to find the requisites of possession and valuable improvements upon the faith of the promised conveyance were present. *Garner v. Stubblefield*, 5 Tex. 555; *Dugan's Heirs v. Colville's Heirs*, 8 Tex. 128; *Ottenhouse v. Burleson's Adm'rs*, 11 Tex. 87; *Whitson's Adm'r v. Smith*, 15 Tex. 36; *Neatherly v. Ripley*, 21 Tex. 435; *Lodge v. Leverton*, supra; *Willis v. Matthews*, 46 Tex. 483. In *Sullivan v. O'Neal*, 66 Tex. 434, 1 S. W. 185, Justice Robertson applies the blended doctrine that the equity relied upon must grow out of acts of part performance. In *Murphy v. Stell*, 43 Tex. 123, the court emphasized the necessity for clear proof of the contract and required the proof for possession and improvements present in all the other cases. *Ponce v. McWhorter*, 50 Tex. 572; *Wells v. Davis*, 77 Tex. 636, 14 S. W. 237; *Harold v. Sumner*, 78 Tex. 581, 14 S. W. 995; *Ward v. Stuart*, 62 Tex. 333; *Eason v. Eason*, 61 Tex. 225; *Wright v. Bearrow* (Tex. Civ. App.) 35 S. W. 190. These and many other cases we might cite, which, though not deciding the question in terms, illustrate the extent to which our courts have gone, the restricted way in which the rule has been applied, and their reluctance to extend the broad equitable doctrine to its logical end. In *Lodge v. Leverton*, supra, Judge Moore reviewed the question at great length, and his conclusions have neither been overthrown nor assailed by any subsequent decision. In that case occurs the

following quotation from Fonblanque, emphasizing the significance of part performance toward establishing the contract: "So if it be carried into execution by one of the parties by delivering possession, and such execution is accepted by the other, he that accepted it must perform his part; for when there is performance the evidence does not lie merely upon the words, but upon the part performance, and it is unconscionable that the party who has received the advantage of the contract should be admitted to say that such contract was never made." Justice Moore, however, after reviewing the authorities, rejects the doctrine that mere part performance will authorize a decree, and holds outright that the interposition of the courts can be justified alone upon the ground of preventing fraud. It appears, however, that, instead of repudiating the necessity for part performance, he merely holds that that alone is not sufficient. As we have seen, many of the Texas cases which preceded that had followed the doctrine that mere part performance would authorize the decree, independent of whether the position of the parties had thereby been irrevocably changed. In concluding his discussion of the question Judge Moore remarks: "The propriety of enforcing such contracts by courts of equity under any circumstances has always been a mooted question, and, while it is not to be denied by us that it may be done in such cases as have heretofore been held by the courts as authorizing it, we are unwilling to extend its limits beyond the boundaries defined by them."

We cannot escape the conclusion, therefore, that the decision must be regarded as a restriction upon the English rule, rather than an enlargement of it. It is undoubtedly true that it has generally been believed by the bench and bar of the state that it is more difficult to enforce a parol contract for the sale of land under the Texas decisions than in those jurisdictions where the English rule of part performance prevails. We are aware that the broad principle of equitable estoppel, if logically extended, would include the case made by appellant's pleading. In several of the later Texas cases there are expressions broad enough in their scope to include, perhaps, the state of facts alleged. In *Bateman v. Maddox*, 86 Tex. 546, 28 S. W. 51, Justice Brown expressly reserved the question as to what amount of part performance of a parol lease of real estate for a longer time than one year would take the contract out of the statute. In *Sorrells v. Goldberg* (Tex. Civ. App.) 78 S. W. 712, it is held that possession and payment of several installments of rent will take the lease out of the statute. In *Morris v. Gaines*, 82 Tex. 268, 17 S. W. 538, Chief Justice Gaines, in applying the rule to the state of facts there involved, announced the equitable doctrine in very broad terms, but did not overrule

*Lodge v. Leverton*, supra, and declined to decide that the rule he declared was inconsistent with that case. In our opinion the doctrine actually applied in *Morris' Case* was not inconsistent with *Lodge v. Leverton*. The suit was upon an oral promise to pay the debt of another and involved a different section of the statute. Nor is *Evans v. Railway* (Tex. Civ. App.) 28 S. W. 904, cited by appellant, inconsistent with our conclusion. In that case the plaintiff by oral promise induced a railway company to build its road across his land; he agreeing to make deed to the right of way. The road was built on the faith of his promise, and the court rightly held him bound. In *Bradley v. Owsley*, 74 Tex. 71, 11 S. W. 1052, Justice Henry states the doctrine broadly, using the expression "possession, valuable improvements, or other facts making the transaction a fraud on the purchaser if not enforced"; but in that case, although there was possession, payment of purchase money and small improvements, recovery was denied. *Anderson v. Anderson* (Tex. Civ. App.) 36 S. W. 818, cited by appellant, opinion by Justice Williams is in no way inconsistent with the other Texas cases cited by us. Nor has appellant cited us to any case in which a parol transfer of an estate in lands has been enforced merely for the reason that the vendee would otherwise suffer some consequential damage independent of the land and his connection therewith by reason of his reliance upon the oral promise to convey.

Mr. Pomeroy, at section 830 of his work on Equity (volume 6), states that, independent of the doctrine of part performance, relief will be granted when the fraud of defendant had led to an irretrievable change of position, citing *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185, *Allen v. Moore*, 30 Colo. 307, 70 Pac. 682, *Gaslight Co. v. Baltimore Coal Co.*, 63 Md. 285, and *Wooldridge v. Scott*, 69 Mo. 669. In *Wooldridge's Case*, supra, there is a doubtful dictum tending to support the text. *Peek v. Peek*, supra, was a case whereby one by artifice and fraud induced a woman to marry him on his promise to convey to her certain lands and other property. The contract was upheld, the court following *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, and *Green v. Green*, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256. The court quotes from Mr. Story the expression: "In this respect it is always treated as a peculiar case standing upon its own grounds." 1 Story, Eq. Juris. § 768. *Gaslight Co. v. Baltimore Coal Co.*, supra, was a case involving a contract for the sale and delivery of chattels, and is not in point. *Allen v. Moore*, supra, is not accessible to this court. In *Dugan's Heirs v. Colville's Heirs*, 8 Tex. 126, Justice Lipscomb instanced as analogous the case of one standing by and permitting another to sell his land to one ignorant of the bystander's title. We have found no other authority

which recognizes the analogy between the two cases, and it seems to us the distinction is broad and clear. In the one case there was a contract upon which the party relied, notwithstanding the clear terms of the statute. In the other there was at least a tacit misrepresentation of an existing fact on the part of the party sought to be charged, upon which another acted to his detriment. To such a case the statute bears no relation, and specific performance is not the appropriate remedy. "By the concurrence of all the American authorities," says Mr. Warvelle in his work on Vendors, at section 767, "possession may be fairly considered as the first, and in many instances the best, of all the elements that contribute to take the case out of the statute of frauds, and coupled with payments, improvements, and other like ingredients it will rarely prove ineffectual." "To allow a mere technical possession \* \* \* capable of being proved by only select and confidential witnesses to be sufficient \* \* \* would manifestly afford an encouragement to dishonest testimony." Browne on Stat. Frauds, § 478. The same author declares the possession should be exclusive and necessarily of the specific land claimed. If one who is in possession of premises verbally contracts with the owner for a new term, his merely continuing in possession after making a new contract is not a taking of possession within the rule. Browne on Stat. Frauds, § 476.

From these considerations we conclude that, unless, the appellant's allegations may be fairly construed as averring valuable improvements, following distinct possession delivered by the grantor and taken by appellant upon the faith of the contract, his case must fail, the majority of the court being of the opinion that the loss of opportunity to secure another suitable building and the alleged consequent damage are not, independent of the others, sufficient to take the case out of the statute of frauds. With this conclusion in mind, we will further analyze the allegations of appellant with respect to the question of possession and improvements. The answer clearly discloses: That on the 10th of October, 1904, appellant was in possession of the lower story of the building under a written lease which did not expire until February 1, 1905. That the remainder of the building was occupied by other tenants of Burns, who continued to be his tenants, with their rent payable to him, until February 1, 1905, when they should begin to pay to appellant. That appellant's obligation under the new lease and the increased monthly rental did not begin until February 1, 1905. With these distinct allegations of minute facts we are of opinion that the general allegation following, that Burns on the 10th of October placed him in possession of the entire building under the terms of the five-year verbal lease, is a mere conclusion of the pleader and should not be regarded

as an allegation of fact. We have, then, a possession of a part of the building already existing and lawfully referable to the current lease. The allegations disclose that the new lease was repudiated before February 1, 1906. The improvements alleged to have been made prior to notice of repudiation were not only made during the life of the old lease, but are of value so insignificant compared to the total value of the property, and manifestly so easily compensated for by an action at law, that appellant does not seriously contend that, standing alone or coupled with the alleged possession, they would serve to uphold the equity he seeks to enforce. That the possession alleged will be referred to the current lease is a proposition upheld by the elementary authorities cited above upon the point, and finds ample support in Texas cases: *Bateman Bros. v. Maddox*, 86 Tex. 546, 26 S. W. 51; *City of San Antonio v. French*, 80 Tex. 577, 16 S. W. 440, 26 Am. St. Rep. 763. See, also, *Browne on Statute of Frauds*, § 477.

Another element, usually present where a contract of this character is insisted on, is the parting with a consideration. Nothing passed to Burns, and the contract was repudiated long before the contract became operative or anything became due. Of course, it is manifest that the tender of the monthly rental after the contract was repudiated is utterly without force in the case beyond a continuing offer to comply with the terms of the alleged contract. If prior to the tender no such equities had arisen as bound Burns to his agreement, he was free to repudiate it and refuse the tendered rent. It is clear to our minds that, unassisted by what may be termed the outlying equity growing out of the failure to procure another building, the other facts alleged are wholly inadequate to justify a decree. In this we all concur.

Justice REESE dissents upon the main proposition, and will express his views in a separate opinion.

Some other minor contentions remain to be noticed. Appellant urges two points against recovery by the bank: (1) The lease between Burns and the bank was ultra vires as to the bank, because their pleadings disclose that the bank had not leased it for the purpose of using it or any part of it for banking purposes. (2) It was neither alleged nor proven that the vice president who executed it was duly authorized to do so by the directory. To the first objection there are two answers: The allegations of the bank disclose that they leased the building in order to exchange the use of a part of it for a building suitable to their purposes, which they urgently needed and could not procure otherwise. We think this answered the requirement of the law. Second, the lease was an executed contract between Burns and the bank, to which the sovereign alone could make objection. *Russell v. Railway Co.*, 68 Tex.

652, 5 S. W. 686; *Home of Mercy v. Davidson*, 90 Tex. 529, 39 S. W. 924. It is certain that one not a party thereto could not question it. To the second it is a sufficient reply to say that the bank is now ratifying the act of its vice president by prosecuting this litigation, and it does not rest with appellant to say there was no previous authority. Back of all this is the proposition, to our minds perfectly sound, that Burns, the admitted owner, having prayed for possession of the building for the use of the bank, was entitled to recover, even if the lease to the bank had appeared to be void. The contention that the pleadings of Burns amounted to no more than a disclaimer is without merit. This is true, also, of the contention urged by appellant that because he is a defendant in possession the statute of frauds does not apply to his effort to interpose the verbal lease in defense of his possession. While the statute contains the expression, "No action shall be brought," etc., it has been held to apply equally to those who interpose an oral contract respecting lands as an affirmative defense. *Lodge v. Leverton*, supra.

Recurring, in conclusion, to the main question discussed, the majority are of the opinion that if such contracts may be enforced whenever irremediable damage results from their repudiation, and this without any acts of the parties directly touching the lands to be affected, but upon the broad ground that specific performance should follow whenever the position of the parties is thereby so changed that the remedy at law is not adequate, then the statute had as well be abrogated. It will open the door to just such mischief as vexed the world when the statute of frauds first became a law. It will make it possible for a dishonest tenant by the aid of his employees to extend his lease indefinitely and at any rental which may suit his purposes. A casual and ill-considered conversation may be converted into a grave undertaking, and one, by purposely acting on it and changing his position, may by the aid of false testimony take a man's lands for years or in fee at his own price. We do not mean to intimate that there is a hint of such design in this case. We have discussed the questions upon the theory that the facts averred are true. We speak merely of the evils which may flow from a further extension of the grounds of equitable interference in the matter of parol sales of lands. So far, the courts of the state have proceeded with caution and conservatism in dealing with the statute of frauds. In every case of specific performance there have been present those certain and reliable evidences of the contract, such as possession and valuable improvements, acts and facts in themselves unequivocal and presupposing the contract. The majority are not disposed to be the first to dispense with these valuable safeguards against fraud. We are content to follow what has been said in the better

considered opinions in this state and to refuse to extend the rule beyond the point to which it has already been carried.

We think the judgment should be affirmed, and it is so ordered.

Affirmed.

REESE, J. (dissenting). I concur in the opinion of the majority that the improvements alleged to have been made by appellant upon the property, taking into consideration the value of the five years' lease, were not sufficient to authorize a court of equity to enforce the parol contract of lease for five years. I also concur in the view that the delivery of possession of the premises, as alleged by appellant, was not sufficient. If there was, at the date of the alleged parol contract for a five years' lease beginning on February 1, 1905, a delivery of possession of the property under such contract or a tacking of such five years' lease on his then existing lease for one year, with a present delivery of possession under such contract, such delivery of possession did not alter appellant's status with reference to the property. He was already in possession under his existing lease, and entitled to such possession until the following February. I think, however, that these facts of possession and improvements are entitled to some consideration in connection with the other equities hereafter referred to. I understand the majority to hold that, while delivery of possession of the property in case of a parol sale of land or lease thereof for a longer term than five years is not of itself sufficient to take such sale or lease out of the operation of the statute of frauds, such delivery and acceptance of possession is in all cases essential to such result, and that no equities of any kind will suffice, unless there is also this essential element of a delivery and acceptance of possession upon the faith of the parol contract. In this view I do not concur. It is alleged in the pleadings of appellant that, relying upon the verbal contract for the five years' lease and Burns' agreement to have the same reduced to writing, he was induced to forego the opportunity to procure a lease of the only building in the city of Houston suitable for his business; that Burns knew of his intention to secure a lease of this building and persuaded him to make the five years' lease of the building in which he was then located instead of leasing the other. The allegations of the petition are full and specific as to the irretrievable loss to appellant in his business which he will suffer if the verbal lease from Burns is not enforced, which loss would be directly attributable to his reliance upon the verbal lease and upon Burns' promise to reduce it to writing.

The underlying principle upon which courts of equity have acted in enforcing parol agreements within the inhibition of the statute of frauds has always been that it is necessary to enforce such agreements in order that a

statute made for the purpose of preventing fraud may not be made an instrument of fraud. As said by this court in *Bringham v. Texas Co.*, 87 S. W. 893, 13 Tex. Ct. Rep. 133, the doctrine rests fundamentally upon the principle of equitable estoppel. Upon no other ground, I think, can a court of equity justify the abrogation of the statute. Upon this view it seems illogical to hold that all other elements of equitable estoppel must fail to take a case out of the operation of the statute in case of a parol sale of land or a lease thereof for more than five years, if there is no delivery of possession under the contract. In the case of *Morris v. Gaines*, 82 Tex. 258, 17 S. W. 539, it is said: "The doctrine is well established that where either party, in reliance upon the verbal promise of the other, has been induced to do or to forbear to do any act, and thereby his position has been so changed for the worse that he would be defrauded by a failure to carry out the contract, equity will enforce a performance." I think this is a sound and not too broad statement of the equitable doctrine applicable to the present case, and that courts in this state have not been called upon to apply it to the facts of any case, in which the element of delivery of possession was lacking, should not interfere with its application here. Mr. Pomeroy in his work on *Equitable Jurisprudence* says: "Independently of the doctrine of part performance, relief may be granted when the defendant has been guilty of fraud which leads to an irretrievable change of position. Accordingly, where a marriage is obtained under a fraudulent promise to convey property, the defendant may be forced to carry out his contract, although, as we have seen, marriage is not a sufficient part performance to take a case out of the statute. Likewise, where there is a fraudulent omission to have an agreement reduced to writing, which induces an irretrievable change of position, equity will grant relief." 6 Pom. Equity Juris. § 830. If it be true, as stated by Chief Justice Gill, speaking for this court in *Bringham v. Texas Co.*, supra, that "upon whatever grounds, however, parol sales of real estate have been upheld in other jurisdictions we are satisfied that in this state they are upheld on the theory of estoppel," not upon the doctrine of part performance furnishing such reliable evidence of the contract as to supply the place of the written evidence required by the statute of frauds, but upon the broader doctrine, purely equitable in cases of this kind, of estoppel, such conclusion seems to me to be inconsistent with the opinion of the court in the present case. Mr. Pomeroy, in his work on *Equity Jurisprudence*, sums up his statement of the origin, history, and nature of this doctrine by the following comprehensive definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps

have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct and has been induced thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, contract, or of remedy." 2 Pomeroy's Equity Jurisprudence, § 804. Now, when the appellant seeks to have applied to the facts of this case the doctrine of equitable estoppel upon which parol sales of real estate are upheld in this state as said in *Bringham v. Texas Co.*, and the broader doctrine announced by the Supreme Court in *Morris v. Gaines*, supra, I do not think it is a sufficient answer to say that the relief sought does not come within the limits imposed upon the application of the doctrine by the facts of adjudicated cases. A general principle, if well settled, cannot properly be so limited. That the facts of this case, as stated in the opinion of the majority of the court, bring it within the general principles of equitable estoppel, necessarily elastic in their very nature, and the doctrine stated in *Morris v. Gaines*, I think can hardly be denied, unless the principles of equity stated are to be confined to cases identical in their facts to those heretofore adjudicated.

The holding of this court in *Bringham v. Texas Company* seems to me entirely inconsistent with the holding of the majority in the present case. In passing upon the parol sale by Minter to Willis, the court says: "Upon whatever grounds, however, parol sales of real estate have been upheld in other jurisdictions, we are satisfied that in this state they are upheld on the theory of estoppel. We do not pause to discuss the point, but content ourselves with the citation of representative cases. *Wooldridge v. Hancock*, 70 Tex. 21, 6 S. W. 818; *Lodge v. Leverton*, 42 Tex. 18. The inquiry then is, was there any evidence tending to establish an estoppel as between Minter and Willis? According to the testimony of Willis he undertook to buy up the conflicting claims to the Sour Lake property. He purchased the claims of Lacy, Lacour, and the heirs of Smith, paying therefore in the aggregate about \$20,000. When he came to take possession he found Minter in charge under a deed to the whole tract. Minter had refused to recognize Mrs. Lacy's claim. While he did not regard Minter's title as paramount, and laid small stress upon it as a title, he nevertheless would not have proceeded with his plans, which involved the expenditure of large sums of money, until he could dispose of Minter. If his statement is true, he disposed of Minter's claim for a valuable consideration. That it was small may be accounted for by the state of the title generally, and the fact that Minter's right grew out of a sale under execution for costs and for a very small consideration. But with the size of the consideration moving from Willis to Minter we have nothing to do, since its adequacy to sustain the contract is not ques-

tioned. Nor are we concerned with the credibility of the witness. He so testified and the jury believed him. Therefore, although it is true that Willis would not have proceeded but for his other purchases, and his conduct was largely influenced by them, the verdict establishes the contention that he also relied on the transaction with Minter, and that but for that the progress of his plans would have been arrested and he would not have expended the large sums he did expend in improvements until he had disposed of Minter's claims by purchase or in some other way. We have, then, the ordinary elements of estoppel, and we can perceive no good reason why one who purchases several adverse claims may not avail of the defense against any one of his vendors against whom it may be appropriate under the facts. If the proposition is not sound, then a tenant in common cannot under any circumstances acquire the title of his co-tenant except by an instrument in writing. The selling co-tenant cannot in any way estop himself as against the purchasing co-tenant, because the latter has neither entered nor improved with sole reference to the purchase, and this one was asserting an exclusive right against the other." The parol sale is upheld and enforced upon the bare equities of the case arising from the fact that Willis had been led to expend large sums for improvements, which he would not have done if he had not disposed of Minter's claim by purchase. It is not claimed that possession of the property was delivered and accepted on the faith of the parol sale by Minter.

I can see no difference in principle, as a basis of equitable estoppel, between the expenditure of money by Willis on the faith of the parol sale and the large and irretrievable loss suffered by Lechenger, according to the allegations of his answer, in the loss of the opportunity to rent a suitable building for his business, directly induced by his reliance upon the parol lease. The allegations of appellant's pleadings must be taken as true, and I think they make a case for the application of the equitable doctrine referred to. I regret not to be able to concur in the views so ably expressed in the opinion of Chief Justice GILL, speaking for the majority. I think the trial court erred in sustaining exceptions to the appellant's answers, and that the judgment should be reversed and the cause remanded.

#### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. GAMMAGE.

(Court of Civil Appeals of Texas, June 16, 1906. Rehearing Refused Oct. 6, 1906.)

#### 1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—NECESSITY OF PLEADING.

The defense of contributory negligence not having been pleaded by defendant, and not being developed by plaintiff's case, is not available. [Ed. Note.—For cases in point, see vol. 37, *Cant. Dig. Negligence*, § 195.]

\*Writ of error denied by Supreme Court November 7, 1906.

## 2. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence in action for injuries to a passenger caused by the parting of cars as he was passing from one to the other, *held* insufficient to raise the question of contributory negligence, on the ground that he was warned.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by E. D. Gammage against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff. Defendant appeals. Affirmed.

E. B. Perkins and Glass, Estes & King, for appellant. Hart, Mahaffey & Thomas, for appellee.

TALBOT, J. This is a suit by appellee against appellant to recover damages for personal injuries alleged to have been sustained by him through the negligence of appellant's servants. Appellant pleaded a general denial. A jury trial resulted in a verdict and judgment for appellee in the sum of \$750, from which appellant has appealed.

On August 27, 1904, appellee was in the city of Texarkana, Tex., and purchased of appellant a ticket entitling him to be carried as a passenger over its line of railway from that place to Redwater, Tex. When appellant's passenger train going to Redwater arrived at Texarkana, appellee boarded it, and took his seat in one of the coaches thereof. This train was made up of coaches destined to different points on appellant's road, and, soon after appellee had taken his seat, the conductor in charge of said train directed all passengers going to Redwater to go into the second coach. He said to appellee, "You get into the second car." As appellee was passing from the car he was in to the car into which he was directed by the conductor to go, and as he was in the act of stepping from the platform of the one car to the other, the cars were uncoupled by appellant's employes, and separated, and appellee was thereby caused to fall between the cars to the ground, and, as a result thereof, was seriously injured.

Appellant requested the court, by separate special charges, to instruct the jury, in substance: First, that if they should find that appellee fell between the cars, as they were pulled apart, at the time and in the manner alleged by him, and further found that, as he started to pass from one to the other of said cars, he was warned or signaled back, and that he failed to heed same, and, after such warning or signaling, of his own accord, attempted to pass from the car he was in to the car in front of him, and fell, to find for appellant; second, that if they should find that appellee fell between the cars as they were pulled apart, and further found that as he started to pass from one to the other, an employe of appellant uncoupling said cars warned or signaled him not to attempt to cross from the car he was on to the one in front of him, and if they

believed that a person of ordinary care and prudence would not have attempted to cross from the one to the other under the circumstances, then return a verdict in favor of appellant. Both of these charges were refused, and the court's action is assigned as error. It seems to be settled by the decisions of this state that if the defendant relies upon contributory negligence not developed by the plaintiff's case, he must, in order to make such defense available, plead it. Such plea was not filed in this case, and the issue arising neither on appellee's pleadings, nor the evidence offered by him, the special charges were correctly refused. *Murry v. Railway Co.*, 73 Tex. 6, 11 S. W. 125; *Railway Co. v. Watson*, 72 Tex. 633, 10 S. W. 731; *Railway Co. v. Shieder*, 88 Tex. 153, 30 S. W. 902, 23 L. R. A. 538; *Oll Co. v. Jarrard*, 91 Tex. 290, 42 S. W. 959; *Railway Co. v. Johnson*, 90 Tex. 304, 38 S. W. 520; *Railway Co. v. Jamison*, 12 Tex. Civ. App. 689, 34 S. W. 674. Besides, we are of the opinion the evidence was insufficient to raise the issues sought to be submitted. In order to have found for the appellant under the requested instructions, the jury would have been required to find that such warning as therein referred to was given, that appellee was the man to whom it was given, and that he saw or heard it, and willfully disregarded the same. No witness testified to these facts. The switchman of appellant, who must have given the warning claimed, if given at all, disclaimed any knowledge whatever of the accident resulting in appellee's injuries, and hence his testimony, while it is not so expressed, amounts to denial that such warning was given. The testimony of the witness Cullen, upon which the charges were probably predicated, is entirely too meager and lacking in probative force to justify a finding that appellee was warned as suggested. He does not swear positively that a warning was given. He does not identify appellee as the man he saw step from the car, or to whom he supposed warning was given. Appellee was injured at night on August 27, 1904, and this witness could not tell whether the incident of the man stepping from the car which he witnessed, occurred in the daytime or at night, and could be no more definite as to the date of its occurrence than that it happened some time in the summer of that year. He says he saw the switchman motioning to some one, but did not know whether he was motioning to the man he saw step off the car or not; that the switchman uncoupled the cars, gave a signal to the engineer, the cars were pulled apart and a man at that instant stepped off. He did not hear the switchman say anything to the man, and whatever motion he saw, and the stepping of the man from the car, occurred at about the same instant. When considered as a whole, we regard the testimony of this witness as entirely too vague and indefinite to authorize a finding that ap-

pellee was notified that the cars were about to be separated and warned not to attempt a passage from the one to the other. Furthermore, the first of the charges referred to is probably erroneous, in that the jury were thereby instructed, in effect, that, if appellee was guilty of the acts therein enumerated, the same constituted contributory negligence per se.

The other assignments of error complain that the court erred in overruling appellant's motion for a new trial, because the evidence was insufficient to support the verdict, and the verdict was excessive. These assignments are without merit, and will be overruled. The evidence, we think, is amply sufficient to show that appellee was injured through the negligence of appellant's servants, and has sustained damages in the amount awarded him by the verdict of the jury.

The judgment of the court below is affirmed.

#### DUPREE & McCUTCHAN v. TEXAS & P. RY. CO. et al.

(Court of Civil Appeals of Texas. June 30, 1906. Rehearing Denied Oct. 3, 1906.)

##### 1. EVIDENCE—OPINION OF WITNESS.

A witness' answer to a question as to why cattle remained in the pens at a certain place for the length of time they did, that he did not know, but presumed that they were waiting for an early stock train the next morning, on which they were taken out, was improperly admitted, being the opinion of the witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2149-2185.]

##### 2. TRIAL—INSTRUCTIONS—ISSUES NOT RAISED BY EVIDENCE.

In an action for damages to cattle in transportation, where the evidence was insufficient to raise an issue that the cattle were weak and needed to be unloaded to recuperate, an instruction submitting such issue was erroneous.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 597.]

##### 3. SAME—UNDUE PROMINENCE TO PARTICULAR MATTERS.

In an action for damages for delay in the transportation of cattle, an instruction singling out certain facts and stating that the jury could consider them in determining what was a reasonable time for the shipment of the cattle was erroneous in giving too great emphasis to the particular facts.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 577-581.]

##### 4. SAME—MISLEADING INSTRUCTIONS.

An instruction stating that the jury could consider the other freight being handled over the road at the same time in determining whether the cattle were transported in a reasonable time was misleading, where there was no evidence as to the amount of freight being shipped at the same time.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 569-576, 597.]

Appeal from Dallas County Court; H. F. Lierley, Judge.

Action by Dupree & McCutchan against the Texas & Pacific Railway Company and another for damages in the transportation of

stock. From a judgment for defendants, the plaintiffs appeal. Reversed.

C. M. Templeton, for appellants. Liake & Henry and Louis Wilson, for appellees.

BOOKHOUT, J. This suit was originally instituted in the justice court of precinct No. 1, Dallas county, Tex., by the appellants, Dupree & McCutchan, against the Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company (called in this opinion "Iron Mountain Railway Company"), for damages in the sum of \$146.82 on account of delay, shrinkage, rough handling, etc., in the transportation by appellees for appellants of 93 grown cattle and 7 calves from Benbrook, Tex., to East St. Louis, Ill., on or about July 19, 1902. In the trial in the justice court the plaintiffs were awarded a judgment against both defendants for \$100, and the Texas & Pacific Railway Company was awarded a judgment over against its co-defendant, the "Iron Mountain Railway Company," for the sum of \$100, or so much as it might have to pay to the plaintiffs upon said judgment. The defendant the "Iron Mountain Railway Company" appealed from this judgment to the county court of Dallas county, Tex. Upon the trial in the county court there was a verdict and judgment in favor of the plaintiffs and against each of the defendants for the sum of \$8.25, making a total of \$16.50. Plaintiffs appealed.

On the trial in the county court the defendant "Iron Mountain Railway Company," over plaintiffs' objection, read in evidence the following question and answer from the deposition of its witness Geo. W. Denison: "What is the reason of their [meaning the cattle] remaining the length of time they did in the pens of Little Rock? What objection did the shipper make to this?" "I do not know why the cattle remained in the pens at Ft. Smith Crossing the length of time they did. I presume, however, that they were waiting for the early stock train the next morning, on which they were taken out. The shipper made no objection to the cattle remaining there as they did." The answer of the witness as to why the cattle remained in the pens at Ft. Smith Crossing the length of time they did was only the opinion and conclusion of the witness, and the appellants' objection to the same based on that ground should have been sustained.

The following paragraph of the court's charge is assigned as error: "If you find and believe from the evidence that the cattle were weak and needed to be unloaded and held in the pens the length of time they were held at the points and places held, to recuperate the said cattle, then you are told that it was the duty of the defendants to so unload and hold said cattle in the pens such time as was reasonably necessary to recuperate them, and the defendants would not be liable for such delay, if any there was." The evidence was in-

sufficient to raise the issue that the cattle were weak and needed to be unloaded and held to recuperate. This charge submitted an issue not raised by the evidence, and was error. *Railway v. Gilmore*, 62 Tex. 391.

In the third paragraph of the charge the court instructed the jury as follows: "In passing upon the question of delay in the shipment and transportation of the shipment, you are instructed that the duty of the defendants was to use reasonable diligence to transport the shipment of the plaintiffs, considering all the facts and circumstances, in a reasonable time, over their respective lines of railroad; and in determining what was a reasonable time you will consider the distance the shipment had to be carried by each defendant, the size of the shipment, the other freight being handled over the railroad at the same time, the necessity of the trains stopping to secure coal, water, and for other purposes, and the facts and circumstances surrounding the shipment." This charge singled out certain facts and circumstances, some of which were shown in evidence, and told the jury that they could consider the same in determining what was a reasonable time for the shipment of the cattle. This charge gave too much emphasis to the particular facts and circumstances referred to, and was error. *Railway v. Kutac*, 76 Tex. 478, 13 S. W. 327; *Medlin v. Wilkins*, 60 Tex. 415; *Railway v. Taylor*, 5 Tex. Civ. App. 668, 24 S. W. 975. It told the jury that they could consider "the other freight being handled over the railroad at the same time" in determining whether the cattle were transported in a reasonable time. There was no evidence as to the extent or amount of the other freight shipped over the railroad at the time appellants' cattle were shipped, and in this respect it was misleading. *Railway v. Harriett*, 80 Tex. 83, 84, 15 S. W. 556.

We find no other reversible error in the record. For the errors pointed out, the judgment is reversed, and the cause remanded.

**TRAMMELL v. ULLMAN, LEWIS & CO.\***  
(Court of Civil Appeals of Texas, June 16, 1906. Rehearing Denied Oct. 4, 1906.)

**1. GARNISHMENT — JUDGMENT AGAINST GARNISHEE—VACATION—EQUITY SUIT.**

Though a court of chancery has power to set aside a judgment duly rendered against a garnishee and grant a new trial of the issue of the garnishee's liability, it will only exercise such jurisdiction on facts showing the clearest and strongest reason for its interposition.

**2. SAME—NEGLIGENCE.**

Where a garnishee permitted judgment to be erroneously rendered on his answer, as a result of his inexcusable neglect, and a bill in equity to set aside such judgment failed to allege any excuse for complainant's failure to pursue his legal remedy by a motion for new trial during the term, or by appeal or writ of error, the bill was demurrable.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 360.]

\*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

**3. SAME—LIABILITY OF GARNISHEE—ANSWER.**

Where a garnishee answered, fully denying indebtedness to the defendant, but alleged that he had deposited \$800 in a bank, out of which an unascertained indebtedness from the garnishee to the defendant was to be paid on a settlement of their accounts, and that before the settlement the bank suspended payment, etc., plaintiff in the garnishment proceeding was not entitled to judgment on the answer.

Appeal from Galveston County Court; Lewis Fisher, Judge.

Suit by H. L. Trammell against Ullman, Lewis & Co. From a decree dismissing a bill, plaintiff appeals. Affirmed.

Geo. W. Graves, for appellant. Hunt & Myer, for appellees.

REESE, J. Ullman, Lewis & Co. being judgment creditors of T. L. Larkin, who owed them \$513.76 for which they had obtained judgment in the county court of Galveston county, sued out a writ of garnishment in statutory form against H. L. Trammell. The writ of garnishment having been duly served upon Trammell he made answer thereto as follows: "I am unable to say at the present time in what amount I am indebted to T. L. Larkin, nor what I was indebted to the said Larkin when the writ of garnishment in this suit was served upon me, for the reason hereinafter set out. I have no effects of the said T. L. Larkin in my possession, nor had I any effects of the said T. L. Larkin in my possession when the said writ was served. I know of no other persons who are indebted to the said T. L. Larkin or who have effects belonging to the said Larkin in their possession, except Citizens National Bank of Beaumont, Tex., which has in its possession about \$800, deposited in said bank by me on the 22d day of July, 1903, with the intention of turning said amount over to Larkin when we should have a settlement, but before we, the said Larkin and myself, had a settlement the said bank suspended payment and is now in the hands of a receiver, and what per cent. said bank will pay to creditors on their deposits I am unable to say, but Larkin will lose whatever part of said amount that said bank fails to repay to me." From certain allegations in the petition in this case it is to be inferred that Trammell was at the time a nonresident of Galveston county and made answer under the provisions of the statute with regard to garnishment proceedings against nonresidents, but it is not affirmatively so stated, nor does it appear by positive averment or proof that such was the case. The answer of the garnishee appears to have been made September 28, 1903. On October 27, 1903, judgment was rendered by the said county court which, after reciting the existence of judgment against Larkin and the issuance and service of the writ of garnishment proceeds: "And it further appearing to the court from the evidence and from the answer of said H. L. Trammell, garnishee, that the said H. L. Trammell is in-



debted to the said T. L. Larkin, and was when said writ was served upon him, in the sum of \$800.00: It is therefore considered, ordered, adjudged, and decreed by the court that plaintiff M. Ullman, who trades and does business under the firm name and style of 'Ullman, Lewis & Co.,' do have and recover of and from the defendant H. L. Trammell the sum of five hundred and thirteen and  $\frac{70}{100}$  (\$513.76) dollars, together with interest thereon from this day until paid at the date of 10 per cent. per annum, and all costs herein incurred, for which said plaintiff may have his execution or executions, as many and as often as may be necessary, against the said H. L. Trammell; and further that the amount or amounts paid by or received from said H. L. Trammell upon this judgment shall be a credit upon his indebtedness, as aforesaid, to the said T. L. Larkin, and shall operate as payment and satisfaction of said indebtedness pro tanto." On December 11, 1903, Trammell instituted this suit against Ullman, Lewis & Co. in the said court to set aside and vacate the aforesaid judgment against him and for a new trial. Plaintiff also, at the time of filing the petition, applied for and obtained a writ of injunction from the county judge restraining the said Ullman, Lewis & Co., from further proceedings to enforce said judgment until the final determination of this case. Defendant demurred generally to the petition, and also, by special exceptions, objected that it appeared from the allegations of the petition that the judgment sought to be vacated was not rendered through any fraud on the part of defendant, nor by accident, mistake, or error due to the acts of defendant, but was due to the negligence of plaintiff and that plaintiff was not prevented from making his defenses, if any he had, by fraud, accident, or acts of defendant. It is further objected by special exception that by the petition plaintiff seeks to set aside the judgment upon the ground that it was rendered upon evidence which it was alleged would not legally authorize the judgment, though the answer of the garnishee disclosed an indebtedness to Larkin in excess of defendant's debt against Larkin, and because it appears that plaintiff has failed to make an answer which would have protected him from said judgment, and it is not alleged that his failure to make such answer was caused by the fraud of defendant, and further that the petition shows that plaintiff has not availed himself of his remedy at law of appeal or writ of error to set aside said judgment. Upon the hearing the general demurrer and several special exceptions were sustained and the cause dismissed, from which judgment Trammell prosecutes this appeal.

The case as presented is a motion or petition for new trial made after the term at which the judgment was rendered, and is a purely equitable proceeding. The principles which govern such proceedings are well settled in this state, and are thus stated in

the opinion of the Supreme Court in *Nevins v. McKee*, 81 Tex. 413, from which we quote at length: "The object of the present suit was to set aside a judgment duly rendered in a garnishment proceedings against Nevins, to retry the issue between the parties determined in that cause, and have a decision made as to whether the plaintiff in that judgment, or another party who claimed to own the note, was entitled to recover against the garnishee. In fact it was an attempt by petition, filed after the adjournment of the term of the court at which the judgment was rendered, to obtain a new trial of the cause which had resulted in such judgment. A court of chancery has power to grant such relief, but it will not do so except upon facts which show the clearest and strongest reasons for its interposition. It was held by this court, in *Johnson v. Templeton*, 60 Tex. 238, that it is not sufficient to show that injustice as been done, or that the plaintiff has a good defense which he was prevented from making upon the trial. But he must further show that he has not resorted to chancery because of any inattention or negligence on his part. He must show a clear case of diligence as well as of merit; that he has a good defense which he was prevented from making by fraud, accident, or the acts of the opposite party, wholly unmingled with any fault or negligence on his part. Here it is not pretended that the appellant was deprived of his defense by the fraud of any one, or by any act chargeable to the plaintiff in garnishment. If his failure to appear and defend the action can be said to have been due to accident, McKee had nothing to do with bringing it about, but it was owing solely to the negligence of Nevins or of the attorney to whom he intrusted the defense of the cause." *Taylor, Knapp & Co. v. Fore*, 42 Tex. 253; *Overton v. Blum*, 50 Tex. 423; *Johnson v. Templeton*, 60 Tex. 239; *Harn v. Phelps*, 65 Tex. 597.

Appellant states in his petition, very fully, that he is not indebted to Larkin and was not at the time of the service of the writ of garnishment, and thus shows what would have been a sufficient defense to the proceeding against him as garnishee, but it appears that after filing the answer herein set out he paid no further attention to the proceeding, but contented himself with merely filing the answer. It does not appear to us that the answer alone authorized the judgment against appellant, but upon the face of the judgment it appears to have been rendered upon "the evidence and from the answer" of the garnishee. The petition does not enlighten us further as to the pleadings or evidence in the case in which the judgment was rendered. The only excuse attempted to be given for the failure of appellant to give further attention to the case in which it was sought to charge him with so large a sum, if indeed, it be appellant's intention to urge this as an excuse, is "that at the date

of the said answer in garnishment and said judgment and until after the adjournment of the term of said court at which said judgment was rendered, plaintiff's attorney, who had charge of all of his legal business and particularly his business with said Larkin, was sick in bed and unable to represent plaintiff." It may be freely conceded that it was error in the court to render judgment upon the uncontroverted answer of appellant to the garnishment alone, but it is not alleged that this was done, and if it had been, practically no excuse is shown for appellant's failure to pursue the plain legal remedy to have such error corrected by motion for new trial during the term, or by appeal or writ of error. It is true that it is alleged that appellant was ignorant that the judgment had been rendered until after the adjournment of the term, but this very ignorance was the result of his inexcusable neglect to give that attention to the suit, in the protection of his interest, which the law required of him. It is not pretended that appellees, by any act of theirs, induced the belief from which appellant seems to have acted that his answer would effectually prevent any judgment against him. The court had jurisdiction of the subject-matter and of the parties. The most that can be claimed from the allegations of the petition is that the judgment was probably erroneous, and that he has now a good defense to the demand against him. This is not sufficient to entitle him to set aside the judgment by this proceeding and have new trial of the cause.

The trial court did not err in sustaining the general demurrer and special exceptions.

The judgment of the court below is affirmed.

Affirmed.

**PARKER et ux. v. W. L. MOODY & CO.**  
(Court of Civil Appeals of Texas, June 20, 1906. On Rehearing, Oct. 10, 1906.)

**1. JUDGMENT—COLLATERAL ATTACK.**

In trespass to try title, an attack on a judgment, under which the land was sold on execution, is collateral, the action in which the judgment was rendered being in a different court, though between the same parties.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 965.]

**2. HOMESTEADS—RURAL AND URBAN—EXEMPTION.**

A homestead must be wholly urban or rural, so that one residing on a lot in a town cannot claim exempt as part thereof a disconnected tract outside the town.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 100.]

Appeal from District Court, Leon County; Gordon Boone, Judge.

Action by W. L. Moody & Co. against J. P. Parker and wife. From an adverse judgment, defendants appeal. Affirmed.

Boyd, Edwards & Boyd and Wm. Watson, for appellants. B. D. Dashiell and S. W. Dean, for appellees.

**NEILL, J.** This is an action of trespass to try title, brought by W. L. Moody & Co., appellees, against J. P. Parker and wife, appellants, to recover a certain tract of land containing about 20 acres situated in Leon county. The answer of defendants consisted of a plea of not guilty. The case was tried without a jury, and judgment rendered in favor of appellees for the land in controversy.

Conclusions of fact: On July 9, 1903, appellees recovered a judgment in the county court of Leon county against the appellant for \$390.49, with 6 per cent. interest thereon from its date. From this judgment an appeal was prosecuted on a cost bond, without supersedeas to the Court of Civil Appeals, by which court it was affirmed on December 3, 1903. An execution was issued on the judgment on June 7, 1904, by virtue of which the property in controversy was duly levied on as the property of Parker and sold by the sheriff to appellees, and deed made by him to them on July 8, 1904. The real issue in the case is whether the property was a part of appellants' homestead. It is situated in the country, with a fruit orchard on it, and occupied by tenants who used it for purposes of agriculture and horticulture; appellant J. P. Parker getting a part of the crop grown on it, which he uses at home and sells on the market. Appellants, nor any member of their family, ever lived on the land, or used or occupied it as a home. But their residence, in which they lived, was upon a two-acre lot situated within the limits of the town of Buffalo. This the trial judge found as a fact, and there is evidence tending to support such a finding. Besides the land in controversy, appellants owned several other tracts of land, in all not exceeding 200 acres, in the country which he rented and used for agriculture purposes. Parker was not a farmer, but, at the time of the levy and sale, was, and had been for some time prior thereto, a traveling salesman or drummer for a drug company. Immediately prior to the time he commenced to pursue the vocation of drummer he was manager of the J. P. Parker Company, which was engaged in a general mercantile business in the town of Buffalo, Tex., and had been conducting such business for three or four years. During that time he lived with his family on the two-acre lot where he has continued to reside ever since. He also had and has a land-agency business in the town during the same time, his office where he conducted and conducts said business being in the same town. From these facts we conclude that the land in controversy was not, when sold under the execution, and never had been, appellants' homestead or any part thereof; but that their homestead is, and was for years prior to such sale, upon the two-acre lot where they have their domicile and reside and resided with their family.

Conclusions of law: While the judgment under which the land was sold was dormant, the sale was not void and could not be col-

laterally attacked. This suit, although between the same parties as the one in which the judgment was rendered, upon which the execution issued under which the land was sold, is a collateral attack on such judgment, it being in a different court from that wherein such judgment was rendered. *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Bogness v. Howard*, 40 Tex. 153. The land, not being appellants' homestead or any part thereof, its sale under the execution and the sheriff's deed thereto to the appellees vested title thereto in them.

There is no error in the judgment, and it is affirmed.

#### On Motion for Rehearing.

The evidence being sufficient to warrant the conclusion of the trial court that the two-acre lot upon which appellants resided when the land in controversy was levied on and sold was within the town of Buffalo, and it being undisputed that the premises sued for are situated outside of the town, the principle, that a rural homestead may consist of several disconnected parcels of land, not exceeding 200 acres, has no application in this case, and renders it immaterial whether Mr. Parker used the land in dispute in connection with his homestead on the two acres or not, or what his business or employment was. One's homestead must be either rural or urban, and cannot be partly of one and of the other.

The motion is overruled.

**WATERHOUSE et al. v. CORBETT et al.\***  
(Court of Civil Appeals of Texas. June 25, 1906. Rehearing Denied Oct. 4, 1906.)

#### 1. PUBLIC LANDS—CONFLICTING SURVEYS—PRIORITY.

Where the field notes of a survey actually made in 1840 were recorded in the surveyor's records of the county in which the land was located, but the patent was not issued until 1846, when the certificate and field notes were returned to the land office, such patent was superior to another issued in 1845 on a conflicting and overlapping survey made in 1844, as the record of the field notes was notice to subsequent locators.

#### 2. EVIDENCE—OFFICIAL ACTION—PRESUMPTION AS TO DISCHARGE OF DUTIES

Where a survey was actually made, and the field notes were recorded by the surveyor, it being his duty to return the certificate and field notes to the land office, and it appearing that a patent was issued by the proper authorities, it must be presumed that his action was regular.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 105.]

#### 3. PUBLIC LANDS—LOCATION OF CERTIFICATES—RETURN TO LAND OFFICE.

Where a survey was recorded in 1840, after Act Feb. 5, 1840 (Sayles' Early Laws, art. 838), requiring field notes to be returned to the land office within a year, but the field notes were not returned until 1846, when the patent was issued, another patent issued in 1845 on a survey in 1844 cannot be declared superior because of unreasonable delay in returning the field notes of the earlier survey, in view of Act Dec., 1840 (Sayles' Early Laws, art. 848), and subsequent

acts extending the time for the return of field notes.

#### 4. SAME—SUBSEQUENT LOCATORS—NOTICE.

Actual knowledge by a subsequent locator of the previous location by another precludes him from deriving any advantage from the fact that the surveyor's office contained no evidence thereof at the date of the subsequent location.

Error from District Court, Harris County; Norman G. Kittrell, Judge.

Trespass to try title by Alfred Waterhouse against W. C. Corbett and others. From a judgment for defendants, the plaintiff and certain impleaded parties bring a writ of error. Affirmed.

Ford, Stone & Ford, for plaintiffs in error. Ross & Wood and Hunt & Myer, for defendants in error.

GILL, C. J. Alfred Waterhouse brought this suit in the form of an action of trespass to try title for the recovery of the Bowman league in Harris county. He made defendants W. C. Corbett, Julius Leider, Fred Mueller, Herman Mueller, C. Cain, August Baatz, R. S. McClaren, Alice B. and Sterling Meyer, O. C. Perrin, and R. G. Tyler. Sue E. Baker was impleaded as warrantor. J. W. and E. Miller were impleaded on the cross-action of Cain, Meyer, Perrin, and Tyler. Leider, the Muellers, Baatz, McClaren, and Corbett were eliminated from this action by disclaimer or otherwise. The defendants Meyer pleaded not guilty as to a specific part of the land sued for and disclaimed as to the remainder. They also asked for an affirmative judgment as to the land claimed by them, both against the plaintiffs and the two Muellers. Perrin and Tyler filed similar pleas. Upon a trial to the court they had judgment, and Waterhouse and J. W. and E. Miller have prosecuted this writ of error.

Inasmuch as the entire judgment is not assailed, it is unnecessary to set out more minutely the nature of the judgment or the intricate history of the suit in the matter of parties. The appellees have title to the land adjudged to them, if the claim under the Francis survey is superior to the Bowman, under which the claims of the other parties are predicated. The Francis certificate for two-thirds of a league was issued on the 25th day of December, 1838, and the survey thereon was made in Harris county, Tex., on April 11, 1840. The land in question is included in the boundaries of that survey. The Bowman two-thirds of a league was located in Harris county pursuant to a judgment in favor of Bowman against the republic of Texas of date May 23, 1842, and the survey was made August 16, 1844. After the Francis survey was made its field notes were duly recorded in volume A, the earliest volume of the surveyor's records of Harris county. The record was made in 1840, shortly after the survey. The evidence is silent as to whether the Francis certificate was left in the office of the surveyor. The Bowman

\*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

certificate and field notes were returned to the land office February 19, 1845, and the patent issued March 15, 1845. The certificate and field notes of the Francis were not returned to the land office until July 14, 1846, and the patent issued July 17, 1846. The trial court found that the Bowman survey overlapped and conflicted with the Francis to the extent of the land in controversy, and we approve the finding. We here adopt generally the fact findings of the trial court. They are lengthy, cover many points not necessary to the decision of the questions raised upon this appeal, and we do not consider it necessary to embody them at length in this opinion. It is enough to state that they disclose facts which show that both the Francis and Bowman certificates and surveys were regular and that the patents were properly issued.

The claimants under each survey connected themselves by mesne conveyances with the original grantees. Appellants claim the land involved in the conflict between the two surveys on the ground that Bowman was an innocent locator; their proposition being in effect that, as the Francis survey was made in 1840 and the field notes not returned to the land office until 1846, it devolved upon the claimants under Francis to show, not only that the field notes were duly recorded in the surveyor's office, but that the certificate was also left on file in that office, a fact which the evidence does not affirmatively show. In support of the proposition they cite *Wyllie v. Wynne*, 26 Tex. 42, *Lewis v. Durst*, 10 Tex. 398, *Woods v. Durrett*, 28 Tex. 430, and other cases to like effect. Appellants have fallen into the error of confusing a file requesting a survey of certain lands with a survey actually made and field notes recorded by the surveyor. The record of the field notes of a survey actually made is authorized by law and is notice to subsequent locators. *Timon v. Whitehead*, 58 Tex. 295; *Morris v. Brinlee*, 14 Tex. 285. It was the duty of the surveyor to have possession of the certificate before the survey was made, and to retain it and return it, together with the field notes, to the general land office. The evidence being silent upon the point, and his acts being duly followed by the issuance of a patent by the constituted authorities, the presumption is that his action was regular.

Another proposition advanced by the appellants is that, where no time is fixed by law for the return of field notes to the general land office, they should be returned within a reasonable time; otherwise, a subsequent locator who promptly complies with the law will obtain the superior right. It is contended that under this proposition the Bowman claim is superior, because the six years which elapsed between the date of the Fran-

cis survey and the return of the field notes to the land office was an unreasonable delay. In 1840 and prior to the making of the Francis survey an act was passed requiring the return of field notes within one year. Act Feb. 5, 1840; *Sayles' Early Laws*, art. 838. This is the first law fixing a time for the return of field notes. After that date relief acts were passed in December, 1840 (*Sayles' Early Laws*, art. 848), November 27, 1841 (*Laws* 1841, p. 5; *Sayles' Early Laws*, art. 1120), December 27, 1842 (*Laws* 1842-43, p. 5; *Sayles' Early Laws*, art. 1237), June 26, 1845 (*Laws Ex. Sess.* 1845, p. 13; *Sayles' Early Laws*, art. 1542), and December 31, 1847 (*Laws* 1847-48, p. 4; *Sayles' Early Laws*, art. 1758); and others subsequently passed extended the time for the return of field notes. In the absence of a statute fixing the time, the courts might with propriety require the field notes to be returned within a reasonable time; but, in view of the relief acts cited, there is no room for construction or judicial interference. This principle was enunciated by the court in *Wyllie v. Wynne*, supra, in discussing and overruling *Williams v. Craig*, 10 Tex. 437. *Magee v. Chadoin*, 30 Tex. 650, recognizes the force of the acts extending the time of returning field notes to the land office. In *Wyllie's Case*, supra, the distinction is also observed between a mere filing of the certificate with the surveyor with request to make a survey and a survey actually made and field notes recorded. The case of *Lewis v. Durst* is also distinguished from such as the one under consideration. It was also held that the certificate and field notes were constructive notice to subsequent locators that the land had been appropriated.

But there is another and broader reason in this case why Bowman cannot prevail as an innocent locator. It affirmatively appears that the Francis location was not abandoned, and it does not appear that Bowman acted upon that theory. On the other hand the two surveyors merely conflict as to boundaries, and the junior survey seems to have been made in recognition of the senior. All the early maps and plats of the land office regarding these surveys disclose the existence of each and show no conflict. Actual knowledge on the part of a subsequent locator of the previous location by another precludes him from deriving any advantage from the fact that the surveyor's office contained no evidence thereof at the date of the subsequent location. *Morris v. Byers*, 14 Tex. 277.

We do not deem it necessary to discuss the remaining assignments in detail. They are in our opinion without merit. The judgment of the trial court is affirmed.

**Affirmed.**

## ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. KENNEDY.\*

(Court of Civil Appeals of Texas, June 30, 1906. Rehearing Denied Oct. 6, 1906.)

## 1. CARRIERS—INJURY TO PASSENGER—PLEADING—SUFFICIENCY.

In an action by a passenger for injuries sustained in alighting from a train, a petition alleging that defendant frequently moved its trains at such station while passengers were alighting to get the engine in position to take water, which custom was unknown to plaintiff; that the distance from the step to the ground, which was rocky and uneven, was 25 or 30 inches and that defendant neglected to have a stool in position; that the conductor saw plaintiff descending, knew that she needed assistance, that no stool was in position on which she could alight, and neglected to give her assistance, and that by reason of either or all the acts of negligence of defendants, its agents and servants, as alleged plaintiff sustained the injuries complained of, was sufficient as against a demurrer.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1273, 1275½.]

## 2. SAME.

The petition was not insufficient because the facts alleged were immaterial and irrelevant, and no facts were stated showing any failure of the conductor to plaintiff, or showing any liability of defendant to plaintiff on account of any failure of duty by the conductor.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1273, 1275½.]

## 3. SAME—INSTRUCTIONS.

In an action by a passenger for injuries sustained in alighting because of the alleged movement of the train, where it appeared that plaintiff was carrying a handbox and holding her skirts; that when she reached the last step the train suddenly moved back throwing her backward and then moved forward, causing plaintiff to jump to the platform about three feet, and that the conductor did nothing to assist her, except to put his hand on her arm and give her a slight push, an instruction predicated defendant's liability on the negligence of its servants in failing to assist her to alight, if there was such failure, and if by reason thereof she was caused to fall, was not erroneous as authorizing a verdict for plaintiff, if she was caused to stumble for some other reason than a movement of the train as she alleged, and if the conductor failed to assist her in alighting from the train.

## 4. DEPOSITIONS—SUPPRESSION—IRREGULARITIES IN TAKING.

Where the depositions of witnesses were taken under a single commission, each signing at the conclusion of his answers to the interrogatories, and the notary affixing to the answers of each a separate caption and certificate, showing that they were sworn to before him by each witness respectively, a motion to quash was properly overruled.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 166.]

## 5. SAME—DEFECTS IN COMMISSION.

Where the style of the case appeared in the body of the commission and it was attested by the clerk with his seal, that it was not indorsed with the number and style of the case, and marked issued, followed by the official signature of the officer issuing it, was not cause for quashing the deposition.

## 6. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS—WITNESSES—COMPETENCY.

Where defendant objected to a witness because it was not shown that he comprehended the nature of an oath, or that he had sufficient intelligence to qualify him to testify, and the witness was permitted to testify and was cross-examined by defendant, and the court then sus-

tained defendant's motion withdrawing the evidence from the jury because it appeared that the witness was not competent to testify, defendant had no ground to complain.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 977.]

## 7. EVIDENCE—BEST AND SECONDARY.

Evidence by plaintiff's mother that plaintiff had been offered a certain sum per week, was properly excluded, where the offer was made by letter, the letter being the best evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 558.]

## 8. SAME—HEARSAY.

Evidence by plaintiff's mother that plaintiff was offered certain employment by telephone before her injury, was admissible over objection that it was hearsay, where the witness was called up by telephone by the person making the offer.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1177.]

## 9. CARRIERS—INJURY TO PASSENGER—EVIDENCE—SUFFICIENCY.

In an action by a passenger for injuries sustained in alighting from the train, the evidence considered and held to sustain a finding that the injury was the result of defendant's negligence in causing its train to suddenly move while plaintiff was attempting to alight, without notice to her, and in the failure of the conductor to assist her in alighting after he saw that she needed assistance; and that plaintiff was not negligent.

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by V. G. Kennedy against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

V. G. Kennedy brought this suit against the St. Louis Southwestern Railway Company of Texas to recover damages on account of injuries alleged to have been received by her as she was alighting from one of defendant's trains at Greenville, Tex., she being a passenger thereon. It was averred in the petition that as she was coming down the steps of the coach she was in, there was a sudden and unexpected movement of the train, which caused her to lose her balance and to jump or fall to the ground, and it was charged that the operatives of the train were negligent in causing such movement. It was further charged that the conductor, who was at the steps assisting passengers to alight, was negligent in that he failed to render her proper assistance. The defendant urged a general demurrer and a number of special exceptions to the petition, which were overruled. The defendant also interposed the general issue and the defense of negligence on the part of the plaintiff in failing to use proper care as she was alighting from the train and in failing to use proper care in having her injuries treated and to relieve herself from the effects thereof. There was a trial by jury, and a verdict and judgment for the plaintiff for \$8,000. Defendant appealed.

E. B. Perkins and Templeton, Crosby & Dinsmore, for appellant. Evans & Elder, for appellee.

\*Writ of error denied by Supreme Court.

BOOKHOUT, J. (after stating the facts). The assignments, numbered consecutively from 1 to 10 inclusive, complain of the court's action in overruling a general demurrer and certain special exceptions to plaintiff's petition. The petition alleged in substance that on March 6, 1904, the appellant was a common carrier of passengers for hire; that plaintiff was a passenger on one of the defendant's trains from Wylie to Greenville; that it was the duty of the defendant to have stopped its train a reasonable length of time to have allowed plaintiff to alight with safety; the duty of the agents and servants of defendant to keep the train standing still and not to move it while passengers are alighting; the duty of defendant to furnish a reasonably safe place or platform and means, and appliances to enable passengers to alight with safety; that defendant had in use a goose neck where the engine pulling its passenger trains would stop for the purpose of taking water for the engines, that it was customary, usual, and of frequent occurrence for such trains to be moved by the engine in placing the engine in position to take water while passengers were alighting, or in the act of alighting from its trains, which rendered the same dangerous, which was known to the defendant, its agents, and servants, but was unknown to plaintiff, and that it was the duty of the conductor, to see that passengers did not attempt to alight while said train was likely to be thus moved, and to stand ready to extend personal assistance to passengers alighting from said train in the event the train should be moved. That plaintiff started to alight from said train at Greenville, and as she was descending the steps she was carrying a hatbox in one hand and holding her dress skirts in the other; that defendant neglected to have a stool or box in its proper position; that the distance from the bottom step of the car to the ground was 25 or 30 inches, also the rough, rocky, and uneven condition of the platform; that the conductor was present and saw the plaintiff and knew that she was then descending said steps and knew she had a package or box in one hand and was holding her skirts with the other. And knew that there was no box or stool in position upon which she could stop or alight, and failed and neglected to extend to her any assistance whatever in alighting from said train. And that by reason of the negligence and carelessness of the defendant, its agents, and servants plaintiff received and sustained the injuries complained of. That if said conductor had extended to her any assistance he would have enabled her to regain her lost balance, or have assisted her in alighting therefrom in such way as to have rendered it unnecessary for her to have jumped, or to have prevented her falling therefrom. At the close of the petition there is this allegation: "That by reason of either or all of the acts of negligence of the defendant, its agents,

and servants, as herein alleged, plaintiff sustained the injuries complained of, to her damage in the sum of \$20,000, for which she sues and prays judgment." The allegations in the petition were sufficient to show a cause of action when tested by a general demurrer.

We are also of the opinion that none of the special exceptions urged to the petition were well taken. One of the special exceptions urged was that, the petition was insufficient "for the reason that the facts alleged were immaterial and irrelevant and no facts were stated showing any failure of duty on the part of the conductor to the plaintiff or showing any liability on the part of the defendant to the plaintiff for any injuries sustained by her on account of any failure of duty on the part of the conductor." The petition alleged that plaintiff, when injured, was descending the steps of the car carrying a hatbox in one hand and holding her dress skirts with the other. "That the conductor of said train was present, and was extending personal assistance to passengers in alighting from said train. That when plaintiff reached the second step from the bottom step of said car the train was suddenly and unexpectedly moved or started which threw plaintiff off her balance and she endeavored to regain her equilibrium and a second movement of the train threw plaintiff from said steps or caused her to jump therefrom a distance of about three feet to and on the rocks, gravel, and hard ground injuring her as hereinafter set forth. Plaintiff shows that the agents and servants of the defendant in charge of said train negligently and carelessly failed to place any stool or box in its proper position at the foot of the steps, or if said stool or box had been placed in its proper position the movement or movements of said train, as aforesaid, had carried said train away from said stool or box, leaving the same out of position and away from said steps. That the conductor was present and saw the plaintiff and knew that she was then descending said steps and knew that she had a package or box in one hand and was holding her skirts with the other. He saw the plaintiff when she lost her balance and knew that she was endeavoring to regain her equilibrium and would fall or be compelled to jump to keep from falling from said steps, and knew that there was no box or stool in position upon which she could step or alight, and failed and neglected to extend to her any assistance whatever in alighting from said train. That if said conductor had extended to her any personal assistance he could have enabled her to regain her lost balance or have assisted her in alighting therefrom in such a way as to have rendered it unnecessary for her to have jumped, or could have prevented her falling therefrom, and that by reason of the negligence and carelessness of the defendant, its agents, and servants, plaintiff received and sustained the injuries complained of."

These allegations, we think, sufficient to show that it was the duty of the conductor to assist passengers situated and circumstanced as was plaintiff in alighting from the train. It alleges the conductor was present and was assisting passengers in alighting. It alleges facts showing the necessity of his rendering assistance to plaintiff in her attempt to alight, and further in effect, that he failed to render her proper assistance. These allegations were not subject to the criticism urged. Evidence was admitted on the trial without objection, tending to show that it was the duty of the agents and employes of defendant to assist passengers in alighting from the train at their destination. The conductor testified: "It was my duty to assist persons on and off the train when they needed assistance, if anybody needed assistance we certainly would like to give it to them. It was the duty of the men that operated that train to keep it standing still. It is my duty to assist them when coming down there if they needed it, if a person was coming down there with bundles it was my duty to assist them. Certainly, if I see any one coming down the steps, a lady, child or man or any one else, that I thought needed assistance in getting off, and on, I rendered them such assistance as I could. If, on this occasion, I was standing at the steps assisting passengers to get off and on and plaintiff was coming down the steps and the train had been moved, the movement would be my fault because I would give a certain signal. It would be my fault without me giving a signal because after he gets stopped until we get ready to leave he could not leave unless I gave him a signal to go, but if he moved anyhow without any signal I could not stop that, and that would not be my fault." The plaintiff testified: "When I got down next to the last step the train gave two sudden movements. The first time it moved, it threw me to the right and kinder forward, and the conductor was standing there and when it moved I jerked back to keep from falling and when I jerked back to keep from falling, the first time a pain went through my lungs, hurt worse through my left lung than my right, and the second movement threw me forward. I threw my foot out to catch on the steps and when I caught on the ground I caught on my left foot, and went plum over the box. One corner of the box was showing. It was back to the left under the steps. I do not know what the distance was nor how high it would be from the second step down to the ground. I hit on my left foot and when I lit on the ground, a pain run up my back. When I struck the ground I caught on my left foot and run several steps, some 8 or 10 feet before I stopped. The conductor caught me against the elbow and must have given me a little push. When the train first moved I was on the second step and the conductor

reached up and caught my arm. That was when the train first moved. He caught me above the elbow."

In this connection the court charged the jury as follows: "If you find from the evidence that on the 6th day of March, 1904, plaintiff purchased a ticket at Wylie, Tex., over the defendant's road to Greenville, Tex., and boarded one of the defendant's passenger trains at Wylie, bound for Greenville, and that she became and was a passenger on said train; and if you further find from the evidence that when the train on which plaintiff was riding, reached Greenville, she used reasonable diligence to get off said train, and if said train did not stop at Greenville long enough for her to have alighted therefrom in safety, and if while she was endeavoring to get off of said train it was started, and if by reason thereof, she was caused thereby to lose her balance and to be thrown from the steps of the car to the ground or she was compelled to jump from said steps to the ground and was injured without fault or negligence on her part; or if you find that plaintiff started to alight from said train and while going down the steps of the car that the agents and servants in charge of, and operating, said train negligently and carelessly and without notice or warning to plaintiff caused said coach and train to be suddenly moved one or more times and that such movement or movements, if any, caused plaintiff to lose her balance and thereby to be thrown from said steps to the ground below or that said movement or movements caused plaintiff to jump from said steps to the ground and she was thereby injured; or if by reason of the negligence, if any, of the parties operating said train in failing to assist her to get off, if you find there was a failure, and if you find that such failure was negligence, and if by reason thereof she was caused to fall and be injured without fault or negligence on her part; and if you further find that the agents and servants in starting said train, if they did, or in causing said coach to be suddenly moved, one or more times, was guilty of negligence, or if you find that the failure, if any, on the part of the agents and servants operating said train to assist her to get off, was negligence, as that term is defined in the first paragraph of this charge, and that such negligence, if any, was the proximate cause of her injuries, if any, then in either event you will find for the plaintiff, unless you find for the defendant under the instructions hereinafter given you." Error is assigned to this charge in that it authorized a recovery by the plaintiff upon a theory of the case not warranted or authorized by the pleadings or evidence, "and authorized a verdict for the plaintiff if she was caused to stumble or start to fall for some reason other than a movement of the train when the only cause alleged in her petition for her stumbling or starting to fall

was a movement of the train, and authorized a verdict for the plaintiff if the servant of defendant whose duty it was to assist passengers in alighting from the train, failed to assist her in alighting therefrom when the evidence showed conclusively that the said servant of defendant did render her all possible assistance as she was getting off the train and did all that a very cautious, competent, and prudent person would have done under the circumstances to prevent her from being injured." The defendant owed to the appellee that high degree of care that is due from a carrier to a passenger. If, in the exercise of such high degree of care, the jury found that it was the duty of the conductor to have assisted the plaintiff, situated and circumstanced as she was at the time, in alighting from the train, and he failed to do so and such failure constituted negligence on his part and she herself was not at the time guilty of contributory negligence she was entitled to recover. The plaintiff pleaded facts showing that it was the duty of the conductor to have assisted her in alighting from the train. There was evidence tending to support this plea.

The conductor was on the platform and at the foot of the steps of the car helping passengers to alight. The evidence shows that the plaintiff started down the steps of the car carrying a small handbox in her right hand and holding her dress skirt in her left. When she reached the next to the last step the train suddenly moved backward throwing her back, whereupon the conductor placed his hand on plaintiff's right arm above the elbow. The train then suddenly started forward throwing plaintiff, who at the time was about to place her left foot on the last step, forward, causing her to fall or jump to the platform, a distance of about three feet, and alight on her left foot, resulting in serious and permanent injury to her. The conductor saw her, and did nothing towards assisting her, except to place his hand upon her right arm and give her, as she says, a slight push. It is clear that he recognized the necessity of rendering her assistance. The charge fairly submitted this issue, and was correct. *Railway v. Miller*, 79 Tex. 78, 15 S. W. 284, 11 R. A. 395, 23 Am. St. Rep. 308; *Railway v. Armes*, 74 S. W. 77, 7 Tex. Ct. Rep. 555. The facts and charge are quite similar to the case of *Railway v. Armes*, supra, decided by the court of the second district, in which a writ of error was refused by the Supreme Court.

The above remarks dispose of assignments numbered from 1 to 10 inclusive; also, assignment 27 and the same are overruled.

There was no error in overruling the motion to quash the depositions of Mrs. Mary Lee, J. W. McCullough, High Phillips, and J. H. Calloway. The depositions of these four witnesses were taken by the plaintiff under a single commission. Each witness

signed at the conclusion of her or his answers to direct interrogatories and again at the conclusion of her or his answers to cross-interrogatories, the answers of the witnesses following each other and all being attached together. The notary affixed to the answers of each witness a separate caption and certificate, showing that they were sworn to before him by the respective witnesses whose answers they purported to be. The defendant filed a motion to quash the depositions of these witnesses, which was overruled and exception duly reserved. Nor was there any error in overruling the motion to quash the deposition of Dr. Butler. The objection to this deposition was that the commission was not indorsed on the back thereof, "issued," followed with the signature of the officer issuing the same. The style of the case appeared in the body of the commission and the commission was attested by the clerk, with his seal of office affixed to such attestation. This was sufficient. The fact that the commission was not indorsed with the number and style of the case and marked "issued," followed by the official signature of the officer issuing the same, did not constitute such defect as required the quashing of the deposition.

James Kennedy, who accompanied plaintiff to Greenville on the occasion she was injured, was offered as a witness by plaintiff upon the trial and after testifying that he was 9 years old, and went to the public school at Wylie, studied the second reader and arithmetic, in answer to the question: "Jim, the clerk swore you to tell the truth and nothing but the truth awhile ago. Suppose you were to swear a falsehood; what would become of you?" He answered: "Send me to the Pen." Plaintiff's counsel then asked the witness this question: "Suppose you were to swear a falsehood to day and tomorrow you should die, what would become of you?" The witness answered: "Go to the bad man." The counsel for defendant objected to the witness being permitted to testify "for the reason it appeared that at the time he was offered as a witness he was between 9 and 10 years old and that at the time of the alleged accident he was between 8 and 9 years old and it not being shown that he knew and understood and comprehended the nature of an oath or the penalty for false swearing, or that he had sufficient intelligence to remember and detail the facts concerning which he was called upon to testify, or that he had sufficient intelligence to qualify him to testify as a witness." The objection was overruled, and the witness permitted to testify to which defendant excepted. The witness was then examined by plaintiff's counsel and cross-examined at length by defendant's counsel and re-examined by plaintiff, and recross-examined by defendant. Thereupon the defendant's counsel



filed a written motion to exclude and strike out the evidence of James Kennedy, "because it appears from the examination of said witness that he is not competent to testify as a witness in this cause." This motion was sustained, and the testimony of the said witness excluded and withdrawn from the jury. In this there was no error of which the appellant can complain. The evidence having been expressly withdrawn from the jury we cannot presume that they were in any way influenced thereby. If there was error at all in this action of the court it was in excluding the testimony and withdrawing the same from the jury. The witness attended school, could read, and was studying arithmetic. He understood the nature of an oath and his answers on this examination show some considerable intelligence. The appellant's attorneys asked him no questions testing his qualification to testify, but submitted the witness to quite a searching cross-examination. Considering the character and manner of the cross-examination, we do not think it can be said that the failure of the witness to answer certain of the questions propounded established his inability to make such coherent detailed statement of the facts as disqualified him as a witness.

There was no error in permitting Mrs. Sue Kennedy, the plaintiff's mother, to testify that plaintiff had been offered prior to the injury, \$10 per week to work in a millinery store in Dallas. This offer was made by letter, also over the telephone. The court on objection by appellant's attorneys, struck out the evidence of an offer by letter on the ground that the letter was the best evidence, but refused to strike out the testimony that an offer was made over the telephone. The objection was that the evidence was hearsay. The witness was called up by telephone from Dallas by the party making the offer and the offer made. There was no error in the ruling.

The assignments of error not discussed have each been carefully considered by the court, and because we find no error pointed out therein the same are overruled.

There was evidence which justified the jury in finding that plaintiff was injured while alighting from defendant's train at Greenville, and as a result of such injuries suffered damage in the amount found by the jury. That the injury was the result of defendant's negligence in causing its train to suddenly move while she was attempting to alight without notice to her, and before she had time to alight, and in the failure of its conductor to assist her in alighting after he saw that she needed assistance. That such negligence on the part of defendant and its agents caused the injuries to plaintiff, and at the time she was not guilty of contributory negligence.

Finding no error in the record, the judgment is affirmed.

## GOODBAR &amp; CO. v. BLOOM et ux.

(Court of Civil Appeals of Texas, June 13, 1906. Rehearing Denied Oct. 10, 1906.)

## 1. MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

Prior to the execution of an absolute deed by defendant to plaintiff, defendant owed plaintiff \$1,800. The deed was drawn by plaintiff's attorney pursuant to instructions and was submitted to plaintiff for approval before execution, reciting an absolute sale of the property for a cash consideration of \$1,000. As a part of the same transaction defendant executed to plaintiff a note for \$800, after which plaintiff insured the property as its own and executed a separate instrument by which it agreed to reconvey the property to defendants on repayment of the consideration and interest, within a specified time. *Held*, that the transaction amounted to a conditional sale and not a mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 5.]

## 2. SAME—INTENTION—BURDEN OF PROOF.

Where an absolute deed is claimed to be a mortgage, the burden is on the party making such claim to prove with clearness and certainty that the instrument was intended by both parties as a mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 109.]

## 3. REFORMATION OF INSTRUMENTS—ANCILLARY RELIEF.

Where a reformation of an absolute deed was sought as preliminary to having the instrument declared to be a mortgage and foreclosed, and it was determined that plaintiff was not entitled to the principal relief, it was not entitled to reformation.

Appeal from District Court, Leon County; Gordon Boone, Judge.

Suit by Goodbar & Co. against N. Bloom and wife. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Jno. A. Newsom and Gregg & Brown, for appellant. Watson & Dashiell, for appellees.

NEILL, J. This suit was brought by Goodbar & Co., a corporation incorporated under the laws of Tennessee, against the appellees, Nathan Bloom and his wife, Theresa, to recover an alleged debt of \$1,006.73 claimed by appellant to be due it from appellees, and to reform a certain instrument, in the form of a deed, but averred by appellant to be a mortgage, made by appellees to secure such indebtedness, by including therein two other lots, which appellant claims were agreed by the parties to be included but were omitted from said instrument either by mistake or fraud of the appellees, and, when so reformed, to have such instrument declared a mortgage, and, as such, foreclosed and the property sold to satisfy the debt sued for. The appellees answered by a general denial, and pleaded specially that the instrument averred by appellant to be a mortgage was, as it purported on its face to be, an absolute deed of conveyance made by appellees to appellant in consideration of the cancellation of the alleged debt sued on, and that it was so intended and understood by the parties and ac-

cepted by appellant with full knowledge of its contents, and that the two lots sought to be included by its reformation were not intended to be embraced in such instrument. The case was tried by the court without a jury and judgment rendered that the plaintiff, Goodbar & Co., take nothing by its suit and that defendants Nathan Bloom and his wife, Theresa, go hence without day and recover of the plaintiff and sureties on his cost bond all costs of suit.

The facts in this case shown by evidence, which is undisputed, are substantially as follows: On October 5, 1903, the appellee N. Bloom of Buffalo, Tex., being indebted to appellant, a commercial corporation of Memphis, Tenn., wrote it a letter in which he said, "I have a good hotel comprising five lots, all necessary barns, cisterns, servant's houses, etc., well situated to the depot, and, in fact, from every point of view, a desirable location. This piece of property brings me \$25.00 per month which amounts to \$300.00 per year. I will take for this property \$2,000.00, which is very cheap. The rent would pay you over 10% on your money invested, as repairs are not necessary to any great extent. I owe you, and this is the only way that I can see to pay you. My resources are sufficient to meet my liabilities, provided I can collect, but this is utterly impossible as there is nothing made to pay with. You cannot understand how serious the outlook is, and I am well aware that you think collections should amount to something. If you can handle this piece of property I can pay you, but if not I am wholly unprepared to make you any proposition." Again, on October 19, 1903, he wrote a letter to appellant in which, after stating his inability to raise money on account of failure of crops, he said: "Now to the point. I have received word from Sanger Bros., to whom I owe \$1,403.00, that they are willing to carry me over, provided I will pay as much as I can, and take only my personal note payable in 1904. They are my largest creditor, excepting you; that is, for goods. I pledge you that I will give no man a deed of trust during the year of 1903 or 1904. I am going to do by one and all the same, and make no distinction. I intend to pay you all I can, and all in the same proportion except my little creditors, and I think—and also your Mr. King—that it is best to pay them, so that their mouths will be stopped as they are all more or less restless. Now, gentlemen, I wish your voice on this subject at your earliest opportunity so that we will come to some understanding at an early date. I wish to allay suspense."

The appellant, in reply, on November 3, 1903, wrote Bloom, expressing surprise at his not being willing to mortgage his property for the benefit of creditors, and reminded him that his statement to the mercantile agencies included 800 acres of land in his wife's name and was, in part, the basis of his credit, and

suggested that it should now be made the basis of security for his debts. In reference to the hotel property, the letter is as follows: "We do not want the hotel property and would not give you \$1,000.00 for it, but we will agree to extend your debt, if you will give us a mortgage on that piece of property. This would put you in no worse light with your other creditors than to sell to us." Again, on November 10, 1903, appellant wrote Bloom as follows: "Replying to your recent letters in regard to selling us your hotel property, we have to say that we do not want it at any price, because our experience has been that property of similar character has always proved a loss to us. We will, however, make you this proposition: You make us a deed to the property at a consideration of \$1,000.00, and we will carry you until next fall for the balance of the debt. The deed can go on record, and outside of that record we will give you an obligation that we redeemed to you the property next fall, after you have paid us the balance of the \$737.00 and interest and paid us the \$1,000.00. This we know would simply make it equivalent to a mortgage, but to the outside world, or in other words, to everybody except you and us, it would have the appearance of being a bona fide sale. If you decline to do this, then we must insist upon your executing a mortgage trust deed upon your 640 acres of land, the hotel property and all other real estate you have, except your homestead, for the benefit of all your creditors. \* \* \* We believe, and have been so advised, that your creditors could hold that real estate as community property, but we do not wish to test that matter by going into the courts, and simply ask you to do what we believe to be fair, just and right with us and your creditors. We do not believe that we could sell the hotel property for over \$1,000.00, which is the reason that we are unwilling to take it at any more than that and then carry the balance of your debt. We will also make you another proposition: If you will raise enough to pay us the \$737.00, we will take the hotel property at \$1,200.00, and clean up the entire indebtedness at once."

On November 16, 1903, Bloom wrote the appellant, after some introductory observations, as follows: "I wish to satisfy you, as you have been rather kind to me during this year, therefore I will comply with your letter of the 10th. I will have my attorney make out deed to hotel property, and you may send me note for balance, and as soon as you get the deed fixed up you can forward me the obligation, which will grant me the option of redeeming the aforesaid property. It is not my desire to ask one and one-half times the value of my land, but since you asked to buy some of it, I simply give you a price. I do not wish to be contrary, neither do I wish to be dishonest, but I do not wish to give a trust deed to my property. I kindly ask that you make note payable November

1st, as that will give me time within which to meet this obligation. Include interest in face of note."

On November 21, 1903, Goodbar & Co. wrote to Bloom a letter in reply, which is as follows: "We are in receipt of your letter of the 16th inst., and note your acceptance of our proposition of settlement of your account with us, to give us a deed to the hotel property in question for \$1,000.00 and execute your note payable October 1st, 1904, for the balance. In compliance therewith we have this day prepared a statement of your account, together with note due at the above stated time for your signature, and sent the same to Mr. Jno. A. Newsom of your town to pass on the title to the property and receive the settlement for us. You will also please deliver to Mr. Newsom the rent notes that you have been carrying thereon. We have requested Mr. Newsom to draw up an agreement for our signature giving you an option to re-purchase the property for the same consideration you will convey it to us, upon the prompt payment of the note you are to give us as above stated, and 8% interest on the \$1,000 from date until paid by November 1st, 1904. If we collect rents in excess of the amount of taxes, insurance and interest on the property, we will refund the same to you. We do not know whether or not Mr. Newsom is your attorney, but he is very highly recommended to us and we have confidence in him to refer the same to him for settlement. We trust you will call to see Mr. Newsom at once and arrange the settlement for we desire to close the same definitely at an early date."

On the same date appellant wrote John A. Newsom, an attorney at law, as follows: "In regard to N. Bloom and his indebtedness to us, we have just arrived at the following settlement with him: He has agreed to give us a deed to the hotel property in question for and in consideration of \$1,000 and to execute his note due October 1st, 1904, for the balance due on his account. With that end in view we hand you a statement of his account to us, together with note for his signature for \$800.00 which please have him to execute in taking a deed to the property. We want you to thoroughly look into the title to the property and if you approve of it, it will be acceptable to us. You will also secure from Bloom the rent notes he has for the property, and have him transfer to us the insurance that he has been carrying thereon. In regard to the maturity of the note that he is to give us he is now asking that we make it November 1st, but our original proposition was to make it payable October 1st, and please govern yourself accordingly. We have agreed with him to convey the property back to him for the same consideration that he has delivered it to us, upon the prompt payment of his note due October 1st, 1904, which he is to execute, as above stated, together with 8% interest on the \$1,000 from date until paid by November 1st,

1904. It is also agreed that if we collect rents in excess of the taxes, insurance and interest on the property, we will refund the same to him. We were advised by Mr. Bloom on October 5th, last, that he had a \$25.00 monthly income from the property and we presume he is deriving the same from it at this time. Please draw us an agreement, giving him such option on the property which we will promptly execute upon the receipt of deed and his note. We are anxious to get this matter definitely settled at an early date and please call to see him at once and push it vigorously to a settlement. For your information, we inclose herewith a copy of the letter we have this day written him."

On November 23, 1903, Mr. Newsom, in reply, wrote appellant in substance that he had had an interview with Mr. Bloom in regard to the matter of settlement and that they were together except on one point—i. e. Bloom wanted the note payable November 1, 1904, instead of October 1st, as directed; that he (Newsom) had suggested as a compromise that the note be made payable on October 15th, and that after considerable begging Bloom had assented to it; that he had prepared the deed, which he expected Bloom's wife to sign, which he sent appellant for inspection before signing; that Bloom had informed him that the insurance he was carrying on the hotel building had just expired, and that he had not taken rent notes from his present tenant, and that he had rented the property for \$25 per month, but had to reduce it to \$15, and that he (Bloom) was willing the tenant pay the \$15 rent per month, when due, to him (Newsom) to be sent to appellant, or to collect it and send it himself. Newsom closed the letter by asking appellant to advise him as to such matters.

On November 27, 1903, in reply to Newsom's letter appellant wrote him as follows:

"We are just in receipt of your letter of the 23d inst. with inclosure of deed to be executed by Nathan Bloom and wife, both of which are carefully noted. You did not make the deed in our favor as a corporation so we have taken the liberty to add the same therein, and with this exception we are willing to accept the deed on your judgment as stated in your letter. In regard to the rental of the property and its collection, we think it advisable to let Mr. Bloom continue to look after the same, for it will make him more friendly towards us in this transaction and will keep him in touch with the property. Please say to Mr. Bloom, however, that any contract he makes for the rent of the property, must not extend beyond November 1st, 1904, at which time his option to repurchase it will expire by limitation. We note that the insurance has expired on the hotel and you will please take steps to insure it for \$1,000 for a period of twelve months and kindly send the policy to us and we will reimburse you. In regard to the maturity of

the note, we see that he contended for November 1st, but that you compromised the matter by making it mature October 15th, which is satisfactory. We trust that you will be able to get this matter definitely closed at an early date and awaiting your attention, we are, yours truly, Goodbar & Co., Incorporated, by W. E. Stansbury.

"Please also look into the taxes for this year—we feel that Mr. Bloom should settle them as the year is so far advanced. Also charge interest on note to October 15, 1904."

The negotiations between the parties culminated on the 1st day of December, 1903, by Bloom and his wife executing and delivering to Goodbar & Co. their general warranty deed, which expresses a consideration of \$1,000 in hand paid by appellant to appellees, to lots Nos. 8, 9, and 10 in block No. 27 of the town of Buffalo in Leon county, Tex., according to map and plat of town, as it appears of record in deed records of Leon county, Book O, p. 487; the execution and delivery by N. Bloom to appellant of his promissory note for \$802.08 (the remainder of his indebtedness to Goodbar & Co. after deducting the \$1,000, expressed as the consideration of said deed) payable on October 15, 1904, with interest thereon at the rate of 8 per cent. from maturity; and the execution on December 3, 1903, by Goodbar & Co. to the appellee N. Bloom of an agreement in writing, drawn at the same time the deed was by Mr. Newsom, which is as follows: "Refusal memorandum, between Goodbar & Company a corporation, incorporated under the laws of Tennessee and doing business in the city of Memphis in said state, acting by J. M. Goodbar, its president, duly authorized to act in this capacity, and, Nathan Bloom of Buffalo, Leon county, Texas: In consideration of the sum of \$10 to it in hand paid, the receipt of which is hereby acknowledged and for other valuable consideration had and received, it the said Goodbar & Company, (Inc.) does hereby agree to and with said Nathan Bloom, that he shall have the right to purchase from it at any time between this day and date and the 1st of November, A. D., 1904, the following described premises, now belonging to it, with the appurtenances there to belonging, which premises are described as follows, to wit: Lots Nos. (8) eight, (9) nine, and (10) ten, in block No. (27) twenty-seven, of the town of Buffalo, Leon county, Texas, according to the map and plat of said town as it appears of record in the Deed Records of Leon county, Book O, p. 487, on the following terms, to wit: One thousand dollars cash, with interest thereon, from this date at the rate of 8% per annum until the said first day of November, A. D. 1904, and upon the further condition that the said N. Bloom shall have paid off and discharged a certain note by him executed and delivered to this Company dated December 1st. 1903, due October 15, 1904, with interest thereon at the rate of 8% from maturity, for the sum

of (\$802.28) eight hundred two and <sup>22</sup>/<sub>100</sub> dollars. And on notice of his election so to purchase, given to it in writing, by letter mailed to it at Memphis, Tennessee, or served on it personally, it does here agree and bind its assigns and successors to make full, complete and perfect title by, through or under it to said Nathan Bloom, his heirs or assigns, and to perfect such title to or under it, and to reconvey to said Nathan Bloom, his heirs or assigns upon his complying with the terms and conditions above set forth and expressed. It is understood and agreed that all rents and revenues, collected by this company from this property, in excess of taxes, insurance, interest, etc., the same to be repaid to the said N. Bloom upon his purchasing said property."

A month or two after the execution of these instruments Mr. Newsom took out two fire insurance policies of \$500 each on the property payable to Goodbar & Co., as the absolute owner thereof. After the papers were executed, Bloom, in pursuance of the arrangement made with him at the time, collected for appellant the monthly rent of the property and remitted proceeds to Goodbar & Co. until October 12, 1904, when he wrote the appellant as follows: "I have by this mail forwarded to Memphis Trust Company draft for amount of \$802.28 to cover note given in 1903. Relative to the conditional sale of the hotel I would say that I do not care to redeem the hotel as money matters are cramped at present. If you had my note for \$1,000.00, I, of course, would pay it; but since you bargained for the hotel, I had rather it remain as it is now than to go to the trouble to raise \$1,000.00. I am of opinion that you can find a purchaser for this property as it is worth that amount even to-day, though I am not able to pay such a price. In regard to the rent you may get some one to attend to that matter in the future, as I would rather you get some one else. I am sorry that I cannot take it off your hands, but there is no chance for me to have the deed made different, therefore you can destroy the agreement." As stated in this letter, the draft was sent to the Memphis Trust Company, who held the note, in payment and discharge of the indebtedness evidenced by it, and the note, upon receipt of draft, sent back to Bloom. In reply to the above letter, on the 15th of October, 1904, the appellant wrote Bloom as follows: "We are in receipt of your letter of the 12th inst., and note that you have remitted to the Memphis Trust Company in payment of your note which became due this date, which is appreciated. We also observe that you do not desire to redeem the hotel property under our agreement with you and shall govern ourselves accordingly. As we understand it, you have rented the property monthly to the tenant now in charge for the consideration of \$15.00 per month. Please give us the name of the parties so that we may correspond with

them directly concerning the matter. Thanking you for your courtesy and wishing you much success, we remain yours, etc." Mrs. Fannie Stocker was the party who had rented and was occupying the hotel at that time; and, November 1, 1904, the appellant wrote her as follows: "Dear Madam: Please remit to us the monthly rental for the use of the Bloom hotel, as we are now the owners of it. Your prompt attention will be much appreciated."

Bloom, who was a witness in the case, was asked on the trial: "And at the time you made that deed, how about canceling the \$1,000 debt? Did you intend to put up any security for \$1,000, or did you intend to pay \$1,000?" He answered: "I intended to pay \$1,000, which I did, and if I didn't intend to pay it I wouldn't have given a note for \$802.20 to cover my indebtedness." There was no testimony of any officer or agent of appellant upon the issue as to whether the instrument was intended as an absolute deed or a mortgage. We have stated practically all the testimony bearing upon the question, whether the deed to the hotel property was intended by the parties as a conveyance of the title or as a mortgage. This we take to be a question of fact, ordinarily to be decided by the jury from all the evidence pertinent to it, and, like any other issue whose province is within the domain of the jury, when decided, either by the jury or the court sitting as a jury, such determination of it will not be disturbed upon appeal unless the evidence upon the issue is such that no reasonable mind can reach the same conclusion attained by the jury.

It is true that there are certain principles of law applicable to the issue which must guide the jury in considering the evidence upon which the issue is to be determined, but they are rules of construction rather than principles of substantive law which arise from and attach to a given state of facts. These principles will be stated, as enunciated in the elementary authorities, pronounced and applied in courts of last resort in other states as well as those of our own. When stated, we shall then apply them to the evidence before us, and, in view of them, determine from it whether any ordinary mind could reach the same conclusion as that found by the trial judge upon the question. If so, then our finding upon the issue of deed or mortgage will simply be an adoption of that of the trial judge. To determine whether a particular transaction amounts to a mortgage or a sale with a contract to repurchase, Mr. Pomeroy states the rule thus: "The criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt

existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of the existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instrument. On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a mere sale and contract of repurchase." 3 Pom. Eq. § 1195.

Mr. Jones thus states the criterion for determining the question: "Whether a conveyance be a mortgage or a conditional sale, must be determined by a consideration of the particular circumstances of each case. A glance at the numerous adjudications in controversies of this kind will suffice to show that each must be decided in view of the particular circumstances which belong to and mark its character, and that the only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction." The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances attending the transaction and the conduct of the parties as well as from the face of the written contract." Jones on Mort. § 258. Again, the same author says: "The character of the transaction is fixed at the inception of it, and what the intention of the parties makes it. The form of the transaction and the circumstances attending it are the means of finding out the intention. If it is a mortgage in the beginning it remains so; and if it was a conditional sale at the start no lapse of time will make a mortgage of it. \* \* \*

If not a security in the beginning, but an absolute sale or a conditional sale, no subsequent event, short of a new agreement between the parties, can convert it into a mortgage. Where an instrument contains the exact terms agreed on by the parties, and expresses their intent and meaning, the fact that they thought it a mortgage, while it was in fact a conditional sale, does not change its character or effect. The existence of a debt is the test. If an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land by the grantor upon receiving a certain sum within a certain time does not create a mortgage, but a conditional sale, and the grantee holds the premises subject only to the right of the grantor to demand a reconveyance according to the terms

of the agreement. A debt either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. An absolute deed delivered in payment of a debt is not converted into a mortgage merely because the grantee therein gives a contemporaneous stipulation binding him to reconvey, on being reimbursed within an agreed period, an amount equal to the debt and interest thereon. If the conveyance extinguishes the debt, and the parties so intended, so that a plea of payment would bar an action thereon, the transaction will be held an absolute or conditional sale notwithstanding. And so if there was in fact a sale, an agreement by the purchaser to resell the property within a limited time, at the same price, does not convert it into a mortgage. \* \* \* But if the indebtedness be not canceled, equity will regard the conveyance as a mortgage, whether the grantee so regards it or not. He cannot at the same time hold the land absolutely and retain the right to enforce payment of the debt on account of which the conveyance is made. The test, therefore, in cases of this sort, by which to determine whether the conveyance is a sale or a mortgage, is found in the question whether the debt is discharged or not by the conveyance. If, in the subsequent transaction of the parties, there is no recognition in any way of the relation of debtor and creditor, and the vendee for a considerable period holds possession without paying interest or rent, these facts go to show that there is only an agreement for purchase and not a mortgage." *Jones on Mort.* §§ 263, 265, 267.

For cases from other states illustrative of the application of the principle that a conveyance absolute in form is not converted into a mortgage by a contemporaneous agreement for a resale and purchase, where it was not shown the parties intended to give it that effect, see *Hays v. Emerson* (Ark.) 87 S. W. 1027; *Gerhardt v. Tucker* (Mo. Sup.) 85 S. W. 552; *Gassert v. Bogk* (Mont.) 19 Pac. 281, 1 L. R. A. 240, and note. There are many other cases to the same effect but we deem the citation of these, together with those cited in text-books quoted from, sufficient to illustrate the principle.

We will turn now to some of the cases from our own courts, which will be found to be in perfect accord with the elementary authorities upon the subject under consideration. In *Alstin's Ex'r v. Cundiff*, 52 Tex. 453, it is held "that in determining whether a conveyance absolute on its face, with a written agreement to repurchase signed by the parties, is a mortgage or a conditional sale, reference must be had to the inquiry whether the relation of creditor and debtor continues to exist. If it does, it is a mortgage; otherwise, a conditional sale." This test is adhered to in *Miller v. Yturria*, 69 Tex. 549, 7 S. W. 206, where, after saying that "a conveyance, however, which purports

to be a sale, either absolute or conditional, may be shown to be a mortgage by proving it was intended merely as a security for a debt," it is held that, in order to establish that an absolute deed is intended as a mortgage, it must be proved with clearness and certainty, and that the same rule applies to an instrument which clearly shows upon its face a conditional sale. We will here observe that this rule as to the character of proof has been enunciated with the same, if not greater, emphasis in other jurisdictions. *Hays v. Emerson* (Ark.) 87 S. W. 1027; *Gerhardt v. Tucker* (Mo. Sup.) 85 S. W. 552. The case of *Kirby v. National Loan & Inv. Co.*, 54 S. W. 1081, 22 Tex. Civ. App. 257, is very similar in its facts to the one at bar. In that case Kirby was indebted to the National Loan & Investment Company in the sum of \$1,500 evidenced by a note which was a lien upon a certain piece of land owned by Kirby. In order to settle said indebtedness Kirby and wife made a deed to the land to the company, in which such indebtedness was recited, reciting as a consideration the discharge of said debt and the payment of \$100 cash. The deed of conveyance then recites "It is the purpose and intention of this instrument to make an absolute and unqualified conveyance of said property and to vest in grantee free, clear, and unincumbered title thereto, having no other or further condition attached thereto except the following right to repurchase said property upon the following terms, to wit: 'The said grantees herein in accepting this instrument give to the grantors herein, and the grantors herein expressly reserve the right to repurchase said property from said National Loan & Investment Company, its assigns and successors, at any time within three years from this date, at the agreed price of \$1,550 cash, conditioned, however, that whereas said grantors have this day leased from grantee, the National Loan & Investment Company of Detroit, Mich., the aforesaid premises for a period of three years at an annual rental of \$93.00, payable semi-annually, as evidenced by the notes of said grantors herein, being five in number, four each for the sum of \$46.50, due and payable to the order of the National Loan & Investment Company of Detroit, Mich., and due as follows: (one on August 1, 1895, one on February 1, 1896, one due on August 1, 1896, one due February 1, 1897, one due August 1, 1897, and one for \$93.00 due February 1, 1898: Now, therefore, if said A. H. Kirby and Alma Kirby shall fail or refuse to pay any one of said notes for a longer period than six months after its maturity (time being the essence of this agreement), then and in that event the option to repurchase this property shall be, and is, forfeited by said A. H. and Alma Kirby; and it is understood that said last maturing note shall also be paid at the expiration of said three years in the event said A. H. and Alma Kirby purchase said property under their

right to repurchase herein contained. The said A. H. and Alma Kirby, as a further condition of leasing this property and of their right to repurchase, obligate and bind themselves to keep said property insured for a sum not less than \$1,550 at their own cost and expense, making the policy payable to the National Loan & Investment Company as their interests may appear, and further to annually pay the taxes assessed against said property; and a failure to keep said property so insured, or in the event they fail to pay said taxes due thereon as the law requires, then their right to repurchase said property shall and does expire, and is by them forfeited. In the event of a failure to pay any of said notes or taxes, or to keep in force said insurance, as above set forth, within the time set forth, said A. H. Kirby and Alma Kirby agree and concede that their right to repurchase is forfeited, and they agree and consent to surrender immediate possession, peaceably and quietly, to said National Loan & Investment Co.; and they further agree to pay to said company for the time they have so occupied said premises the rents due at the time they surrender possession to said loan company, at the annual rate stated. In the event of the forfeiture of the rights of said A. H. and Alma Kirby to repurchase as hereinbefore stated, or in the event of their failure to pay said purchase price as hereinbefore stated, within three years from this date, then the National Loan & Investment Company shall be, and by these presents are, vested with clear and unincumbered title, being free to own, hold, or in any manner dispose of said property; it being in that event the property of the said National Loan & Investment Company of Detroit, Michigan, free from any right, title, claim, or interest therein or thereto in said A. H. and Alma Kirby. In testimony whereof, witness our hands this the 1st day of February, 1895. A. H. Kirby. Alma Kirby." It was insisted by the appellant that this instrument upon its face purported to be a mortgage, and not a deed. Upon this insistence it was observed by the court that the intent and purpose of the parties, manifested by the instrument, to pass title in present, subject to the reserved right to repurchase upon the terms named, was clear. "The intent and purpose in the execution of an instrument, by all authorities, are of controlling influence in its construction. Every canon of construction has for its object the ascertainment of this intent. It is true, the written expression thereof is not conclusive. The situation of the parties, the attendant circumstances, as well as written memorials, may be considered. But when thus ascertained, effect must be given thereto when not unlawful or opposed to public policy. In determining the effect of the instrument as written, however, we can consider such extraneous facts only as appear therein. Its effect as written is a question of law, to be solved in the first instance by the court. If

parol evidence must be resorted to in order to explain the terms or intention of the parties, then the question of construction ceases to be one of law merely and becomes one of mixed law and fact, to be determined by the jury under appropriate instructions. As we read the instrument before us, no fact is recited that is sufficient to nullify or modify the express intent and purpose. The fact that there was a pre-existing debt is insufficient. In such case the question is, was the old debt surrendered or canceled at the time of the conveyance? To constitute a mortgage, the relation of debtor and creditor must continue to exist. The instrument before us recites, as one of the purposes, of its execution, the discharge of such indebtedness, and the consideration therefor, in part, was its cancellation. It may be, as insisted, that the instrument contains a clause of defeasance, within the definition thereof; \* \* \* but, if so, it is evident that the clause here under consideration is not of the character that abrogates, rescinds, or gives reverse or non-effect to the title conveyed. It in effect provides that, in a given contingency, the title and right conveyed may be reacquired by the grantors. If such provision must fix the character of the instrument as a mortgage, then it is evident that no such instrument as a conditional sale can be framed. Such provision is a necessary concomitant of such a sale, and in no view can be construed therewith. Such, we think, must be the conclusion as to each of the circumstances relied upon appearing on the face of the instrument before us. When analyzed, we think, without further discussion, that none of the provisions or recitals of the instrument under consideration are inconsistent with the express purpose to constitute an absolute conveyance of title in present, and that therefore the court correctly refused to construe it as a mortgage." For cases of similar character, see *Focke v. Buchanan* (Tex. Civ. App.) 59 S. W. 820; *Pumilla v. De George* (Tex. Civ. App.) 74 S. W. 814.

We will now apply these principles of law to the facts for the purpose of determining whether the evidence is sufficient, in view of the law, to warrant the ultimate conclusion of fact reached by the trial judge that the conveyance of the hotel property by appellees to appellant was an absolute sale conditioned upon the right of appellee to repurchase the property within the time and upon the terms specified in the instrument denominated "Refusal Memorandum." It has been seen that the deed of appellees to appellant, if standing alone and unaffected by the memorandum referred to, or any extraneous facts, would be an absolute conveyance of the property. This is shown by its face as clearly as if it bore the expression, "this is intended as an absolute deed and not a mortgage," for it is in the form and very language of an absolute deed conveying a fee-simple title to property. It is equally clear, when viewed in the light

of the authorities cited, that when this deed and the refusal memorandum are read and considered, as they should be, as one instrument, it simply is an absolute conveyance of the property by Bloom to Goodbar & Co. without condition of defeasance, conferring upon the grantor the right to purchase it, at his option, within the time and upon the terms specified. If the intention of parties can be gleaned from the language used by them for the purpose of giving it expression, no canons of construction need be invoked to demonstrate and illustrate that these instruments, when read, taken and considered as one, show the intention of the parties was an absolute sale in present of the property, in which the grantor is given the right, if he should elect to exercise it, to purchase the property within a given time upon terms and conditions plainly and unequivocally expressed—an option, nothing more nor less, that might have been given as well, for a consideration, had he never owned the property. In view of this express intention, the burden rested upon the appellant to prove with clearness and certainty that the instrument was intended by the parties—not one, but both—as a mortgage. *Miller v. Yturria*, supra; *Hays v. Emerson*, supra; *Garhardt v. Tucker*, supra.

Do the extraneous facts evince with clearness and certainty, or, as for that, reasonable certainty, that the intention of the parties was that the deed to Goodbar & Co. should be held as a security for a debt that Bloom owed appellant? If the correspondence between the parties up to the time the final agreement was reached were alone to be considered, it would appear that appellant did not desire to purchase or take the land in payment or discharge of the indebtedness of the appellee, but wished to take a deed to the property to secure its payment. If, then, the intention of Goodbar & Co., up to that time, could alone determine the character of the transaction, it might be said that the conveyance was clearly proven to be a mortgage. But it is a homely adage that "it takes two to make a trade." In order to do this there must be a drawing together of the minds, a meeting and concurrence of them in the same intention. If the intention existing in one mind is different from that existing in the other, such diverse intentions can never, as long as they exist, meet in agreement and form a contract. It is just as apparent from the correspondence that Bloom did not desire to convey the property in question, or any of his property, as security for the debt he owed appellant, as it is that the latter desired him to do so. There is nothing tending to show a concurrence of intentions by the parties, until November 16th, when Bloom wrote Goodbar & Co. that he would comply with its letter of the 10th. The letter he refers to, as is seen, submits two propositions—one, if accepted and acted upon, would be tantamount to a mortgage;

the other, an absolute sale, with the right given Bloom to repurchase. Let it be assumed pro hac vice that it was the first that Bloom had in mind when he wrote that he would comply with appellant's letter, yet it appears from the letter of instruction of November 21, 1903, written by Goodbar & Co. to Mr. Newsom, and from another of the same date to appellee, in regard to drawing up the papers, that the agreement reached by the parties was, with some minor modifications, just as it is expressed in the papers drawn by said attorney. There was no fraud nor mistake, save as to the failure to include two other lots in the deed, alleged or claimed by the appellant. The appellee makes no such claim, but insists the papers express the agreement. They were drawn by appellant's own attorney from data which it furnished him for that purpose, and, before being signed and delivered, were submitted to appellant for inspection and approval. It interposed no objection save that the instrument did not state that it was a corporation, but sent the deed back to their attorney for the appellee and his wife to execute and acknowledge. When executed and acknowledged, they accepted it, and executed the memorandum giving the appellee the right to repurchase. Up to the time the deed was executed, appellee's indebtedness was \$1,800. Of this indebtedness only \$800 remained when the deed was executed, for which a note with interest was taken. For this note, it is not, and never was, contended that the deed was intended to secure; the deed nor memorandum says anything about indebtedness, or security for indebtedness, but expresses a cash consideration of \$1,000; no cash was paid. Can any one doubt that this expressed consideration was for that much of the indebtedness as it existed prior to the execution of the deed, or that \$1,000 of the indebtedness ceased to exist, having been extinguished by becoming the purchase money? If so, let him consider the action of the parties in regard to the matter afterwards. For it is a rule that if one of two constructions can be placed upon a contract, and it has been construed by the parties to it, it will be given by the courts that construction the parties have placed upon it themselves. In the letter of appellant of November 27, 1903, to Mr. Newsom, in which the deed was returned for appellee's signature, Newsom was requested "to say to Mr. Bloom that any contract he makes for rent of the property must not extend beyond November 1st, 1904, at which time his option will expire by limitation." This clearly and unequivocally shows that appellant construed the contract as an absolute sale, with an option on the part of appellee to purchase, which expired on November 1st, following. Appellant also instructed his agent to insure the property for it; and it was insured, in obedience to the instruction, for the company. Ordinarily the mortgagor of the property is entitled to the rents. The



rents for the property, through curtesy, were collected by Bloom and paid to appellant and received by it as its own, without being credited on any debt. On October 12th, when Bloom wrote the appellant that he had remitted the money in payment of the note made for the balance of the debt, and notified it that he did not wish to redeem the property, the reply he received from Goodbar & Co., together with the letter it afterwards wrote to Mrs. Stocker, shows clearly that it regarded the hotel property as its own, which is inconsistent with the idea that the conveyance was intended as security for a debt, and perfectly consistent with what the deed, in connection with the contemporaneous memorandum, shows upon its face.

So in any light the transaction is viewed, we conclude that the evidence is sufficient to warrant the trial court in finding, as a fact, that an absolute conveyance of the property, with an option to repurchase by the grantor, was the intention of the parties. As a reformation of the deed was sought as a preliminary relief to having the instrument declared and foreclosed as a mortgage, and in no other event, and, it having been determined that appellant is not entitled to the principal relief sought, it follows that it is not entitled to the ancillary relief of reformation in this action.

The judgment is affirmed.

#### OLSCHEWSKE v. KING.\*

(Court of Civil Appeals of Texas, June 26, 1906. Rehearing Denied Oct. 4, 1906.)

#### 1. VENDOR AND PURCHASER — REPRESENTATIONS AS TO TITLE—POSSESSION—NOTICE—ESTOPPEL.

That a purchaser of land knew at the time of his purchase that certain heirs were in possession did not as a matter of law deprive him of the right to rely on his vendor's representation that he had full legal title to the property, nor estop him from demanding a rescission on it subsequently appearing that such representation was false.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 202-204.]

#### 2. JUDGMENT—MATTERS CONCLUDED.

Plaintiff purchased land, relying on defendant's representation that he had full title and right to convey, but with knowledge that the land was in possession of certain heirs, who thereafter brought suit against plaintiff and defendant to establish their interest in the property. *Held*, that plaintiff's failure to assert his right to rescind in that action did not bar him from thereafter maintaining a separate suit for such relief.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1104, 1105.]

#### 3. ABATEMENT AND REVIVAL—OTHER ACTION PENDING.

The pendency of the action by such heirs was no bar to plaintiff's suit for rescission of the contract of sale.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 27-37.]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Jesse King against William Olschewske. From a judgment in favor of plaintiff defendant appeals. Affirmed.

Baldwin & Christian, for appellant. James R. Masterson, for appellee.

PLEASANTS, J. Appellee brought this suit against appellant to rescind a contract of sale of land, and to recover the money and cancel the notes given by him as consideration for the conveyance to him by appellant of said land. The facts disclosed by the record are these: On March 10, 1903, appellant sold and conveyed to appellee lots 4 and 5, in block 21, in Castanie's addition to the city of Houston, for a consideration of \$1,250, of which \$250 was paid in cash by appellee, and for the balance he executed his 67 promissory notes, 66 for \$15 each and 1 for \$10 payable, respectively, in from 1 to 67 months after date. The deed reserved a vendor's lien to secure the payment of the notes. Appellee purchased the property with the intention of making it his home. As an inducement to appellee to make the purchase appellant represented to him that he had a perfect title to the property and could and would place him in immediate possession; and but for such representation and promise appellee would not have agreed to buy the property. At the time the contract of sale was made appellee knew that the property was in the possession of Mrs. Somerville and her minor children, but she was holding as a tenant of appellant, and appellee had no actual knowledge of any title or claim on the part of said minors. Appellant failed to put appellee in possession of the premises as he agreed and promised to do, and did not, in fact, own the property as he represented, but only had title to an undivided one-half interest therein. Shortly after the execution of the deed the Somerville minors brought suit against appellant and appellee, claiming a one-half interest in the property in fee and the right to occupy the entire premises as a homestead so long as their guardian, with the permission of the county court of Harris county, should so elect. The suit was tried in the district court of Harris county on July 6, 1903, and judgment was therein rendered in favor of plaintiffs, decreeing them title to one-half the property and the homestead rights claimed in their petition. This judgment was appealed from and was affirmed by the Supreme Court (83 S. W. 680) in so far as it adjudged title in the Somerville minors to one-half of the property, but was remanded to the district court for the adjustment of certain equities growing out of improvements. The suit of the Somerville minors had not been finally disposed of in the district court at the time this cause was tried. Shortly after the judgment in favor of the Somerville heirs was rendered in the district court the appellee herein tendered appellant a deed reconveying

\*Writ of error denied by Supreme Court Nov. 14, 1906.

the property to him and demanded the return of the money and notes before mentioned. This demand was refused and thereupon this suit was instituted.

The petition in this cause alleged the facts above stated in substance, and prayed for judgment for the \$250, with interest from the date of its payment, and for the cancellation of the notes above described. The defendant answered by general exception and general denial and by special plea, in which he set up the pendency of the suit by the Somerville minors and the knowledge of the plaintiff that said heirs were in possession of the premises at the time he purchased from appellant, and avers "that, by reason of the facts above set forth, the plaintiff is estopped from suing upon a warranty of title, and estopped from claiming that said title has failed, and by reason of the fact that plaintiff, when he bought said property, knew of the claim of the Somervilles thereto, and of the pendency of the suit hereinbefore mentioned, the plaintiff cannot now maintain this suit, and is estopped from so doing." He also filed a cross-bill by which he sought recovery against plaintiff of the amount due upon the notes, with interest and attorney's fee. The cause was tried without a jury and judgment rendered in favor of plaintiff for \$296, and for rescission of the sale and cancellation of the notes.

The first and second assignments of error complain of the judgment on the ground that it is not supported by either the pleading or the evidence, in that the petition alleges, and the findings of fact by the trial judge establishes, that appellee knew at the time he purchased the property that the Somerville minors were in possession, and he was thereby charged with notice of any title or claim which they had to said property, and will not be heard to say that he bought the property relying on the representation of the defendant and without knowledge of any adverse claim. There is no merit in these assignments. The authorities cited by appellant and the doctrine of notice invoked by him in support of the assignments have no application in this case. It is well settled that one who buys land in possession of another will not, as to such possessor, be heard to say that he purchased

without notice of the possessor's title, but is charged with constructive notice of whatever right or title the possessor has in the property; possession being as conclusive evidence of notice as is the registration of a deed under the statute. Under this rule appellee could not claim as against the Somerville heirs that he did not purchase with notice of their title, but it cannot be held as matter of law that, because he was charged with notice of their title, he could not have relied upon the representation of appellant that he owned the property and would put him in possession of it. The trial court found that such representations were made by the appellant and were relied on by the appellee. There is no statement of facts in the record, and the findings of fact by the trial court must be conclusively presumed to be supported by the evidence.

We do not understand appellant to contend otherwise, but his contention is that because it appears from the petition and the findings of fact that appellee knew that the Somerville heirs were in possession of the property he cannot as a matter of law be heard to say that he relied upon appellant's representation as to the title of the property. As we have before said, this contention cannot be sustained. The appellee was not required to set up his right to rescind the sale in the suit brought against him and appellant by the Somerville heirs, and his failure to do so does not now estop him from asserting that right, nor is his right to maintain this suit affected by the fact that the former suit is still pending. There is no finding by the trial court that appellee prosecuted an appeal from the judgment in favor of the Somerville heirs, and from the fact that shortly after the judgment in that suit was rendered in the district court appellee tendered appellant a deed reconveying the property and demanded a rescission of the contract the presumption is that he did not appeal from that judgment.

These conclusions dispose of all of the questions raised by the remaining assignments presented in appellant's brief, and it is unnecessary to discuss them in detail.

We think the trial court's judgment should be affirmed, and it has been so ordered.

Affirmed.

## CATO et ux. v. SCOTT.

(Court of Civil Appeals of Texas. June 16, 1906. Rehearing Denied Oct. 6, 1906.)

## 1. NEW TRIAL—DILIGENCE.

A case being at issue was regularly called for trial October 23, 1905, when plaintiff announced ready. Defendants appeared by their attorney, and requested a postponement, and this being refused, defendant's attorney withdrew from the case, and judgment was entered for plaintiff. No motion for a new trial was filed until October 28th when defendant claimed he had a meritorious defense and that the reason why he was not present at the trial was because of the illness of his wife, who was a material witness. He also claimed that his attorney had agreed to inform him when the case would be tried, but, through misunderstanding, he was not present. He did not state what the misunderstanding was or how it arose, nor that he had made any attempt to ascertain the condition of the docket. *Held*, that the motion for a new trial was properly denied for lack of diligence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 190–193.]

## 2. SAME — MOTION — FILING — TIME — DISCRETION OF COURT.

Where a motion for a new trial was not filed until five days after judgment for plaintiff it was within the discretion of the court to grant or refuse the same.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 9, 10, 243, 244.]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Suit by S. L. Scott against B. S. Cato and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The appellee, S. L. Scott, brought this suit on the 22d day of August, 1905, in the district court of Bowie county, Tex., against the appellants, B. S. Cato and Mrs. L. A. Cato, defendants, in trespass to try title for certain land described in his petition. The defendants answered by a general denial, and the plea of not guilty. There was a trial before the court, without a jury, on the 23d day of October, 1905, resulting in a judgment for the plaintiff against the defendants for the title and possession of the land in controversy. The defendants excepted, and prosecute this appeal. On May 10, 1905, the City Improvement Company conveyed by deed to Mrs. Cato the lots in question. On May 16, 1905, Mr. and Mrs. Cato conveyed by deed said lots to the appellee, S. L. Scott. This deed is absolute in form and legal effect, and recites a cash consideration of \$1,325. On May 20, 1905, S. L. Scott and B. S. Cato, husband of Mrs. Cato, made and entered into a written contract, the substance of which is that Scott had that day bargained to sell to Cato said lots at and for the sum of \$1,325, to be paid in 53 installments of \$25 each; the first to be paid on June 20, 1905, and the others at intervals of 1 month for 52 months according to the stipulations of a note of even date given by Cato to Scott, with interest payable monthly at the rate of 10 per cent.; that Cato should keep the buildings insured for the benefit of Scott and should pay all taxes upon the property; that upon

payment by Cato of said purchase money, taxes, insurance, and interest at the times specified Scott would make a good and sufficient deed to Cato for said lots; that if payment should not be made at the time and in the manner specified, then at the expiration of 30 days after default the whole of the amount should at once become due and if not paid all the obligations resting upon Scott should cease and be considered as rent, and Scott was authorized to take possession of the premises; that Cato accepted the conditions of said instrument, and agreed that, in event he failed to make the payments specified, he waived all rights or claims to the property, and would restore the possession thereof to Scott at any time after the expiration of 30 days from the date of default. Contemporaneously with the execution of said contract Cato executed and delivered to Scott his note for the sum of \$1,325, payable in installments of \$25 each as aforesaid, and reserving in express terms a vendor's lien upon said lots, the note reciting that it was for the purchase money thereof. Nothing was paid by Cato under his contract with Scott. On the 22d day of August, 1905, Scott filed this suit in the form of an action of trespass to try title against Mr. and Mrs. Cato for recovery of the title and possession of the premises. The defendants answered on the 25th day of September, 1905, by a general demurrer, general denial, and plea of not guilty. The case was called regularly for trial on the 23d day of October, 1905, when the plaintiff announced ready. The defendants appeared by their attorney, and requested a postponement of the case to some future day of the term. This being refused, the attorney for the defendants withdrew from the case, and the trial proceeded, resulting in a judgment for plaintiff for the lots in question. No exception was taken to the action of the court in refusing a postponement of the case, and no motion for a new trial was filed until the 28th day of October, 1905. On that day defendants filed a motion for new trial. Upon the hearing of this motion, defendants offered as witnesses Mr. and Mrs. Cato and Mr. Lawler, by whom they proposed to prove the facts stated in the motion. This testimony was excluded upon objection by plaintiff; the court, however, stated that he would take the allegations in the motion as true in considering the same. The motion was overruled, and the action of the court in this respect presents the sole question for determination upon this appeal.

Horace W. Vaughan, for appellants. Hart, Mahaffey & Thomas, for appellee.

BOOKHOUT, J. (after stating the facts). Does the motion for a new trial show good excuse for the appellants' failure to appear in the court below on the trial of the cause? The case was regularly called on the 23d of October, 1905. The plaintiff announced

ready. The appellants' attorney announced not ready, and requested the court to postpone the case. This request was refused, whereupon the said attorney stated that he would no longer represent the defendants. The case thereupon proceeded to trial, resulting in a judgment for plaintiff. Thereafter on the 28th day of October, 1905, defendants filed a motion for new trial. The motion sets up that defendants' claim is a good and meritorious defense to the plaintiff's cause of action. If it be conceded that defendants show a meritorious defense; still, we are of the opinion, the defendants failed to show a good excuse for not being in court when the case was tried, and presenting such defense, or if Mrs. Cato was unable, on account of sickness, to be present, then to have procured a continuance of the cause on that ground. The motion states that Mrs. Cato was a material witness for defendant, and, at the time of the trial, was unable to attend court on account of sickness, and was confined to her home. As to why B. S. Cato was not present at the trial it is stated, "that the defendant, B. S. Cato, would have been present at the trial, and attempted to get a continuance on account of the sickness of his wife, L. A. Cato, but through a misunderstanding with his attorney, H. W. Vaughan, upon whom he relied to inform him what week to come to court, he was not informed when he would be needed, and if he had been informed he would have been compelled to ask for a continuance to get the evidence of his wife, who was at said time so sick as to be unable to attend court, and did not learn that judgment was rendered against them until Friday, October 27th." Cato says he relied upon his attorney to inform him what week to come to court. He must have

known that the case would be called as soon as reached, and that as soon as called his presence would be required. Yet he made no attempt to ascertain the condition of the docket, but relied solely on his attorney to notify him what week to attend court. He does not say his attorney had agreed to inform him when to come to court. What reason he had for relying upon his attorney to notify him is not shown. He says it was through a misunderstanding that he was not present. He does not explain what the misunderstanding was or how it arose. It was his duty to be present, and if he could not go to trial because of Mrs. Cato's absence, to have had his attorney move for a continuance. He was not present, and did not, until five days thereafter, file his motion for new trial. When the case was called defendants' attorney asked that it be postponed. This being denied, he withdrew from the case. Obviously, the attorney believed such action to be for the best interest of his clients under the circumstances. The same attorney prepared and presented the motion for new trial, and upon its being denied perfected an appeal, and is here, by brief, ably and vigorously insisting for a reversal of the judgment. The excuse offered by defendant, B. S. Cato, for not being present when the case was tried was insufficient. *Rice v. Mortgage Co.* (Tex. Civ. App.) 30 S. W. 75; *Harrison v. Oak Cliff Land Co.*, 85 S. W. 821, 12 Tex. Ct. Rep. 401. The motion for new trial not having been filed in the lower court within the time prescribed by the statute it was in the sound discretion of the trial court whether or not he would grant the same. The record does not show any abuse of his discretion in overruling the motion.

The judgment is affirmed.

## BROWN MFG. CO. v. GILPIN.

(Kansas City Court of Appeals, Missouri.  
June 4, 1906. Rehearing Denied Oct. 1,  
1906.)

## 1. JUSTICES OF THE PEACE—AFFIDAVIT BY TREASURER OF APPELLANT.

The affidavit for appeal from a justice's judgment in the action of B. Co. against G., "M., being sworn, \* \* \* says that his application for an appeal is not made for \* \* \* delay, but because he believes the appellant to be injured by the judgment," signed "B. Co., M., Treas., Appellant," though stating that M. makes the application for himself, is not insufficient, as it is to be gathered from the entire instrument that he makes the application for the company.

## 2. AFFIDAVIT—FOREIGN NOTARY.

An affidavit for appeal, though made before a notary of another state, is efficacious; judicial notice being taken of the seals of notaries.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Affidavits, § 60.]

## 3. SAME—CERTIFICATE OF NOTARY.

Failure of a notary before whom an affidavit for appeal is taken to certify when his term of office will expire does not render the affidavit ineffective.

## 4. APPEAL—BOND—EXECUTION BY CORPORATION.

The appeal bond of a corporation, though not signed by its president, nor attested by its secretary, but merely "B. Co., M., Treas.," is binding on it, and sufficient.

## 5. PLEADING—FAILURE TO DENY UNDER OATH—NECESSITY OF PROOF.

An exhibit being the foundation of plaintiff's action, and, because not denied under oath, standing confessed, under Rev. St. 1899, §§ 746, 3967, plaintiff may introduce it in evidence without proving the signature to it was that of defendant.

## 6. SALES—RETURN OF GOODS—RECOVERY OF PRICE.

The seller of goods may recover their price, though the buyer returned them; the seller having, before they were reshipped, notified the buyer that they would not be received, and on their arrival stored them subject to defendant's order.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 323.]

Appeal from Circuit Court, Boone County; A. H. Waller, Judge.

Action by the Brown Manufacturing Company against George A. Gilpin. Judgment for plaintiff. Defendant appeals. Affirmed.

Webster Gordon, for appellant. Charles J. Walker, for respondent.

BROADDUS, P. J. The plaintiff corporation brought this suit in a justice's court on an alleged indebtedness for goods sold and delivered to defendant, to the amount of \$34. The case originated in Columbia township, Boone county, where it was tried and judgment rendered for defendant, and plaintiff appealed to the circuit court. When the case reached the latter court, defendant filed a motion to dismiss for the following causes: "(1) Because the affidavit for an appeal is insufficient to authorize an appeal. (2) Because the appeal bond is insufficient to authorize an appeal. (3) Because the notice

of appeal is insufficient and does not comply with the statute." The motion was overruled, and defendant refused to further plead or answer, and stood on his motion. The court heard the evidence and rendered judgment in favor of the plaintiff, and defendant appealed.

The affidavit for an appeal, after giving the style of the case, reads as follows:

"James M. Morey, being duly sworn, upon his oath says that his application for an appeal is not made for vexation or delay, but because he believes the appellant to be injured by the judgment of the justice, and that this appeal is from the merits. Brown Manufacturing Co., James M. Morey, Treas., Appellant.

"Subscribed and sworn to before me this 4th day of Jan., A. D. 1906. C. W. Allen, Notary Public. [Seal C. W. Allen, Notary Public, Green Co., Tenn.]"

One of the objections made to the affidavit is that it states that James M. Morey makes the application for himself, and not for the Brown Manufacturing Company. That is true, literally speaking; but it is to be gathered from the entire instrument that he makes the application for said company.

The next objection is that the affidavit was taken before a notary public of another state, which can have no force in this state. This objection is not well taken. Courts will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world. *Barhydt & Co. v. Alexander & Co.*, 59 Mo. App., loc. cit. 193; *Pierce v. Indseth*, 106 U. S., loc. cit. 549, 1 Sup. Ct. 418, 27 L. Ed. 254. And, further, that the notary does not certify, as required, when his term of office will expire. It has been ruled that a failure so to do will not invalidate his certificate. *K. C. & S. E. Ry. Co. v. K. C. & S. W. Ry. Co.*, 129 Mo. 62, 31 S. W. 451; *Baskowitz v. Guthrie*, 99 Mo. App. 304, 73 S. W. 227.

The appeal bond is objected to because, purporting to have been entered into by the plaintiff, it should have been signed by the president of the corporation, attested by its secretary, with the seal of the corporation attached. The bond is signed as follows: "Brown Manufacturing Co., James M. Morey, Treas." It is no longer the law that all instruments of writing executed by a business corporation should be signed by the president under its corporate seal. *Washington Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Preston v. Mo. & Pac. Lead Co.*, 51 Mo. 43; *Buckley v. Briggs*, 30 Mo. 452. In the *Preston Case*, supra, our court adopted the law as stated in *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. Ed. 351, that, "whenever a corporation is acting within the scope of the legitimate purpose of its institution, all parol contracts made by its authorized agents are express promises of the corporation. \* \* \*" We believe the bond executed by the treasurer of

the plaintiff is sufficient to bind it and in substantial compliance with the statute.

We cannot find any substantial objection to the notice of appeal. It states the cause, the justice's court in which the judgment was rendered, its date, and that an appeal had been taken.

It is also contended that the court committed an error in admitting as evidence Exhibit A without first requiring plaintiff to prove that the signature attached was that of defendant. The exhibit was the foundation of plaintiff's action, and, not being denied under oath, it stood confessed. Sections 746, 3967, Rev. St. 1899.

Lastly, defendant contends that, as the goods were returned to plaintiff and accepted by it without question, plaintiff was not entitled to judgment for their value. Defendant misapprehends the record. The plaintiff did not accept the goods when returned by the defendant, but notified him, before he reshipped them, that they would not be received, and when they arrived stored them subject to defendant's order.

We have examined carefully every question presented by the defendant and find them without merit.

**Affirmed. All concur.**

#### BOYCE v. CHICAGO & A. RY. CO.

(Kansas City Court of Appeals. Missouri. June 18, 1906. Rehearing Denied Oct. 1, 1906.)

##### 1. RAILROADS—CROSSING ACCIDENT—INJURIES TO PEDESTRIANS—FINDINGS.

In an action for injuries to a pedestrian as she was about to cross defendant's railroad tracks between two parts of a train at a crossing, evidence held to sustain a finding that defendant's brakeman told plaintiff that she might pass between the parts of the train.

##### 2. SAME—DUTY OF SERVANT.

Where a brakeman was stationed at a crossing where a freight train had been cut in two, it was the brakeman's duty to exercise reasonable care to prevent injuring persons who might be in the act of passing over the tracks between the parts of the train.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 974, 975, 1014.]

##### 3. SAME—PROXIMATE CAUSE.

Plaintiff desiring to cross defendant's railroad track at a crossing where a freight train had been cut in two, defendant's brakeman told her that she could cross in safety; but, as she attempted to do so, the train started to come together, and plaintiff, in her fright, stepped on a loose stone in the roadway, fell and severely strained her ankle. Held, that defendant's negligence in moving the train while plaintiff was attempting to cross, and not her act in stepping on the stone, was the proximate cause of her injury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1090.]

##### 4. SAME—ACTION—INSTRUCTIONS—ANTICIPATED INJURY.

Where plaintiff was injured by stepping on a loose stone as she was endeavoring to escape from between two parts of a train at a crossing, a request to charge that if defendant's employes in charge of the train did not anticipate, and could not by exercise of

ordinary care have anticipated, that, if they started the train while plaintiff was crossing the track, she would run off the track and in doing so would step on a rolling stone, and be injured thereby, she could not recover, was properly refused, defendant being liable if its agents had reasonable ground to anticipate that plaintiff would be injured under the circumstances without reference to the manner in which it would occur.

##### 5. TRIAL—INSTRUCTIONS—PARTICULAR FACTS.

Where plaintiff was injured while passing between two parts of a train which had been opened at a crossing, an instruction that if plaintiff's companion saw the train was about to move and warned plaintiff not to proceed, and thereafter plaintiff persisted in attempting to cross the track ahead of the train, she could not recover, was properly refused as singling out particular facts to the exclusion of others on which the jury was authorized to find a verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 577-581.]

##### 6. RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff while attempting to retreat from between two cars, where she went in an endeavor to cross defendant's railroad track at a crossing between two parts of a train, evidence held to require submission of the question of plaintiff's contributory negligence to the jury.

##### 7. TRIAL—INSTRUCTIONS—CONFORMITY TO EVIDENCE—DAMAGES—LOSS OF TIME.

In an action for personal injuries, it is error to instruct the jury to consider plaintiff's loss of time without evidence of its value.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-601; vol. 15, Cent. Dig. Damages, § 537.]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Catherine E. Boyce against the Chicago & Alton Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Richard Field and Scarritt, Griffith & Jones, for appellant. N. M. Houx and Wm. H. Chiles, for respondent.

**BROADBUSH, P. J.** This is a suit for damages for negligence. The facts of the case are as follows: On the evening of October 16, 1903, the plaintiff in company with her daughter-in-law, Mrs. Dorothy Boyce, started to go to the opera house in the town of Odessa. They took the usual route on the south side of Mason street, which crosses the defendant's track at its station. When they got to defendant's tracks, they stopped and waited for a passenger train to go by. They also saw a freight train standing on the passing track, which was cut in two to allow the passing of traffic on the street, which crossed the track parallel with the sidewalk, and to enable foot passengers to continue their journey. At this opening of the train they saw a man dressed in overalls with a railroad lantern in his hand, who appeared to be connected with the train, who told them they "could cross if they wanted to." Whereupon plaintiff started to cross the tracks, at which time the train began to move, which

alarmed her, and in order to prevent being crushed between the cars when they came together she got off the sidewalk into the street-way, trod upon a stone, fell to the ground, but got up in time to get out of the way of the moving cars. She did not discover that she was injured until she got to the opera house, when she says she felt a pain in her ankle, which according to the evidence turned out to be a severe sprain. Plaintiff, her companion and another witness testified that they did not hear any warning given of the starting of the train, but the train operators testified that the usual warning in such cases was given. When plaintiff started to cross the track, her companion cried out to her to come back, but she did not heed the warning. The rear brakeman testified that he was at or near the place in question, that he did not say anything to plaintiff about crossing the tracks, and that he gave the signal for starting.

Defendant insists that there was no evidence that the man plaintiff took to be a brakeman was such. We think there was sufficient evidence that it was defendant's brakeman who told plaintiff that she might pass between the two parts of the train. Such matters are sometimes difficult to prove to a certainty, and reliance must necessarily be placed upon the appearance and acts of the person charged with the duty of a brakeman. Ordinarily, the only person found on such occasions at such places, where the person whom plaintiff took to be a brakeman was found, is a brakeman with a lantern, if it is dark, dressed in overalls, and apparently connected with the movements of the train. And it is the duty of a brakeman on such occasions to exercise reasonable care to prevent injuring persons who may be in the act of passing over the tracks of his company. *Montgomery v. Railroad*, 181 Mo. 477, 79 S. W. 930. It is the brakeman that cuts a train in two at a crossing, and it is the brakeman that gives the signal to close the train again. He is at the place of separation of the train or near by and necessarily has his attention called to the surrounding, and, if he sees a person about to enter into danger, it is his duty to warn him of its approach. If he says to a traveler that he may safely pass, the traveler may rely on what he says, for he is apparently authorized to speak for the company operating the train. In law, he has such authority. Otherwise, the master would be liable because he did not have some one present who did have such authority. Great diligence is required of those operating trains over the streets of cities and towns. *Burger v. Railroad*, 112 Mo. 238, 30 S. W. 439, 34 Am. St. Rep. 379. The argument and authorities presented by the defendant to the effect that it was not shown that the brakeman was acting within the scope of his authority at the time mentioned have no application for the reason already

given; or, in other words, the very nature of his employment implies authority.

The next question presented by the defendant is that the injury plaintiff received was not the proximate result of the negligent act charged; that is to say, plaintiff was not injured by being struck by the cars, but was injured by stepping upon a stone in her effort to escape danger. It is a general rule that there must be a direct connection between the negligent act and the injury. *Gilliland v. Railroad Co.*, 19 Mo. App. 411; *Brink v. Railroad*, 17 Mo. App. 177. And it has been held "that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the act." *Banks v. Railway Co.*, 40 Mo. App. 458; *Foley v. McMahon* (Mo. App.) 90 S. W. 113. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have happened. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation." *Dickson v. Omaha & St. L. Ry. Co.*, 124 Mo. 140, 27 S. W. 473, 25 L. R. A. 320, 46 Am. St. Rep. 429. "The negligence which is the proximate cause of the injury authorizing a recovery, is not necessarily the immediate cause, but the culpable act in the chain of causation nearest the injury." *Hensler v. Stix et al.*, 113 Mo. App. 162, 88 S. W. 108. The doctrine of the latter case was applied in *Parker v. St. Louis Transit Co.*, 108 Mo. App. 465, 83 S. W. 1016: "Where a passenger in alighting from a street car, by the sudden and negligent starting of the car before she had time to alight, was thrown under the feet of a mule hitched to a wagon, when the animal became unmanageable and drew the wagon wheels over her," it was held that the negligence of the street railway company was the proximate cause of the injury, and not the act of the frightened mule in drawing the wheels of the wagon over the body of the plaintiff after she had been thrown to the ground. Speaking for myself, I am free to say that the definition of proximate cause resulting in an injury is unfortunate, and tends to create confusion in its application in many cases. Properly speaking, "proximate cause" means "a cause that immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause." *Webster's International Dictionary*.

Strictly speaking, the plaintiff's injuries were not the immediate result of defendant's act of negligence, but it was the producing cause. The injury was the result of her attempt to escape impending danger. There

was no independent agency between the act of negligence and the injury. If A. negligently sets B.'s house on fire and B. in attempting to escape is injured in jumping from a window and alighting on a stone, under the defendant's theory, A. would not be liable for his negligence because B.'s injuries were not the result of his having been burned, but the result of his attempt to escape from being burned. Plaintiff was not injured by being crushed between the cars as they came together, but in endeavoring to escape from such a danger; ergo, defendant is not liable, as her injuries were not the proximate result of its negligence. The defendant has misinterpreted what the courts mean by the term "proximate cause." And defendant also misconstrues the language of the courts, where it is said that the injury must be "the natural and probable consequence" of the act of negligence. The meaning is, tracing the effect to the cause, was it probable and natural? As applicable to this case, it is not to say that it was natural or probable that plaintiff in endeavoring to escape from danger would step off the sidewalk on to a stone, but that, if she did, the natural and probable result would be that her ankle would be sprained and that she would fall.

The defendant presented the question we have just been discussing in the following instruction, which the court properly refused: "The court instructs the jury that if you believe from the evidence in this case that defendant's employees in charge of the train at the time in question, did not anticipate and could not by exercising ordinary care, have anticipated that if they started the train while plaintiff was crossing the railroad track, she would run off the track and in doing so would step upon a rolling stone and be injured thereby, then your verdict should be for defendant." That is to say, if defendant by the exercise of ordinary care could not have anticipated in what particular manner plaintiff would pursue to escape and in what way she would be injured in so doing, defendant would not be liable. That would require such foresight as human beings at this day do not possess and exercise. The law of the case is: Did defendant's agents have reasonable grounds for anticipating that plaintiff would be injured under the circumstances without reference to the manner in which it would occur?

The defendant asked an instruction, which was refused, to the effect that if the woman, who was with plaintiff and saw that the train was about to move and warned her not to proceed, and that thereafter she persisted in attempting to cross the track ahead of the moving train, the finding should be for defendant. The vice of the instruction is that it singles out particular facts, to the exclusion of other facts, upon which the jury are authorized to find a verdict. This left out of consideration the fact that plaintiff had already started to make the pas-

sage, and, such being the case, it was a question for the jury to say whether it was safest for her to proceed or turn back. We all know from experience that in case of danger it is sometimes a question whether it is safer to proceed or to retreat. And the law will not place a strict construction upon the acts of a person in such a situation because of want of time for deliberation, and because the eminence of peril is calculated to confuse the judgment. It was a question for the jury to say whether she acted in a reasonable and prudent manner under the circumstances. The plaintiff's instruction for damages contained the following: "If the jury find from the evidence for the plaintiff, then in assessing her damages the jury will allow her a reasonable compensation for loss of time, if any, the jury may believe from the evidence she has sustained up to the present time in consequence of such injuries." As there was no evidence of the value of the plaintiff's loss of time, defendant insists that the instruction was erroneous. Under the most recent decisions of our courts, it is error to instruct the jury in estimating plaintiff's damages to take into consideration loss of time without evidence of its value: *Mammerberg v. Street Ry. Co.*, 62 Mo. App. 563; *Stoetzel v. Swearingen*, 90 Mo. App. 588, and numerous other cases. But plaintiff contends that the instruction was not erroneous under the late ruling in *Perrige v. St. Louis*, 185 Mo. 274, 84 S. W. 30. In that case, the instruction only went to the diminished ability of the plaintiff to labor, which was the impairment of a faculty and "an injury to a personal right wholly apart from any pecuniary benefit that might be derived from the exercise of the power." Plaintiff insists that although the instruction may have been erroneous, yet the verdict of the jury shows that it did not take into consideration plaintiff's loss of time in estimating her damages. But there is nothing whereby we can infer that such was the cause.

For the error noted the cause is reversed and remanded. All concur.

#### HINES v. KANSAS CITY.

(Kansas City Court of Appeals, Missouri.  
July 2, 1906. Rehearing Denied Oct. 1,  
1906.)

##### 1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—EVIDENCE.

Where plaintiff alleged that defendant city negligently permitted its sidewalk to become and remain out of repair and permitted some of the planks and boards to become rotten, broken, and unnailed, evidence that there were boards in the walk that were not nailed was admissible to support the petition and to show the general condition of the walk at the place in question.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1726-1728.]



**2 DAMAGES—PERSONAL INJURIES—EVIDENCE.**

In an action for injuries to plaintiff caused by a fall on a defective city sidewalk, evidence that plaintiff had been afflicted with falling of the womb since her injury, and that she had not had trouble of that kind prior thereto, was admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 41.]

**3. APPEAL—RIGHT TO ALLEGE ERROR.**

Where, in an action for injuries, defendant objected to two of plaintiff's instructions correctly defining the issues, and induced the court to sustain such objections, defendant could not complain on appeal that the court failed to define the issues on plaintiff's part.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3591-3610.]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by Bessie Hines against Kansas City. From a judgment for plaintiff, defendant appeals. Affirmed.

Edwin C. Meservey and Francis M. Hayward, for appellant. Burnham & Brewster, for respondent.

ELLISON, J. The plaintiff fell upon one of the defendant's sidewalks and suffered injury to her damage. She brought this action therefor, and prevailed in the trial court.

The petition charges that the defendant at a certain designated place negligently permitted its sidewalk to become and remain out of repair, and permitted some of the planks and boards of which it was constructed to become rotten and broken and unnailed, so that there existed holes in the walk; that said boards became loose and uneven, etc. The plaintiff was injured by stepping upon, or "through," a rotten board. Plaintiff was asked as to the condition of the board with reference to any of them being loose or unnailed. She answered that there were boards not nailed. We can see no possible objection to the evidence. It bore directly in support of the allegations of the petition and of her injury, besides showing the general condition of the walk at that place of which the defendant was charged to have had notice. *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96.

Objection was made to the plaintiff testifying that she was afflicted with falling of the womb since her injury and that she had not had trouble of that kind prior to that time. We cannot see why she should not have answered that question. The authorities cited by defendant have no bearing on it.

Objection is made to the failure to define the issues on plaintiff's part in instructions for her. It is said that there is no instruction defining negligence, and none advising the jury that the city should have had notice or knowledge of the defect in the sidewalk, and that, after such knowledge, there should have been reasonable time to have made repairs. On these subjects there were

two proper instructions prepared and offered by the plaintiff, but the defendant objected to either of them being given and yet contends that one, at least, was wrong. The court sustained the objections by refusing them. If they had been given, as they should have been, there could not have been the criticism now made. To permit the defendant's success in convicting the plaintiff, or the trial court, of error which it asked to have committed, would be an injustice which we cannot allow. The instructions given for the defendant covered every phase of the case which was supported by evidence. And when all for either party are considered, there is scarcely a possibility that the jury were misled or confused as to the facts, or misdirected as to the law. Those refused for defendant, which were not covered by those given, were not supported by the evidence.

We do not feel that we would be justified in ordering a remittitur on account of excessive verdict. It was \$1,500, and, from plaintiff's standpoint of evidence, which we must accept, since it is sanctioned by the jury, it was not too much.

The judgment was for the right party, and is affirmed. All concur.

**OBERMEYER v. F. H. LOGEMAN CHAIR MFG. CO.**

(St. Louis Court of Appeals, Missouri, July 9, 1906.)

**1. NEGLIGENCE—DANGEROUS APPLIANCES—ELEVATORS.**

Proper care in the construction of freight elevators does not, in general, require that they be wholly inclosed or sheathed.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 60.]

**2. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.**

In an action for injuries to a servant by having his foot caught between the floor of an elevator and strips nailed on the floor beams, evidence held to require submission of the issue of negligent construction of the elevator to the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1025.]

**3. SAME—CONTRIBUTORY NEGLIGENCE.**

Plaintiff, a boy 14 years and 11 months of age, was standing near the edge of defendant's elevator, but not in a position to be caught between it and certain strips nailed on the floor beams to lessen the space between them. Plaintiff was leaning on the shoulder of another boy, who stepped back on plaintiff's foot, to relieve which plaintiff stepped back, when his heel was caught. Held, that plaintiff was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

**4. SAME—ASSUMED RISK.**

Where defendant negligently lessened the space between its elevator and the floors of the building by nailing strips to the floor beams less than the full width of the beams, plaintiff, a servant, did not assume the risk of injury from such dangerous construction by continu-

ance in his employment, though by the exercise of ordinary care he could have known of the danger.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

#### 5. SAME—PROXIMATE CAUSE.

Plaintiff and a fellow servant were riding on defendant's elevator, when the latter stepped on plaintiff's foot. Plaintiff immediately pulled his foot back, when his heel was caught between the floor of the elevator and strips negligently nailed to the floor beams for the purpose of reducing the space between the elevator and the floor. *Held*, that defendant's negligent construction of the elevator well, and not the act of plaintiff's fellow servant, was the proximate cause of the injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 257, 259, 353.]

#### 6. WITNESSES — COMPETENCY — PRIVILEGE — PHYSICIANS.

Rev. St. 1899 § 4659, declares that a physician shall be incompetent to testify concerning any information acquired from a patient while attending him professionally, which information was necessary to enable him to prescribe for the patient. Plaintiff, on sustaining an injury to his foot, was sent by defendant to a physician employed by the latter to treat plaintiff, when the physician interviewed plaintiff as to his condition, in order to treat him professionally, and also to get admissions advantageous to his employer. *Held*, that the physician was incompetent to testify as to any of the statements made by plaintiff at such interview.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 768-777.]

#### 7. EVIDENCE — EXPERTS — SUBJECTS OF EXPERT TESTIMONY.

In an action for injuries to a servant by his foot becoming caught between the floor of an elevator and strips nailed on the floor beams, evidence of an expert that the strips were unnecessary and formed a cage that would catch anything that might get in their way, and that such was not the ordinary method of finishing the well hole of an elevator, was not objectionable as an improper subject for expert testimony.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2317, 2318.]

Norton, J., dissenting.

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by John Obermeyer, Jr., by his next friend, etc., against the F. H. Logeman Chair Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellant is a corporation engaged in the manufacture of chairs, in the city of St. Louis. On June 23, 1902, the respondent, then 14 years and 11 months old, was in the employ of the appellant, and at work on its freight elevator. As the elevator ascended from the first floor, the respondent's foot was caught, at the third or fourth floor, between the elevator and a projecting strip of timber nailed on the floor beam and so badly crushed as to necessitate the amputation of his leg about 10 inches below the knee. The suit is to recover for the injury. The negligence alleged, and relied upon at the trial for recovery, is as follows: "That said elevator upon two sides thereof was not provided

with gates or guards to prevent persons riding thereon from coming in contact with obstructions in the shaft; that between the sides so left open and the walls of the shaft was a space of several inches; that from each floor there extended a strip or sill of wood several inches in width and reaching to the sides of said elevator so exposed; that the failure to inclose said elevator on said sides and the extension of said strip into said elevator shaft made it extremely dangerous and hazardous to ride upon said elevator, in that persons so riding thereon were apt to come in contact with said sill; that defendant carelessly and improperly exposed plaintiff to the dangers of said elevator and negligently omitted to give plaintiff notice of such dangers or instructions to protect himself from injury." The answer was a general denial and the following plea of contributory negligence: "Further answering, the defendant states that whatever injuries, if any, were sustained by plaintiff on the occasion mentioned in his petition by and on account of the matters and things in said petition set forth were caused by the negligence of plaintiff directly contributing thereto in this, to wit: That on the said occasion said plaintiff, while ascending in an elevator, carelessly and negligently stood near the edge of the said elevator platform, and as said elevator ascended, said plaintiff carelessly and negligently allowed a portion of his foot to project over the edge of said elevator platform in such a manner as to allow it to be struck by a portion of the siding or inclosure of said elevator. And defendant states that the said acts of negligence on the part of said plaintiff directly contributed to cause whatever injuries, if any, were sustained by him on said occasion." A reply was filed denying the new matter stated in the answer.

The elevator was simply a board platform constructed of rough boards with no cage or shield, and four uprights connected at the top and running in grooves. The north side of the shaft in which the elevator ran was inclosed by a solid brick wall, the south side by a solid wooden wall. The east and west sides were not inclosed, except by doors on each floor which opened and closed automatically as the elevator ran up or down. There were five floors in the building, each story being about 7½ feet high. The distance between the elevator platform and the several floors abutting the elevator shaft was about three inches. To lessen these openings for the purpose of preventing the legs of chairs catching between the elevator and the floors when dragged from one to the other, a strip of timber 1½ inches square was nailed on the floor beams on a level with the floor. The floor beams are 12 inches wide. Respondent testified that he had been working in the factory for several months, at different jobs, but had not worked on the elevator until about 12 days before he was injured.

that by direction of the boss, he and several of the boys about his own age, for 12 days prior to his injury, between the hours of 5 and 6 p. m., had worked on the elevator, removing chairs from the upper to the lower floors; that on the day of his injury two loads of chairs had been carried down and the elevator was going up to the fifth floor for the third load; that while he was leaning on the shoulder of one of the boys (Clyde Harder) facing east, Harder stepped back on his toes and he threw his foot back and his heel was caught between the elevator and the projecting strip at the third floor and crushed. He further testified that he knew the strips were on the sills, knew that if he got his foot caught between one of them and the elevator he would be hurt; that it was dark on the first floor but not so dark on the second and third floors as to prevent one from seeing his surroundings. He also stated that he had not been warned by the foreman or any one else to look out and be careful not to let his foot get caught between the elevator. Respondent introduced testimony of an expert, tending to show that the construction adopted by appellant was not the usual construction of elevator shafts, but that the usual construction was either to have the 12-inch beam extend out further so as to be within 1½ inches of the passing elevator, or else to fasten a sill at each floor and have the said sill, instead of extending down one inch, extend down the entire width of the beam. Said expert expressed the opinion that either of said constructions would obviate the dangers incident to a construction like that adopted by appellant.

The testimony in behalf of appellant tended to show that the shaft construction adopted by it was the usual construction, omitting the strips on the floor beams. This was shown by an ex-inspector of elevators of the city of St. Louis, one of whose duties was to examine this freight elevator for a period of eight years, during which time he examined it four times a year, and every time issued a certificate of indorsement; also by an employé of the Moon Elevator Company who had been in the business for 17 or 18 years. As to the happening of the accident, the testimony on behalf of appellant tended to show that the respondent had been several times warned to be careful while using the elevator and not to indulge in play. The testimony on behalf of appellant also tended to show that at the time the respondent was injured he was "skylarking," and while so doing allowed his foot to project beyond the floor of the elevator. Appellant offered to show by Dr. Amyx that the respondent stated to him the day of the accident that he was kicking back against the wall of the inclosure of the elevator and that this was what caused his accident. This was objected to by the respondent on the ground that the communication was privileged. The objection was sustained and appel-

lant saved exception: The testimony for appellant also tended to show that the construction suggested by respondent's expert, to wit, to have the 12-inch beam extend out further, or the sill extend down the entire length of the beam, would not, in any way, be less dangerous than the construction adopted by appellant, or in any way obviate any of the dangers incident to the construction adopted by appellant.

The trial resulted in a verdict for \$3,000 in favor of the respondent and against the appellant. The latter filed its motion for a new trial in due time, which was overruled, and it appealed.

Sedden & Holland, for appellant. Walther & Muench, for respondent.

BLAND, P. J. (after stating the facts).

1. At the close of respondent's evidence the appellant moved for a peremptory nonsuit which the court refused. This ruling is assigned as error. If the respondent's evidence shows that the elevator furnished him was a reasonably safe place to work, or if the evidence is all one way that respondent himself was guilty of negligence that directly contributed to his injury, he should have been nonsuited. Webb on Elevators, § 17, says: "Proper care in the construction of freight elevators does not require that they be wholly inclosed or sheathed, and this may be considered a general rule, although there may be exceptions," citing *Hoehmann v. Moss Engraving Co.*, 4 Misc. Rep. 160, 23 N. Y. Supp. 787. The same authority, at section 14, says: "In all cases except where the failure to exercise care is in violation of some statute, or willful, or such reckless disregard for the personal safety of others as to amount to negligence per se, the questions of fact arising in the case and the estimate of prudence are for the jury to determine." Respondent offered some evidence tending to show that the accident was due to faulty construction, viz., that the strips nailed on the floor beams were not properly constructed; that they should have been the full width of the beams and beveled from the upper to the lower edge to prevent the very sort of accident that happened to respondent. On this evidence, we think the issue, in respect to negligent construction, was a question for the jury to determine. *McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700 (both elevator cases); *Hunt v. Railroad*, 14 Mo. App. 160; *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709; *State v. Peebles and York*, 178 Mo. 475, 77 S. W. 518. Does respondent's evidence conclusively convict him of contributory negligence? We do not think so. He was standing near the edge of the elevator but not in a position to be caught between it and the strip on the floor beam. He was a boy, who would not be expected to be

on his guard at all times to avoid danger, was leaning on the shoulder of another boy, who, he says, stepped back on his foot, and, to relieve his foot of the pressure, respondent stepped back and his heel was caught in the manner he described. A man in respondent's situation would perhaps have noticed that the elevator was near a floor, and have remembered the danger of having his foot caught should he throw it back, but whether a 14 year old boy should so closely observe and exercise such a degree of prudence, we think was a question for the jury; for the same standard of care required of an adult, in *Rodgers v. Meyerson Printing Co.*, 103 Mo. App. 683, 78 S. W. 79, was held not to apply to a boy of 13 years, and not to apply to a boy of 16 years in *Campbell v. St. Louis & Suburban Ry. Co.*, 175 Mo. 161, 75 S. W. 86. It is the duty of employers of boys and girls of immature years not to expose them to such dangers as they are not likely to see or, if seen, appreciate, on account of their indiscretion and want of care; and if they do, and injury results to the minor, the employers cannot escape liability on the plea of contributory negligence, unless they can show that the minor failed, after being warned of the danger, to use that care which persons of his age, capacity and intelligence are capable of and are expected to use in like circumstances. *Anderson v. Railroad*, 81 Mo. App. 116; *Coleman v. Land & Lumber Co.*, 105 Mo. App. 254, 79 S. W. 981; *Anderson v. Railway*, 161 Mo. 411, 61 S. W. 874. And whether or not the minor did use such care is almost always a question for the jury. This case does not furnish an exception to this rule, and we think the court was right in refusing to nonsuit the respondent.

2. The appellant assigns as error the giving of the following instructions for the respondent: "(1) The court instructs the jury that if they find from the evidence that the defendant occupied a building in the city of St. Louis in which it carried on business as a manufacturer, and that in said building there was an elevator propelled by steam and maintained and operated by the defendant; that on the 23d day of June, 1902, plaintiff was in the employ of defendant, and was on said day riding upon said elevator in the discharge of his duties as such employé of defendant; that said plaintiff while so riding upon said elevator was injured by catching his left foot and ankle between the floor of said elevator and a certain sill or board which projected into the shaft of said elevator, up an down which said elevator was propelled; and if the jury further believe from the evidence that the extension of said sill or board into said elevator shaft made the same unsafe or dangerous, and that such dangerous condition was known to defendant at said time, or could, by the exercise of ordinary care have known to it, and if the jury believe from the evidence that the

defendant did not exercise ordinary care in maintaining said elevator in such condition, and if the jury further believe from the evidence that plaintiff was injured in consequence of said dangerous condition of said elevator, and that, at the time of the injury, plaintiff was exercising such degree of care as an ordinarily prudent boy of the same age and experience would have exercised under the same or similar circumstances, then the jury will find for plaintiff. (2) The court instructs the jury in this case that if they find from the evidence that the plaintiff was a minor of about the age of 15 years, then he could not and did not assume any risk that might arise in his employment, if any there was, caused by the failure of the defendant to exercise ordinary care to provide a reasonably safe elevator shaft and appliances with which the plaintiff was to work in the discharge of the duties of his employment. \* \* \* (5) If the jury find from the evidence that there existed in the elevator shaft at the third or fourth floor of the building mentioned in the evidence a certain projection into said shaft, and if the jury find from the evidence that said projection rendered the use and travel on said elevator hazardous, and if the jury find from the evidence that defendant provided said elevator and shaft for the plaintiff to ride upon in the discharge of the duties of his employment; and if the jury find from the evidence that the defendant did not exercise ordinary care in providing said elevator and shaft for the plaintiff to work with in the discharge of the duties of his employment; and if the jury find from the evidence that on the 23d day of June, 1902, the plaintiff in the discharge of the duties of his employment was on said elevator and whilst so on said elevator the plaintiff was pushed or shoved by one Harder and thereby was caused to step back, and in doing so got his foot caught between said projection and the floor of the elevator, and thereby sustained the injuries mentioned in the evidence; and if the jury further find from the evidence that said condition or projection in said shaft directly concurred with said Harder in causing plaintiff's said injury; and if the jury find from the evidence that the plaintiff was exercising ordinary care at the time of his injuries, then he is entitled to recover."

The objections to the respondent's first instruction is disposed of by what is said in the foregoing paragraph of this opinion; likewise the objection to the second instruction, except the contention of appellant that the respondent assumed whatever risk there was in riding on the elevator. This is the principal contention of appellant, and is chiefly relied upon for a reversal of the judgment. It is contended that the evidence conclusively shows the case is one of assumed risk, and able counsel have industriously and ably collated and digested the cases in this

country upon the subject. Their labor is lost in the circumstances of the case, and in view of the unique doctrine established by our Supreme Court that the servant assumes only such risks as are ordinarily incident to his employment, after the master has performed his whole duty to provide him a reasonably safe place to work and reasonably safe appliances with which to do his work, and holding that if the master is negligent in furnishing his servant an unsafe place to work, or unsafe appliances with which to do the work, and the servant knows, or by the exercise of ordinary care could have known, of the unsafe place or appliances, and yet continues in the master's service, he does not thereby assume the risk occasioned by the negligence of the master; but if the place to work, or the appliance furnished, is obviously so dangerous that a reasonably prudent man would not attempt to use them, or they could not be used even with caution, the servant will be guilty of such contributory negligence as to cut off his right of recovery. *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737; *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Cole v. St. Louis Transit Co.*, 183 Mo. 81, 81 S. W. 1138; *Blundell v. Manufacturing Co.*, 189 Mo. 552, 88 S. W. 103. See, also, *Stafford v. Adams*, 118 Mo. App. pp. 723, 724, 88 S. W. 1130, where Johnson, J., of the Kansas City Court of Appeals, has industriously collated the other Missouri cases in point. In *Blundell v. Manufacturing Co.*, 189 Mo., at page 560, 88 S. W. 105, Judge Marshall, in respect to the doctrine of assumption of risk and contributory negligence, says: "There is a vast difference between the doctrines of assumption of risk and contributory negligence; the first rests in contract, and the second arises out of the negligence of the servant. The result to the person injured is the same in both cases, but the underlying principles are radically different, and should be carefully borne in mind in every case. The maxim, '*volenti non fit injuria*,' cuts off a recovery where the injury is caused by one of the risks incident to the business which the servant assumes when he enters the employment. The right of recovery is cut off in the second case under the rule of law that prohibits a recovery where the negligence of the person injured contributes thereto." Under the law of the Supreme Court of the state, the respondent did not assume the risk arising from the negligent construction of the elevator, if it was negligently constructed, and hence instruction No. 2 is not erroneous.

8. It is contended that respondent's fifth instruction is erroneous for the reason Har- der stepping on the respondent's foot was the primary and proximate cause of the injury. In *Bassett v. City of St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446, an excavation extending into the street was negligently left uncovered, and plaintiff (a female traveling

on the street) through fear of being kicked by a mule, jumped to one side and into the excavation and was injured. It was held that the kicking of the mule, or the fright caused thereby, was not the sole cause of the injury and that plaintiff was entitled to recover if she was in the exercise of ordinary care. In *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248, plaintiff, a boy, while exercising ordinary care for his own safety, passing along a much-used public sidewalk of defendant, was, by reason of the inadvertent or negligent shoving by one boy of another boy against him, jostled or pushed from the sidewalk at a point where it was elevated some six feet above the ground, and where it was unprotected by railing or other guard, and thereby severely injured in one of his limbs. It was ruled: "If a person, while exercising due care for his personal safety, be injured by the combined result of an accident and the inadvertent or careless act of another, or the negligence of a city or village, and the injury would not have been sustained but for such negligence of the city or village, yet, although the accident or wrongful act of the third person be the primary cause of the injury, if it was such as common prudence could not have foreseen and avoided, the negligent city or village will be liable for the injury." In *Newcomb v. Railroad*, 169 Mo. 409, 69 S. W. 348, it was held: "A defendant is liable if his negligence concurred with that of another, \* \* \* and became a part of the direct and proximate cause although not the sole cause of the injury." The instruction is in line with these authorities and we think properly stated the law.

4. Error is assigned in the refusal of the court to give the following instructions asked by appellant: "(B) The court instructs the jury that there is no evidence of any negligence in this case on the part of the defendant with reference to the construction of the elevator in question. (C) The court instructs the jury that plaintiff in his petition alleged that the defendant was guilty of negligence in having a sill on the interior of the elevator shaft at the third floor of the building in question. And the court instructs the jury, with reference to the sill mentioned in the petition, that there is no evidence of any negligence on the part of the defendant in having such a sill on the third floor. (D) The court instructs the jury that if you believe from the evidence the plaintiff knew the way the elevator shaft in question was constructed, and knew that there was a projection of 1½ inches into the elevator shaft at each floor, and knew this space at this projection was narrower than it was between the floors, and if you also believe from the evidence that the plaintiff knew there was no guard on the platform of the elevator, and also knew that if his foot was out beyond the platform of

the elevator it would be caught by such projection, and that he understood and comprehended there was danger of this happening while and during all the time he was using the elevator, and you also believe from the evidence that, having this knowledge and understanding (if you from the evidence believe he did have them), he of his own will continued in the employ of the defendant and continued to use the elevator in question, then he assumed the risk of being caught and injured by such projection." If we are right in our views of the case as stated in the foregoing paragraphs, the court properly refused these instructions.

5. Error is assigned in the refusal of the court to permit Dr. Amyx to testify to a conversation had with the respondent in regard to his injury and how he happened to be injured. The doctor's evidence shows that when respondent was injured, appellant sent him to the doctor's office for treatment and the interview was had while respondent was in his care. In answer to the following question: "The subject of your interview and conversation with him was to ascertain his condition for the purpose of treating him?" the doctor said, "Yes, sir. And there were other motives there." He further testified that he was acting as physician and surgeon for the appellant, and that the remarks made by the respondent were not made in answer to any question asked in order to properly treat him. Section 4659, Rev St. 1899, provides: "The following persons shall be incompetent to testify: \* \* \* fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." The fact that Dr. Amyx examined respondent at the instance and request of appellant for the purpose of treating him did not remove his incompetency. *Weltz v. Railway*, 53 Mo. App. 39. The doctor's testimony shows that he had a double purpose in holding the interview with respondent: First, to ascertain his condition for the purpose of treating him professionally; second, to ply the boy with questions, while he was suffering from shock and severe pain as a result of the recent injury, for the purpose of getting some statement or admission from him that would be advantageous to his (Amyx's) employer, the appellant, in case the boy should sue to recover compensation for his injury. In these circumstances we are not inclined to split the interview into parts and determine what parts were and were not necessary to enable the doctor to prescribe for the respondent, but to hold him incompetent to testify to any part of the interview; besides, the evidence of the doctor, as offered, was but cumulative and there is no

probability that it would have changed the result if it had been admitted.

6. George W. Caldwell, an expert witness for respondent was permitted to testify, over the objection of the appellant, that the strips nailed on the floor beams were unnecessary; that "they formed a cage that would catch anything that might get in their way," that he never erected an elevator or allowed anything like said strips, and it was not the ordinary method of finishing the well hole of an elevator, and if put on should extend to the bottom of the floor beams. It is contended that this was not a proper subject of expert testimony; that the only proper expert testimony in this connection was to show whether this was the usual construction, and that the question as to whether or not it was necessary was entirely immaterial. In *Lee v. George Knapp & Co.*, 55 Mo. App., loc. cit. 406, in speaking of the construction of an elevator, this court said: "Mere usage by others is not the sole criterion. It is the duty of owners of elevators to make them reasonably safe for the uses to which they are to be put; and, in so doing, they should exercise that degree of care employed by reasonably prudent men in attaining the same end." The witness testified that elevators were not usually constructed as was this one, that strips were not common on elevators in the city of St. Louis. We can see no valid objection to the testimony.

Discovering no reversible error in the record, the judgment is affirmed. All concur.

NORTONI, J. (dissenting). The defense of assumed risk is not pleaded in the answer in this case and except for the fact that both parties requested instructions along that theory and tried the case with respect thereto, it would not be a subject for our consideration, but as the record discloses both parties participated in the trial as though this defense was pleaded in the answer, it therefore becomes the province of the court to review the question here. I do not concur in that portion of the opinion of the court holding that under the law of this state, the servant assumes only such risks as are ordinarily incident to the employment. In the recent case of *Mathis v. Kansas City Stockyards Co.*, 185 Mo. 434, 84 S. W. 66, decided by the Supreme Court in banc, the servant held to have assumed the risk which clearly arose by virtue of the master's negligence and was not one ordinarily incident to the employment. The holding was predicated upon the proposition that, by continuing in the employment without complaint with respect to the dangerous appliance, the servant had assumed the risk resulting therefrom, provided he knew and appreciated the risk thereof, and he was held, as a matter of law, to have known and appreciated the danger inasmuch as the danger was obvious. Now it is the law universally that by con-

tinuing to labor with a defective appliance without complaint, the servant assumes such risks therefrom as were both known and appreciated by him, and further, that when the dangers of such defective appliance is obvious to both servant and master alike, he is held to have assumed the risk therefrom as a matter of law. Our views on this question are fully set out in *Lee v. St. L. M. & S. E. Ry. Co.*, 112 Mo. App. 372, 87 S. W. 12, and *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 91 S. W. 460. Our Supreme Court, in numerous ably considered cases, has recognized and adjudged the proposition stated to be the law. There is no question about that. The cases are abundant to that effect. None of them have been expressly overruled. Consult the following authorities in point: *Porter v. Ry. Co.*, 71 Mo. 60, 36 Am. Rep. 454; *Keegan v. Cavanaugh*, 62 Mo. 230; *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Mathis v. Kansas City Stockyards Co.*, 185 Mo. 434, 84 S. W. 66. These cases are sound in principle and in accord with the best courts on this subject in every jurisdiction where the common law obtains, so far as I have been able to ascertain, and I have devoted much time and careful thought to the question of assumed risk. I do not say that the boy in this case should have been held, as a matter of law, to have assumed the risk, but I am of the opinion that at least the plaintiff's second instruction incorporates a vicious notion with respect to this question and that it should have been refused. I am of opinion that the defendant's instruction D, as follows: "The court instructs the jury that if you believe from the evidence that plaintiff knew the way the elevator shaft in question was constructed, and knew that there was a projection of 1½ inches into the elevator shaft at each floor, and knew this space at this projection was narrower than it was between the floors, and if you also believe from the evidence that the plaintiff knew there was no guard on the platform of the elevator, and also knew that if his foot was out beyond the platform of the elevator it would be caught by such projection, and that he understood and comprehended there was danger of this happening while and during all the time he was using the elevator, and you also believe from the evidence that having this knowledge and understanding (if you from the evidence believe he did have them) he of his own will continued in the employ of the defendant and continued to use the elevator in question, then he assumed the risk of being caught and injured by such projection"—was a proper declaration of law on the facts in proof and that it should have been given. To my mind, it appears that its refusal was error.

I deem the doctrine of assumed risk running through the case, as manifested by the instructions given and refused, to be at

variance with fundamental principle on the subject as well as in conflict with the several decisions of our Supreme Court above cited, and therefore respectfully request that the cause be certified to that court.

#### NAIRN v. NATIONAL BISCUIT CO.

(Kansas Court of Appeals, Missouri, June 18, 1906. Rehearing Denied Oct. 1, 1906.)

#### 1. MASTER AND SERVANT—EMPLOYMENT OF MINOR—MACHINERY—NEGLIGENCE—STATUTES.

The act of a master in requiring plaintiff, a minor, to work at a steam candy roller, in violation of Rev. St. 1899, § 6434, providing that no minor shall be required to work between the fixed or traversing parts of any machine while it is in motion by action of steam, etc., constituted negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 159, 160, 177.]

#### 2. SAME—ASSUMED RISK.

Where defendant put plaintiff to work at a steam candy roller, in violation of Rev. St. 1899, § 6434, defendant took all the risks of danger to plaintiff in the operation of the machine.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 159, 160, 171, 545.]

#### 3. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a minor, was employed to operate a steam candy roller in defendant's factory, in violation of Rev. St. 1899, § 6434. He saw that candy was sticking to the rollers and in order to prevent this was throwing starch on the rollers, when his fingers inadvertently came in contact with the sticky material on the rollers, causing his hand to be drawn between them and injured. *Held*, that plaintiff was guilty at most of mere negligence, and was not guilty of such contributory negligence as precluded a recovery.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 668, 670, 687-697.]

Appeal from Circuit Court, Jackson County; Cyrus Crane, Special Judge.

Action by Joseph R. Nairn, by his next friend, against the National Biscuit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Harkless, Crysler & Histed, for appellant.  
Rust & Campbell, for respondent.

BROADBUSH, P. J. The plaintiff, a minor, brought this action to recover damages for an injury he received while in defendant's employ. The plaintiff, about 15 years of age; was employed by defendant in its business, a part of which was the manufacture of candy. He was injured while engaged at work on a certain part of the machinery used in the business. The description of the machinery given by one of defendant's foremen substantially was as follows: There was a table about 20 feet long, in the center of which were two rollers, one on top of the other; one of these rollers was located on the under side of the table, the other came up above the table about one-fourth of an inch; these

rollers were operated by means of steam and a belt; there was a small lever running from the tables so that the operator could turn the rollers in any desired direction. The purpose of these rollers was to press material into sheets preliminary to cutting them into smaller quantities. The method of doing the work was for the workman to take a batch of material that had been prepared and run it through the rollers from one side of the table to the other, whereupon the motion could be reversed and the material put through to the other side. The space between the rollers would be gradually lessened as the work progressed and finally this alternating movement of the candy between the rollers would result in reducing it to a flat mass of the desired thickness for cutting into smaller pieces. As the material was inclined to stick to the rollers, starch was sifted by the hand upon them to prevent it from so doing. It was shown that for several weeks prior to the date of plaintiff's injury he had been working in the room where the machinery in question was located, but at another part of the business. He had watched the operation of the machine and knew how it was done. He was put to work on the machine about three days before his injury. His statement of the occurrence was as follows: "I was rolling out the molasses caramel, and at the time I had just got rolled out the right height [thickness], a quarter of an inch, that was the height they wanted the molasses caramel rolled out. I was just rolling it out for the last two times to get it settled down good when I seen that it was liable to stick on me if I run it through any more, and I had to put starch on it; and I got it out at one end—got the candy out at one end of the rollers and started to throw starch on the rollers, and this candy that had went through, of course, had got these rollers sticky, and as I was throwing starch on the rollers, my hand caught on this sticky stuff and it went under the rollers." At the close of plaintiff's case, and after all the evidence had been introduced, defendant interposed a demurrer to plaintiff's right to recover.

The theory of the defendant is that there was no negligence shown on the part of the defendant company, and that as plaintiff's injury was the result of his own careless act, the court committed error in not sustaining its demurrer to the evidence. But the defendant has assumed too much. The plaintiff's suit was instituted upon the theory that defendant in putting him to work on the machinery in question did an unlawful act, and therefore an act of negligence. Section 6434, Rev. St. 1899, provides that no minor shall be required to work between the fixed or traversing parts of any machine while it is in motion by the action of steam, water or other mechanical power." The act of defendant in requiring plaintiff, a minor, to

work at said machinery, it being the kind interdicted by the statute as unsafe to minors and women, was an act of negligence. *Lore v. American Manufacturing Co.*, 160 Mo. 608, 61 S. W. 678; *Bair v. Heibel*, 103 Mo. App. 621, 77 S. W. 1017.

The fact of defendant's negligence being established, the question arises whether there was such contributory negligence on the part of plaintiff as should prevent him from recovering. As we look at the evidence in relation to the character of the machinery, the material manufactured, and the manner in which the machinery was managed by the operator, we have come to the conclusion that its operation was attended with much danger and that consequently great care was required of the workman intrusted with its operation. We conclude that an injury like that of plaintiff is a danger incident to the business, notwithstanding the person engaged in the work may be using the care and caution of a person of ordinary caution. The slightest diversion of the mind from the work in hand may cause the hand of the workman to come in contact with the rollers which will usually result in injury.

The defendant's answer, among other things, alleges that plaintiff's injury occurred as an incident to the business. But it is no defense. When defendant violated the law by requiring plaintiff to work at the machinery in question, it assumed all the risks of danger to the latter. It is not logical nor just to permit the defense to prevail under such circumstances. Its obvious inconsistency needs only to be stated to be controverted and overturned. *Stafford v. Adams*, 113 Mo. App. 717, 88 S. W. 1180. But, waiving that question, we do not believe that plaintiff, take into consideration his youth and that want of caution usual with boys of his age, should, under the circumstances, be charged with contributory negligence. When injured he was sprinkling starch on the rollers to prevent the candy material from sticking to them and, while so doing, inadvertently his fingers came in contact with them, the sticky matter adhering sufficiently to cause his hand to be drawn in between said rollers. It is not probable that the plaintiff was aware of danger from such a source. And in the absence of the adhesive substance on the rollers there would have been little or no danger attending the mere touch of the fingers to them. The defendant's counsel, seemingly, does not believe that the injury was inflicted in that way. But we think it makes no difference whether it was so inflicted or not. There is nothing to show that plaintiff knowingly placed his hand in danger. At most he was only guilty of mere negligence, which would not prevent him from recovering. *Adams v. Kansas & Texas Coal Company*, 85 Mo. App. 486; *Western Coal Co. v. Beaver*, 192 Ill. 335, 61 N. E. 335. To hold otherwise would be to defeat



the purpose of the statute. It was such dangers the Legislature had in view when the act was passed. The opinion disposes of all other questions raised.

**Affirmed. All concur.**

#### HARDIN et al. v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri.  
July 2, 1908. Rehearing Denied  
Oct. 1, 1908.)

##### 1. CARRIERS—INITIAL CARRIER—LIABILITY FOR NEGLIGENCE OF CONNECTING CARRIER.

A carrier contracting to carry a shipment to its destination, a point beyond its line, is liable for damages resulting from negligent delay in the transportation, whether the delay occurred on its own line or that of a connecting carrier, though the bill of lading restricted its liability to the consequences of its own acts.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 766-774, 815-828.]

##### 2. SAME — NOTICE OF DAMAGES — FAILURE TO GIVE—EFFECT.

Where a carrier learned of the damaged condition of a shipment on its arrival at the point of destination, and was afforded opportunity to investigate the nature and extent of the damage, the failure to give notice of damage, as required by the bill of lading, did not defeat a recovery.

##### 3. EVIDENCE—SECONDARY EVIDENCE—GROUND FOR ADMISSION—SUFFICIENCY.

A party testified that he had dictated to his stenographer a letter to the adverse party and had read and signed it after it had been written. He then returned it to the stenographer, whose duty it was to prepare letters for mailing and mail them, but he could not say from his personal knowledge whether or not the stenographer had prepared the particular letter for mailing or mailed it, but only stated that it was her custom to follow this course with all of the letters dictated by him. *Held*, insufficient as a foundation for the introduction of secondary evidence of the contents of the letter.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 638-641.]

##### 4. CARRIERS — NEGLIGENT DELAY IN TRANSPORTATION—DAMAGES—BILLS OF LADING—STIPULATION.

The measure of damages for a carrier's negligent delay in transporting property is the difference between the market value of the property at the point of destination, in the condition in which it would have been received had it been delivered in a reasonable time, and its market value at that point in the condition which it was in at the time of its arrival, notwithstanding the stipulation in the bill of lading that in the event of loss of property the value of the same at the point of shipment should govern, the stipulation referring to property lost in transit and not to property damaged.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 451-461.]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by Samuel Hardin and others against the Missouri Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Elijah Robinson, for appellant. Sherman & Fletcher, for respondents.

JOHNSON, J. Plaintiffs, grain dealers doing business in Kansas City under the name of Samuel Hardin Grain Company, brought this action against defendant, a common carrier, to recover damages resulting from the alleged unreasonable delay in the transportation of a carload of corn chops from Kansas City to Babcock, Ga. The shipment was received by defendant on March 27, 1903, and from the contents of the bill of lading issued therefor by defendant, it is evident the contract made by the parties included the agreement of defendant to carry the shipment to its destination, a point beyond the line of defendant, consequently defendant became liable for damages to the property that resulted from negligent delay in its transportation, whether such delay occurred on its own line or on that of a connecting carrier, and despite the provision in the bill of lading, by which defendant attempted to restrict its liability to the consequences of its own acts. *Lee v. Railroad* (not yet officially reported), 94 S. W. 991; *Bank v. Ry.*, 72 Mo. App. 82; *Marshall v. Ry.*, 74 Mo. App. 81; *Popham v. Barnard*, 77 Mo. App. 628; *Marshall v. Ry. Co.*, 176 Mo. 480, 75 S. W. 638, 98 Am. St. Rep. 508; *Western Sash Co. v. Ry.*, 177 Mo. 641, 76 S. W. 998. It was shown by plaintiffs that the corn chops left Kansas City on the day of shipment in good condition, 10 days were a reasonable time for the transportation, and that, had no longer time been consumed, the chops would have sustained no damage in transit. It was conceded that the shipment did not arrive at Babcock until April 21st, more than three weeks after it left Kansas City, and that on arrival the chops were found to be in a badly damaged condition from heating and fermentation. The legal effect of conditions in the bill of lading was to limit defendant's liability on account of delays to those caused by negligence, but the facts and circumstances disclosed strongly tend to show a negligent origin of the delays that occurred. The issues were submitted to the jury, a verdict returned for plaintiffs, and judgment entered accordingly, from which defendant appealed.

The bill of lading contained a provision requiring notice of damage to be "reported by the consignee in writing to the delivering line within 36 hours after the consignee has been notified of the arrival of the freight at the place of delivery," and it is argued by defendant that the action must fail because no such notice was shown to have been given. Plaintiffs themselves were the consignees of the shipment, but on the bill of lading was indorsed the direction: "Notify Babcock Lb'r. Co." The delivering line was the Georgia, Florida & Alabama Railway Company. On the day the shipment arrived at Babcock the agent of that company at that point notified the Babcock Lumber Company of its arrival. Promptly responding to

this notice, a representative of that company called at the station, and he and the agent of the railway company inspected the contents of the car and acquainted themselves with the condition thereof. He testified: "When the car door was opened, the corn chops were found to be steaming and smelling very sour, and were turning black. They were so hot I could not bear my hand in them. They had no ventilation." The agent testified: "On the 21st day of April, 1903, L. & N. car No. 4,427, arrived in Babcock, Ga., and on the 21st day of April (the same day) I examined the contents of said car and found it to contain corn chops in a very badly damaged condition, same being heated." No written notice was given the delivering line. Three days later plaintiffs were notified by telegram of the damage and immediately thereafter presented a claim in writing to defendant. In the recent case of *Freeman v. Railway* (decided at this term), 93 S. W. 302, we said: "The right of the carrier to receive notice as stipulated will be enforced when necessary to prevent possible imposition in the particular case, but it will not be unreasonably nor harshly applied to deprive the shipper of his lawful rights, nor will it be enforced at all when its purpose has been fully and unequivocally accomplished." And in *Richardson v. Railway*, 62 Mo. App. 1, we observed that the object of such notice "is that defendant may have an opportunity of inquiring into the alleged loss so that unjust claims may be thwarted." Applying the principles followed in these and other cases (*Popham v. Barnard*, 77 Mo. App. 619; *Ward v. Ry. Co.*, 158 Mo. 226, 58 S. W. 28; *Rice v. Ry.*, 63 Mo. 314), it would be harsh and unreasonable to enforce the letter of the stipulation under consideration since its purpose has been clearly accomplished. We are not saying that where the fact that the carrier received actual knowledge of the damaged condition of the property within the period fixed for the giving of notice is controverted and therefore at issue, a shipper may relieve himself of his obligation under the shipping contract to give notice by satisfying the triers of fact that the carrier had actual knowledge of the damage, but are holding that where, as in the case in hand, the existence of such knowledge, in effect, is conceded, the carrier has been afforded the very opportunity to investigate the nature and extent of the damage, the notice was intended to provide, and the purpose of the notice thus being satisfied, no reason appears for compelling the shipper to perform an obviously useless condition. Defendant objects to the admission in evidence of the impression copies of two letters plaintiffs claimed to have written and mailed defendant, the contents of which, in our opinion, have a material bearing on issues involved in the case. Plaintiff served timely notice on defendant to produce the original letters, but defendant denied having

them in its possession and its official, in whose custody they should have been, did not remember that such letters ever had been received. In order to lay the foundation for the introduction of the secondary evidence offered, it devolved on plaintiffs to show that the letters had been delivered to defendant. This, they attempted to do by the testimony of one of the plaintiffs, who testified that he dictated the letters to his stenographer and after they were written read and signed them. He then returned them to the stenographer, whose duty it was to prepare them for mailing and then deposit them in a mail chute connected with a post box maintained in the building. Witness could not say from personal knowledge whether or not the stenographer had prepared these particular letters for mailing or deposited them in the chute, but stated that it was her custom to follow this course with all of the letters dictated by him. Had plaintiffs been able to produce the stenographer, and had she testified that, although she had no recollection of the particulars, she invariably prepared and mailed in the "chute" all letters received by her for mailing, the evidence would have been sufficient; but, as it now stands in the record, the evidence leaves the letters in the hand of the stenographer. Evidence of the general course of business followed in plaintiffs' office cannot supply the missing link in the necessary evidentiary chain: *Goucher v. Carthage Novelty Co.* (decided at this term) 91 S. W. 447; *Ward v. Morr Transfer & Storage Co.* (decided at this term) 95 S. W. 964; *Pier v. Heinrichshoffen*, 67 Mo. 163, 29 Am. Rep. 501; *Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51; *Hetherington v. Kemp*, 4 Camp. 193.

The subject has been fully discussed by us in the *Goucher* and *Ward* Cases, and we refer to them for a full understanding of the views we entertain. As no proper foundation was laid for the introduction of secondary evidence, the court committed reversible error in admitting the copies. Defendant claims that the court committed error in the instruction relating to the measure of damages, and the point would be well taken had the error not been induced by defendant's own interpretation of a stipulation in the shipping contract. However, in view of the probability of a retrial of the case, we will construe the provision and announce the rule that should be applied. The contract states that, "In the event of the loss of property under the provisions of this agreement, the value or cost of the same at the point of shipment shall govern the settlement." This clearly refers to property lost in transit and not to property damaged during the transportation by the fault of the carriers and consequently can have no effect on the general rule of law controlling cases similar to the one before us. The measure of damages is the difference between the market value of the chops at Babcock, in the condition in which

they would have been received had they been delivered in a reasonable time, and their market value at Babcock, in the condition in which they were at the time of their arrival.

We find no other error in the case, but, for that noted, the judgment is reversed, and the cause remanded. All concur.

GAAR, SCOTT & CO. v. BLACK et al.  
(Kansas City Court of Appeals. Missouri. July 2, 1906. Rehearing Denied Oct. 1, 1906.)

**1. JUDGMENT—ACTIONS ON JUDGMENT—LIMITATIONS—STATUTE APPLICABLE.**

The statute of limitations as it existed at the time a judgment was rendered is applicable to an action thereon, and not a statute subsequently passed.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1732; vol. 33, Cent. Dig. Limitation of Actions, § 22.]

**2. SAME—PLEADING—INCONSISTENT PLEAS.**

In an action on a judgment, pleas of general denial, payment, and that the judgment was compromised and defendant released, were not objectionable as inconsistent.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1744-1746.]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by Gaar, Scott & Company against David A. Black and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. D. Dow, for appellant. R. A. Higdon, for respondents.

**BROADDUS, P. J.** This suit was commenced on December 31, 1904, upon a judgment rendered on the 16th day of May, 1884, in favor of plaintiff against defendants for the sum of \$541.35, founded upon two promissory notes.

The history of the case, which is somewhat involved in obscurity, is as follows: It seems that some time prior to the judgment plaintiff sold to one Gebhart some farm machinery, who afterwards sold it to the defendants, Black and Gehringer, who became liable in some way to pay the purchase money to plaintiff. The defendants failed to make payment for the machinery, whereupon plaintiff sued and obtained said judgment against them. Some time in the year 1886 payments were made on the judgment, which reduced it to about \$475. In June of that year the defendant Gehringer and Calvin Gehringer, now deceased, executed a chattel mortgage to the plaintiff, which was to run for two years, to secure the payment of said judgment and also a certain promissory note. The mortgage included said machinery and some horses. There were payments made upon the mortgage, but as to the amount there is a dispute between the parties; but, as they were not sufficient in amount to satisfy the mortgage and judgment, that is a matter of no importance in the present in-

vestigation. The amount of the note was \$240.

The mortgage provided that upon condition broken plaintiff was authorized to take possession of the property and upon proper notice sell it at public auction at Gehringer's mill. The mortgagors having failed to pay the judgment and note, plaintiff by its agent took possession of the property and by consent of all parties the place of sale, after proper notice, was changed to Sedalia. But before the sale was made there was some agreement entered into between the parties by which a man by the name of Page should become the purchaser. Mr. John H. Bothwell, who was plaintiff's attorney, represented it in the transaction. By agreement between the parties Page took the property and assumed the payment to plaintiff of the sum of \$200. Mr. Bothwell's evidence is to the effect that if Page paid the \$200, the defendants were to stand discharged of the judgment and mortgage. Defendant Gehringer's statement, on the contrary, was that he was released by the terms of the agreement at the time when the property was turned over to Page and he assumed the payment of said sum of money. Mr. Bothwell testified that he had authority from the plaintiff to adjust the matter with defendants. There was evidence that the mortgage and judgment had been reduced by a payment from Black, and by a sale of some of the mortgaged property, and that the property turned over to Page exceeded in value the amount assumed by him for payment to plaintiff. Page failed to pay the \$200. The cause was submitted to a jury under instructions of the court, which returned a verdict for defendant. From the judgment rendered on the verdict plaintiff appealed.

As the judgment was rendered in 1884, the statute of limitations as contained in Rev. St. 1899 has no application, but the case is governed by the statute as it then existed, and this was the holding of the trial court. *Tice v. Fleming*, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 478; *Chiles v. School District*, 103 Mo. App. 240, 77 S. W. 82.

The defendants in their answer set up different pleas as a defense, viz.: A general denial, payment, and that the judgment was compromised and defendant released. To this answer plaintiff filed a motion to require defendants to elect under which of said pleas they would go to trial, which the court overruled. This action of the court is alleged as error on the ground that said pleas are inconsistent.

The rule of law is that defenses are inconsistent only when one fact contradicts another. *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267; *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346. The best illustration of the rule is found in *Nelson v. Broadhack*, 44 Mo. 596, 100 Am. Dec. 328. There the defendant denied having executed the note and then

pleaded payment. The court held that the pleas were not inconsistent. Under the construction of our courts as to what are, and are not, inconsistent pleas, the court was right in holding that pleading was not inconsistent within itself.

The plaintiffs contention, however, is, mainly, that there was no evidence that Bothwell was plaintiff's agent in making the settlement in which defendants claim they were released from the judgment. That, as attorney, he had no authority to make the settlement is admitted. But the evidence of Bothwell was that plaintiff authorized him to make a settlement with the defendants and that he did make such settlement, but not as stated by defendants. But proof of his authority in the matter we think was clearly shown.

The decision of this question disposes of all the remaining questions raised by plaintiff. **Affirmed.**

### STEVENS v. NORWICH UNION FIRE INS. CO.

(St. Louis Court of Appeals. Missouri. July 9, 1906.)

#### 1. INSURANCE—FIRE INSURANCE—VALUED POLICY—STATUTES.

Under Rev. St. 1899, § 7969, providing that in the event of a total loss of the property insured the measure of damage shall be the amount of the policy less depreciation in value shown by the insurer, the measure of an insurer's loss on a building totally destroyed is the amount of the policy, no claim being made that the property had been depreciated prior to the loss, so that there could be no disagreement with respect to the amount of the loss within a stipulation of the policy requiring arbitration in the event of disagreement.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1421, 1425.]

#### 2. SAME—TOTAL LOSS—EVIDENCE—SUFFICIENCY.

In an action on a fire policy, evidence examined, and held to support a finding of a total loss within Rev. St. 1899, § 7969, providing that in the event of a total loss the measure of the insured's loss is the amount of the policy, and not a partial loss within section 7971, providing that if there is a partial destruction, the insurer must pay the damage done or repair the property to the extent of the damage.

#### 3. SAME—WHAT CONSTITUTES TOTAL LOSS.

A building which in consequence of a fire has lost its identity and character as a building, and has become so far disintegrated that it cannot be properly designated as a building, though some part of it may remain standing, is a total loss within Rev. St. 1899, § 7969.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1266-1268.]

#### 4. SAME—INSTRUCTIONS—SUFFICIENCY.

Where, in an action on a fire policy, the court charged that if the building insured had lost its identity and character as a building, and had become so far disintegrated that it could not be designated as a building, though some part of it remained standing, the loss was total, and that the building was not totally destroyed if the portion which remained standing was such as a reasonably prudent man with-

out insurance, desiring such a building as the one in question was prior to the fire, would use as a basis in restoring the same to its original condition, the insurer could not complain that the jury was not charged as to what constituted a total loss.

#### 5. SAME—TOTAL LOSS—FINDING.

Where, in an action on a fire policy, the jury on substantial evidence found that the building insured had lost its identity and character as a building, and had become so far disintegrated that it could not be designated as a building, though a portion remained standing, and that the portion which remained standing was not such as a reasonably prudent man without insurance, would use as a basis on which to rebuild, it was conclusively settled that the building was a total loss, so that the measure of the recovery, in the absence of evidence showing a deterioration of the building prior to the fire, was as fixed by Rev. St. 1899, § 7969, the amount of the policy.

#### 6. SAME—STIPULATIONS IN POLICY—CONSTRUCTION.

A fire policy insuring household goods, which stipulated that the insurer would not be liable beyond the actual cash value of the property at the time of the occurrence of the loss, and that in the event of disagreement the loss should be arbitrated, shows an intent to submit to appraisers any disagreement as to the amount of the loss, which appraisal is a condition precedent to a right of action on the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1420, 1435.]

#### 7. CONTRACTS—VALIDITY—OUSTING JURISDICTION OF COURT—AGREEMENT FOR ARBITRATION—INSURANCE POLICY.

A provision in a fire policy calling for the submission of the amount of a loss to arbitration in case of a disagreement as to the amount thereof, but leaving the right of action intact, is a reasonable one, and will be enforced.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 611.]

#### 8. SAME—STATUTES—CONSTRUCTION.

Rev. St. 1899, § 7979, providing that no company shall take a risk on any property at a ratio greater than three-fourths of the value of the property insured, and when taken the value shall not be questioned in any proceeding, operates only to fix the value of property insured at the time of the insurance, and prevents the insurer from thereafter saying that at that time the property was not of the value mentioned.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1275, 1276.]

#### 9. SAME—TOTAL LOSS.

A fire policy insured \$600 on household goods. A portion of them were rescued from the fire. Those saved amounted in value to \$100, and those destroyed to \$800. Held, that the loss was only partial, requiring in case of disagreement as to the amount of the loss, the submission to appraisement as provided for in the policy.

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by A. J. Stevens against the Norwich Union Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is a suit on a policy of fire insurance issued by the defendant insurance company in favor of the plaintiff, covering a frame residence and household goods therein owned

and occupied by him in the city of West Plains. In so far as material to the questions involved in the present controversy, the policy in suit is as follows: "Norwich Union Fire Insurance Society in consideration of \$20.70 premium and the conditions and stipulations herein contained, does hereby insure A. J. Stevens against loss or damage by fire from noon of the 2d day of December, 1904, to noon of the 2d day of December, 1907, as follows: Nine hundred dollars on 1½ story shingle roof frame building and additions attached thereto, while occupied as a private dwelling house, including all permanent fixtures and decorations and to include window and door screens, storm doors and awnings, while contained in or attached to said buildings, situate on lot 2, block 12, Howell's addition, West Plains, Mo. Six hundred dollars on household furniture, useful and ornamental, mirrors, beds, bedding, linen, family wearing apparel, watches and jewelry (in use), printed books and music, silver plate and plated ware, pictures, paintings, engravings and their frames (at not exceeding cost), sewing machines, musical instruments, fuel and family stores, trunks, satchels, canes, umbrellas and bric-a-brac, while contained therein. This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the article at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first se-

lect a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss; stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. And the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." The petition is in the usual form, alleges a total destruction by fire of the property insured and the full performance by the plaintiff of all conditions of the policy on his part. The answer admits the issuance of the policy and a loss by fire thereunder, and among other things, specifically denies that the dwelling house was wholly destroyed, and affirmatively pleads the condition of the policy quoted, which provides, in effect, that in event of loss and disagreement between the parties as to the amount thereof, the same shall be ascertained by competent appraisers, etc. It avers that after the fire a disagreement arose between plaintiff and defendant with respect to the amount of the loss on both the building and household goods, so that an appraisal thereof was required, and that no such ascertainment of the loss by appraisal has been had, and that, therefore, plaintiff is not entitled to recover. It further denies every allegation in the petition contained which was not expressly admitted to be true. The reply is a general denial. The proposition advanced by the plaintiff and upon which he predicates his suit is that the loss was total on both the residence and contents; or, in other words, that the property, both real and personal, was wholly destroyed, within the meaning of the statute, and therefore the condition of the policy with respect to arbitration does not apply, while the counterproposition advanced by the insurance company is that the loss was partial only on both the residence and household goods and therefore the arbitration agreement in the policy does apply and operates as a condition precedent to plaintiff's right; and the plaintiff, having failed to comply with this condition, no recovery can be had.

Aside from the facts that the plaintiff owned the property and held defendant's policy of insurance thereon, containing the arbitration condition mentioned, the facts on the part of the plaintiff tended to prove that while the policy was in full force and effect, the building was discovered to be on fire during the night of March 19, 1905.

which fire totally destroyed a portion of the building, an ell thereof at least, and so burned between the weatherboarding and walls, and between the ceiling and floors and under the shingles on the roof and in several of the rooms, as to totally destroy the identity of the same as a building, to such an extent that it is doubtful whether a prudent man, without insurance, desiring a building of like kind, would attempt to reinstate the same without first dismembering it. Whether the building was totally destroyed within the meaning of the law is an important question in the controversy, however, and, therefore, a few excerpts from the record will be given. After much evidence tending to show that the fire ran through the house, some between the walls and weatherboarding, between the ceilings and floors, and under the shingles, some of plaintiff's witnesses said in part as follows. The chief of the fire department testified: "The alarm was not turned in until the house was past redemption. When we got there the whole house was afire; the back part of the building had burned down, and the main front part of the building was afire inside of the rooms between the ceiling and weatherboarding, where it was hard for us to get to it, and right on the front in one place it was just seeping out and the fire was between the ceiling and the roof and the weatherboarding on the main part of the building at the top. Q. State if the fire was running through the rooms in the main part of the building. A. It was. It was quite a while before we could get to it; we had to put out the fire in the upper rooms. Q. How did you manage to put it out? A. We had to get in where we could turn the stream between the ceiling and the weatherboarding. Q. Do you remember anything of the fire between the floor of the upper rooms and the ceiling of the lower floor? A. Yes, sir; we cut a hole in one place to get the water to it. \* \* \* I think we cut the hole in the west room." Mr. Traxler, a carpenter, testified as follows: "The southern part of the house was all ruined, and the south half of the front of the house and top of the roof was all burned. A hole was burned out of the west end; I don't remember of any hole being burned out of the east end. \* \* \* Q. Could the main building be repaired and made as good as it was before the fire? A. I don't know about that." Mr. Weston, a carpenter, said: "It is pretty well burned up except the main part of the building in front; some parts of that is fairly good yet. Q. What condition was it in? A. It was damaged by smoke and water and one place in front the smoke and some fire come through right at the gable end. Q. Could the main part of that be used in rebuilding the house, and if so,

in what way? A. Some parts of it might be used in rebuilding. Q. In what way? A. In tearing it down some might be found that could be used again." On cross-examination, he was asked: "And you say none of it could be used again?" And he answered: "I would not use it again." Mr. Gocher, a carpenter, testified as follows: "State to the jury what condition it was in, if you can. A. It was very near all burned up; some of it is there yet. Q. How much of it, if any, could be used in rebuilding the house? A. Not very much; some of it could be used. Q. How would you do it, by tearing it down or leaving it standing? A. By tearing it down. It is not fit to build to." On cross-examination he was asked the following question: "Q. Why is the front not fit to build to? A. It was all afire inside. \* \* \* It looked like the house was on fire all over."

The evidence further tended to show that members of the fire department cut several holes through the roof and also through the ends and sides of the building in order to play upon the fire beneath the roof and between the walls and ceilings; and that much damage was occasioned by the water, whereby the floors were caused to cup, etc. On the part of defendant, the evidence tended to prove that the ell of the building only was rendered a total loss, and that the two-story or principal portion of the building was slightly damaged. Several carpenters testified that this portion of the building could be repaired and reinstated in as good condition as before the fire, at an expense of from \$550 to \$875. The defendant introduced in evidence, and we find in the record before us, several photographs showing the front, side and rear views of the building after the fire as well as the interior of three of the rooms, and we must say that from the inspection of these, the building, save the rear or ell portion thereof, seems to be but slightly damaged, and it is difficult to ascertain from the photographs how \$550 or \$875, the amount estimated by defendant's carpenters, could be expended in reinstating the building to its former condition. It seems from these that its damage was not so great. The photographs were viewed by the jury, however, as was also the building itself, for at the conclusion of the evidence, the parties stipulated to that effect, and the jury, in the custody of the sheriff, were permitted to and did make a personal inspection of the burned building. As to the loss on the household goods, the policy covered the same in the sum of \$600. There were a number of articles of furniture saved from the fire. The plaintiff, in his testimony, mentioned a rocking chair, sofa, one bed, parlor set, dresser, and a number of other small articles, of which he fixed a value. These goods were somewhat damaged. The sum total of the value of the articles rescued was, prior to the

fire, \$103.50; that is, according to the price he paid for them. They had depreciated somewhat, and were, therefore, necessarily worth less than that amount when saved. The value of the articles of household furniture totally consumed and destroyed by the fire and water was \$810 when purchased by plaintiff. They, too, had depreciated somewhat in value, the amount not given.

After the fire, plaintiff gave notice and rendered proof. He claimed a total loss of both building and contents. The adjuster for the defendant insisted that the loss was partial only on both, and a disagreement having thus arisen and the plaintiff having made no move for an arbitration, the defendant made a demand, as follows: "Fort Scott, Kansas, May 17, 1905. A. J. Stevens, West Plains, Mo.—Dear Sir: Your papers purporting to be proofs of your loss alleged to have been sustained March 19, 1905, on property insured under Norwich Union Fire Insurance Society, policy No. 4,630,911, have been received and are held subject to your order. We object to same in that they do not represent the facts and true account of your loss and damage. We deny that the loss sustained to the property insured was any such amount, and hereby demand that said damage be left to disinterested appraisers as provided for in printed conditions of said policy relating to proceeding in case of a disagreement. Awaiting notice of your compliance herewith, I am, Yours Very Truly, W. A. Corman, Adjuster for Norwich Union Fire Insurance Society." Plaintiff, insisting that the loss was total, declined to arbitrate the same, and instituted this suit. Upon a trial in the circuit court, at the conclusion of the evidence on behalf of the plaintiff, defendant requested, and the court refused a peremptory instruction to find for the defendant. The same instruction was requested by defendant and refused by the court at the conclusion of all of the evidence, as was also a peremptory instruction requested by defendant to the effect that the finding should be for the defendant on the issue pertaining to the insurance on household goods. The court submitted the issue whether or not the building had been wholly destroyed to the jury by instructions which instructions will be noticed in the opinion. The jury returned a verdict in effect, finding the building to have been wholly destroyed, inasmuch as by their verdict they found for the plaintiff in the sum of \$900, the full amount of insurance on the building. The court instructed the jury with respect to the household goods that if their finding was for the plaintiff, they should return a verdict for him in the amount of the value of such goods as were totally destroyed by the fire, not exceeding \$600, the amount of the policy thereon. As said, the verdict returned was for a total loss, or \$900 on the building, and a partial loss, or \$500 on the household goods. After unsuccessful motions for new trial

and in arrest, defendant prosecutes this appeal.

Fyke & Snider, for appellant. A. H. Livingston, for respondent.

NORTONI, J. (after stating the facts). As said in the statement of facts supra, plaintiff predicates his suit upon the theory that the loss on both building and furniture is total, rather than partial, and that, therefore, inasmuch as the property was wholly destroyed, there could be no disagreement between the parties as to the amount of the loss. He argues that the statute fixes the amount of the policy as the measure of his damage, and therefore the amount of the loss being thus positively fixed by the statute, no disagreement can arise between the parties whereby the condition of the policy with respect to arbitration can be invoked; or in other words, that the arbitration agreement in the policy is wholly inapplicable to the facts before the court. The proposition asserted is predicated upon two sections of our statute: First, with respect to the alleged total loss on the building, on section 7969, Rev. St. 1899, which in effect, when read with section 7970 next succeeding, provides, among other things, that the policy covering the building is a valued policy, and in event of the total loss of the building by fire, the amount of the policy is thereby conclusively fixed to be the measure of plaintiff's damage therefor, less only the amount the property may have depreciated in value during the interim from the issuance of the policy to the time of the loss. It is devolved upon the company, by the statute, however, to show in defense the matter of depreciation contemplated therein, and there having been no showing in this behalf in this case, the measure of his damage is conclusively fixed by the statute to be the amount of the insurance on the building. The same proposition with respect to the loss on the household goods is predicated upon section 7979 of the Revised Statutes of 1899, the last and concluding lines of which provide that: "No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding." We will examine the two propositions separately, and that pertaining to the building, first in order. It must be conceded, and, in fact, it so stands, for the learned counsel do not controvert it, and the law is that if the building was totally destroyed, then under the provisions of the statute (section 7969, supra), the defendant having failed to make any showing as to the depreciation of the property after the issuance of the policy and before the fire, the measure of plaintiff's loss on the building is positively fixed by the statute to be the amount of the policy thereon, and there was, and in the very nature of the case, can be no question or disagreement between the parties with respect

to the amount of such loss. The matter (the amount of the loss) upon which the disagreement must arise in order to invoke the arbitration condition, having been thus positively foreclosed and set at rest by the provisions of the statute, there can be and is no disagreement as to the amount thereof, on which the arbitration clause can operate. This proposition is determined by the ordinary rules of logic, and is amply supported by authority. It has been said that in case of a total loss on real property, under this statute, the agreement to arbitrate contained in the policy is void as being in contravention of the statutes. *O'Keefe v. Ins. Co.*, 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; *Marshall v. Ins. Co.*, 80 Mo. App. 18. And also void for want of consideration. *Baker v. Assurance Co.*, 57 Mo. App. 559.

The defendant's counsel concede the law to be as stated, but assert, as a matter of fact, that the building was not totally destroyed, and insist that the facts in proof show a partial loss as contemplated by section 7971, Rev. St. 1899; that it was not a total loss, as contemplated by section 7969, supra, and, therefore, it is a proper subject for arbitration; that the loss, being one for arbitration, under the provisions of the policy, such arbitration provision contained in the policy is a condition precedent upon the plaintiff's right to sue, and, therefore, he cannot recover for the loss on said building, because he has, not only failed to move himself for an arbitration, but has declined to participate in the same when proposed by the defendant. An issue of fact was made upon this question by the parties and evidence pro and con introduced thereon, as will appear by reference to the statement of facts supra. It is sufficient to say here that there was substantial evidence introduced by the plaintiff, tending to show the building was wholly destroyed or a total loss within the meaning of the law, and the court did not err in refusing to peremptorily direct a verdict for the defendant on that score. Whether the building was a total loss, within the meaning of the law in that behalf, was a question of fact for the jury, rather than a question of law for the court, on the evidence in this case. The court referred the matter to the jury by instruction, as follows: "The court instructs the jury, that the only question pertaining to the building is the meaning of the term 'total loss,' and that if you believe from the evidence that the building has lost its identity and specific character as a building, and become so far disintegrated that it cannot be properly designated as a building although some part of it may remain standing, then there is a total loss in the meaning of the law, and you should find for plaintiff, although you may believe that some parts of the building were left standing and might be safely used in rebuilding." The jury, with this guide before it, after having heard the evidence and made a personal inspection of the

building in the custody of the sheriff, in accordance with the stipulation of counsel to that effect, found the building to be a total loss. Learned counsel for defendant insist, however, that the instruction quoted is erroneous in failing to further inform the jury that the matter of the total destruction of the building depended upon the question whether a reasonably prudent man, uninsured, desiring such a structure as the one insured was before the fire, would, in proceeding to restore the building to its original condition, utilize the remnant thereof as a basis on which to build, and indeed, this seems to be a fair criterion by which the question should be ascertained; for, as a general proposition, the law, in dealing with matters not otherwise determined, usually adopts the conduct of a reasonably prudent man under like circumstances and conditions, as the proper standard by which the conduct of others should be regulated. The law is settled in this state, however, to the effect that a policy of insurance upon a building is an insurance upon the building as such, and not upon the materials of which it is composed. *Nave v. Ins. Co.*, 37 Mo. 430, 90 Am. Dec. 394. And therefore the question for decision in case of an alleged total destruction, is whether the building, as a building, has lost its identity and specific character as such, by means of the fire and as a result thereof has become so far disintegrated that it can no longer be properly designated as a building, even though some parts of it may remain standing. This is settled by numerous adjudications on the subject, and as a law proposition, it is no longer open; at least it is concluded so far as this court is concerned. In fact it appears that the identical instruction complained of here has the approval of the Supreme Court in *O'Keefe v. Ins. Co.*, 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819. See, also, *Ampleman v. Ins. Co.*, 35 Mo. App. 308; *Ampleman v. Ins. Co.*, 35 Mo. App. 317; *Barnard v. Ins. Co.*, 38 Mo. App. 106; *Havens v. Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570; *Royal Ins. Co. v. McIntyre* (Tex. Sup.) 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797, 2 May on Ins. (4th Ed.) § 412a; 4 Joyce on Ins. §§ 306-3029; 12 Amer. & Eng. Ency. Law (2d Ed.) 323. Under the authority of the *O'Keefe* Case, supra, it would become our duty to approve the instruction in this case, whatever our views might be on the question.

On behalf of the defendant, the court, in effect, instructed the jury that the building was not totally destroyed if the portion which remained standing was such as a reasonably prudent man, without insurance, desiring such a building as the one in question was prior to the fire, would use as a basis in replacing and restoring the same to its original condition. This is the proposition of law deduced in *Royal Ins. Co. v. McIntyre* (Tex. Sup.) 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797. The learned trial court



gave the defendant the full benefit thereof in its first instruction, and it is no position to complain that the jury was not sufficiently charged as to what would constitute a total loss of the building. The result is, the jury, by its verdict, found, not only that the building had lost its identity and specific character as a building, and that it had become so far disintegrated that it could not be properly designated as a building even though a portion thereof remained standing, but it found as well that the portion which remained standing was not such as a reasonably prudent man, without insurance, desiring a building like the one insured prior to the fire, would use as a basis on which to rebuild or restore the same to its prior condition. The jury, having so found, and there being substantial evidence to support the verdict, it is thereby conclusively settled that the loss was total in so far as the building was concerned, and the measure of plaintiff's damage is so fixed by the statute *supra* that there remains no question of the amount of the loss about which the parties could disagree, so as to invoke the condition of the policy pertaining to arbitration thereon. It is therefore the opinion of the court that the suit is not premature for the loss on the building.

2. The condition with respect to arbitration contained in the policy is set out in full in the statement of facts accompanying the opinion of the court. It provides in part as follows: "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, \* \* \* and the loss shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by the company, including an award by appraisers when appraisal has been required." This, and the preceding stipulations found in the policy and quoted in the statement, clearly manifest the intention and agreement of the parties to the contract of insurance that any difference which might arise between them as to the amount of the loss or damage to the property should be submitted to appraisers as therein provided, and that the award thereon, in accordance with the provisions of the policy, should terminate the amount in dispute. The amount found does not become payable, however, until 60 days thereafter. The appraisal, when required, is clearly made a condition precedent to the obligation of the company to pay, or of the right of the plaintiff to maintain a suit therefor. While the law is undantly well established that stipulations in contracts providing for the submission of matters pertaining to a contemplated contro-

versy; that is, the right of action itself, and all matters incident thereto, to arbitration, are void as against public policy, as tending to oust the courts of their rightful jurisdiction. It is equally well settled that provisions in contracts of the character of that here involved, which provides, not for the submission of the cause of action itself, but only for the amount in dispute to arbitration, thus leaving the right of action intact and capable of judicial enforcement, if necessary, are to be upheld and enforced by the law as reasonable provisions tending to the peace and repose of society in furnishing an amicable method of estimating and ascertaining the amount of damage which might otherwise become the subject of controversy and litigation. Such provisions are, therefore, not only upheld by the courts; but unless it appears from the contract to the contrary, they are held to be and enforced as conditions precedent upon the right of the party seeking to enforce his claim without first complying with such reasonable and just provision. *Murphy v. Mercantile Co.*, 61 Mo. App. 323; *McNees v. Ins. Co.*, 61 Mo. App. 335; *Dautel v. Ins. Co.*, 65 Mo. App. 44; *McNees v. Ins. Co.*, 69 Mo. App. 232; *Bales v. Gilbert*, 84 Mo. App. 675; *Vining v. Ins. Co.*, 89 Mo. App. 811; *Carp v. Ins. Co.*, 104 Mo. App. 502, 79 S. W. 757; *Fowble v. Ins. Co.*, 106 Mo. App. 527, 81 S. W. 485; *Hamilton v. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419. The policy insured \$600 on household goods, and a portion of the goods covered by this item of the policy were rescued from the fire. Those saved amounted in value to about \$100, those destroyed by fire, to about \$900. From these facts it appears that there was not a total loss of the goods insured unless section 7979, Rev. St. 1899 operates to produce that result as a conclusion of law upon the facts stated. That section has been interpreted to apply as well to losses under a policy of insurance on personal as on real property. *Howerton v. Ins. Co.*, 105 Mo. App. 575, 80 S. W. 27.

Now it must be conceded upon these facts that the loss being partial only on the household goods, the amount of such loss was a proper matter for arbitration and appraisal under the provisions of the policy if the parties disagreed on the amount thereof unless the statute renders a partial loss a total loss, and we do not understand such unreasonable and unjust result to have been intended by the Legislature. The principle upon which, and the reason assigned by the courts for their denial of the enforcement of the arbitration clause with respect to a total loss on real property, is that the statute absolutely fixes the amount of the loss, in case the property is wholly destroyed, to be the amount written in the policy, and, therefore, there can be no matter of difference with respect thereto. (And indeed, since the provision pertaining to the depreciation of property after the issuance of the policy

and prior to the loss have found their way into our valued policy statute, it seems that there might arise a question for arbitration under it in a proper case. But that question is not before the court, and is not decided.) Certainly the reasons given for denying arbitration on a valued policy do not obtain on the facts of this case, for it stands admitted that all the household goods were not destroyed, and the right of arbitration is denied only where the property is wholly destroyed and a total loss is had within the meaning of the law. Plaintiff's counsel, however, predicate their proposition upon section 7979, supra, and argue that the policy on household goods was a valued policy as well as that upon the building. Suppose it was a valued policy. That fact would not render a partial loss a total loss even on real estate. The concluding words of that section, and so much of it as pertains to a valued policy on chattels, are: "No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding." Let us apply this statutory rule to the facts in proof and ascertain the result of its influence. This will render to the court the intention of the lawmakers with mathematical precision. The policy in suit on personal property is for \$600. Now, under the mandatory provision quoted, from the fact that the insurance company issued its policy thereon for \$600, we must and do know as a matter of law (whether it be true or false as a matter of fact) that the goods insured were of value at least \$800. It must be, and it is, conclusively presumed by the operation of the statute that the value of the goods at the time of the issuance of the policy, was that sum, of which \$600, the amount of the policy is three-fourths, viz., \$800. This follows from the fact that the law forbids insurance companies to write to exceed three-fourths of the value of the goods insured. The court must indulge the presumption of correct conduct on the part of the insurance company, and, therefore, the company is presumed to have written not to exceed three-fourths of such value. The result is, the law fixes for the purpose of this case, the value of the goods at the time of the issuance of the policy at \$800. Having thus fixed the value, it forbids the company in any proceeding, from denying that the goods were of that value when insured, and that is the extent of the rule thereby established. Thus far the policy is valued. It goes no further than this. It does not command that for all the years of the risk covered by the policy and during its life the goods shall remain at the value of \$800, or of any other amount. It operates only to fix the value at the time of the issuance of the policy and denies the right of the insurance company to thereafter say that, at that time, they were not of the

value mentioned. No one can successfully, and the learned counsel would certainly not, argue, in event the goods were depreciated in value from any cause, after the issuance of the policy and prior to the loss, that the insurance company would be precluded from asserting their depreciation in availing itself of its right under the policy to indemnify the insured only to the amount of the loss suffered by him. That the whole theory of insurance is based upon the idea of indemnity, only, is fundamental, and except something more than this is affixed by the statute or policy, the insurer, as a matter of common justice, has the right always to settle on the basis of indemnity for the loss suffered. Suppose, for instance, a stock of merchandise is insured for \$3,000. The same statute applies thereto, and the company is prohibited from saying that the goods were, when insured, of a value less than one-fourth in excess of the policy; or, in other words, that their policy exceeded three-fourths of the value of the stock. The company is estopped from denying that the stock of goods was worth \$4,000 when insured; yet, during the life of the policy, the merchant disposes of and reduces his stock and a total loss by fire occurs to the amount of \$2,000, would any one argue for a moment that, under the provisions of the policy, it is incumbent upon the insurance company to do more than indemnify the insured, and such indemnity would be entirely met by a payment to him of \$2,000 only. No other reasonable interpretation can be placed upon the statute, and this is the view entertained by the courts which have given it attention. The section of the statute quoted renders the policy on chattels valued only in so far as it precludes the company from denying their value as mentioned when the insurance was written; and aside from this, it does not influence the question in the least. *Howerton v. Ins. Co.*, 105 Mo. App. 575, 80 S. W. 27; *Burge Bros. v. Ins. Co.*, 106 Mo. App. 244, 80 S. W. 342; *Gibson v. Ins. Co.*, 32 Mo. App. 515.

The argument that the policy was valued on the household goods, and, therefore, the loss thereon was total, when in fact only a portion of the goods insured was destroyed, is without merit. In no sense was there a total loss on the household goods, so that the statute would arbitrarily fix the amount written in the policy as the measure of damage. The loss on these goods was partial only, and the amount thereof was not foreclosed by the statute; but, on the contrary, it was an open question to be ascertained by the parties and in event of their disagreement, then by appraisers. The plaintiff having declined to participate in the appraisal when required by the provisions of the policy and requested by the defendant, he is precluded from maintaining this suit for the loss on household goods under the second item of the policy. The plaintiff re-

lies upon *Havens v. Ins. Co.*, 123 Mo. 423, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570, as supporting his contention. That case is not in point, and does not influence the proposition here in judgment. There the property insured was a mill. A portion of the machinery amounting to \$380 in value had been removed from the mill pending repairs. The mill was destroyed by fire. It was contended that the loss was not total, and the court held: First, that the machinery was real property within the meaning of the valued policy statute (section 6009, Rev. St. 1879, which was repealed in 1889 and replaced by one materially different [section 5897, Rev. St. 1889, and the present section 7967, Rev. St. 1899]); and, second, that inasmuch as the identity and specific character of the mill was destroyed, the loss was total, notwithstanding the fact that some portions remained, and the fact that machinery of value of \$380 stored in a warehouse was not injured by the fire, rendered the fact of a total loss of the mill no less. The result of the decision was to fix the face of the policy as the measure of the loss, on the theory that the identity, specific character and integrity of the mill as a mill was destroyed, and therefore the face of the policy, less the value of the machinery, \$380, which was not subject to the fire and at the time not covered by the insurance, was the measure of the plaintiff's damage under the valued policy statute. It will be readily seen that the principle of that case is not pertinent here. The learned trial judge erred. The defendant's peremptory instruction with respect to the claim for loss of household goods should have been given.

From what has been said, it results that the judgment must be reversed. The cause will be remanded, with directions to the trial court to enter judgment on the verdict of the jury for the claim asserted on the loss of building, together with the costs of suit in that court, and judgment for the defendant on the claim asserted with respect to the loss on household goods. The costs of this appeal are taxed against the plaintiff.

It is so ordered.

BLAND, P. J., and GOODE, J., concur.

### HANLEY v. HOLTON.

(St. Louis Court of Appeals. Missouri. July 9, 1906.)

#### 1. APPEAL—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION—PROBATE PROCEEDINGS—EXECUTORS—ACCOUNTING.

Rev. St. 1899, § 278, providing for appeals from the probate court, enumerates cases in which the same may be had, and concludes with a provision that, in all cases where there shall be a final decision of any matter arising under the provisions of the chapter, an appeal is allowed. Held that, where an order of the probate court denying the motion of an administrator pendente lite to require a suspended executrix to make a settlement was a final

decision of the matter, the order was appealable.

#### 2. SAME—DECISION OF INTERMEDIATE COURT—MOTION TO DISMISS—DECISION ON MERITS.

Where, on a motion to dismiss an appeal from a probate order, the parties submitted the merits of the proceeding, and the bill of exceptions recited that all of the facts were in evidence or agreed to in addition to the record proper, and that at the conclusion of the hearing of the motion the court announced that it would consider the whole matter, whereupon the motion to dismiss the appeal was sustained, the judgment should be regarded as a judgment on the merits.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 547.]

#### 3. SAME—REVIEW—ERROR GROUND FOR REVERSAL.

Where, on appeal from a probate order, the circuit court sustained a motion to dismiss the appeal on the merits, the appellate court, on a further appeal, was bound to re-examine the merits under Rev. St. 1899, § 865, providing that the Supreme Court or Court of Appeals shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error materially affecting the merits of the action.

#### 4. JUDGMENTS—CONCLUSIVENESS—CONSTRUCTION.

Under Rev. St. 1899, § 672, providing that no judgment shall be reversed, impaired, or in any way affected for any informality in entering the judgment or making up the record thereof, a judgment, reciting that an appeal from a probate order was dismissed, did not conclusively establish that the case was not determined on the merits, where it was demonstrated beyond controversy that the court considered the whole matter in disposing of the case.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 970.]

#### 5. EXECUTORS—ACCOUNTING.

Where the letters of an executrix were revoked on the same day they were granted, and she never took charge of any part of the estate, nor attempted to inventory or charge herself therewith, she could not be compelled by an administrator pendente lite subsequently appointed, as authorized by Rev. St. 1899, § 13, to account for any portion of decedent's property, under sections 47 and 48, requiring an executor to account to his successor for assets of the estate in his hands.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1986.]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Proceeding by Joseph L. Hanley, as administrator pendente lite of the estate of Edward K. Holton, deceased, against Lillian M. Holton. From an order of the circuit court dismissing an appeal by plaintiff administrator, and from an adverse order of the probate court, he appeals. Affirmed.

This proceeding originated in the probate court of the city of St. Louis. The following facts appear in the bill of exceptions: The defendant, Lillian M. Holton, was nominated in the alleged will of Edward K. Holton, deceased, as executrix thereof, and, after said will was admitted to probate in said court, qualified to that office. Letters executory were duly issued to her on December 11, 1902, and on the same day, it having been

made to appear to the probate court that a suit had been filed in the circuit court contesting the validity of such will, the probate court recalled said letters, suspended further proceedings thereunder, and thereupon appointed Joseph L. Hanley administrator pendente lite in accordance with the provisions of section 13 of the administration law (Rev. St. 1899). The defendant made no move toward taking charge of the estate other than qualifying as executrix under the will. She made no inventory, nor did she otherwise take any steps under the statute looking to the collection and preservation of the estate. In no manner did she take possession of, or charge herself with any of, the property thereof. This was not occasioned by neglect on her part, however, but resulted from the fact that her letters were revoked or recalled on the same day and about the same hour they were issued and she had qualified thereunder. The plaintiff, upon being appointed and qualifying as administrator pendente lite, proceeded at once to take charge of the estate, inventoried the same, etc., and took such other steps as were necessary under the administration law for an original administration. The administrator pendente lite did not require an accounting from his predecessor, the suspended executrix, but at once made an inventory, published notice, etc., as if he were the original administrator, wholly ignoring the fact that the executrix had qualified and been suspended. This resulted, of course, from the fact that it was well known to all parties concerned that his predecessor had taken no steps with respect to the estate other than merely qualifying to the office of administratrix. The inventory filed by the administrator pendente lite purports to be an inventory of "all of the real and personal estate of Edward K. Holton, deceased." The property is described in detail, and no reference is made to any prior administration. In truth, the proceedings show that all parties viewed the matter and conducted themselves as though nothing had been done under the nomination of the administratrix in the will. Some months afterwards, in May, 1903, the plaintiff administrator pendente lite moved the probate court to compel the defendant, as such suspended executrix, to make a settlement as is provided in sections 47, 48, Rev. St. 1899, to the end that the court might ascertain the amount of money and all other property of the deceased in her hands as such executrix, or that came into her hands and remained unaccounted for up to the time of her suspension, and enforce a settlement thereof with the administrator pendente lite. The defendant was cited to appear, which she did, and upon a hearing the court denied such motion, holding in effect that, she having failed to take any steps under her appointment as executrix toward taking possession of the property of the estate, there was nothing for her to settle, and that, if she had any property

in her possession belonging to the estate, it did not appear in any inventory or other record of the probate court, and the proper remedy to ascertain such fact would be a proceeding to discover assets under sections 74-78, Rev. St. 1899. From this ruling of the probate court the plaintiff administrator pendente lite appealed to the circuit court. In that court the defendant moved a dismissal of the appeal, insisting: First, that the case was not appealable; second, that the circuit court had no jurisdiction of the appeal; and, third, that the appeal was not authorized by statute. The bill of exceptions shows that, when this motion came on for hearing in the circuit court, the facts as above set out were "in evidence or agreed to in addition to the record proper," and that, "at the conclusion of the hearing of the motion before the circuit court, the court announced that it would consider the whole matter, whereupon said motion to dismiss said appeal was taken under advisement by the court until, to wit, June 29, 1904, \* \* \* at which time the court sustained said motion and dismissed said appeal." The judgment of the circuit court is to the effect that the appeal be dismissed. Plaintiff, administrator pendente lite, appeals to this court.

W. W. Henderson, W. H. Trigg, and Chouteau Dyer, for appellant. Geo. D. & Geo. V. Reynolds, for respondent.

NORTONI, J. (after stating the facts). 1. Notwithstanding the recital in the bill of exceptions to the effect that the circuit court heard the whole case and "announced that it would consider the whole matter" in disposing of the motion to dismiss the appeal, appellant insists that the motion to dismiss said appeal only was adjudicated by said court, as appears by its judgment, which recites that said appeal was dismissed, etc. It is urged that the case was a proper subject of appeal from the probate to the circuit court, and we are persuaded that this proposition is true. Section 278, Rev. St. 1899, providing for appeals from the probate court, enumerates a number of cases in which the same may be had, and then concludes as follows: "And in all cases where there shall be a final decision of any matter arising under the provisions of this chapter." Now, under this provision, it is obvious that, if the order of the probate court in denying the motion of the administrator pendente lite to require the suspended executrix to make a settlement was a final decision of the matter, then the appeal therefrom was authorized by the general provision quoted. There can be no doubt that such order denying the motion was a final determination and decision so far as that matter was concerned. The probate court, for reasons which appeared to be sufficient to it, adjudged and determined that there was no cause for ordering such accounting, and this was a final decision of that question thus presented. It is true another

and different application could have been made under the statute (sections 74-78, Rev. St. 1899), pertaining to the discovery of assets; but that is a different and distinct proceeding and cannot influence the question here involved. The question presented was finally decided by the court, and an appeal from such final determination is contemplated and provided for in the language and spirit of the statute supra. *McCrary v. Manteer*, 58 Mo. 446; *McGee v. Thompson's Adm'r*, 39 Mo. 514; *Donaldson v. Lewis*, 7 Mo. App. 403. And it appears quite clear that, if this were the only question before the circuit court, it should have overruled the motion to dismiss the appeal, entertained jurisdiction of the cause, and proceeded to its final determination. The defendant insists, however, that the court did do this, and heard the "whole case," even though a hearing was had on the motion to dismiss, and the judgment shows that the case was dismissed; that in truth and in fact, as appears from the bill of exceptions, the court considered the whole case and disposed of it accordingly; that the judgment of dismissal on motion to dismiss is a mere informality in view of the proceedings had and on which the judgment is rested. Now it is argued, contra to this, on the part of the plaintiff, that such proceeding is in conflict with the idea of a motion to dismiss, etc. The proposition advanced is that a motion to dismiss an appeal in effect requests the appellate court to refuse an examination of the merits of the cause, and that questions therefore which affect the merits will not be considered by the appellate court on such motion, as they are grounds for a reversal or affirmance of the judgment; that the inquiry on such motion, in the very nature of the proposition involved, is limited to an ascertainment whether the appeal will lie in the case, and whether it has been regularly perfected. Upon principle the propositions are true in the science of the law, and our views fully concur therewith. 2 *Ency. Pl. & Pr.* 346-347; *Parker v. State* (Tex. Cr. App.) 21 S. W. 370. See, also, *McCrary v. Manteer*, 58 Mo. 446.

The record before the court, however, in this case, removes it from within the influence of the principle contended for. It is true on principle that a motion to dismiss and a judgment of dismissal are not entirely harmonious with the idea of a hearing and judgment on the merits, and, if this were the only question here presented, we would be compelled to reverse the judgment. But the parties may, if they see fit, so shape the facts and produce such a situation before the court on a simple motion to dismiss as will render the application of abstract principles pertinent to such questions entirely inapplicable. And so it is here, for, while the court heard the motion, and, as appears by the recitals of its judgment, disposed of the case thereon, it also appears by the bill

of exceptions, a record of equal solemnity and force in this court, that the court heard the "whole matter" on said motion, and that the parties, without objection or exception, developed before the court all of the facts set out in the statement supra. The bill recites that all of these facts were "in evidence or agreed to in addition to the record proper," and that, "at the conclusion of the hearing of the motion before the circuit court, the court announced that it would consider the whole matter, whereupon said motion to dismiss said appeal was \* \* \* sustained," and the appeal dismissed. There appears in the bill to have been no objection or exception to this mode of proceeding, which, no doubt, was technically erroneous. In fact, from what appears in the bill of exceptions, it is manifest that appellant's counsel participated therein and "agreed" at least to the principal facts in the record, and no exception was saved by him to any action of the court other than the dismissal of the appeal. From all of this, it is manifest that, while the court entered up its judgment as one of dismissal, it in truth disposed of the case and rested its action in that behalf upon a consideration of the merits as well. In view of this showing in the record before us, it becomes our duty to re-examine the case upon the same theory as that chosen by counsel and pursued by the trial court, in order that the same matters may be determined here that were in judgment there, and that equal and exact justice may be done to both the parties and the court on the case made below. And especially is this true in view of our statute (section 865, Rev. St. 1899), which provides as follows: "The Supreme Court or Courts of Appeals shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action." This legislative command upon the courts requires that the judgment in this case shall not be reversed, unless the appellate court believes that error has been committed against appellant which materially affected the merits of the action. Now, notwithstanding the ruling on the motion to dismiss, if it appears upon the merits that the result reached by the trial court was a determination ultimately right between the parties, then it is the duty of this court to affirm the judgment. It is therefore important to ascertain the merits of the appellant's case. Prior to an examination in that behalf, however, we will dispose of one other thought suggested by appellant; and that is, that the judgment in this case is conclusive, etc., notwithstanding the facts recited in the bill of exceptions. The judgment recites the appeal was dismissed. It is insisted that this recital precludes the notion that the circuit court disposed of the case on the merits. Now it is demonstrated beyond

peradventure that the parties went into the merits, and that the court considered the whole matter in disposing of the case. The matter being in this posture, we are confronted with section 672, Rev. St. 1899, which provides, among other things, that no judgment shall be "reversed, impaired or in any way affected \* \* \* for any informality in entering the judgment or making up the record thereon." Under the liberal provisions of this statute, it is the duty of this court, if it finds upon examination that plaintiff's claim is without merit, and that the result reached by the trial court is right on the merits of the case, to entirely ignore the wording of the judgment mentioned and affirm the action of the court below, even though there be technical error therein. This being the state of the law, we will proceed to the merits of the controversy.

2. As stated, Mrs. Holton was nominated by the proposed will as executrix and qualified as such in the probate court. On the same day, and about the same hour, her letters of authority were recalled, and she was suspended because of the contest of the will. She had not taken charge of the estate, nor any part thereof; nor had she inventoried or charged herself therewith, nor attempted to do so. In view of the contest of the will, the plaintiff administrator pendente lite was appointed under section 13, Rev. St. 1899, and proceeded as original administrator to inventory and administer the estate. He afterwards, no doubt, conceived the notion that Mrs. Holton had certain property in her possession which rightfully belonged to the estate, and therefore sought to proceed under sections 47 and 48 to compel her, as an outgoing executrix, whose letters had been revoked, to settle with him as administrator in charge and turn over such property. Waiving the question, which is entirely unimportant in the view we entertain, whether the letters had been revoked within the meaning of that statute or only suspended (and we see no reason why they should not be considered in this case as revoked), the purpose of these statutes is obvious. They are to enjoin upon the administrator or executor, who has come into possession of property of the estate in virtue of his or her office, to account for the same to his successor in event of his or her resignation or of letters being revoked, etc. They certainly have no application to a party who does not come into possession of property by virtue of the office mentioned. By a careful reading of the sections, it is clear that they contemplate a settlement by the outgoing executor or administrator with his successor in office for the property, etc., of "every kind of the testator or intestate in the hands of such executor or administrator." We understand from this that it is such prop-

erty as came into the hands of the outgoing officer of the court in virtue of his or her office. The statutes (sections 74-78) provide a scheme for discovering assets in the hands of one who is in possession of property otherwise than administrator or executor, and, in view of the fact that both the record and facts before the court showed conclusively that this defendant never at any time came into possession of any property of the estate as such executrix, she certainly could not be held to account therefor, under sections 47 and 48, as executrix, which confine their application to one holding property or having in possession property in virtue of the office and trust conferred by the court. If, as intimated, there was property in the hands of the defendant, which belonged to the estate, it is apparent, that she did not obtain possession of the same as executrix, but obtained it, or held it, if at all, wrongfully, and the remedy against her is identical with that against any other person under like circumstances. She should be cited in a proceeding to discover assets under sections 74-78, etc. Why the administrator pendente lite seeks to proceed under sections 47 and 48, rather than for the discovery of assets, under sections 74-78, seems somewhat difficult to understand, unless it be that he is of opinion that she could be called upon to account under these statutes for property she never received as executrix and charged therewith, and, in event of her failure to comply with the order of the court in that behalf, such charge might be fixed thereby against her bond, in event she executed a bond, or confronted with a criminal prosecution for embezzlement. Whatever the purpose is, it is immaterial here. The decisive question with which the court is concerned, succinctly stated amounts to this: That it is not the mere appointment and qualification of the executrix which renders her liable to account under this statute, but, on the contrary, it is the fact that as such executrix she has become possessed of property of the estate which affixes upon her the obligation to account to her successor under sections 47 and 48, and, in event she fails to do so, authorizes the court to enforce the same. Notwithstanding the technical error mentioned in the judgment of the court, the result reached was ultimately right between the parties, and we are unable to believe that error was committed by such court against the appellant materially affecting the merits of the action.

The disposition of the case, as made by the learned trial judge upon the facts which appear in the bill of exceptions, was entirely proper; wherefore the judgment will be affirmed.

It is so ordered.

BLAND, P. J., and GOODE, J., concur.

**WICHMAN v. METROPOLITAN LIFE  
INS. CO.**

(St. Louis Court of Appeals. Missouri. July 9,  
1906.)

**INSURANCE—LAPSE OF POLICY—REINSTATE-  
MENT.**

A life policy provided that, should it become void for nonpayment of premiums, it might be revived within a year on payment of arrears and presentation of satisfactory evidence of insured's good health. After a policy had lapsed for nonpayment of a premium, the insurer's collector called on insured, received the premium, and gave a provisional receipt, reciting that the money would be applied to the premium, if the application for restoration should be approved. The insurer made no objection to the form or substance of the application, but subsequently the collector informed the insurer that in order to reinstate the policy the next premium must be paid in advance (which was not required by the policy); but the collector, on learning that insured was ill, refused to receive the advance premium. *Held*, in an action on the policy, wherein it appeared that insured was in good health at the time of the application for reinstatement, and wherein the application for reinstatement was not offered in evidence, that the policy was in force.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 933.]

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by Louise Wichman against the Metropolitan Life Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Geo. E. Smith, for appellant. Nathan Frank and Richard A. Jones, for respondent.

BLAND, P. J. The petition is in the usual form to recover on a policy of insurance for the sum of \$500, issued to Albert O. Wichman, payable to him at the expiration of 20 years from the date of the policy, and in case of his death within that period to his wife, Louise, or her legal representatives. After admitting the issuance of the policy and denying the other allegations of the petition, the answer set up the following defense: "That one of the express considerations upon which said policy was issued, and upon which payment was to be made, and a condition precedent thereto, was that the said Wichman should pay to said defendant a quarter annual premium of \$6.54 on or before the 12th day of September, December, March and June of each and every year, and that, if the said sums should not be paid at the time they became due as aforesaid, then by the terms of said contract of insurance the same should be, without further action on the part of defendant, void and of no effect, and defendant should not be liable to pay to plaintiff anything thereunder. It was further agreed, under the terms of said contract, that the same was completely set forth in such written policy and the application therefor by the terms of said policy made a part thereof, and that none of the provisions or terms of said

contract of insurance could be varied or modified, nor any forfeiture waived or premiums in arrears received, except by agreement in writing signed by either the president, vice president or secretary of defendant, whose authority would not be delegated, and that no other person had or would be given authority. Further answering, defendant states that the quarterly premium of \$6.54 due under the terms of said policy on the 12th day of September, 1903, was not paid on said date, whereby the policy became void, and there was no further liability on the part of the defendant thereon. That thereafter, and during the month of November in said year, and after said policy had become void and of noneffect by reason of nonpayment of premium as aforesaid, the sum of \$6.54 was paid by said insured to a local employé of defendant at St. Louis and was received by him. That said employé had no authority, under the terms of said policy as aforesaid, to waive any of the provisions of said contract or to revive the same, and said payment was received by the said employé upon the express understanding and agreement that 'this sum of \$6.54 as aforesaid is received as a deposit to be applied to the premium due on said policy for the nonpayment of which at due date this policy was lapsed, provided that the Metropolitan Life Insurance Company at its home office approves the application for the restoration of said policy submitted; if not so approved it is agreed that said deposit shall be returned to the person making it. And it is expressly understood that no obligation under said policy is assumed until the application for restoration has been approved.' That defendant did not approve the revival of said policy or revive the same, and the amount so paid as aforesaid was heretofore tendered to the plaintiff and is now tendered into this court for her use and benefit, or whomsoever the court may find entitled thereto." Omitting caption, the reply is as follows: "Now comes said plaintiff and for her amended reply to the new matter pleaded in defendant's answer says that by an invariable custom and usage established by defendant said defendant collected all of the premiums paid upon said policy except the initial premium by sending its duly authorized agent to the residence of the insured for that purpose and there demanding and receipting for said premiums; that, relying upon said custom and usage, both the insured and assured in said policy always awaited the arrival of said agent on and after the days when the several premiums on said policy became due, and in pursuance of said custom each and every premium paid upon said policy, with the exception of the initial premium, was called for, demanded and paid to said agent long after the day upon which it became due and payable and was accepted and retained by defendant although thus paid after ma-

turity. And for further reply plaintiff says that all premiums which accrued upon said policy prior to September 12, 1903, were paid to and accepted by defendant; that payment of the premium which accrued on September 12, 1903, was extended by defendant for 30 days, and after said extension expired defendant's said agent did not call for or demand payment of said premium until November 17, 1903, although money to pay the same on demand was provided and in hand awaiting the call of said agent; that when said agent did call on November 17, 1903, for the premium which accrued September 12, 1903, and then received the same, to wit, the sum of \$6.54 from the insured, he gave a provisional receipt therefor and required the insured and assured, this plaintiff, to sign an application for the revival of said policy, representing at the time that said provisional receipt would thereafter be exchanged for a regular receipt; that, at the time said application for revival was signed as aforesaid, the representations therein made relating to the good health of the insured were true; that thereafter, to wit, on December 1, 1903, said agent again called on the insured and assured and demanded that they pay the next premium that would accrue thereafter, to wit, that on December 12th, which the insured and assured at first protested against paying because the same was not then due, but afterward and at the same time offered to pay and tendered to said agent who, being informed that the insured was not then in good health, refused to accept the same; that defendant retained the premium paid to its said agent as aforesaid on November 17, 1903, until after the death of the insured, which occurred on December 10, 1903, and after it was notified of his illness on December 1, 1903, resulting in death, and never offered to repay said premium until long after the insured had died and after it received notification of his death from the assured, the said premium thus retained being the last to accrue upon said policy before death of the insured by reason whereof plaintiff says that defendant ought not now to be permitted to maintain any defense to this action based upon the nonpayment of premiums on the days provided in said policy, and particularly that which accrued September 12, 1903, and which was paid as aforesaid. Plaintiff denies each and every allegation of new matter contained in defendant's answer which is not herein specifically admitted, and prays judgment as before." At the close of plaintiff's case, the court gave the following instruction: "The court instructs the jury that, under the pleadings, the law, and the evidence in this case, the plaintiff has not established a cause of action against the defendant, and you are therefore directed to find and return a verdict in favor of the defendant." Whereupon plaintiff took a nonsuit with leave to move to

set the same aside. A motion to set aside the involuntary nonsuit was filed and overruled by the court, whereupon plaintiff appealed.

The quarterly premiums of \$6.54, stipulated to be paid, were due on the 12th day of September, December, March, and June of each year. Albert O. Wichman died December 10, 1903. Premiums falling due prior to September 12, 1903, were often not paid until from 5 to 15 days after they became due and were accepted and receipted for by the company. The plaintiff testified that the agents of the defendant always called at her residence for the premiums, and she always paid them herself and took the receipts; that she was visiting in the state of Indiana, in September, 1903, and did not know whether an agent of the company called during that month to collect the premium or not; that, on November 17th, Richard P. Edgington, agent of the company, called and she paid him the September premium, for which he gave her the following provisional receipt: "Provisional Receipt. I acknowledge to have received from the former insured under policy No. 201,788C in the Metropolitan Life Insurance Co., \$6.54, six dollars <sup>54</sup>/<sub>100</sub> dollars as a deposit. Said deposit to be applied to the payment of premium due on said policy September 12, 1893 (1903), for the nonpayment of which at due date this policy was lapsed, provided that the Metropolitan Life Insurance Company at its home office approves the application for the restoration of said policy submitted this day. If so approved I agree to pay to the company the said money and deliver to the said former insured the regular home office receipt in exchange for this receipt; if not so approved, I agree to return said deposit to the person making it. It is understood that no obligation under said policy is assumed until the application for restoration has been approved. R. F. Edgington." Witness further stated that Edgington returned on December 1st with a letter from the company, stating, in effect, that in order to reinstate the policy the December premium must be paid in advance; that she had never paid a premium in advance, and at first protested against making this payment before it was due, but finally stated to Edgington that she would pay it, and that she had the money in the house with which to make the payment; that in the course of the conversation she stated to him that her husband was sick with typhoid fever, and that she might need the money; that, as soon as Edgington learned that her husband was sick, he refused to receive the December premium and went away; that, when she paid the September premium on November 17th, her husband was well and at work; that no offer to return the \$6.54 paid on November 17th was ever made until after her husband's death. Richard Edgington testified that he was an agent of the company with authority to collect premiums and write



new business; that, after he made a written application to reinstate the policy, he was told to collect the quarterly premium to become due on December 12th, and called on plaintiff for that purpose and told her the company wanted her to pay that premium before it would reinstate the policy; that she said she did not care to pay it in advance, but that "maybe" she had better do so, as her husband was very sick with typhoid fever, and asked him what he thought about it; that he told her it "seemed" he did not have authority to collect it; that the money he collected on November 17th he paid in at the company's local office, No. 3860 S. Broadway, St. Louis. The following stipulations are made a part of the policy: "If any statement in the application herein referred to is not true, or if any premium or installments of premiums be not paid when due, this policy shall be void, and all premiums paid shall be forfeited to the company, except as provided in paragraph first of 'Benefits and Privileges.' \* \* \* Should this policy become void, for nonpayment of premiums, it may be revived within one year after nonpayment of premiums, upon payment of all arrears, with interest at six per cent. and presentation of evidence satisfactory to the company that the insured is in good health."

The evidence is all one way that the policy became void on account of the nonpayment of the premium due September 12, 1903, and there is no evidence showing, or tending to show, that the company waived the forfeiture by subsequently accepting the payment for the overdue premium. The provisional receipt offered in evidence shows that the overdue premium was accepted by the agent on condition that the company would revive the policy according to the stipulation therein, to the effect that a forfeited policy might be revived within one year on payment of all arrears with 6 per cent. interest and presentation of satisfactory evidence to the company that the insured is in good health. The application for reinstatement, signed by both plaintiff and the insured, was not offered in evidence. Therefore we are not informed of its contents. The company, however, made no objection to the form or substance of the application, nor any demand for evidence of the good health of the insured. Plaintiff testified that the deceased was in good health at the time he signed the application. From these facts, the reasonable inference is that the application itself contained satisfactory evidence that the deceased was in good health at the time the application was made; if so, then under the terms of the policy it was the duty of the company to reinstate the policy, and its demand that the December premium should be paid in advance was an attempt on its part to enforce a condition for reinstatement outside the stipulations of the policy. The company retained the past due premium, retained the application for reinstatement,

without making any objection thereto, and, the insured having done all that was required of him by the terms of the policy to entitle him to restoration, the policy should be treated in equity as having been reinstated. The company could not hold on to the premium until after the death of the insured, and then successfully defend on the sole ground that it had not issued to the deceased a formal receipt showing a reinstatement of the policy. It could not retain the benefits, and at the same time deny the existence of the contract. *Andrus v. Insurance Ass'n*, 168 Mo., loc. cit. 166, 67 S. W. 582; *James v. Mutual Reserve Fund Life Ass'n*, 148 Mo. 1, 49 S. W. 978; *Suess v. Life Ins. Co.*, 86 Mo. App. 10; *Wagaman v. Insurance Co.*, 110 Mo. App. 616, 85 S. W. 117.

We think, under the evidence, the plaintiff made out a case that should have been submitted to the jury; therefore the judgment is reversed, and the cause remanded. All concur.

#### JOHNSON et al. v. MERCANTILE TOWN MUT. FIRE INS. CO.

(St. Louis Court of Appeals. Missouri. July 9, 1906.)

##### 1. INSURANCE — FIRE POLICY — IRON-SAFE CLAUSE.

The iron-safe clause in a fire policy is a promissory warranty, and failure to substantially comply with it does not avoid the policy, but precludes recovery.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 853.]

##### 2. SAME — ACTION ON POLICY — BURDEN OF PROOF.

Where, in an action on a fire policy, the answer denies the allegations of the petition showing full performance by plaintiff, and specially pleads failure to observe the iron-safe clause, the burden is on plaintiff to show compliance with such clause.

##### 3. SAME — COMPLIANCE WITH IRON-SAFE CLAUSE.

A fire policy required insured to keep a set of books showing all purchases and sales for cash and credit from date of inventory, and to keep them in a fireproof safe. In an action on the policy an inventory made prior to the issuance of the policy was read in evidence, but it appeared that no record was kept save one of credit sales and that such book not being in the safe was destroyed. Duplicate bills of goods purchased, made at insured's request after the fire were also put in evidence. *Held*, that there was no substantial compliance with the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 853.]

Appeal from Circuit Court, Taney County; F. C. Johnston, Judge.

Action by Adam Johnson and others against the Mercantile Town Mutual Fire Insurance Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

On January 31, 1904, for a consideration of \$87 to it paid by plaintiffs, defendant issued and delivered to them its policy of insurance, insuring them against loss by fire for one

year as follows: Five hundred dollars on their frame store building, located in the town of Brown Branch, Taney county, Mo., and \$3,500 on their stock of general merchandise kept in said store. On October 22, 1904, the store building and its contents were totally destroyed by fire. The suit is on the policy to recover the full amount of the insurance. Defendant admitted its liability to pay the \$500 insurance on the store building. In respect to the insurance on the stock of merchandise the defendant set forth in its answer the following stipulations contained in the contract of insurance, and alleged the failure of plaintiffs to comply with said stipulations, warranty, and conditions: "(2) The assured shall keep a set of books which shall clearly and plainly present in detail a complete condition of business transacted, including all purchases, sales and shipments of said stock, both for cash and credit from the date of the inventory, provided for in the first section of this clause, and during the continuance of this policy. (3) The assured shall keep such books and inventory and also the last-preceding inventory, securely locked in a fire-proof safe at night and at all times when the building mentioned in this policy or the portion thereof containing the stock described therein, is not actually open for business; or failing in this the assured keep such books and inventories at night and at all such times in some place not exposed to a fire which would ignite or destroy the aforesaid building; and in case of loss the assured specifically warrant, agrees and covenants to produce such books and inventories for the inspection of said company. (4) In the event of failure on the part of assured to keep and produce such books and inventories for the inspection of this company, this entire policy shall be null and void and such failure shall constitute a perpetual bar to any recovery thereon." Plaintiff's evidence shows that in November, 1903, Johnson, one of the plaintiffs, bought the stock of goods from one Adams, at which time duplicate invoices of the goods then on hand were taken. The invoice retained by Johnson was destroyed when the store burned. The duplicate was produced, identified, and read in evidence. Without taking any invoice, on an estimate that there was \$5,500 worth of goods on hand, Thomas, the other plaintiff, in December, 1903, bought an interest in the store and became the partner of Johnson. Plaintiffs kept no books showing the amounts of their purchases or cash sales. The only book they kept was a book of accounts of the goods sold on credit. This book was left on top of the safe and was destroyed the night of the fire. The bills or invoices of purchases furnished by the wholesale dealers from whom plaintiffs bought goods were also consumed in the fire. Plaintiffs had an iron safe but testified there was no room in it for these bills or invoices. Until the 1st of April, plaintiffs kept no account whatever of cash sales. It

appears they operated a flour mill at Brown Branch, bought some wheat and sold flour. About the 1st of April they commenced to keep a cash account, but the receipts of the store and the mill were counted up at the end of each day and the gross sum entered in the cashbook as one item; so that plaintiffs were unable to state how much cash was received on account of sales of goods on any day during the time the cash account was kept. After the fire the plaintiffs wrote to the wholesale houses from whom they had purchased goods (after the date of the policy) asking for duplicates of the bills of their purchases. The following are samples of the answers they received:

"Springfield, Mo., Nov. 5, 1904.

"Messrs. Johnson & Thomas—Dear Sirs: In regard to the job lot shoes you purchased, believe it was August the third and fourth. the amount was \$29 (twenty-nine dollars). Sorry for your misfortune. Respectfully, A. Tyler."

"Springfield, Mo., Oct. 1, 1904.

"Mr. Adam Johnson & Thomas,

Brown Branch, Mo.

To Rogers & Baldwin Hardware Co., Dr.

Due in Wholesale Hardware.

Due after 313, 315 South St.

"This statement is not a demand for bills not due. If incorrect, please advise us. For all accounts due, we desire a prompt remittance. Past due bills subject to slight draft. Interest charged at eight per cent on over-due accounts.

1904	April 5	Mdse.	\$ 3.30
	" 18	"	29.70
	May 23	"	45.73
	June 16	"	18.78
	" 20	"	1.16"

Over the objections of the defendant these letters or statements were admitted in evidence. Plaintiffs introduced other evidence, consisting of the mere opinions of the witnesses, tending to show the stock of merchandise on hand at the time of the fire was as good and as valuable as the stock on hand at the date of the policy. It was admitted that the defendant is a town mutual insurance company, incorporated and doing business under the laws of this state. Defendant offered no evidence. At the request of the plaintiffs the court gave the following instruction to the jury: "You are instructed that, under the law and evidence in this case, the plaintiffs are entitled to recover the sum of \$500 for the loss of the building, and the sum of \$3,000 for the loss of the stock of merchandise, and 10 per cent. damages on the whole amount, or \$350 for their damage, together with a reasonable attorney's fee." The following instruction asked by the defendant was refused: "The court instructs the jury that, under the pleadings and evidence, the plaintiffs are not entitled to recover as far as the insurance on the stock

of merchandise is concerned, and you will find for the defendant as to the insurance on the stock of merchandise." The jury returned the following verdict: "We, the jury, find the issues for the plaintiffs in the sum of \$500 for the loss of their building, and the sum of \$3 000 for the loss of merchandise, together with 6 per cent. from December 20, 1903, and 10 per cent. damages, and an attorney's fee of \$200." Defendant filed a timely motion for new trial, which the court overruled, whereupon defendant duly appealed to this court.

Fyke & Snyder, for appellant.

BLAND, P. J. (after stating the facts). Numerous errors intervened on the trial of the cause, but if it was error to refuse defendant's instruction in the nature of a demurrer to the evidence, it is useless to discuss the other errors. The evidence for the plaintiffs is conclusive that they did not keep the books they agreed to keep, except a book of credit sales, and they did not keep this book in the iron safe and it was destroyed by fire. There is no evidence tending to prove a waiver of the stipulations set forth in defendant's answer.

In regard to what is commonly called the "iron-safe clause" in policies of insurance, in *Am. & Eng. Ency. of Law* (2d Ed.) vol. 13, p. 355, it is said: "It has now become well settled by adjudications which have multiplied rapidly during the few years of its existence that this clause is not only reasonable but even desirable, and that in ordinary cases it will be enforced." In *Crigler v. Ins. Co.*, 49 Mo. App. 11, the Kansas City Court of Appeals, and in *Keet-Rountree Dry Goods Co. v. Ins. Co.*, 100 Mo. App. 504, 74 S. W. 469, this court held that compliance on the part of the insured with the iron-safe clause was a condition precedent to his right of recovery; that, in effect, the warranty was an affirmative one and, if breached, avoided the contract of insurance. An affirmative warranty consists of representations in the policy of facts then existing. As the iron-safe clause consists of representations of things to be done in the future, it seems to us the warranty is not an affirmative one, but a promissory one, and a failure to substantially comply with it does not avoid the contract of insurance, but defeats the right of recovery. This is the view taken by the United States Circuit Court of Appeals, in *Western Assurance Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619, and approved by Joyce on Insurance at section 2063, vol. 3, and we think the great weight of authority coincides with this view. *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Niagara Fire Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507; *Scottish Union & National Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180; *Roberts, Willis & Taylor*

*Co. v. Sun Mutual Ins. Co.* (Tex. Civ. App.) 48 S. W. 559; *Sowers v. Mutual Fire Ins. Co.*, 113 Iowa, 551, 85 N. W. 763. Numerous other cases of the same tenor and effect are collected in a footnote on pages 710-713, 51 L. R. A.

The petition alleges that the plaintiffs duly performed all the conditions required of them by the terms of said policy. The answer denies this allegation, and pleads, specially, a breach of the promissory warranty to keep books, inventories, etc. Thus the specific issue of the breach of the warranty to keep books, inventories, etc., was raised by the pleadings, and the burden was on the plaintiff to show affirmatively a substantial compliance with said promise. The evidence is all one way that they utterly failed to keep and perform this promise, literally or substantially, and there being no evidence whatever that defendant waived its performance the defendant's peremptory instruction should have been given.

The judgment is therefore reversed and the cause remanded, with directions to the trial court to enter judgment for plaintiff for \$500, the amount of the insurance on the house, with 6 per cent. interest thereon per annum from the date the same should have been paid under the terms of the policy.

NORTON, J., concurs. GOODE, J., absent.

#### TOWN OF CANTON v. MADDEN.

(St. Louis Court of Appeals. Missouri. July 9, 1906.)

##### 1. EVIDENCE—JUDICIAL NOTICE—MUNICIPAL ORDINANCES—REGULATIONS.

State courts cannot take judicial cognizance of municipal ordinances and regulations, but their existence and contents must be proved as other facts.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 42.]

##### 2. MUNICIPAL CORPORATIONS—ORDINANCES—VIOLATION—PENALTIES—PROOF.

Where, in a proceeding by a town for violation of an ordinance making the discharge of firearms within its limits, without the written consent of the mayor, a misdemeanor, the information specified certain penalties for the violation of the ordinance, which of itself provided no penalty, but no ordinance fixing a penalty was introduced in evidence, defendant was properly discharged.

Appeal from Circuit Court, Lewis County; E. R. McKee, Judge.

John Madden was charged with unlawfully discharging a shotgun within the corporate limits of the town of Canton without the written permission of the mayor, and from an order discharging him the town appeals. Affirmed.

This suit originated in the recorder's court in the town of Canton. The defendant was charged with having unlawfully fired off and discharged a shotgun within the corporate limits of said town on July 11, 1904, without having the written permission of the mayor so to do, and in violation of sec-

tion 38 of chapter 4 of the Revised Ordinances of the town of Canton. A trial by jury was had in the recorder's court and the defendant acquitted. The case found its way into the circuit court, and upon a trial *de novo*, the plaintiff introduced the following section of the ordinance which it is alleged the defendant violated: "Whoever shall, in this town, fire or discharge any cannon, musket, rifle, pistol, revolver, fowling piece, or gun of any description, or anvil (without written permission from the mayor, which permission shall limit the time of such firing and shall be subject to be revoked by the mayor or board of trustees at any time), shall be deemed guilty of a misdemeanor." It will be observed that there is no provision in this section with respect to the penalty incurred by one violating its provisions. There was no ordinance introduced at the trial providing a penalty for the commission of the act herein complained of. The further facts in proof were uncontroverted, to the effect that the defendant occupies a small property within the limits and adjacent to the outskirts of said town. He follows the avocation of gardener, and had set out and then had growing thereon a large number of cabbage plants. The rabbits in the neighborhood were daily feeding upon and destroying said plants. The defendant applied to the mayor of the town for permission to shoot and kill such rabbits as were found so destroying his cabbage plants, and the mayor verbally granted the request. He failed to reduce his permission in that behalf to writing, however, as contemplated by the ordinance quoted. It was shown that on the day mentioned the defendant, acting in good faith on such verbal permission from the mayor, shot a rabbit on his premises while in the act of destroying his cabbage plants in the garden. At the conclusion of all the evidence, the court peremptorily instructed the jury to find the defendant not guilty. Plaintiff appeals.

C. M. Ewalt and R. W. Ray, for appellant.  
O. C. Clay, Horace B. Clay, and Geo. Ellison, for respondent.

NORTONI, J. (after stating the facts.)

1. It seems that the trial court was justified in peremptorily directing the defendant's acquittal on the uncontroverted facts in proof. In the first place, the ordinance, as attempted to be enforced here, would be violative of the spirit of our Constitution and the fundamental principles of the common law. This is manifested from the following reservations of right to the citizen which are not delegated to the state. It is provided in our Bill of Rights:

First. Section 4 of article 2 of the Constitution of Missouri of 1875 provides: "That all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry."

Second. Section 30 of article 2 of the Constitution of Missouri provides: "That no person shall be deprived of life, liberty or property without due process of law." The right to have and enjoy the fruits of one's own industry, is recognized and reserved to the citizen as a natural and inalienable privilege and no authority is delegated to the state by him to deny this sacred privilege, and it follows as a necessary corollary that the citizen has the same natural right to use whatever force, and no more, to protect that property from total destruction as may appear reasonably necessary to one acting in good faith. *Reed v. Goldneck*, 112 Mo. App. 310, 86 S. W. 1104.

Third. Section 17 of article 2 of the Constitution of Missouri provides as follows: "That the right of no citizen to keep and bear arms in defense of his home, person or property \* \* \* shall be called into question." Now it must be conceded if the citizen has reserved to himself the right to bear arms in defense of his home, person or property, he also has reserved the right to effectuate that privilege by employing such arms under the established limitations of the law, when a proper occasion presents itself and renders such employment imperative in order to give life and vigor to this natural right, for the right to bear arms in defense of one's property, his home or his person, would amount to naught if the right to use such arms, under proper circumstances, were denied. While under the theory of our organic law, the right of the citizen to bear arms in defense of his home and property is identical with that to defend his person. It is true that the right to employ such arms in defense of either home or property is not of that same high and sacred order as the right to defend his person; nevertheless such rights are analogous and nearly allied, as is manifest by the spirit of the Constitution, and, under proper circumstances, the right to employ arms to protect property may become of the very highest order. Suppose the defendant had been personally assaulted by another on the streets of Canton with a knife or gun or other deadly weapon under such circumstances as to greatly endanger his life or render him liable to great personal injury; would he not have had the right, notwithstanding the ordinance in question, under such circumstances, to defend his life or person by firing a gun without first having obtained written permission from the mayor so to do? Or, suppose desperadoes had assaulted his home with the manifest purpose to destroy and demolish it; would he be held to have violated the ordinance because, forsooth, he availed himself of his natural and constitutional right to defend his home by employing such force as is necessary, and no more, even to the extent of discharging firearms against such invasion without the written permission of the mayor? These are questions which suggest themselves to our

minds as being conclusive of the entire proposition involved in the record before us. They are broad and sound considerations which amply support and justify the action of the learned trial judge in peremptorily directing the defendant's discharge. It may be and no doubt is true that the defendant could not justify the discharge of firearms against an intruding horse or cow or other domestic animal trespassing upon and destroying his garden, for the reason that such would, no doubt, have been the employment of more force than was reasonably necessary for the purpose, and further, there would, no doubt, be in such conduct a wanton disregard of the property rights of others, inasmuch as domestic animals are property. But the principle has no application to the case of a wild animal, such as that involved here. It is, of course, a matter of common knowledge that rabbits, as wild animals, are capable of doing immeasurable and irreparable injury to growing vegetation in the gardens, and that the only effectual manner in which to relieve such invasion of private rights is the slaughter of the animals. The case may be likened to that of wild animals, such as wolves entering upon premises and destroying sheep, or foxes destroying chickens. In either of the cases mentioned, the slaughter of the intruding animals by the use of firearms is not an exercise of more force than is reasonably necessary under the circumstances, nor is it an invasion of the property rights of others, as such animals are without private ownership.

What has been said on this feature of the case is in the nature of suggestions only, as tending to support the judgment of the learned trial court upon the theory that the ordinance, in so far as its attempted enforcement on the facts in proof, was violative of the constitutional rights of the defendant. Inasmuch as this court is without authority to adjudicate constitutional questions, however, the considerations suggested are not decided, nor will the judgment of the court be rested thereon. The questions are only discussed. From other considerations, the judgment of the trial court must be affirmed.

2. It is well settled that the state courts cannot take judicial cognizance of municipal ordinances and regulations. Their existence and contents must be proved in a case on trial therein as other facts are established. *City of St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915. Therefore, it devolved upon the plaintiff to show by proof, not only that the town of Canton had provided and levied the ordinance against the discharge of firearms within said town, without written permission of the mayor, but it devolved upon it as well to show by competent proof, which was the ordinance itself, what penalty it had provided for such offenses; otherwise the court would be at a loss to affix a punishment in pursuance of the ordinances of the town had

conviction been had thereunder. Although plaintiff had charged and specified in its information certain penalties for the violation of the ordinance mentioned, it wholly failed to introduce its ordinance, if it had such, providing what penalty the town authorities had prescribed for the commission of this or any other misdemeanor. Without such, there was a total failure of proof, essential to support a valid judgment in the case, and the learned trial judge very properly so declared as a matter of law.

The judgment will be affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

#### CITY OF EXCELSIOR SPRINGS, to Use of McCORMICK, v. ETTENSON.

(Kansas City Court of Appeals. Missouri. July 2, 1906. Rehearing Denied Oct. 1, 1906.)

#### 1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—SPECIAL TAX BILLS—VALIDITY—BURDEN OF PROOF.

The presumption that special tax bills are valid, arising from the presumption of right acting on the part of the municipal officers and from the fact that tax bills are *prima facie* evidence of the regularity of the proceedings, goes no further than to cast the burden of proof on one assailing the validity of the bills to show that the proceedings were not in conformity to law.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1137.]

#### 2. SAME—STATUTES—COMPLIANCE.

Where, in proceedings leading to the levying of an assessment for a street improvement, the law has been ignored, the assessment is void whether actual injury has been inflicted or not.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1063.]

#### 3. SAME—CONSTRUCTION.

Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, providing that the board of aldermen of cities of the fourth class shall have power by ordinance to cause to be graded all streets within the city at such time and to such extent and of such dimensions and with such materials and in such manner and under such regulations as shall be provided by ordinance, does not require the street improvement to be let to the lowest bidder, but authorizes a city of that class to select by ordinance the method for doing the work of street improvement, and a city adopting an ordinance must follow it.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 854, 862.]

#### 4. SAME—ORDINANCE—COMPLIANCE WITH PROVISIONS.

An ordinance of a city of the fourth class, adopted pursuant to Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, provided for a street improvement specifying the time allotted for the completion of the work, the materials to be used, the manner and regulations to be followed, and with reference to the extent and dimensions of the improvements fixed a boundary at each end of the street and stated that each street was to be macadamized to the full width thereof, exclusive of sidewalks. When the ordinance was passed, and when the contract for the work was awarded, the sidewalk limits had not been established. *Held*, that the city failed to comply with the ordinance in let-

ting the contract, rendering special tax bills issued in payment of the work invalid.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1063.]

**5. SAME — CURBING — ORDINANCE — SUFFICIENCY.**

An ordinance providing for the curbing of a street "according to the established grade" refers to the grade previously established, and special tax bills issued for the work are not invalid on the ground that the matter of the grade is left to the city engineer.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 812.]

**6. SAME — AUTHORITY OF CITY TO DIRECT — STATUTES.**

Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, authorizing cities of the fourth class to cause streets "to be graded, constructed, reconstructed, paved," etc., authorizes a city of the class to issue special tax bills to pay for the cost of curbing, especially in view of the provision in the section authorizing the issuance of tax bills for special assessments for "paving, macadamizing and curbing," for the terms "constructed" and "paved" refer to the entire pavement of the street and include curbing, which is a necessary part thereof.

**7. SAME — STREET IMPROVEMENT — CONTRACT — TAX BILLS — VALIDITY.**

An ordinance for a street improvement required the work to be completed in a time specified without qualification. The contract for the work stipulated that a specified sum per day should be deducted from the amount of the estimate as liquidated damages for each day the work remained unfinished, unless the delay was excused by the city engineer. The improvement was completed in the time fixed in the ordinance. *Held*, that the special tax bills issued in payment of the work were not void because of the provision in the contract authorizing the city engineer to extend the time for the completion of the work.

**8. SAME.**

A contract for a street improvement bound the contractor to pay the engineering expenses. The engineering work was performed by the city engineer, who received a salary. The ordinance providing for the work did not require the payment of such expenses by the contractor, nor were they included in the estimates filed by the engineer. *Held*, that as such expenses could not have been taken into consideration in the bidding, they imposed no additional burden on the property owners, and the special tax bills issued in payment of the work were not invalid.

**9. SAME.**

The ordinance and contract for the curbing of a street provided for the curbing from "the west line of lot 7 \* \* \* east to" a point named. The tax bills issued in payment of the work recited that it had been completed from the west line of the lot. The improvement constructed began at the east line of the lot. Under the facts it appeared that a mistake was made in naming the west for the east line of the lot. *Held*, that the special tax bills were not void because of such mistake.

**10. SAME — BURDEN OF PROOF.**

Under the statute making special tax bills issued in payment of a street improvement prima facie evidence of the regularity of the proceedings, one assailing the validity of the bills on a particular ground has the burden of establishing the fact relied on.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1137, 1138.]

Appeal from Circuit Court, Clay County; J. W. Alexander, Judge.

Action by the city of Excelsior Springs, to

the Use of David McCormick, against Henry Ettenson. From a judgment for plaintiff. defendant appeals. Reversed and remanded.

Harris L. Moore and I. J. Ringolsky, for appellant. D. C. Allen and Sandusky & Sandusky, for respondent.

**JOHNSON, J.** Action to enforce special tax bills issued in payment of certain street improvements in Excelsior Springs. Their validity is attacked by defendant on a number of grounds, but was sustained by the trial court. An appeal was allowed to this court, but, on motion of defendant, the cause was certified to the Supreme Court because, in our opinion, a constitutional question was involved. The Supreme Court reached a different conclusion and remanded the cause. *Excelsior Springs, to Use, etc., v. Ettenson*, 188 Mo. 129, 86 S. W. 255, and in the opinion filed eliminated that question from the case.

Thirty-six tax bills were issued against property of defendant in Excelsior Springs, a city of the fourth class; nine for the macadamizing of Main street, nine for the curbing laid thereon, nine for the macadamizing of Broadway and nine for curbing on that street. Each tax bill was made the subject of a count in the petition. In the judgment a separate finding was made on each count and judgments were rendered in the aggregate on all counts affecting the same property. The improvements mentioned consisted of the macadamizing, guttering, and curbing of Broadway, South, and Main streets. Broadway runs east and west. South is the eastward prolongation thereof. Main runs north and south crossing Broadway. On June 28, 1894, the city in providing for the doing of the work contemplated passed four ordinances, i. e., No. 232 for the macadamizing and guttering of Broadway and South streets, No. 240 for the curbing of the same, No. 236 for macadamizing Main street, and No. 244 for the curbing thereof. Each ordinance required the city engineer to make and file in the city clerk's office an estimate of the improvement, stating in those relating to macadamizing the cost per square yard "for macadamizing according to the specifications of this ordinance and" in those relating to curbing "the cost per lineal foot for said curbing according to specifications," etc. The mayor and clerk were required to advertise for bids in the official newspaper for a period of 10 days and each ordinance made it mandatory on the mayor and board of aldermen to "let the contract \* \* \* to the lowest and best bidder provided the amount bid does not exceed the estimate price." The estimates were filed, advertisements made, and on July 21st, by resolutions duly passed, the whole work was awarded to F. P. McCormick, whose bid on the macadam was 60 cents per square yard, and on the curbing 50 cents per lineal foot. Written contracts were made

with McCormick on July 26th and on the same day these were confirmed by the city in ordinances duly passed. The improvements were completed by the contractor in the time required by the ordinances and contracts—120 days—the cost thereof computed and apportioned, and the tax bills were issued on November 15th and delivered to the contractor, who, before the bringing of this suit, assigned them to the plaintiff. At the time these improvements were made the right of the city to assess the cost of such improvements against the adjoining property was derived from the provisions of section 1592, Rev. St. 1889, as amended in 1893 (Sess. Acts 1893, p. 107 et seq.). That section provided: "The board of aldermen shall have power by ordinance to cause to be graded, construed, reconstructed, paved, or otherwise improved and repaired, all streets, sidewalks and alleys, and public highways, and parts thereof within the city at such time and to such extent and of such dimensions and with such materials and in such manner and under such regulation as shall be provided by ordinance," etc. The ordinances passed by the city for the macadamizing specified the time allotted for the completion of the work, the materials to be used, the manner and regulations to be followed, and with reference to the extent and dimensions of the improvements fixed a boundary at each end thereof and stated that each street was to "be macadamized to the full width thereof exclusive of sidewalks." Broadway-South street is 60 feet wide; Main street 40 feet. When the ordinances were passed no sidewalk limits had been established by the city on these streets either by general or special ordinance, nor were they fixed until after the contracts had been awarded to McCormick. On July 26th, the date the contracts were made and confirmed by ordinance, the city passed an ordinance establishing the width of the sidewalks on Broadway-South street, at eight feet and on Main street at six feet. It thus will be seen that bidders were not advised by the ordinances, nor by the plans and specifications, of the extent of the macadamizing required, since a necessary dimension—the width—was not stated, and could not have been known. Defendant relies on this omission to defeat the validity of the bills issued for the cost of the macadamizing.

We give ready assent to the argument of plaintiff "that all presumptions are in favor of the right acting of public officers" and that "the tax bills themselves are prima facie evidence of the regularity of the proceedings for such special assessments, of the validity of the bill, of the doing of the work, of the furnishing of the materials charged, and of the liability of the property to the charge stated in the bill." But such presumptions go no further than to cast the burden of proof on defendant to clearly show that the proceedings were not in substantial conform-

ity to the requirements imposed by law, and should the proceedings in the record before us disclose a fatal infirmity the presumptions invoked must give way. This is in line with the expression of the Supreme Court in *Paving Co. v. Ullman*, 137 Mo., loc. cit. 568, 38 S. W. 464, copied in the brief of counsel for plaintiff: "It is our duty to assume (in the absence of a showing to the contrary) that the municipal authorities have proceeded in accordance with law and not in violation thereof. Action by city officials in regard to the imposition of special taxes for a street improvement comes within the protection of the general maxim that public officers are presumed to have rightly acted *until the contrary is clearly made to appear*. It is a grave error to suppose that the law looks with any disfavor upon these special tax bills for street improvements. They are to be treated with the same fairness and justice that should be accorded all public acts of the civil authority *when taken in conformity to law*. And a want of conformity to law is not to be presumed as to such governmental action any more than to other proceedings of public functionaries, *Farrar v. St. Louis*, 80 Mo. 393." (The italics are ours.) The facts we have stated are clear and indisputable for they are matters of public record and now we will consider their effect on the validity of the tax bills. It is true, courts should not look with disfavor on such special assessments for they result from a method prescribed by the legislative department of government for the making of necessary and indispensable street improvements in municipalities and therefore should be enforced with fairness and justice, but also is it true that, at best, they are harsh and coercive in their effect on the property owner. They are an exercise of sovereignty, of the taxing power of the state (*City of Independence v. Gates*, 110 Mo. 374, 19 S. W. 723; *McCutcheon v. Railroad*, 72 Mo. App. 271), and for that reason courts have carefully enforced the provisions found in the laws authorizing their imposition that are designed to protect the rights of the property owner to the end that he may not become the unwilling and helpless victim of possible dishonest practices on the part of public officials or contractors, and when it appears that such safeguards have been ignored in the proceedings leading to the assessment, the law pronounces the assessment void regardless of whether or not actual injury has been inflicted in the specific case, for the destroying vice lies in opening a door to fraud or favoritism that the lawmaking power has said must remain closed. Plaintiff points out that "the charter of Excelsior Springs (Rev. St. 1889, p. 444; Acts 1893, p. 107) did not require public work to be advertised and let to the lowest bidder, nor was there any general ordinance that so required," and adds: "The city could therefore proceed without it." The statute did not re-

quire the work to be contracted nor let to the lowest bidder (Warren v. Paving Co., 115 Mo. 572, 22 S. W. 490), but it authorized such procedure as one likely to be adopted by cities of this class and required the city to specify in the ordinance providing for the improvement in what manner the work should be done. In addition to what we have quoted before, the ordinances provided: "When a majority of the resident real estate owners in front feet on such street \* \* \* petition the board of aldermen to have such street \* \* \* paved or macadamized then the same shall be done in the manner \* \* \* designated in such ordinance," etc. In this enactment the Legislature chose not to designate an exclusive method for the doing of the work of street improvements in cities of this class and invested the city with the legislative function of making a selection among different methods, but, obviously, having in view the protection of the property owner required the city to express its selection in the ordinance providing for the improvement and strictly to follow the method adopted. Those were conditions precedent, the performance of which was made essential to the exercise of the right to levy a special assessment to pay for the cost of the improvement. Springfield v. Weaver, 137 Mo., loc. cit. 666, 37 S. W. 509, 39 S. W. 276; City of Nevada v. Eddy, 123 Mo. 546, 27 S. W. 471. Being charged with the duty of providing a method for doing the work, it is immaterial that the city was not bound in the first instance to advertise for bids and to let the contract to the lowest and best bidder. That was a method it could select and in proceeding with the improvements under the ordinances adopting it, the city was bound to follow it in the manner and to the extent that would have been required had the statute in express terms made that method exclusive. Thus, it will be seen that the duty of the city to advertise for bids and to let the contracts to the lowest and best bidder was imperative. The performance of that duty was regulated by the terms of the statute requiring the ordinance to state all of the facts concerning the improvements necessary to enable contractors to prepare their bids intelligently. The prime object of these provisions had in view the information and guidance of property owners and contractors to the end that the former might know not only the extent and character of the work, and the time in which it was to be performed, but also have the assurance that, if advertised and let to the lowest and best bidder, a full and fair opportunity would be afforded for competitive bidding. McQuiddy v. Brannock, 70 Mo. App. 535; Galbreath v. Newton, 30 Mo. App. 392. One of these essential conditions the city failed to perform. It advertised and let the contract without in any manner designating one of the dimensions and consequently bidders were left entirely in the dark as to

the extent of the macadamizing that would be required. That depended on the future action of the lawmaking body of the city and was permitted to remain undetermined until after the time allotted for the reception of bids had expired. We cannot disregard this mandatory provision of the statute by saying that no contractor could have been prevented by this omission from estimating the cost per square yard of laying the macadam. He could not have known whether the macadamizing on Broadway would be 30 or 50 feet in width. Knowing that the improvement must be completed in 120 days, he well might have concluded that, should the city establish the width of the roadway at 50 feet, he could not purchase and assemble the materials or obtain the necessary labor to complete the work in the time required, or, if he could, it would be at an expense that would enhance materially the cost of the work. This uncertainty regarding the extent of the work, for aught that may be known, may have prevented some from bidding at all and may have increased the amount of the bids submitted by others. Moreover, the omission opened the way to favoritism. Action establishing the sidewalk limits could have been delayed purposely and the favored bidder secretly informed of the limits that would be fixed. There is no suggestion of such unfair practice in this case, but, as we said, the vice lies in giving the opportunity for it in the face of statutory provisions expressly designed to prevent such possible occurrences. Ramsey v. Field, 115 Mo. App. 620, 92 S. W. 350. It follows from what we have said that the failure of the city to specify the extent and dimensions of the improvements was the failure to perform a condition made by the statute prerequisite to the exercise of the right to levy an assessment and the macadamizing bills therefore are void. Construction Co. v. Loevy, 64 Mo. App., loc. cit. 434.

The validity of the tax bills issued to pay for the curbing is attacked on many grounds.

First, it is said by plaintiff that these bills should be held invalid because "there is no provision in these ordinances fixing the grade or level at which these improvements shall be made," and that, "as the ordinances are thus silent, the provisions of the contracts, respectively, essentially leave and delegate to the city engineer the whole matter of the grade \* \* \* of those improvements." Turning to the ordinances, we find in each the provision that the street "be curbed according to the established grade." Evidently, this refers to a grade previously adopted by ordinance and in requiring conformity with it in the proposed improvement no legislative function was permitted to be exercised by the engineer. Property owners and contractors could obtain definite information respecting the grade by an examination of the previous municipal legislation on that subject. No necessary purpose was to



be served by setting out the details of the established grade in the ordinances providing for the improvements. The provision under consideration was sufficient. *Clafin v. Chicago*, 178 Ill. 549, 53 N. E. 339.

The next point made is that under section 1592 (Laws 1893, p. 107 et seq.) no authority was given cities of the fourth class to issue special tax bills to pay for the cost of curbing. Power was given the board of aldermen by ordinance "to cause to be graded, constructed, reconstructed, paved, or otherwise improved and repaired all streets," etc., and it was provided that "when a majority of the resident real estate owners in front feet on such street \* \* \* petition to have such street \* \* \* graded, constructed, reconstructed, paved, or macadamized, then the same shall be done \* \* \* at the owner's or occupier's expense and collected by special tax bills." Curbing is not specially mentioned, but clearly was intended to be included in the improvements designated. The terms "constructed" and "paved" as here employed were comprehensive enough to refer to the entire pavement of the street. Curbing is a necessary part of paving to separate the sidewalk from the roadway for vehicles and it would require a strained construction of the enactment to say that the Legislature intended to authorize special assessments to be levied to pay for the cost of sidewalks and of paving the way for vehicles and not for the cost of the usual and necessary wall separating them. *Morse v. City of West-Port*, 110 Mo. 502, 19 S. W. 831; *Powell v. St. Joseph*, 81 Mo. 347; *Carlin v. Cavender*, 56 Mo. 286; *Warren v. Henly*, 31 Iowa, 31; *Wistar v. Philadelphia*, 80 Pa. 505, 21 Am. Rep. 112; In Matter of Petition of *Burmeister*, 76 N. Y. 174; In re *Phillips*, 60 N. Y. 16; *Steckert v. East Saginaw*, 22 Mich. 104; *Dillen on Municipal Corp.* (5th Ed.) § 3797; 6 Words & Phrases Judicially Defined, 5239 et seq. Moreover, in the enactment we find direct expressions of the legislative intent. "Tax bills issued as herein provided for special assessments for paving, macadamizing, curbing, guttering, grading," etc., were made assignable and "the owner of any lot or parcel of ground fronting on such street, avenue, square, gutter, curb, alley, sidewalk or part thereof to be improved" was given the right, on notice, to pay his assessment in installments. We grant that a municipal corporation has no authority to create a tax lien by ordinance, or otherwise, where none has been expressly conferred upon it by statute (*Inhabitants of Houstonia v. Grubbs*, 80 Mo. App. 433), but are holding that a proper interpretation of the statute under examination necessitates the conclusion that express authority was conferred therein on cities of the fourth class to issue special tax bills to pay for curbing.

Another point urged against the validity of the tax bills is grounded on this clause in the contracts: "It is further agreed that the

sum of ten dollars per day shall be deducted from the amount of the final estimate of said work as liquidated damages for each and every day said work shall remain unfinished and unaccepted by the city engineer of said city after the time herein specified, within which said work shall be completed, unless such delay is excused by the city engineer."

The ordinances required the work to be completed in the time stated, 120 days, without condition or qualification, and granted no authority to the city engineer to extend the time for any cause, but it is argued the bills must be held void because of the variance in these respects between the contracts and the ordinances. The case of *McQuiddy v. Brannock*, 70 Mo. App. 535, is relied upon to sustain this contention. In that case the improvement was not completed in the time fixed in the ordinance, and we held the tax bills void despite the fact that the contracts authorized the city engineer to extend the time and the improvements were completed in the time so extended. But here the improvements were completed in the time fixed in the ordinances and certainly it would be extremely harsh and unreasonable to pronounce the bills void—when the contractor had complied with the strict letter of the ordinances—because the city had attempted in the contracts to enlarge the provisions of the ordinances, a thing it clearly was without power to do. In the particulars that the contracts are out of harmony with the ordinances, the contracts must yield. *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460. And, "when the requirements of both ordinances and contract are fully satisfied, surely neither the city, the property owner, nor anybody else has any ground of complaint against the contractor." *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163. As the unauthorized stipulations in the contracts were clearly void, we must assume they were without effect on the bidding and offered no opportunity for discrimination in favor of any bidder.

Further objection is made on account of the inclusion in the contracts of an agreement on the part of the contractor to pay "the engineering expenses for laying out and superintending and issuing tax bills for the same." The engineering work and superintendence were performed by the city engineer who received a regular salary from the city for his services, and it has been said that "services rendered by officers of a municipal corporation, who are paid a regular salary, should not be considered as forming any part of the cost of the improvement. It is the duty of municipal corporations to provide the appropriate machinery for making public improvements and the individual citizen charged with special benefits ought not to be compelled to bear any part of that machinery beyond that which he pays as one of the taxpayers of the municipality." *Ellott on Roads & Streets* (2d Ed.) § 573.

Authorities holding contrary to this doctrine may be found. *Beniteau v. Detroit*, 41 Mich. 116, 1 N. W. 899; *In the Matter of Lowden*, 89 N. Y. 548. We may concede, for argument, without so deciding, that the city had no right to impose on the property, against which the assessment was levied, the salary of its engineer or any part thereof as an item of the cost of the improvement, but this concession, when made, avails defendant nothing, since it appears clearly that this item was not included in such cost and therefore the property owners were not burdened with an expense that should have been paid out of the general revenue. The ordinances providing for the improvements did not require the payment of such expenses by the contractor, nor were they included in the estimates filed by the engineer, and therefore could not have been taken into consideration in the bidding. Appearing for the first time in the contracts, they imposed no additional burden on the property owners and for that reason, if for no other, cannot be allowed to affect the validity of the tax bills.

An objection peculiar to the tax bills issued for the improvements on Broadway-South street, is made on the following ground: Both ordinance and contract provided for the curbing "of Broadway street from the west line of lot 7 in block 19 in the Western addition east to" a point named and the tax bills recited that the work had been completed from the west line of said lot 7. This lot fronts 40 feet on Broadway and is on the north side of the street. It is conceded that the improvements constructed began at the east line of said lot and the point is made that these tax bills must be held void because the work was not completed in substantial compliance with the requirements of the ordinance and contract. The principle of law invoked in this contention is too well settled to be called in question. There must be a substantial compliance with the ordinance and contract in such case else no authority exists to levy a special assessment. *King Hill Brick Co. v. Hamilton*, 51 Mo. App. 120; *City of Trenton v. Collier*, 68 Mo. App. 483. And further the fact that full performance would be unduly burdensome, or even impossible, furnishes no excuse in law for a failure to perform all of the conditions. If the improvement cannot be constructed as provided for in the ordinance, it is the duty of the city to repeal the ordinance and begin anew. It cannot proceed under the ordinance and materially change the improvement and compel property owners to pay therefor. *City of Boonville v. Stephens* (decided at this term) 96 S. W. 314; *Eustace v. The People*, 213 Ill. 424, 72 N. E. 1089. But under the novel situation disclosed in the record before us, we are satisfied there was no substantial difference between the improvements as authorized and as constructed. The western terminus of Broadway was the east bank of

Fishing river. The street as dedicated and platted did not cross that stream, nor extend into it. The southwest corner of lot 7 extended to the river bank. From this point the course of the bank was towards the southeast, so that a prolongation southward of the east line of lot 7 would have intersected the south line of the street at the point where it met the river bank, and consequently a prolongation of the west line of the lot would have met an extension of the south line of the street 40 feet west of the east bank of the river and therefore 40 feet west of the terminus of the street. No provision was made for extending the street westward. Such extension would have been neither practicable nor useful and it is altogether unreasonable to infer that anyone interested in the work, city officials, contractors, or property owners, contemplated that an embankment 30 feet high was to be constructed into midstream for the sole purpose of providing an end to a street that had no existence at that place. Clearly a mistake was made in naming the west for the east line of the lot and it would be carrying the doctrine of street construction to a ridiculous length to say that this obvious mistake should serve to defeat the tax bills. *Bank v. Haywood*, 62 Mo. App. 550. It is more consistent with reason and fairness to construe the ordinances and contract to give effect to the evident purpose of the city to macadamize and curb the street that existed to its western terminus, the east bank of the river, and not to hold that the city attempted to exercise jurisdiction over territory that had not been dedicated as a public street and over which it had no jurisdiction. Our construction of the ordinance and contract requires the holding that the improvements were constructed as therein required. But it is argued by defendant that for aught disclosed the owner of lot 7 may have signed the petitions for the improvements and the 40 feet frontage of that lot may have been necessary to make up the required frontage. The petition was not introduced in evidence and the question here is concerned with the burden of proof. The charter provided: "Such special tax bills shall in any action thereon be prima facie evidence of the regularity of the proceedings for such special assessments of the validity of the bill of the doing of the work and of the furnishing of the materials charged for and of the liability of the property to the charge stated in the bill." With the tax bills in evidence, the burden was on defendant to overcome the prima facie effect given them by the statute. As we have shown, the validity of the bills for curbing and the regularity of the proceedings leading to their issue in no manner have been impeached by the ordinances, contracts, and other evidence offered. Consequently, the burden still remained with defendant to show, if he could, that the petition signed by the property owners was insufficient. This he has not done and there-

fore we assume that it conformed with the requirements of the statute.

Other questions raised against the validity of the curbing bills have been considered and are decided adversely to the contention of defendant.

The views expressed necessitate the conclusion that all of the tax bills issued for curbing are valid and that all issued for macadamizing are void. The judgment is reversed and the cause remanded, with directions to enter judgment accordingly.

All concur.

**CITY OF EXCELSIOR SPRINGS, to Use of McCORMICK, v. MISSISSIPPI VALLEY TRUST CO.**

(Kansas City Court of Appeals. Missouri. July 2, 1906. Rehearing Denied Oct. 1, 1906.)

Appeal from Circuit Court, Clay County; J. W. Alexander, Judge.

Action by the city of Excelsior Springs, to the use of David McCormick, against the Mississippi Valley Trust Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Harrison L. Moore and I. J. Ringolsky, for appellant. D. C. Allen and Sandusky & Sandusky, for respondent.

JOHNSON, J. This suit relates to special tax bills of the series to which the tax bills involved in the case of the same plaintiff against Ettenson, 98 S. W. 701, belong. The two cases were tried together and are submitted here on the same briefs. We have filed an opinion in the Ettenson Case at this term, and for the reasons therein stated the tax bills for macadamizing are pronounced void and those for curbing valid. The judgment is reversed and the cause is remanded, with directions to the trial court to enter judgment accordingly.

All concur.

**RIGGS v. ST. FRANÇOIS COUNTY RY. CO.**  
(St. Louis Court of Appeals. Missouri. June 5, 1906.)

**1. STREET RAILROADS—INTERURBAN RAILWAYS—FAILURE TO FENCE—DOUBLE DAMAGES FOR STOCK KILLED.**

An interurban electric railway company, incorporated under Rev. St. 1899, c. 12, art. 3, § 1187, and authorized to operate a street railway for public conveyance of passengers, mail, and express, is a railroad corporation within article 2, § 1105, requiring every railroad corporation incorporated in the state under such article, or any railroad corporation running or operating any railroad in the state, to erect and maintain lawful fences on the sides of its road passing through cultivated fields, and, until such fences are constructed, making it liable for double damages for stock killed on its road.

**2. SAME—OCCUPATION OF PUBLIC ROADS.**

An interurban electric railroad company, incorporated under Rev. St. 1899, c. 12, art. 3,

§ 1187, is not relieved of its duty to fence its road, as required by article 2, § 1105, making railroad companies liable for double damages for stock killed on roads, not fenced, running through and adjoining inclosed fields and uninclosed lands, because it was constructed on the right of way of a public road by permission of the county court.

Bland, P. J., dissenting.

Appeal from Circuit Court, St. Francois County; Chas. A. Killian, Judge.

Action by B. W. Riggs against the St. Francois County Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The St. Francois County Electric Railway Company was incorporated under article 3, c. 12, Rev. St. Mo. 1899, and authorized to construct, maintain, and operate a street railway for the public conveyance of passengers, mail, and express in the county of St. Francois, from and through the city of De Lassus to the city of Farmington, and thence to the unincorporated town of Flat River, a place of about 5,000 people in said county. On June 11, 1902, the county court of St. Francois county granted the corporation the right (qualified easement) to construct its railway upon that part of the public road between the south boundary line of the city of Farmington and the city of De Lassus, a distance of about 1½ miles. Afterwards the St. Francois County Electric Railway Company by a general warranty deed conveyed its road, franchises, etc., to the present defendant company. The cars on defendant's railway are propelled by means of electricity with trolley appliance. It carries passengers and express, United States mail, and some freight, as is shown by the evidence, and it is the principal means of transportation from the Iron Mountain Railroad at the city of De Lassus to Farmington. The road is constructed and maintained along and upon the northern part of the public highway from Farmington to De Lassus. The railroad is unfenced at the point in question. The evidence shows that there are posts standing between the railroad track and that portion of the public road occupied for highway purposes, but no fence thereon. About a quarter of a mile south of the city of Farmington the plaintiff's milch cow came upon defendant's tracks and was injured and killed by one of its electric cars. This suit is predicated upon section 1105, Rev. St. 1899, to recover double the value of the cow. The complaint, sufficient in form, alleges in substance that the cow came upon the railroad track at a point where the defendant was required by law to erect and maintain a lawful fence, which it had wholly failed and neglected to do. The trial was had before the circuit judge without a jury. The court found the issues for the plaintiff, assessing his actual damages at \$40, and doubling the same under the provisions of the statute. Defendant appeals, and contends, first and principally, that it is not a rail-

road within the meaning of section 1105, supra, and hence is not required, under the provisions of the said statute, to erect and maintain fences along the sides of its railroad tracks; and, second, that in the event it is held to be a railroad within the purview of that statute, plaintiff cannot recover, inasmuch as it is only required to fence where its road passes "through, along, and adjoining inclosed fields and uninclosed lands." The points will be noticed in their order.

Benj. H. Marbury, for appellant. R. C. Tucker and W. L. Hensley, for respondent.

**NORTONI, J.** (after stating the facts). 1. The first proposition advanced for reversal of the judgment is that appellant is not a railroad corporation within the contemplation of section 1105, Rev. St. 1899, and as such required to fence its right of way for the better security and protection of animals on the highway and at large, through the country traversed by it. The case of *Sams v. Railway Co.*, 174 Mo. 53, 73 S. W. 686, 81 L. R. A. 475, is cited and relied upon to sustain this contention, and it is argued that the Supreme Court in that case ruled to the effect that the general statutes of the state employing the term "railroad" have application only to commercial railroads and steam railroads, and that street railroads are to be excluded from the provisions of all general statutes employing the term "railroad" only; that to bring a company organized as a street railroad within the purview of the statutes, as in this case, it should by specific terms mention street railroads, etc. The majority of the members of this court do not so understand that adjudication. We are of the opinion that its true import is well digested and stated in the fifth point of the syllabus, in the following language: "The word 'railroad,' used in the statute, may or may not apply to a street railway, and, to determine whether or not it does, the connection in which it is used must be looked to." And it appears in the opinion that the court had in mind a special statute, and was dealing with it "as an act of class legislation"—the "fellow servant law of 1897"—and held that inasmuch as that act neither designated street railroads "by name nor by words necessarily indicating the intention to include them, and as such corporations were neither within the letter nor reason of the law, it does not apply to them." It seems quite clear that this much, and no more, was decided in that case. Indeed, it is a rule universally approved that the meaning of the word "railroad," when employed in a legislative enactment, can only be determined by reference to the context of the act and manifest intention of the Legislature. As said by Mr. Wood, in his excellent work on the *Law of Railroads* (volume 1 [1894] § 1): "Thus it has often been a question whether the term would include a street railway. The answer must depend upon the character of the statute and the purpose for

which it was provided." See, also, 1 *Elliot on Railways*, §§ 4-6. The Supreme Court of Pennsylvania laid down a most reasonable and satisfactory rule on the subject in *Gyger v. Railway*, 136 Pa. 104, 20 Atl. 399, as follows: "'Railway' and 'railroad' are synonymous, and in all ordinary circumstances are to be treated as without distinction, and when either of them is used in a statute, and the context requires that a particular kind of road is intended, that kind will be held to be the subject of the statutory provision; but, if the context contains no such indication and either of the words are used in describing the subject-matter, the statute will be held applicable to every species of road embraced within the general sense of the word used." See, also, *Mass. Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46. So it appears, after all, we must look to the context of the statute before the court, and, upon taking into account its object and purpose, determine in each case, upon its peculiar facts, the meaning of the word "railroad" therein employed, when endeavoring to ascertain to what class or character of railroads the Legislature intended to apply the regulation provided, and in no case can an accurate determination and result be had, except by a constant vigil as to the mischief sought to be prevented and the remedy sought to be provided by the enactment.

2. With these principles before us, let the examination of the case before the court be had. The railroad in question is several miles in length, the greater portion of which passes through an agricultural country in St. Francois county. It is chartered for the purpose, and the second franchise granted to it, under section 1187, Rev. St. 1899, is "to operate its road by animal, cable, electric or other motive power as the consent to the use of which said power may be obtained from the public authority of such city, town or county." A portion of the road passes through the city of Farmington, a place of about 5,000 inhabitants, and makes stops at each and every street crossing when necessary for the accommodation of passengers. Aside from this, it is rural or interurban, rather than urban, and by its charter it is authorized to "receive and collect such fares for the transportation of persons, express and mails as may be provided in the said consent of such public authorities of such city, town or county, given as aforesaid." Section 1187, Rev. St. 1899. The motive power selected by it, and presumably authorized by St. Francois county, and the city, under the second franchise, quoted supra, is electrical, rather than animal or cable, and falls under the designation of other motive power contemplated by such franchise. Its cars are propelled by electricity at a more or less rapid rate of speed, as is usual with such roads, and therefore, when in operation, it is a dangerous agency with respect to the rights of those persons who are passengers or employes

thereon, as well as with respect to the rights of the citizens and other persons along its route to permit their animals to run at large or to pass to and fro upon the highway. Indeed, it may not be so highly dangerous as a steam railroad in operation, inasmuch as the cars are not so heavy, nor the motive power and speed so great, generally speaking, and therefore casualties may be more readily averted. Nevertheless the fact remains that it is a dangerous agency, being operated by means of a motive power of great force, under a charter from the state, in a thickly populated community, which, if permitted to continue with its tracks unfenced, is designed to inflict injury to its patrons and employees aboard the cars on account of the probability of derailment by means of collisions with animals on the track, and designed also to inflict injury to the property rights of citizens by killing or maiming such animals as wander upon its tracks by reason of its failure to fence the same. Now, these are the very rights sought to be protected and rendered more secure by the provisions of the statute under consideration, therefore the railroad in question falls within both the spirit and reason of the statute.

But it is suggested, even though it comes within the spirit and reason thereof, it does not fall within the letter of the statute, inasmuch as the words "street railroad" are not therein employed. Now, it may be answered to this suggestion that the words "steam railroad" or "commercial railroad" are not employed in the statute, and, except for the fact that the statute is found in the article pertaining to railroads, the argument that steam railroads are not within its letter can be predicated with as much force on this truth as can the argument that electric roads, organized under the street railroad law, operating outside of cities and towns and passing through an agricultural country for many miles, are not within its letter. We are not persuaded by this argument in the least. The suggestion throws no light on the subject, for the word employed in the statute is "railroad," which properly applies to either steam or street railroads, and we therefore ascertain that the defendant, although organized as a street railroad company, is operating a railroad in this state, and it therefore falls within the letter of the statute as well. The statute does not mention steam railroads nor limit its application thereto, but, on the contrary, it purports in express terms to apply to "every railroad." The first three words of the section are: "Every railroad corporation." So much as is pertinent here reads as follows: "Every railroad corporation formed or to be formed in this state, and every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this state, shall erect and maintain lawful fences on the sides of its road," etc. Section 1105, Rev. St. 1899. It will be observed that the statute not only

applies to every corporation then in existence and to every railroad "to be formed under this article," but it applies as well to every railroad "to be formed in this state," and continues, and applies "to any railroad corporation running or operating any railroad in this state." These latter words are broad and comprehensive, and include all railroads, whether incorporated in this state or not. Its terms are as comprehensive as the subject itself, and include within its scope the entire import and meaning of the word "railroad." It is true the defendant was not organized "under this article"; the statute quoted being a portion of article 2, c. 12, Rev. St. 1899, pertaining to railroads, and the defendant having been organized under article 3 of the same chapter, which latter article pertains to street railroads. Now, both article 2, pertaining to railroads, and article 3, pertaining to street railroads, are parcel of the same chapter and must be read together. By reference to article 2, in which is found section 1105 under consideration, pertaining to railroads, it is manifest that the article does not contemplate steam railroads exclusively; for in section 1035, parcel thereof, granting powers to the railroad companies organized thereunder, we ascertain that the sixth franchise or power granted to such railroads is "to take and convey passengers and property on their railroad by the power and force of steam or of animal or by any mechanical power, and to receive compensation." This clause of the statute evinces that the Legislature, in enacting the general law for the incorporation of railroad companies in 1855, looked forward to the utilization of other forces of nature than steam as a motive power to be employed by these agencies for transportation, and therefore contemplated and intended, in providing for the organization of railroad companies, to provide for the incorporation of those which might be operated by electricity or other power as well as by steam. They are, in unequivocal language, authorized to employ steam, or animals, or "any mechanical power." Of course, a railroad operated by electricity would fall within the clause last mentioned, and this defendant is therefore such a railroad as is recognized by article 2 of chapter 12, notwithstanding a special article was added, dealing with street railroads. Article 3, dealing with street railroads, was added because it was necessary to make the provisions enabling them to obtain a right of way over streets and other matters incident to municipal interests. As said before, both articles are of the same chapter, dealing with the subject of railroads, and should be read together. Article 3 purports to apply to street railroads, and therefore should be considered special with respect thereto, whereas article 2 purports to deal with railroads, and is not expressly limited to any particular class of railroads, and the provisions of its various sections should not

be confined to steam or commercial railroads exclusively, unless the statute manifests that such railroads are intended; while, on the other hand, if the text of the statute employing the word "railroad" indicates, when considering the mischief sought to be prevented and the remedy therefor, that other railroads were intended as well, then such interpretation must be given as will develop and carry into effect this legislative intention. It is certain that the character of the motive power employed, whether steam, or electricity, or other mechanical power, can render the ultimate fact of a highly dangerous agency none the less, and likewise certain that the fundamental distinction with respect to street railroads and steam or commercial railroads lies in the character of the use of the railroads, and not in the character of the motive power employed by them. *Mass. Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46; *Hannah v. Street Railway Co.*, 81 Mo. App. 78; 27 Amer. & Eng. Ency. Law (2d Ed.) 51; 1 Elliott on Railroads, § 6.

It is true that in the case last cited, which was one involving the killing of stock under this same statute, the railroad company, although operating a rural or interurban, not an urban, railroad, by means of electricity, was organized as a railroad company under the general statutes in that behalf, and not as a street railroad company, and while the court made it clear, and in fact decided, that the motive power employed should not influence the consideration of the question in the least, it rests its judgment of liability against the company principally upon the two facts that the defendant was incorporated as a railroad and was operating a railroad within the meaning of section 1105, supra. In this latter respect the case is an authority here. It is manifest, and the thought runs through the entire opinion, that the court was of the opinion that the defendant would have been liable just the same in that case, whatever statute it was incorporated under, inasmuch as it was operating a railroad and came within the spirit and reason of the statute as well. In *Koken Iron Works v. Robertson Avenue Street Ry. Co.*, 141 Mo. 228, 44 S. W. 269, it was urged that street railroads were not within the intent of Rev. St. 1889, § 6741 (now section 4239, Rev. St. 1899), giving a lien upon the "roadbed, station houses, depots, bridges, rolling stock, real estate and improvements" of "any railroad company," for which work or labor is done as aforesaid, by said section. The Supreme Court answered the argument by saying, in effect, that much of the statute appeared to be directed against the railroads operated by steam, and that steam roads were generally designated by the act, and then said: "But the general terms of the law are also susceptible of application to street railroads, and we find nothing in any part of the enactment to indicate that such obli-

gation is not intended. When we . . . consider the broad objects sought by such legislation, it seems clear that street railroads were not intended to be exempt from liability to respond to such lien claims in a proper case." This seems to be the view of this court on the same question, as appears in *St. Louis Bolt & Iron Co. v. Donahoe*, 8 Mo. App. 559.

Now, in the case of *Jerman's Adm'r v. Benton*, 79 Mo. 148, it was contended that the stockholders in a street railway company were subject to the double liability imposed on stockholders in all other corporations except ordinary railroads. The argument was that a street railway company was not a railway within the meaning of the fifty-seventh section of chapter 39 of the statutes of 1855, authorizing the formation of railway associations. This section was so worded as to exclude stockholders in ordinary railroad companies from the double liability imposed on stockholders in other corporations. A stockholder of the Bellefontaine Street Railway Company insisted that it was a railroad company within the meaning of chapter 39 of the statutes of 1855 (which corresponds to article 2, c. 12, of the present statutes) and that hence he enjoyed immunity from double liability as a stockholder. On the contrary, it was insisted that a street railway company was not a railroad within the meaning of the original railroad law (article 2 of chapter 12 of the present statutes). This court adopted the other view, holding that a street railroad company was within the scope and purpose of the general railroad statutes and its stockholders not subject to double liability. This holding was approved by the Supreme Court. After saying that the point for consideration could not be satisfactorily disposed of by considering the various methods of locomotion employed by railroad companies, the opinion of the Supreme Court proceeded to point out that, according to even this narrow test, a street railroad company was within the meaning of the general railroad act, resting its argument on the clause we have quoted, which provides for the use, not only of steam and animals, but of any kind of power to transport persons and property. The Bellefontaine Street Railway Company was one which was to operate only by horse power within the limits of St. Louis. Part of its line was outside of the city and could have been operated by other means. The Supreme Court held that even within the city it was a railroad within the meaning of the general laws. The opinion says: "Horse or street railroads, as far as they are employed in cities, serve the same uses and purposes for which railroads are used between distant points in the country. They possess the same essential features as servants of the public, the principal difference being tested by the peculiar character of the territory they are operated in, and the safety, comfort, and wants of the people in that territory."

That decision would seem to be decisive of the present case. There is much more reason for holding an electric railroad running across the country between distant towns is a railroad, within the meaning of that section of article 2 which imposes double damages where the line was unfenced, than there is for holding that a horse railroad company, operating entirely within the limits of St. Louis, was a railroad company, within the meaning of the section of the article which was construed to exempt stockholders in railroad companies from double liability.

The fact that the present defendant happened to incorporate under article 3 of chapter 12 relating to the organization of street railway companies has nothing to do with the decision of the question at issue. Defendant is in no real sense a street railway. It does not run over streets. It is a railroad over the country, operated by a mechanical power. For aught we know, it may have stations, though that is an unimportant point. Of course, there are many provisions in article 2 inapplicable to electric roads; for instance, to provide cabooses, double-deck cars, blow steam whistles at crossings, etc. Because it cannot and is not required to do these things, it by no means follows that it need not do other things which are applicable to it. Now, the purpose of this statute is manifest. It is a proper regulation imposed by the state in virtue of its police authority to prevent the operation of such dangerous agencies as it has chartered to maintain and operate railroads from inflicting unnecessary injury to its patrons and employees aboard its cars which are likely of derailment from animals coming upon its tracks (3 Elliott on Railroads, § 1182), and, further, to prevent the killing and maiming of such animals owned by persons in the community or elsewhere. It is a wholesome law, designed primarily to furnish a reasonable degree of protection at least against the probabilities of injury, as indicated, and it is a fact understood by all that the result is the same to either passenger or employé who is injured by the derailment of the car, as indicated, as is the loss the same to the person whose animal is either killed or maimed thereby, whether the car is propelled by steam, electricity, or other motive power. And as to the proposition that the railroad fencing statutes do not apply to rural or interurban railroads organized under the street railroad statutes, we must admit our inability to appreciate the distinction, when viewed from a practical standpoint, with the manifest purpose and intention of the fencing statutes before us. Either railroad, operated as they are through an agricultural country, possesses an element of great danger to the passengers, employes, and the animals along the route; and to the farmer whose cow is killed or injured by reason of the neglect of the corporation to fence it is wholly immaterial whether it was chartered as a street railroad or steam railroad,

just as it is immaterial whether it be propelled by steam or electricity; and, indeed, it is a refined distinction to hold that the farmer must be required to read the charter of the railroad company to ascertain whether it is liable for the value of his cow killed by it, when the cow was killed on a railroad track by a railroad car because the railroad had failed to fence, and under such circumstances as to affix liability therefor against the railroad company under the general statutes requiring railroads to fence.

It is suggested that the statute is penal in its nature and therefore cannot be extended beyond its clear import. This is true, and the court must abide by the rule suggested. We are not extending the statute, however. We are only giving life and vigor to its plain letter and manifest spirit. Now, the rule of strict construction, pertaining to penal laws, like all other rules of construction, must surrender to the first and cardinal principle of all construction, which is that the intention of the lawmakers, when ascertained, must be carried into effect by the court, if not prohibited by constitutional limitations. We find, as pointed out above, that the railroad in question is within both the letter and spirit of the statute, and therefore it is manifest that the Legislature intended that railroads of this class, when engaged in operating their cars through the country between towns, should fence their tracks as other railroads are required to do under like circumstances. The reasons demanding fences are the same in either case. There is a provision in the statute under consideration as follows: "If any corporation aforesaid shall, after three months, from the time of the completion of its road through or along the lands, fields or inclosures hereinbefore named, fail, neglect or refuse to erect or maintain in good condition any fence, openings or farm crossings or cattle-guards as herein required, then the owners or proprietors of said lands, fields or inclosures may erect or repair such fences, openings, gates or farm crossings or cattle-guards, and shall thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction the cost of such fences, openings, gates, cattle-guards or repairs, together with a reasonable compensation for his time, trouble and labor in and about the construction of such fences, openings, gates or cattle-guards, or the making of such repairs, together with ten per cent. interest per annum thereon, from the time of the service of process upon such corporation in such suit: Provided, that before such repairs are commenced, such owner shall give five days (5) notice in writing to the railroad company, by delivering a copy thereof to the nearest section foreman or station agent of such railroad company, that the railroad fence needs repairs at a place or point named in the notice on the lands of such owner." Section 1105, Rev. St. 1899.

It is suggested that this provision relating to five days' notice to the section foreman or depot agent prior to the fences being erected by the owners or adjoining proprietors evinces that the Legislature had in mind only steam or commercial railroads inasmuch as those roads are known to usually employ depot agents and section foremen and maintain depots, whereas such is not the usual practice of electric railroads organized under the statutes pertaining to street railroads. Whatever may be the practice of electric railroads in this behalf, we must read the statute in connection with the other legislation on the subject, and we find in section 1187, Rev. St. 1890, being parcel of article 3, pertaining to street railroads, that the fifth franchise granted to street railways is: "To purchase and acquire depots, powerhouses, sites and terminals." From this it is manifest that the Legislature contemplated that even street railroads should, if they saw fit, maintain depots and, no doubt, depot agents in connection therewith, and especially so if they operate long lines across the country. It is a well-known fact that they do employ a large number of men, commonly known as section men, in keeping the roadbed in repair, and these men are in charge of a foreman, the same as a section foreman of other railroads. And it appears that the provisions of the statute above quoted are, therefore, not inconsistent with the views expressed by the court herein. It is no doubt true that the Legislature did have in mind steam railroads, such as are known to maintain depots, depot agents, and section foremen; but this in no wise excludes the notion that it did not intend as well to apply the statute to electric or street railroads, when they embark in the business of running over the country, outside of cities and towns. By its plain words it says it applies to "any railroad corporation running or operating any railroad in this state," and to every railroad "to be hereafter organized," and the fact that street railroads do have section men in their employ, together with the franchise and its provision authorizing them to erect and maintain depots, seems amply sufficient to bring it within the contemplation of the statute quoted.

Be this as it may, however, we are of the opinion that the mere fact that this provision evinces the purpose of the Legislature to level the statute against such roads as were known to maintain station agents and section foremen, about which there can be no controversy, does not exclude the idea that the Legislature purposed as well to level its provisions against all such railroads as traverse the agricultural portions of the state, where cattle are likely to go upon its track and occasion the two-fold calamity of derailing the car to the injury or death of passengers and employes, or the killing and maiming of the animals with which the collision is had, even though such

roads do not maintain depots, depot agents, and section foremen. In view of the very comprehensive language used by the Legislature and the reason and spirit of the law as well, we are not inclined to hold that the lawmaking power intended anything less in this respect than what it said, if the words "any railroad corporation running or operating any railroad in this state," and every railroad "to be hereafter organized," as expressive of the comprehensive purpose of the lawmakers in respect to the principal object of the law itself, are to be limited in their application so as to exclude certain railroads from the provision of the words "any railroad," by the influence and context of the subsequent provisions relating to such a mere incident to the general purpose of the act, as is the incident pertaining to how a recovery may be had for erecting fences in event the railroad fails for three months to do so and they are constructed by the adjoining proprietors, then it should be done by the court of last resort, the judgment of which would, no doubt, have such influence on the subject as to bring it immediately before the Legislature and occasion an amendment to the section, if, in the wisdom of the legislative authority, an amendment would be proper. The fact is the rural or interurban railroad, organized as a street railroad, is now a factor with which the courts are compelled to deal, and, the earlier their status is ascertained and settled by the courts, the better for the peace and repose of society. Entertaining this view, we are of opinion that the defendant is liable in this case, unless the next question to be considered relieves it therefrom.

3. It is urged that the railroad, being located in the public road by permission of the county court, it could not be required to fence such road, as it would obstruct the highway. In the first place, it must be borne in mind that this statute, requiring the railroads to fence their tracks, is not exclusively for the owner of the animal, nor for the benefit of the adjacent proprietors, but is in the nature of a police regulation, designed to promote the security of persons and property generally. *Robinson v. C. & A. Ry. Co.*, 57 Mo. 494; *Jackson v. Railway*, 43 Mo. App. 324. The fact that the railroad ran along the north edge of the public road does not operate to relieve the railroad company from its duty to maintain fences for the purposes as above indicated; for it has long since been settled beyond controversy that the statute requires fences to be erected everywhere outside of towns and cities, except at the crossings of public and private roads and necessary station grounds. *Morris v. Railway Co.*, 79 Mo. 367. See, also, *Accord v. Railway Co.*, 113 Mo. App. 84, 87 S. W. 537. And it has been frequently decided that, when a railroad runs along and abutting a public road, this in no sense relieves the obligation to fence. *Bozzelle v. Railway Co.*,



79 Mo. 349; *Morris v. Railway*, 79 Mo. 371. And this is true, even though the defendant's railroad encroaches upon a public road, as was decided in *Emmerson v. Railway Co.*, 35 Mo. App. 621. For, as well said in that case, and by the Supreme Court in *Robinson v. C. & A. Ry. Co.*, 57 Mo. 494, a railroad running along a highway is required to be fenced with especial care and watchfulness because of the increased dangers to the public and its property—citing 1 Redfield on Railways (5th Ed.) 517. It is unnecessary to multiply words on this question. The mere fact that the railroad was constructed on the right of way of the public road by permission of the county court cannot relieve it of its statutory duty to fence. On the contrary, its location there could only enhance such duty, if there be such a thing as rendering a duty more mandatory in one instance than another; for on a public thoroughfare there is greater likelihood of inflicting injuries than otherwise, and, as a correlative, special care should be exercised to prevent such injuries. The county court could grant no authority to the company to operate its road in a manner violative of this positive statute which would operate to relieve it from the duties thereby imposed, and its duty to maintain fences remains the same wherever it is located, and if such a fence in the highway constitutes a public nuisance, or if the railroad itself constitutes a public nuisance, it is immaterial so far as this case is concerned. Those questions are not before the court in this case.

The judgment of the learned circuit judge was correct, and will be affirmed. It is so ordered.

GOODE, J., concurs. BLAND, P. J., dissents.

#### NOTE.

[a] A railroad company is not bound to fence its tracks so as to prevent injury to animals straying thereon, unless it is required to do so by the terms of its charter, or by positive statutory enactment.

(Mich. 1851) *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59;

(Miss. 1870) *Memphis & C. R. Co. v. Orr*, 43 Miss. 279;

(Vt. 1853) *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116;

(W. Va. 1876) *Blaine v. Chesapeake & O. R. R.*, 9 W. Va. 252; *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 270;

(Wis. 1859) *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202.

[b] (Conn. 1882) In the absence of statute, a railroad company is not bound to fence its tracks. *Campbell v. New York & N. E. R. Co.*, 50 Conn. 128.

[c] (Ind. 1859) Although the statute does not expressly provide that cattle guards shall be constructed at road crossings, they may, perhaps, be embraced under the general term, fence. *New Albany & S. R. Co. v. Pace*, 13 Ind. 411.

[d] (Ind. 1884) A railroad company's obligation to fence includes the duty of maintaining cattle guards when they are necessary to pre-

vent access from intersecting highways. *Wabash, St. L. & P. Ry. Co. v. Tretts*, 96 Ind. 450.

[e] (Kan. 1882) Under the statute companies must maintain cattle guards and end fences, where necessary, as well as parallel fences. *Union Pac. Ry. Co. v. Harris*, 28 Kan. 206.

[f] (La. 1860) The rights, duties, and obligations of the New Orleans, Opelousas & Great Western Railroad Company are created by express law, and until the Legislature shall, by statute, require them to inclose their road, or shall delegate the power to the parochial authorities, and they shall exercise the same, they will be under no obligation to inclose their road, or any part thereof, with fences or barriers. If cattle stray upon the track and be killed or maimed by accident, it will be *damnum absque injuria*, and the owner will have the loss to bear. *Knight v. New Orleans, O. & G. W. R. Co.*, 15 La. Ann. 105.

[g] (La. 1883) There being no statute in Louisiana requiring railroads to fence their tracks, omission to fence is not *prima facie* evidence of negligence, and one seeking to recover for live stock injured by a locomotive must allege and prove culpable negligence. *Stevenson v. New Orleans Pac. Ry. Co.*, 35 La. Ann. 498.

[h] (La. 1884) A railway company is not liable for neglecting to fence its track running through pasture land, in absence of contract or statute therefor. *Day v. New Orleans P. Ry. Co.*, 36 La. Ann. 244.

[i] (Mass. 1848) The fact that the proprietors of a railroad have erected fences along the line of their road, against the land of a particular individual, is not of itself evidence of any obligation on the part of the proprietors to make or maintain fences for the benefit of such person. *Mores v. Boston & M. R. R.*, 56 Mass. (2 Cush.) 536.

[j] (Mich.) A railway company is under no common-law obligation to fence its track, at the peril of responding in damages for killing animals trespassing on the tracks arising from its neglect to do so. (1851) *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59; (1882) *Continental Imp. Co. v. Phelps*, 47 Mich. 299, 11 N. W. 167.

[k] (Miss. 1872) Railroad companies, like other proprietors, are not bound to inclose their lands to keep off cattle. They are to be considered as proprietors of property, using it for their private gain, but not to be permitted so to use it as to harm or injure others unnecessarily. *New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573.

[l] (Mo. 1858) A railroad corporation is under no obligation to fence its road. *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220.

[m] (Mo. 1886) A railroad company cannot escape liability for the value of stock killed, on the ground that it was not requested to fence by the owner, or on the ground that somebody else waived the requirement of a fence. *Parks v. Hannibal & St. J. Ry. Co.*, 20 Mo. App. 440.

[n] (Mo. 1887) Wherever, under the statute, outside of a town the company "may" erect fences, there it is required to erect and maintain them. *McIntosh v. Hannibal & St. J. R. Co.*, 26 Mo. App. 377.

[o] (N. H. 1850) Before the act of July 13, 1850, a railroad company was not bound to provide cattle guards at places where their track crossed the highway, and no action could be maintained against it for injury to cattle which, having escaped from the close of their owner, had gone upon the track. *Towns v. Cheshire R. Co.*, 21 N. H. (1 Fost.) 363.

[p] (N. H.) Railroads are required by statute to maintain fences on both sides of their tracks for the convenience and safety of adjoining landowners. (1854) *Cornwall v. Sullivan R. R.*,

28 N. H. (8 Fost.) 161; (1857) Horn v. Atlantic & St. L. R. R., 35 N. H. 169; (1857) Smith v. Eastern R. R., Id. 356.

[q] (N. H. 1857) Under the statutes of this state, railroad corporations are obliged to maintain fences on the sides of their roads, and to make cattle guards, cattle passes, and farm crossings for the convenience and safety of adjoining owners, and all who are rightfully upon the lands; and for failure so to do will be liable for injuring animals which stray upon the track. Horn v. Atlantic & St. L. R. R., 35 N. H. 169.

[r] (Or. 1890) Comp. Laws, § 4044, makes a railroad company liable for the value of stock killed upon or near any unfenced track by a moving train, and section 4045 prescribes what shall be deemed a sufficient fence to guard the railway track from the entrance thereon of live stock, and section 4048 provides that in every action for the value of any stock mentioned in section 4044 so killed that proof of such killing shall be deemed and held conclusive evidence of negligence, except when the owner is guilty of negligence or misconduct. *Held*, that by implication it is made the duty of a railway company to fence its track. Sullivan v. Oregon Ry. & Nav. Co., 19 Or. 319, 24 Pac. 408.

[s] (Pa. 1852) In this country a railroad corporation is not bound to fence its railway; and persons suffering their cattle to run at large upon uninclosed land adjoining the track, which are killed or injured by a passing train without negligence or wantonness on the part of the company or its servants, cannot recover against the company, or its servants, for such injury. New York & E. R. Co. v. Skinner, 19 Pa. (7 Harris) 298, 57 Am. Dec. 654.

[t] (Vt. 1851) It is the duty of a railroad company to maintain fences along its right of way, and for failure so to do it will be liable for killing animals which wander on its track. Quimby v. Vermont Cent. R. Co., 23 Vt. 387.

[u] (Vt.) It is the duty, by law, of the Vermont Central Railroad Company to erect and maintain such fences and cattle guards upon their road as will prevent horses and other animals from passing them. (1851) Quimby v. Vermont Cent. R. Co., 23 Vt. 387; (1852) Trow v. Same, 24 Vt. 487, 58 Am. Dec. 191.

[v] (Vt. 1853) Where no statutes exist, and no obligation is imposed by covenant or prescription, a railroad is not bound to fence its land, and for failure so to do will not be liable for injuring animals which stray upon the track. Hurd v. Rutland & B. R. Co., 25 Vt. 116.

**HURLEY v. METROPOLITAN ST. RY. CO.**  
(Kansas City Court of Appeals. Missouri. Oct. 1, 1906.)

**1. CARRIERS—STREET RAILROADS—PREMATURE START—DUTY OF CONDUCTOR.**

It is the duty of a street car conductor, after the car has stopped to permit passengers to alight, to know before giving the signal to start that no one is in the act of getting on or off the car, and it is no excuse for his failure so to do that he is busy with other matters within the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1226–1229.]

**2. SAME.**

A passenger on a street car is entitled to assume that the conductor will not start the car while the passenger is in the act of alighting, though he sees the conductor's arm raised toward the bell cord.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228, 1228½, 1893.]

**3. SAME—DILIGENCE IN ALIGHTING—EVIDENCE.**

Plaintiff had been riding in the vestibule of defendant's street car, which was full of people and tool boxes. The car came to a full stop at the point where plaintiff desired to alight, and as soon as the car stopped he endeavored to get to the steps as fast as he could. There were others ahead of him, whom he followed in his endeavor to alight as soon as possible, and as soon as the man ahead of him got off he stepped down, and while in the act of doing so was suddenly thrown to the street by the starting of the car. *Held*, that plaintiff exercised reasonable dispatch in endeavoring to alight.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228½, 1893.]

**4. SAME—INSTRUCTIONS.**

In an action for injuries to plaintiff while alighting from a street car, the court charged that if plaintiff was a passenger, and when the car stopped plaintiff undertook to alight, and while in the act of stepping from the platform, and before he had time to alight by using reasonable diligence and exercising ordinary care, the car was suddenly started by defendant's servants, whereby plaintiff was thrown to the pavement and injured, and defendant's servants failed to use the utmost skill and care which prudent men would use under similar circumstances to see that plaintiff had safely alighted from the car or was in a perilous position, plaintiff was entitled to recover. *Held*, that such instruction was not objectionable as eliminating the question of plaintiff's contributory negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1403–1407.]

**5. SAME—MISLEADING INSTRUCTIONS—MODIFICATION.**

In an action for injuries to a passenger while alighting from a street car, defendant requested an instruction that plaintiff had no right to alight or attempt to alight from the car after it had started, or while it was in motion, and, if he did so, he assumed the risk of injury; that if, after the car had started or while it was in motion, plaintiff attempted to get off and was thrown down by the motion of the car, then his injuries, if any, were caused by his own fault, and the verdict should be for defendant. *Held*, that the instruction as requested was misleading, and was properly modified by requiring that plaintiff must have been thrown down only by the motion of the car, "and without any negligence on the part of defendant's servants in charge thereof."

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by John F. Hurley against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Lucas and Frank G. Johnson, for appellant. L. A. Laughlin, for respondent.

**BROADDUS, P. J.** This is an action for damages for personal injuries received by plaintiff while alighting from defendant's street car. On the 2d of November, 1903, the plaintiff was a passenger on defendant's south-bound Vine Street car, his destination being the intersection of Thirty-Third street and Woodland avenue. The car stopped on the south side of Thirty-Third street, the usual place for stopping. The plaintiff's evidence tends to show that before the car reached the point mentioned he called out to

the conductor his destination; that several passengers got off when the car stopped; that plaintiff followed immediately after a man ahead of him, but, as he was stepping down from the platform, the car started and threw him onto the street pavement, the fall resulting in breaking the humerus of his right arm at the shoulder joint.

The defendant contends that the plaintiff was not entitled to recover because of his own negligence; that the car remained stationary for a sufficient length of time for a number of other passengers to get off, including a colored woman who was up in the body of the car and had to work her way out to the vestibule, where plaintiff was standing, to get off; that the conductor, who was in the body of the car attending to his duties, after he saw the colored woman get off, and not seeing any others attempting to get off, gave the signal to start when plaintiff was in the vestibule and before he was in the act of getting off; and that plaintiff saw the conductor's arm up in the act of ringing the bell before he started to leave the car. In order to know whether defendant's contention is good, it becomes necessary to examine more in detail the evidence of the plaintiff. Plaintiff testified that when the car was approaching Thirty-Third street he called out the street twice to the conductor, in a voice loud enough for him to hear the call; that he was riding in the rear vestibule of the car, which was full of people and tool boxes; that the car came to a full stop; that as soon as the car had passed Linwood Boulevard (which was north of Thirty-Third street) he endeavored to work his way through the mass of tool boxes piled on the floor, so as to be close to the steps when the car stopped, and as soon as the car stopped he endeavored to get to the steps to get off just as fast as he could; that there were others ahead of him getting off; that he followed the person ahead of him just as close as he could; that as he went by the door of the car he saw a blue uniformed arm up, which he judged to be that of the conductor; that he got to the first step, and as soon as the man ahead got off he stepped down on the other one, and while he was in the act of stepping off the car started suddenly and unexpectedly, and he was thrown in the direction the car was going. The plaintiff was a man with only one arm. He was not holding to the handle of the car when it started, because he says it was standing perfectly still just prior to its starting. We attached but little or no importance to that act of the conductor in raising his arm towards the bell cord. It may have signified that he was ringing a fare. At most it only indicated that he was preparing to give the signal for a prompt starting when all the passengers had gotten off or on, as the case might be. It was his duty to know before giving the signal that no one was getting either on or off. It was no excuse that he was busy

with other matters in the body of the car. The plaintiff had the right to assume that the conductor would not start the car while he was in the act of getting off, notwithstanding he saw his arm raised toward the bell cord. If plaintiff's statement is true, he was using all reasonable dispatch to leave the car when it was started by the motorman. The jury evidently gave credit to his testimony, as they were justified in doing. Besides, he was corroborated by Ex-Gov. Crittenden, whose evidence we believe was entitled to the highest credit. Mr. Crittenden stated that he noticed that the man was lame, and, as he was lame himself, he watched him as he was struggling to get off the car; that he was trying to swing down from the car to the street, but before he could do so the car moved up, and it threw him, when he was trying to get off, to about the curb of the street. The negligence of defendant consisted in starting the car while plaintiff was in the act of alighting. "Street railways are common carriers, and must employ the highest degree of care towards their passengers, and hold the car stationary while they are alighting." *Nelson v. Railroad*, 113 Mo. App. 702, 88 S. W. 1119; *Ridenhour v. K. C. Cable Co.*, 102 Mo. 270, 18 S. W. 889, 14 S. W. 760.

The defendant objects to plaintiff's first instruction which is as follows: "The court instructs the jury that, if you find from the evidence that on or about the 2d day of November, 1903, plaintiff was a passenger on a car operated by defendant in Kansas City; that when said car reached the intersection of Thirty-Third street and Woodland avenue, in said city, it stopped at the place where passengers were accustomed to alight at said intersection; and that while said car was standing still plaintiff undertook to alight from said car, and while he was in the act of stepping from the platform of said car to the street pavement, and before plaintiff had time to alight therefrom by using reasonable diligence and exercising ordinary care, said car was suddenly started by defendant's servants, whereby plaintiff was thrown to the pavement and injured; and should you further find that defendant's said servants failed to use the utmost care and skill which prudent men would use and exercise under similar circumstances to see that either plaintiff had alighted safely from said car or was not in a perilous position at the time of starting it, then your verdict should be for the plaintiff." The objection is that the "instruction entirely eliminates the question of plaintiff's negligence and contributory negligence"; that "it authorized a recovery on the facts stated, so that under it plaintiff could obtain a verdict, although not exercising due care for his own safety"; that the words "and before plaintiff had time to alight therefrom by using reasonable diligence and exercising ordinary care" did not require a finding that he was exercising

care; that "they simply referred to the length of time the car stopped—that is, did it stop a sufficient time to allow him in exercising care to alight, and whether it did so stop or not had nothing to do with whether he was using care; and that he may not have exercised proper care, whether the car stopped a sufficient time for him to get off or not." The objection is hypercritical. The instruction requires the jury to find that the car was standing still when plaintiff was in the act of alighting, and before he had time to do so by using care the car was suddenly started, etc. It does not admit of the construction that his care had reference to the length of time the car was stopped, but to his care in alighting, and to defendant's negligence in starting the car while he was so alighting. It would require more than ordinary precaution in wording an instruction to escape criticism from the learned and ingenious counsel of defendant.

What has been said disposed of defendant's second objection, for it is founded upon the assumption that the point we have last described was well founded. Other objections to the instruction are not pertinent, having in fact no application; and so as to the objection to the fourth and sixth clauses of instruction 2 given for plaintiff.

The court refused to give defendant's instruction numbered 7, but gave it in a modified form. The instruction as asked is as follows: "The court instructs the jury that the plaintiff had no right to alight or attempt to alight from the car in question after it started or while it was in motion, and if he did so he thereby assumed all risk of danger and injury caused thereby; and if you believe and find from the evidence that after the car had started, or while it was in motion, plaintiff attempted to get off the car, and was thrown down by the motion of the car, then you are instructed that his injuries, if any, were caused by his own fault, and you will find your verdict for defendant. The modification consisted of interjecting the words "only and without any negligence on the part of defendant's servants in charge of the" after the words "was thrown down by the motion of the car," and before the words "then you are instructed." The plaintiff's counsel answers the objection so plainly that we are constrained to adopt it, viz.: "The first part of the instruction sets forth clearly that the plaintiff had no right to recover if he attempted to alight from the car while it was in motion, but the latter part of the instruction as asked by the defendant was too broad and might have misled the jury. Plaintiff testified that as he was stepping from the lower step to the pavement the car started. He still continued in his attempt to step down, of course. The sudden starting of the car when a person is in that position would naturally preclude the possibility of his doing anything else. He did step off the car while it was in motion, and fell;

but the reason he did so was because defendant's servants negligently started the car while he was in the act of getting off. The modification made by the court simply made that point clear to the jury. If the cause of the plaintiff stepping off the car while it was in motion was the negligence of defendant's servants as defined in other instructions, then the defendant was not excused." One of defendant's arguments against the modification is that there is no allegation in the petition that plaintiff was injured in attempting to get off a moving train. It is true that there is no such allegation in the petition as defendant construes it. But it does allege that the car was started while plaintiff was in the act of alighting, which in a sense means that he attempted to alight while the car was moving; and, as has been said, the instruction was modified, so that the jury might not be misled by the words "while said car was in motion." It seems to us that the modification was made by the court with a view to substantial justice.

Finally, it is contended that the verdict of the jury, being against the great preponderance of the evidence, implied passion, prejudice, or partiality in that body. That the preponderance of the evidence was greatly in favor of defendant may be true; but it cannot be denied that plaintiff's case was supported by much substantial testimony. The learned judge before whom the case was tried has been upon the bench for many years, and we are satisfied that by his long experience he was fully qualified to weigh the force of the evidence and to judge of the credibility of the witnesses, and that he performed that duty faithfully and well, and that, if there had been any evidence that the jury acted from passion, prejudice, or partiality, he would have promptly set the verdict aside and set down the case for a rehearing. The case was well tried.

Affirmed. All concur.

**KNIGHT v. QUINCY, O. & K. O. R. CO.**  
(Kansas City Court of Appeals. Missouri. Oct. 1, 1906.)

**1. COURTS—JURISDICTION—AMOUNT INVOLVED—COMPUTATION—ATTORNEY'S FEE.**

Rev. St. 1899, § 1674, gives circuit courts jurisdiction of an action for the recovery of money when the sum demanded, exclusive of interests and costs, exceeds \$50. Section 1140 provides that, in any action against a carrier under the statute, it shall be liable for a reasonable attorney's fee to be fixed by the court, and taxed and collected as part of the costs. Held that, in an action against a carrier under the statute, the attorney's fee could not be considered as a part of plaintiff's demand in order to bring the action within the jurisdiction of the circuit court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 420.]

**2. SAME—PLEADING—COMPLAINT—AMENDMENT.**

Rev. St. 1899, § 1140, in relation to carriers, provides that, in an action against a car-

rier under the statute, in case of plaintiff's recovery, defendant shall be liable for treble damages, and section 1082 provides that carriers shall receive all live stock offered for transportation. Plaintiff's petition alleged that he offered an animal to defendant for transportation, but that transportation was refused, and in an insulting manner. Actual damages and treble damages under the statute were prayed for. It appearing that the amount sued for was less than the jurisdictional amount, plaintiff filed an amended petition, alleging the same facts founded on a breach of defendant's common-law duty, and seeking compensatory damages and exemplary damages, in a sum sufficient to cause jurisdiction to attach. *Held*, that the amendment did not change the cause of action was properly allowed, and was sufficient to sustain jurisdiction.

**3. CARRIERS—TRANSPORTATION OF LIVE STOCK—REFUSAL TO ACCEPT SHIPMENT.**

Where, at the time plaintiff offered an animal to a carrier for transportation, conditions were such, owing to the delay of a train, that the animal, if shipped, would be detained a whole day at a certain point, of which plaintiff was informed, conceding that the cause of the delay which the shipment would have encountered was unavoidable, the carrier was liable for refusing to transport the animal unless it should be accompanied by a caretaker, or the shipper should sign a release for all damages and liabilities. Under the circumstances it was the duty of the carrier to receive the shipment, and to exercise reasonable care to supply the animal's wants in case it required food and water during detention.

Appeal from Circuit Court, Grundy County; P. C. Stepp, Judge.

Action by Ashley G. Knight against the Quincy, Omaha & Kansas City Railroad Company. From a judgment in favor of defendant, plaintiff appeals. *Affirmed*.

J. G. Trimble and Hall & Hall, for appellant. E. M. Harber, H. C. Smith and Hubbell Bros., for respondent.

**JOHNSON, J.** Action against a common carrier to recover damages for an alleged wrongful refusal to receive and transport a hog offered by plaintiff for shipment. Plaintiff had judgment in the sum of \$2 compensatory, and \$63 exemplary, damages, and defendant appealed.

The suit was brought in the circuit court, and, in the petition plaintiff alleged, in substance, that he brought the animal properly crated and in good condition to defendant's station at Trenton and requested defendant's agent to ship it to Green City, another station on defendant's line, some 40 miles east of Trenton, and that defendant, not only wrongfully refused to receive and ship the property, but intentionally committed the wrong in an insulting manner. Actual damages were laid at \$2 which plaintiff prayed to have trebled under the provision of section 1140, Rev. St. 1899, and plaintiff further prayed for the recovery of a reasonable attorney's fee, to wit, \$50, to be taxed as costs, as provided by said section of the statutes. The right to the remedy invoked was based on the violation of the statutory duty imposed on common carriers by section 1082, Rev. St. 1899.

In the answer filed by defendant to this petition, among other defenses, the jurisdiction of the court over the subject-matter was attacked on the ground that the amount of plaintiff's demand was but \$6, the treble damages claimed; that the attorney's fee claimed was no part of the demand, but should be regarded as costs, and therefore the court had no original jurisdiction over the cause; the amount involved being less than \$50. Section 1674, Rev. St. 1899. Plaintiff then filed an amended petition containing two counts. In the first the cause of action stated was the same as that pleaded in the original petition, but the amount of the attorney's fee was changed to \$150. In the second the facts stated were a repetition of those stated in the first count and in the original petition, but the cause was founded on a breach of the common-law duty of defendant as a common carrier, and the relief sought included compensatory damages amounting to \$2, and exemplary damages laid at \$150. The right to recover damages of the latter class was predicated on the allegation that defendant "contemptuously, insolently, wrongfully, and maliciously refused" to receive and ship the property. Defendant moved to strike out the second count on the grounds, among others, that the cause pleaded therein differed essentially from that pleaded in the original petition, and therefore was not a proper amendment, and that, as the court had no jurisdiction over the subject-matter of the original action, none could be acquired through an amendment thereof. This motion was overruled, and defendant filed answer to the merits, in which the objection to the jurisdiction of the court was repeated. In the instructions given on behalf of plaintiff the first count was abandoned, and judgment was recovered on the second count alone. The objections made in the motion to strike out were reiterated in the motions for a new trial and in arrest of judgment, and are urged by defendant as grounds for a reversal of the judgment.

In a civil action for the recovery of money, whether such action be founded upon contract or tort, or be for the recovery of a penalty given by statute, the circuit court has no jurisdiction over the cause unless the sum demanded, exclusive of interest and costs, exceeds \$50. Section 1674, Rev. St. 1899; *Barnes v. Railway* (not yet officially reported) 95 S. W. 971; *Bradley v. Asher*, 65 Mo. App. 589; *Bay v. Trusdell*, 92 Mo. App. 377. In the original action the amount of the damages claimed by plaintiff, when trebled, fell below the jurisdictional sum; but it is argued by plaintiff that section 1140 of the statutes enabled him to recover a reasonable attorney's fee, in an action founded on a violation of the duty imposed on common carriers, by section 1082, and, notwithstanding, the statute provides that the attorney's fee shall be taxed and collected as a part of the costs in the case, such fee is

in the nature of a penalty for the wrong committed, and, being a part of the penalty he is entitled to recover, necessarily must be considered as a part of his demand. From this premise the conclusion is drawn that the penalty demanded by plaintiff included his actual damages trebled, and his attorney's fee, and, as these two amounts aggregated \$56, the circuit court had original jurisdiction over the cause. In *Perkins v. Railway*, 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426, the Supreme Court decided that a statutory provision similar to that under consideration should not be condemned as being special legislation, and observed "the statute in question is as much a police regulation as is the double damage section, and the attorney's fee may be lawfully imposed as a penalty for the violation of the law." And in *Briggs v. Railway Company*, 111 Mo. 168, 20 S. W. 32, the same court again treated the attorney's fee as a part of the penalty imposed for the wrongdoing, saying that "the fact the amount is taxed as costs, and is called an attorney's fee, does not change its real character" and held the defendant was entitled to a jury trial in the assessment of the value of the legal services. But, in the later case of *Paddock v. Railway*, 155 Mo. 524, 56 S. W. 453, the Supreme Court, following the decision of the Supreme Court of the United States in the case of *Gulf, etc., Railway v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, held the provision for the recovery of an attorney's fee, in an action of this character, to be in conflict with the fifth amendment to the Constitution of the United States, and therefore void, and overruled the *Perkins* Case. In thus holding that the legislative attempt to burden a certain class of unsuccessful litigants with the payment of their adversaries' attorney's fees was an attempt to deprive them of their property without due process of law, and to single them out as the subjects of class legislation, the view previously entertained that the attorney's fee should be treated as a part of the penalty imposed for the violation of a statutory duty necessarily had to be abandoned. To compel the losing party to a suit to pay his opponent's attorney's fee doubtless should be regarded as the imposition of a penalty, but it is a penalty inflicted for resisting the payment of a legal demand, and in no sense belongs to the remedy provided as a redress for the wrong upon which the demand is founded. When plaintiff's cause of action accrued under the statute the only penalty he was entitled to receive was his treble damages.

Being compelled to bring suit to enforce his demand, the contingent penalty of an attorney's fee, which the statute attempted to give him, regardless of the constitutional question involved, should not be considered a part of the demand inuring to him from the tort committed, and therefore should not be included in the amount necessary to

confer jurisdiction upon the circuit court. The term "the sum demanded exclusive of interest and costs," as employed in section 1674, obviously refers to the amount of the remedy sought under the cause asserted, and excludes incidental matters such as costs or other expenses incurred in the prosecution of the suit. We have not overlooked our decision in the case of *Bay v. Trusdell*, 92 Mo. App. 377, where we treated the attorney's fee as a part of the sum demanded, but there the action was on contract, and, by the express agreement of the parties, defendant obligated himself to pay a specific amount as attorney's fees, and thus made that sum as much a part of plaintiff's demand as was the principal of the obligation. So interest where it is a matter of contract between the parties is an integral part of the demand, and would be included in the jurisdictional sum, except for the prohibition of the statute, which does not extend to attorney's fees made a part of the obligation by express contract. The conclusion reached in that case was right, and is consistent with our present view that the "sum demanded" by plaintiff, within the meaning of section 1674, was the amount of his treble damages, and, as this was less than \$50, the Circuit Court had no jurisdiction over the cause pleaded in the original petition.

The next subject for consideration is the effect of the amendment to confer jurisdiction on the circuit court over the subject-matter. No objection is made by defendant to the sufficiency of the averments in the second count of the amended petition to support a recovery of exemplary damages, had the cause pleaded in that count been made the subject of the original action, nor is it contended, had that been done, that the amount demanded as exemplary damages could not be included in the sum necessary to confer jurisdiction in the circuit court; but it is asserted by defendant that, as the cause pleaded in the original petition on its face disclosed the want of jurisdiction in the court over the subject-matter, jurisdiction could not be conferred by an amendment, and certainly not by the substitution of an entirely new cause. It may be conceded that, when the facts pleaded in the petition disclose a cause of action of a nature or class without the jurisdiction of the court in which the action is brought, no amendment should be permitted to confer jurisdiction, since such amendment to state a jurisdictional cause would necessarily state one of an entirely different nature from that amended, and therefore would not be an amendment, but a substitution of one cause for another. But where the facts pleaded present a cause of a nature belonging to the jurisdiction of the court, and the lack of jurisdiction over the particular action results solely from the insufficiency of the amount of the relief demanded, and the facts pleaded would sus-

tain a money recovery in an amount falling within the jurisdiction, an amendment of the petition that merely so expands the amount of the recovery sought is not a change of the cause of action, and should be permitted. Granting that as a general rule a statutory cause cannot be amended into one under the common law, or vice versa, without changing the cause, this rule under the liberal policy of our Code should not be arbitrarily applied, and does not obtain where the same evidence will support both petitions, and the same measure of damages may be applied to both. *Ross v. Land Co.*, 162 Mo. 317, 62 S. W. 984; *Liese v. Meyer*, 148 Mo. 547, 45 S. W. 282; *Scoville v. Glasner*, 79 Mo. 449; *Purdy v. Pfaff*, 104 Mo. App. 331, 78 S. W. 824. Under the Code the petition is required to contain "a plain and concise statement of the facts constituting a cause of action." Rev. St. 1899, § 592. In actions *ex delicto* the wrong alleged is the cause of action. The "demand of the relief to which the plaintiff may suppose himself entitled" is no part of the cause, but is the assertion of a right resulting to the plaintiff therefrom. *Liese v. Meyer*, *supra*; *McGrew v. Railway*, 87 Mo. App. 250; *Hill v. Railway*, 49 Mo. App., loc. cit. 534. This being true, the selection by the pleader of one of two or more concurrent remedies should not serve to classify the action, and his substitution by amendment of another available remedy, for the one originally invoked of itself, constitutes no change of the cause. The facts alleged in the original petition were repeated in the second count of the amended petition. They show that defendant wrongfully refused to receive plaintiff's property for transportation, and that the wrong was oppressive, intentional, and therefore malicious. Such wrong was actionable either at common law, or under the provision of section 1082, of the statutes. The common-law remedy entitled plaintiff to recover his actual damages for the wrongful refusal to receive his property and punitive damages for defendant's intentional and malicious commission of the wrongful act while the statutory remedy to which plaintiff supposed himself entitled provided a penalty of treble damages for the wrongful refusal and no additional relief where the offense was aggravated by wilfulness, wantonness or malice. Though it is apparent plaintiff, in order to recover punitive damages, was compelled to prove a state of facts not required to be shown to authorize a recovery of the statutory penalty, he made those facts constitutive of the cause pleaded in the original petition, and thereby placed himself in a position to obtain a recovery of such damages by amending his demand without change of the cause of action. The amendment contained in the second count was proper, and invested the court with jurisdiction over the subject-matter.

Passing to the merits of the case, plaintiff testified that he hauled the pig to defend-

ant's station, and went to the window where defendant's agent transacted business with the public, and saw that officer inside the office engaged in business with two other men. After waiting several minutes, he interrupted with his business, and this is his account of what occurred: "Finally I broke into the conversation and told them I wanted to ship this pig by freight, \* \* \* and the agent kind of turned his head around, and he says: 'Have you got a man to go with him.' I says: 'What! A man to go with a pig 40 miles.' And I says: 'I wouldn't have to send a man with him: He is out here properly crated \* \* \* and already to go. All you have got to do is to set him on the car, and he will go all right.' And then he said he wanted a man to go with him to feed and water him, and I says: 'That pig will go a week without feed and water. He's a long hungry fellow, and he don't need anybody to go with him to feed or water him on the freight train for 40 miles.' Then he said that Milan was a division, and that he would have to lay over there that night. This was about 4 o'clock in the afternoon. \* \* \* I says: 'Well, that wouldn't hurt him to lay over there.' And I says: 'If that is all the reason why you don't want to take him, why, I'll take all risks of his laying over there at Milan.' Now that is the first time there was anything said about releasing of risks, and when I said that I would take all chances about the pig about the feed and water for one day, if that was all, for the lay over at Milan, the agent very contemptuously, and very angrily, and very impudently says: 'You would be the first one to kick if anything should happen.' Of course that raised my Irish a little, and I says: 'Then the question is I am here ready to pay the freight on this pig whatever it is, and I says are you going to take him.' And he says: 'No, not unless you release from all damages and liabilities, and sign a release for all liabilities.' And I says: 'Well, we'll see,' and I walked away." Plaintiff was told that the reason the pig would be detained a whole day in Milan was because the east-bound freight train was delayed, and would not arrive at the division station in time to connect with the freight train which ran east from that place, but denies that he was informed of the cause of the delay. The agent admits he told plaintiff he would be the first to complain if the pig was damaged, but denies that he spoke or acted in other than a courteous manner, and says he insisted on plaintiff signing a contract releasing the carrier from all liability, because he knew, and so informed plaintiff, that the pig would be held over a day in Milan, and, if unattended, would likely suffer from lack of food and water. The animal was a boar intended to be used as a breeder, and plaintiff says, and in this is uncontradicted, that he

would have suffered no damage from being without food and water during the anticipated delay.

In the absence of the existence of an exceptional cause, such as the act of God, the public enemy, unavoidable accident, or an abnormal and unanticipated inrush of business which will prevent the performance of its common-law duty to shippers, a common carrier has no right to refuse to receive and transport property offered for shipment, where such property is in good condition and properly prepared for shipment, and belongs to a class properly subject to carriage by such carrier, nor has the carrier any right to impose on the shipper against his will any limitation of its common-law liability as a condition upon which it will receive and carry his property. The common-law liability of a carrier is that of an insurer, but, where the subject of transportation is a living animal, the carrier is not liable for damages resulting solely from the natural vices or propensities of the animal, nor from its lack of vitality to withstand the hardships incident to the ordinary course of transportation. *Brown v. Railway*, 18 Mo. App. 568; *Potts v. Railway*, 17 Mo. App. 394; *Hance v. Express Co.*, 48 Mo. App. 179; *Hutchinson on Carriers*, § 218. The carrier is bound to provide proper facilities both for the carriage of the animal and to protect it against serious injury from the want of food and water. *Hutchinson on Carriers*, § 322. And, where the shipper refuses to send along a caretaker with the shipment, the carrier should observe ordinary care to attend to the necessary wants of the animal, and, for such services, may make a reasonable charge. If the animal sustains injury during the journey from hunger or thirst, the carrier will only be held liable for the resulting damages where it is made to appear that it negligently failed to perform such duty, and the burden of proof is on the shipper to show the existence of such negligence. *Crow v. Railway Co.*, 57 Mo. App. 135. But the fact that the animal will require food and water during the journey, and the refusal of the shipper to furnish an attendant, will not warrant the carrier either in refusing to receive the shipment, nor in exacting an agreement from the shipper to release it from liability. It must receive and carry the property without conditions restricting

its common-law liability if the shipper so demands.

Conceding for argument, though we do not so hold, that the cause of the unusual delay this shipment would have encountered was unavoidable, and that, in notifying plaintiff of its existence, defendant would have been excused in law from liability as an insurer for damages resulting therefrom, defendant was not justified in refusing to receive the shipment, because plaintiff would not agree to release it from all liability whether for damages resulting from such delay or from other causes. It should have received the shipment, and, if the pig required food and water during its detention at Milan, should have exercised reasonable care to discover and supply its wants. Defendant's conduct was wrongful under its own statement of the facts, and plaintiff was entitled to recover the actual damages he sustained in consequence thereof. If the wrong was intentionally committed by defendant's agent, or if, acting in good faith, he mistakenly supposed he was justified in refusing the shipment under the circumstances, but was insultingly rude in his refusal, in either event a proper case was presented for the awarding of exemplary damages to plaintiff. That the act was wrongful is apparent, and that the agent knew he was doing wrong is a fair inference from plaintiff's evidence. The remark, "You would be the first one to kick if anything should happen," if spoken jocularly, would perhaps be entirely harmless; but, considering that plaintiff and the agent were strangers, and plaintiff was making a request within his legal rights, to say it in an angry and contemptuous manner was very insolent, and might have proven sufficiently offensive to provoke a breach of the peace. The business of common carrier is with the general public, and their agents and servants should be required to observe the rules of ordinary courtesy in dealing with patrons; and where they disregard this duty, and in the commission of torts add insult to injury, exemplary damages should be inflicted upon them. The court properly submitted this issue to the jury, and the verdict is sustained by substantial evidence.

We have considered other points made, and find that the case was fairly tried. The judgment is affirmed. All concur.



## STATE v. KOOCK.

(Kansas City Court of Appeals. Missouri. Oct. 1, 1906.)

## GAME—HUNTING LICENSE.

Laws 1905, p. 158, § 54, makes it unlawful for any person to hunt outside of the county in which he lives without first obtaining a license so to do. Section 58 provides how one may obtain a license on application to the clerk of the county of the applicant's residence. Section 61 imposes a penalty on any one hunting without a license. Section 57 (page 168) provides that county clerks and the license collector of the city of St. Louis shall issue resident licenses to persons complying with the statute, and section 50 (page 158) provides that tenants of farm land and owners thereof may hunt on their lands without a license. In the statute as originally drafted section 54 merely made it unlawful for any person to hunt in the state. Section 64 (page 170) requires all proceeds of license fees to be paid into a fund for the protection of game. *Held*, that inasmuch as there is an express exception in relation to farm lands, and as little revenue would be received if persons could hunt without a license in the counties of their residence, and as hunters and county clerks might not have understood the phrase "resident license" to mean a "state license," and might have doubts whether a hunter hunting outside of his own county was required to have a license, which doubt is removed by section 54 (page 158), such section does not, by implication, permit one to hunt without a license in the county of his residence.

Ellison, J., dissenting.

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Arthur Kooch was convicted of hunting without a license, and he appeals. Affirmed.

W. D. Steele, for appellant. C. C. Kelly, Pros. Atty., and Barnett & Barnett, for the State.

**BROADDUS, P. J.** The defendant was indicted, tried, and convicted for hunting without a license in the county of Pettis, the county of his residence. The defendant appealed. The prosecution was under "An act relating to the preservation, propagation and protection of game animals, birds and fish; creating the office of game and fish warden; creating a game protection fund and appropriating money therefrom." Laws 1905, p. 158. The ground relied on for a reversal of the finding and judgment of the court is that under the act in question the defendant was not required to procure a license to hunt in the county of his residence.

"Sec. 54. It shall be unlawful for any person after the passage of this act to hunt in this state outside of the county in which he lives without first obtaining a license permitting him or her to do so."

"Sec. 58. Any person who has been a bona fide resident of this state for six months then last past may procure a license for himself or herself by filing his or her affidavit with the clerk of the county court where he or she resides, stating his or her name, age, place of residence, post-office address, the color of his or her hair and

eyes and the fact whether he or she can not write his or her own name; paying the said clerk the sum of one dollar; provided this section shall not apply to owners and tenants of farm lands, who may hunt on their lands without obtaining a hunting license."

"Sec. 61. Any person who shall hunt in this state without being at the time of such hunting in possession of a license as herein provided, duly issued to him or her, which license shall cover the period in which he or she shall be so hunting or shall furnish to another person a license issued to him or her, shall be fined not less than twenty-five dollars nor more than one hundred dollars and costs of prosecution."

"Sec. 57. County clerks and the license collector of the city of St. Louis shall issue resident licenses under the seal of their office to all persons complying with the provisions of this act and shall sign the same and shall require the person to whom the license is issued to sign his name in the margin thereof. He shall keep a correct and complete record of all licenses issued in a book to be furnished by the state game and fish warden," etc.

I have placed the foregoing sections in the order which they assume in importance to the question under consideration, and not as they are numbered in the act. It may be, perhaps, well to state that sections 55 and 56 relate to license that may issue to non-residents of the state. Section 64 requires that the proceeds of all license fees, fines, penalties, and forfeitures shall go into the state treasury and shall constitute a fund to be known as the "Game Protection Fund," for the payment of the salary of the state game and fish warden and his expenses, and also for the payment of deputy game and fish wardens and their necessary expenses.

The defendant contends that under section 54, by implication, hunters are not required to procure license to hunt in the county of their residence, that said section exempts such hunting from the provisions of the act. We do not think that it can be denied that section 61 makes it unlawful for any person to hunt in this state without having first procured a license to do so, unless the act itself makes exceptions. Section 58 does except from this general provision owners and tenants of farm lands who may hunt on such lands without license. But they are not exempted from hunting on other lands by the terms of the language making the exception, whether in the county of their residence or elsewhere. This is the only express exception to be found in the act, "An express exception, exemption, or saving clause excludes all others." State ex rel. v. Fisher, 119 Mo. 344, 24 S. W. 167, 22 L. R. A. 799. "And when a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication."

Authorities cited in the above case. As it is not claimed that persons are not required to have license for hunting in the county of their residence by any express language of section 54, they come within the rule as above stated—that the expression of one thing is the exclusion of all others.

The St. Louis Court of Appeals in the recent case of *Ex parte Helton*, 93 S. W. 913, after fully recognizing the rule, hold that, owing to the ambiguity of said section, it has cast ambiguity on other provisions. The language of the court is: "And if section 54 is left out of view, the provisions of the other sections of the act clearly indicate that the Legislature intended that all hunters, except owners and tenants hunting on their own lands, should take out a license, and to make it a misdemeanor punishable by fine to hunt without a license. Any other construction would be a perversion of the terms of sections 57, 58, and 61 of the act, and would clash with the provisions of sections 69 and 70. But when section 54 is brought into view, and an effort is made to construe it in harmony with the foregoing section, we find that its terms are not only ambiguous in themselves, but that their ambiguity pervades other sections of the act, and that, if section 54 is construed not to require residents to take out a license to hunt in the county in which he lives, such construction destroys the harmony of the act as a congruous working whole and in the main thwarts the purpose of the Legislature to create a game protection fund as provided in section 64. When a statute is ambiguous or of doubtful meaning, the courts may look to extraneous facts for an explanation of the ambiguity." The opinion proceeds to state that the court has been furnished with a copy of the original bill, wherein section 57 (now 54) then read as follows: "It shall be unlawful for any person after the passage of this act, to hunt in this state without first obtaining a license permitting him or her to do so"—and that it was amended as it now reads. We have not had the benefit of the original bill, but we presume it was as stated, and the House Journal shows that it was amended before its passage in the House, by inserting the words "outside of the county in which he lives." The court reached the conclusion that "this amendment of the language of the section, while it does not, in express words, declare a resident may hunt in the county in which he lives, without first taking out a license, makes it manifest that the Legislature intended that he might do so." The court holds that, if that position is not tenable, section 54 makes it a doubtful question, and discharged the defendant.

We cannot agree with the conclusion of the learned court for several reasons. First. Because it defeats the purpose of the law, which the court admits. Second. Because it violates one of the rules of construction—

that "where there is an irreconcilable conflict between different sections or parts of the same statute the last words stand, and those which are in conflict are repealed; that is, the part of a statute later in position in the same act or section is deemed later in time, and prevails over repugnant parts occurring before, though enacted and to take effect at the same time. This is applicable where no reasonable construction will harmonize the parts." *State v. Taylor*, 186 Mo. 608, 85 S. W. 564. Therefore, if section 54 is, as the court in the *Helton* Case thought it to be, in conflict with sections 57, 58, and 61, which appear later in the act, it stands repealed. And the rule would apply with at least equal propriety if it is held to be ambiguous; that is, whether it is in conflict with such later sections. And we are not aware of any authority, nor in our opinion can it be justified by reason, that an ambiguous expression of a statute will have the effect to defeat the purpose of the law, and its plain and unambiguous provision, and the means provided for its enforcement. It would be a poor makeshift in such a case to say that the ambiguity creates an ambiguity that did not otherwise exist and thus defeat the evident purpose of the Legislature. If the Legislature had intended to make hunting in the county of the hunter's residence an exception to the law, it will be presumed that they would have said so in a plain and unmistakable manner. If there was anything in the proposed legislation that was beyond all reasonable doubt clear, it was that hunters were required to take out license to hunt in the county of their residence. Under such a condition it would be doing violence to the plainest dictates of reason to assume that the Legislature would let sections 57, 58, and 61 remain as they were, and insert section 54, intending thereby to authorize persons to hunt in the county of their residence without license. And we attach but little or no importance to the fact that in the act as originally drafted section 54 (then section 57) contained the expression substantially that hereafter it shall be unlawful for any person to hunt in this state without a license, and that it was amended as it now stands. It was not an amendment of an existing statute. It was only proposed legislation. Had there been the former, perhaps there would be a question whether it was the intention to repeal existing sections prohibiting hunting in the state without a license, or it was for the purpose of making clearer some apparent or real ambiguity. When the proposed bill was adopted, all of its requirements were complete. The Legislature is not presumed to have intended that one section was in conflict with all the others, and that the one should destroy the purpose of the law, for the enforcement of which ample provision had been made; but, on the contrary, the presumption is conclusive that the act was

to be construed as a whole—in *pari materia*. *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649; *Ross v. Railway Co.*, 111 Mo. 18, 19 S. W. 541; *City of Westport v. Jackson*, 69 Mo. App. 148.

We accede to the proposition that, the statute being penal, it should be strictly construed, and not be extended or enlarged by judicial construction so as to embrace offenses and persons not plainly within its terms. *State v. Reid*, 125 Mo. 43, 28 S. W. 172. "Criminal and penal statutes should be strictly construed, and no one should be made subject to their provisions by implication, and only such transactions are covered by them as are within both their spirit and letter." *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39. But the rule has no application to this case. For it must be admitted that a hunter who hunts in the county in which he lives is embraced in the provisions of the act, that he is required by sections 57, 58, and 61 to have a license to do so, and that a penalty is imposed upon him if he hunts without such license. Defendant is within the class of persons, and the offense with which he is charged is plainly embraced within the terms of the statute. As already discussed, the only question is, was the defendant exempted by said section 54 from the terms of the act? And that is settled by the rule stated in *State v. Taylor*, *supra*, which involved the construction of a penal statute, and also by the rule of construction in *State ex rel. v. Fisher*, *supra*. In my opinion the provisions in section 54 should be treated as a redundant expression of the legislative will, and nothing more. Other sections of the act provide that hunters shall take out license to hunt in the counties in which they live, and a penalty is imposed if they hunt without such license in such counties. Section 54, in declaring that it shall be unlawful to hunt outside of the county in which they live without a license to do so, is but a repetition of what the act contains in other sections, and cannot, except by implication, be made to exempt hunters in the counties of their residence from the provisions of the act, which the Supreme Court says is not permissible. While there can be no doubt in the minds of lawyers and judges that without section 54 it is clear that persons who hunt in counties other than those in which they live are required to have a license to do so, it may not appear so to the mind of the hunter unlearned in the law, and said section 54 may have been intended to prevent confusion in that respect, and also as a guide to county clerks as to their duty in the premises.

Section 58 does not specify that the license to be issued shall be a state license. Section 57 requires that the county clerks and the license collector of the city of St. Louis "shall issue resident licenses under the seal of their office to all persons complying with the provisions of this act. \* \* \*

The provision made to procure a license in section 58, wherein the hunter must file his affidavit with the clerk of the county of his residence, giving his name, age, etc., and the requirements of section 57 that the county clerk or the license collector of the city of St. Louis "shall issue resident licenses \* \* \* to all persons complying with the provisions of the act," to the mind of a hunter might imply that such a license would be a local or county, and not a state, license. There is no doubt in my mind that the Legislature, in using the term "resident license," meant state license to residents of the county, and did not mean to localize the license; that is, to make it a county license. But the hunter or the county clerks might not so understand the matter. It might be so construed by the class of persons named, and doubts might arise in their minds whether a hunter hunting outside of his own county was required to have any license, or, if so, where could it be procured. Section 54 makes it plain that he must have such a license. And when we come to consider there is no game in the city of St. Louis, and but little in counties of the state containing a large population, a hunter residing in such city or cities might be at a loss to understand why he should be required to get a license to hunt in the city or county of his residence, where there was no game to hunt, in order to hunt in other counties of the state, where game was to be found. The provision for securing a license in one county in the state to hunt in all the other counties of the state is an unusual provision for obtaining a license, which of itself might be misleading, notwithstanding it was a wise requirement, calculated to prevent fraudulent evasions of the act.

There was realized from, under the law as understood and acted upon by the hunters of the state, and paid into the game protection fund, up to January 1, 1903, \$47,746, according to the report of Mr. Rhodes, the state game warden. It is also shown by his statement that it will take about that amount to pay the salaries and expenses of the game warden and his assistants. The law provides for annual appropriation for that purpose in the sum of \$50,000, which can only be paid out of such fund. It is easy to be seen that, if persons who hunt outside of the counties of their residence and nonresidents of the state are only required to pay a license fee, there will be only a small fund for the purpose of enforcing the law, and it will, for all practical purposes, be a dead letter. The purpose of the law is a strong appeal for its enforcement, if it can be upheld by any fair rule of construction, and we think it can, as has been shown.

For the reasons given, the cause is affirmed, and ordered certified to the Supreme Court as being in conflict with the decision of the St. Louis Court of Appeals in *Ex parte Helton*, 93 S. W. 913.

JOHNSON, J., concurs. ELLISON, J., dissents.

ELLISON, J. (dissenting). I do not believe that the foregoing opinion correctly interprets the statute. The Legislature adopted the game law (Laws 1905, p. 158), protecting certain game absolutely and other game partially, by regulating in some instances and prohibiting in others the hunting thereof. Among other of the regulating provisions is section 54, relating to a hunter's license. It reads as follows: "It shall be unlawful for any person, after the passage of this act, to hunt in this state outside of the county in which he lives without first obtaining a license permitting him or her to do so. Such license shall be dated when issued and shall authorize the person named therein to hunt during that year, and then only subject to the regulations and restrictions provided by law." Before that was enacted it was lawful to hunt anywhere in the state without a license; but after it was enacted it became unlawful to hunt outside of the county in which the hunter lived. It is quite manifest that the section means that no license shall be required of any one hunting in his own county; for, before its enactment, he had that right, which this section not only leaves untouched, but, on the contrary, recognizes by only making it unlawful to hunt in any other county.

But it is said that other parts of the act interfere with the natural meaning of that section, so much, indeed, as not alone to render it ambiguous, but to absolutely require a license to hunt in one's own county. I do not think a reasonable view of other provisions justify such reflection upon the law as a whole. Such other portions of the law said to be more or less involved are sections 55, 56, 57, 58, 60, 61, 63, 69, and 70. Sections 55 and 56 relate chiefly to licenses for nonresidents of the state. Section 57 requires the county clerks (and license inspector of the city of St. Louis) to issue licenses to residents of the state who comply with the provisions of the law. Section 58, providing that the applicant shall have been a resident of the state for six months, then enunciates what he shall do before the clerk issues him his license, viz., file his affidavit with the clerk of the county court where he resides, give his name, age, etc., and pay \$1. Section 60 makes it the duty of every licensee to permit the game warden, sheriff, etc., to examine his license when demanded. Section 61, in full, is as follows: "Any person who shall hunt in this state without being at the time of such hunting in possession of a license, as herein provided, duly issued to him or her, which license shall cover the period in which he or she shall be so hunting or who shall furnish to another person a license issued to him or her, shall be fined not less than \$25.00 nor more than \$100.00 and costs of prosecution."

Section 63 provides that the licenses for residents and nonresidents shall be printed in different colors so as to be easily distinguished, and that sufficient number of blanks shall be delivered to the county clerks, etc. Section 69 provides that it shall be unlawful for any person who has lawfully killed any game to ship it out of, or within, the state without a permit, unless the same be in his personal possession or openly carried as baggage or express, and shall be accompanied by such person on the same train or other conveyance. That such person "shall have in his possession at the time a nonresident or resident license duly issued to him under the provisions of law." Section 70, among other things, forbids any carrier from receiving game for transportation without first ascertaining that the shipper has a license in his possession covering the period when the shipment is offered.

It seems plain to me that neither of those sections control, nor in any way modify or influence, the meaning of section 54. Section 61, in declaring that "any person who shall hunt in this state without being at the time of such hunting in possession of a license, as herein provided, shall be fined not less than \$25.00 nor more than \$100.00," has reference to section 54, the only section declaring where hunting is unlawful. And the "license as herein provided," mentioned in section 61, is the license required by section 54, viz., for any person hunting "outside of the county in which he lives." It is true that section 58, in addition to what we above stated it contained, has the following proviso: "Provided, that this section shall not apply to owners and tenants of farm lands, who may hunt on their lands without obtaining a hunting license." It is said that the legal maxim, "The expression of one thing is the exclusion of another," should be applied to this; and that, since it is expressed that owners and tenants need not have a license to hunt on their own lands, all other persons must, whether hunting in or out of their counties. But that maxim only excludes those things which are unexpressed. If other things besides the one thing are expressed, then, of course, they are not excluded. Now, in this law (as we have already pointed out) it is expressed, not alone that hunters may hunt on their own lands without a license, but that they may also hunt in their own counties. The above proviso to section 58 is no more than if it had been appended to section 54 itself. And it simply means that as there are thousands of persons living on county lines, with part of their lands in two or more counties, and large numbers of others owning lands in distant counties, they should be allowed to hunt upon them, though they were outside the county of residence.

The prosecution also relies for support of its construction of the statute upon the provisions of sections 69 and 70, which, as be-

fore stated, forbid a shipper to ship and a carrier to carry any game, unless "such owner shall have in his possession at the time a nonresident or resident license duly issued to him under the provisions of law." This case is a charge of unlawful hunting and not unlawful shipping. We are therefore not called upon to say whether the possession of a license is a necessary prerequisite to a lawful shipment of game which is killed by the hunter in his own county, or upon his land in some other county. Certain it is that these sections, 69 and 70, are as much applicable to one instance as the other, and it is conceded all round that no license is required in the latter. It may be (I do not say) that the lawmakers meant by the expression "license duly issued to him under the provisions of law" that only in cases where licenses were, by the law, required for hunting, would they be required for shipping. But, on the other hand, it may be that in order to cut off excuses of mistake by the carrier as to the hunter's residence, and thus prevent a proper enforcement of the law, it was intended absolutely to prevent any shipment which was not accompanied by an exhibition of a license to the carrier, and thus, in accomplishing that purpose, incidentally preventing a shipment of game killed in the hunter's own county, or on his lands outside of his county. We are not called upon to solve such questions. It is, however, clear that the sections themselves and the considerations upon them, which we have just offered, form no reason why a statute, plainly defining an offense, should be bent out of all reasonable shape in order to make it harmonize with other parts only connected with it by inference. Especially is this true in criminal statutes, where "no person is to be made subject to such statutes by implication." *State v. Bryant*, 90 Mo. 534, 2 S. W. 836. "The reason of the rule," as given by Judge Gantt, "is found in the tenderness of the law for individuals and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department." *State v. Reid*, 125 Mo. 48, 28 S. W. 172.

A case like this was decided by the St. Louis Court of Appeals. *State v. Helton* (not yet officially reported) 93 S. W. 913. That court, in the first instance, held that the statute required a hunter to take out a license for hunting in the county of his residence. On rehearing and further consideration, the court concluded that view was not in accord with the meaning of the statute, and held that a license was not required for one hunting in his own county. The court was influenced to such change of view by reference to the journal of the House of Representatives, wherein it appears that, when the bill was originally introduced, section 54 read that it should "be unlawful for any person, after the passage of this act, to hunt in this state without first obtaining a license

permitting him to do so." It further appeared that an amendment was offered and adopted by the House by inserting between the word "state" and the word "without" the words which are now a part of it, viz., "outside of the county in which he lives." Counsel for the state, in combating the opinion of the St. Louis Court of Appeals, contend that as the bill for the preservation of game originated in the House of Representatives, and the amendment was adopted in that House before it reached the Senate, no significance should attach to the change from one form of expression to the other so far as the Senate is concerned; in other words, the mind of the Senate never acted upon the amendment, and that therefore whatever significance would follow from a change from one form of expression to another could not apply to the Legislature as a legislative body. And that action on this bill was not like where a bill originating in one house is passed and sent to the other, and the latter amends by a change of phraseology and returns to the house of its origin, and that body also adopts the change. But, be that as it may, what I have already written shows that I consider the legislative intent is clearly enough expressed upon the face of the act, without a resort to extraneous aid.

The law, as herein interpreted, finds ample room for application to conditions existing in the state which the Legislature evidently thought could be improved. It therefore provided for the appointment of a game warden to protect the fish and game of the state as provided in the act aforesaid. To meet expenses incurred by this department, a fund was provided from licenses and fines. It is common knowledge that perhaps every county in the state furnishes hunters who go into some other county for game. The cities of the state furnish hundreds—some of them thousands—of these during the course of the year. It appears by the brief of the warden that the city of St. Louis, where there is no game, and which is not a part of any county, alone licensed 5,789 of this class in one year. Under the law as it is now written every such hunter (not going upon his own land) must provide himself with a license from the clerk of the county court of his county (or if in St. Louis, from the license inspector), which he takes with him for inspection if his right to hunt is challenged in the county to which he may go. It is of no significance that the statute provides that he shall procure the license at his home county; for it is a state license, the money for which is turned into a general state fund, and the clerk of the home county could as well collect it as any other. And it was wise to so provide that such clerk should issue the license, for it is a safeguard from imposition. That the fund thus provided may be inadequate to a full and complete protection through the efforts of the warden calls for legislative, and not judicial, relief.

**KREMER v. EAGLE MFG. CO.**

(Kansas City Court of Appeals. Missouri. Oct. 1, 1906.)

**1. MASTER AND SERVANT — SAFE PLACE TO WORK—NEGLIGENCE.**

The master is only required to exercise reasonable care to discover defects in the place provided for the servant to work, and, when discovered, to use reasonable diligence to repair them; and the burden is on the servant, in an action for injuries, to show a negligent breach of such duty.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 252, 895, 900.]

**2. SAME—QUESTION FOR JURY.**

Where, in an action for injuries by an employe, the evidence showed the existence of a defective place for a long time preceding the injury, it was a question for the jury whether or not defendant was negligent in failing to discover its presence in time to have repaired it by the use of reasonable diligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1030, 1031.]

**3. SAME—EVIDENCE—ADMISSIBILITY.**

Where a witness for plaintiff had operated a machine near the defective place at which plaintiff was injured, his testimony as to a defective place near the place of the injury was admissible in evidence, though he had only hearsay knowledge of the location of the defective place that caused the injury.

**4. SAME—CONTRIBUTORY NEGLIGENCE.**

An employe, not chargeable with the duty of inspecting a floor and who had occasion to enter a room, had a right to assume that the defendant had performed its obligation to him to exercise reasonable care to discover defects in the floor and to repair them, and that the passageway was in a reasonably safe condition for use.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 675-677.]

**5. SAME—CHOICE OF DANGEROUS WAY.**

Where an employe had no knowledge of a particular defect in a floor in a passageway, and it did not appear that such way was inherently more dangerous than that afforded by the main passageway, he cannot be held negligent as voluntarily choosing an obviously dangerous course in preference to a safer one.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 706-709.]

**6. SAME—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.**

In an action by an employe for injuries sustained in falling on a defective floor, whether the plaintiff was guilty of negligence in failing to observe the defect was a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by W. H. Kremer against the Eagle Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Warner, Dean, McLeod, Holden & Timmonds, for appellant. Russell Field and J. L. Lorie, for respondent.

**JOHNSON, J.** Plaintiff was injured while in the employment of defendant, and alleges that his injuries were the direct result of the negligence of defendant. He recovered judgment in the sum of \$2,250, and defend-

ant appealed. The issues presented by the pleadings and submitted to the jury in the instructions given were the negligence of defendant and the contributory negligence of plaintiff. Defendant unsuccessfully requested the giving of an instruction in the nature of a demurrer to the evidence, and complains here of the refusal of the court to give that instruction.

It is argued by defendant that the facts in evidence most favorable to plaintiff fail to show any negligence on the part of defendant, and do show that plaintiff himself in law was guilty of negligence that directly produced his injury. Facts in evidence pertinent to the inquiry thus presented are as follows: On the date of the injury, March 14, 1905, defendant owned and was operating a factory in Kansas City, Kan., for the making of agricultural implements, and plaintiff was the foreman of its foundry. The various activities of the business were conducted in a one-story building, 500 feet long by 80 feet wide; the long dimension being laid in an east and west direction. A row of wooden pillars for the support of the roof ran through the middle of the building the full length thereof. An aisle immediately north of this line of supports bisected the floor space and furnished a passageway from one end to the other. On either side of this aisle were located the different departments of manufacture. The foundry occupied the southeast corner, and the woodworking department the southwest corner. Between them were two other departments. Our concern is with the woodworking room, for it was there plaintiff was injured by tripping on a defective elevation in the floor. That room was 225 feet long by 40 feet wide. It was uninclosed on the north, save by the line of pillars mentioned. On the south and west it was inclosed by outer walls of the building, and on the east by a partition separating it from the adjoining department. The south wall was well supplied with windows. The roof on both sides was shouldered in on an inclined plane a short distance, and then raised on perpendicular walls 6 or 8 feet high, forming what is known as a "texas." These overhead walls were provided with windows through which light was shed towards the middle of the room. The space in the wood shop was well filled with machinery, materials, bins, etc., systematically arranged to facilitate the work conducted. Owing to the fact that heavy loads had to be moved on trucks in different directions through the room, the floor was constructed of heavy planks, 12 inches wide by 2 inches thick, laid flatwise on a bed of cinders and nailed to imbedded stringers. Lengthwise the course of these planks was east and west. At about 11 o'clock in the forenoon plaintiff found it necessary to go from the foundry to the woodshop to present a requisition to the

foreman of that shop for some materials needed in the foundry. After leaving the foundry he passed westward along the main aisle until he reached the east end of the woodshop. From this point an aisle extended southward to a door in the south wall. Plaintiff proceeded a few steps along this aisle looking for the foreman, and, observing him 60 or 80 feet to the west, turned westward and walked along an open passageway running in that direction. He walked at an ordinary gait, was looking towards the foreman, whose attention he endeavored to attract, but noticed the way ahead of him appeared to be clear and unobstructed. He had walked westward perhaps 15 feet when the toe of his advancing foot struck against and slipped under the end of a plank in the floor that had become loosened and was elevated above the surrounding surface. The result was a fall that fractured his kneecap. An examination of the place disclosed the facts that the end of the plank on the under side was very rotten and by warping had turned upward. Where plaintiff's foot struck the wood was shattered, and the plank was split back from the end a distance of about 15 inches. On the side of the split where the blow was delivered, the end of the board was raised four or five inches, and on the other side about an inch above the surface of the floor. The stringer to which the board had been nailed was found to be rotten. The passageway at this point was about  $3\frac{1}{2}$  feet wide and ran between continuous lines of machines, loaded trucks, and other obstructions to the free passage of light, so that the place was cast in deep shadow. It was shown that the surface of the floor had by wear become somewhat uneven, and plaintiff knew of this condition, but had no knowledge of any defects that called for the exercise of special care by one walking along the passageway, and, being intent on his mission, looked at the floor only in a general way.

Defendant contends that no negligence should be imputed to it under the facts in proof, because it does not appear that the defect existed for any length of time before the injury. The mere fact that a servant is injured in the discharge of his duties by a defect in the place provided for his use by the master does not of itself raise an inference of negligence. The master is not an insurer of the safety of the servant, and is only required to exercise reasonable care to discover the presence of defects, and, when discovered, to employ reasonable diligence to repair them. The burden always is on the plaintiff in cases of this character to show affirmatively a negligent breach of the duty just stated as an indispensable element of the right to recover. One of plaintiff's witnesses had operated the machine immediately south of the defective place until a few days before plaintiff was injured. It is true he

did not see plaintiff fall, and had none but hearsay knowledge of the location of the defective place that caused the fall; but his description of the machine at which he had worked and of a defective place in the passageway north of it, which he testified had been there for six months or more, strongly tended to identify the place he had in mind with the one that caused the injury. Evidence of a defect similar to that causing the injury and in close proximity thereto is admissible, even in the absence of direct evidence identifying them, and, when produced, the jury should be permitted to consider and weigh such evidence with the other facts and circumstances in proof. The evidence is substantial, and, as it tends to show the existence of the defective place for so long a time preceding the injury, it was for the jury to say whether or not defendant was negligent in failing to discover its presence in time to have repaired the place by the use of reasonable diligence.

The court in the instructions given submitted the issue of plaintiff's negligence, and the jury in the verdict returned found that he was in the exercise of due care when injured. Defendant says that in law plaintiff must be held guilty of contributory negligence for several reasons:

First, knowing that the floor was uneven from wear and that it was constantly being used in the trucking of heavy loads, plaintiff had no right to assume that it was reasonably safe for his use, but should have made vigilant use of his eyes to discover defects. Considering the substantial character of the floor, which evidently was designed to be sufficient for the purposes of its intended use, we cannot say as a matter of law that the use of an apparently unobstructed passageway by a servant, who found it necessary to walk from one part of the room to another, was made more dangerous by the fact that loaded trucks had been moved over it. The effect such operations would have on a floor of such construction, and the degree of caution to be observed by an ordinarily prudent man who knew the character of the work performed in that room, but did not know of the existence of any defects, are subjects about which reasonable minds well could differ, and, this being true, they were issues of fact for the jury to determine. Plaintiff, as foreman of the foundry, was not chargeable with the duty of inspecting the floor of the woodshop, and, when in the course of business he found it necessary to enter that room, had the right to assume that defendant had performed its obligation to him to exercise reasonable care to discover defects in the floor and to repair them, and that the passageway was in a reasonably safe condition for his use. True, "he could not put his eyes in his pocket" and go blindly forward without giving any heed to his course. But, when not confronted by any

apparent danger, ordinarily prudent persons do not act with the vigilance and caution they employ to detect and avoid known or suspected dangers. To say that plaintiff should be pronounced culpable in law because he admits he did not give close attention to the floor after observing that he had an apparently safe passageway ahead of him would be to require of him the same degree of vigilance he should have used, had he known of the presence of defects in the way or had good reason to believe they existed.

Further, it is said plaintiff should have walked along the main aisle, which was provided with a good, smooth floor, until he arrived at a point opposite to the position of the foreman, instead of entering the woodshop at its east end. Plaintiff did not know in what part of the room he would find the foreman, and it was a very natural thing for him to pass as quickly as he could from behind the obstruction to his view of the interior of the woodshop interposed by the line of wooden pillars. As we before observed, we cannot arbitrarily say that the passageway through the woodshop was inherently more dangerous than that offered by the main aisle, and, as plaintiff did not know of the presence of the defect, it cannot be said in law that he voluntarily chose an obviously dangerous course in preference to one more safe. Under all the facts and circumstances, the classification of plaintiff's conduct fell within the province of the jury, and the demurrer to the evidence was properly overruled.

We have considered the criticisms made by defendant of the instructions given on behalf of plaintiff. Most of them have been answered sufficiently in the views expressed, and for that reason do not call for special mention. The others clearly are without merit.

The case was fairly submitted, and the judgment is affirmed. All concur.

**DAUGHERTY et al. v. POUNDSTONE.**  
(Kansas City Court of Appeals. Missouri.  
Oct. 1, 1906.)

**1. BANKS AND BANKING—INSOLVENCY—LIABILITY OF STOCKHOLDERS—PLEADING.**

In an action by the trustees of a dissolved banking corporation against a stockholder to recover a dividend that should have been applied to a creditor's demand, where the petition fails to allege that defendant was a trustee, and affirmatively shows he sustained no such relation, his liability cannot be predicated on his breach of duty as a trustee.

**2. APPEAL—PRESUMPTIONS TO SUSTAIN JUDGMENT.**

In an action against a stockholder of a dissolved banking corporation, where the evidence is conflicting as to defendant being a director, the court, on appeal, must assume, in support of the judgment and in the absence of findings of fact and declarations of law, that the trial court found for defendant on such issue.

**3. BANKS AND BANKING—NEGLIGENCE OF DISBURSING OFFICERS—LIABILITY OF DIRECTORS.**

The directors of a dissolved banking corporation cannot be held personally responsible for a loss to the bank by the negligence of its disbursing officers in paying unauthorized checks.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 92-96.]

**4. JUDGMENT—RES JUDICATA.**

Where a cashier of a dissolved bank was a party to an action against the trustees to recover a deposit paid out on unauthorized checks, a judgment for such depositor is res judicata of the question of the cashier's negligence in a subsequent suit by the trustees to recover of a stockholder a dividend which should have been applied to the payment of such judgment.

**5. BANKS AND BANKING—INSOLVENCY—LIABILITY—STOCKHOLDERS.**

The trustees of a dissolved banking corporation cannot maintain a suit against a stockholder to recover a dividend, which should have been applied to a judgment obtained against the trustees by a depositor for the amount of a deposit paid by the disbursing officers on unauthorized checks, until they have exhausted their remedy against the culpable officers and their sureties.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 66.]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by W. A. Daugherty and others against R. F. Poundstone. From a judgment for defendant, plaintiffs appeal. Affirmed.

Perkins & Blair, for appellants. Thomas & Hackney, for respondent.

**JOHNSON, J.** Action by the trustees of a dissolved corporation against a stockholder to recover money paid as a dividend that should have been applied to the payment of a creditor's demand. A jury being waived, the cause was tried by the court, resulting in a judgment for defendant, from which plaintiffs appealed.

No findings of fact were made, and no declarations of law asked or given. The petition alleged that plaintiffs, W. A. Daugherty, T. N. Davy, and W. B. Kane, together with H. Weyman and G. B. Ashcroft, composed the board of directors of the Bank of Cartersville, a Missouri corporation. Defendant was a stockholder, owning 15 shares of the stock of the bank of the par value of \$1,500. The entire stock of the bank amounted to \$25,000, divided into 250 shares. On April 7, 1897, the bank went into voluntary liquidation pursuant to a resolution unanimously adopted by the shareholders at a meeting duly called for that purpose. A short time thereafter the directors, as trustees (Rev. St. 1899, § 976), sold all the assets to another bank, and out of the proceeds realized, paid depositors and creditors in full with a single exception—the cause of this controversy—and paid a dividend to the stockholders of 100 per cent. Defendant received \$1,500 as his share of the dividend. After this Louisa Brown brought suit in the Circuit Court of the United States for the Western District



of Missouri against the trustees to recover the amount of a deposit she carried in the bank. She alleged the dissolution and liquidation of the corporation, the fact that the trustees had received sufficient funds to pay all of the creditors in full, and their refusal to pay her demand. She recovered judgment against the trustees, which was discharged in full by the plaintiffs in the present suit out of their own funds. The amount so paid was \$4,728.14. The cause of action here asserted is predicated on the idea that the stockholders, having received in the dividend paid the entire assets of the corporation, should reimburse the trustees the amount they were compelled to pay in satisfaction of the Brown judgment, and accordingly defendant is sued as a stockholder for his proportional share of that liability.

A detailed statement of the facts developed in the Brown Case may be found in the report thereof (C. C.) 120 Fed. 526. Those pertinent to the present inquiry thus may be stated: On June 1, 1895, Mrs. Brown's husband deposited \$4,000 in the bank in her name, and the bank issued her a pass book. The money was her property, but between the time of the deposit and the dissolution of the bank all of the deposit, except some \$700, was paid out on checks signed by the husband. These checks were presented at intervals during the period mentioned, and ranged in amounts from \$50 to \$500 each. Mrs. Brown did not authorize her husband to check on the deposit, and had no knowledge that her money was being dissipated in this manner. The learned judge who wrote the opinion held that the cashier and his assistant were not justified in assuming, as they did, that Brown had authority from his wife to sign her name to checks, and that the money so withdrawn could not be charged against the deposit. The cashier, W. B. Kane (one of the plaintiffs), testified in the present case that he had no knowledge of the fact that Brown was signing his wife's name to checks drawn against the deposit and that the checks were honored by the assistant cashier, W. C. Burch. It appears that Kane and Burch are solvent. Each had given a bond to the bank conditioned for the faithful performance of duty. That given by Burch was in the sum of \$10,000, and was signed as surety by W. A. Daugherty, one of the plaintiffs. It appears that neither the cashier, the assistant cashier, nor their sureties have been called on by the trustees to make good the loss sustained on account of the Brown judgment. Plaintiffs introduced substantial evidence tending to show that in January, 1897, defendant was elected a director of the bank, and was acting in that capacity at the time of the dissolution, and therefore was one of the trustees in charge of its liquidation.

We are besought by plaintiffs to regard defendant as such trustee, but this we cannot do for two reasons: The petition not only

fails to allege that defendant was one of the trustees, but affirmatively shows that he sustained no such relation, and the wrong complained of is his refusal to contribute as a stockholder. This is an entirely different cause of action from one predicated on the wrongful refusal of a trustee to contribute to the discharge of a liability resulting from a breach of duty on the part of himself and his co-trustees. It is elementary that a plaintiff must recover, if at all, on the cause of action pleaded, and not on some other cause. But, should the fact under consideration be considered as having been at issue under the pleadings, it was settled against the contention of plaintiffs by the judgment rendered. Defendant's evidence shows that he was not a director, and with this conflict in the evidence before us, and in the absence of findings of fact and declarations of law, we must assume the court found the fact in favor of the defendant, and treat that finding as we would the verdict of a jury. Assuming, then, that defendant was not a trustee, and that as a shareholder his dividend was proportionally increased by the amount the trustees should have paid to Mrs. Brown out of the proceeds of the sale of the assets before a distribution was made among the stockholders, should defendant be compelled to restore to the trustees the share of that amount received by him? Had the trustees, through excusable ignorance of the existence of a demand against the estate, distributed the fund among the shareholders, and thereby exhausted the estate, we would find no difficulty in saying that on the discovery of the mistake each shareholder should be compelled to restore the fruits thereof received by him. The right of shareholders to a division of the proceeds of liquidation is subordinate to the right of creditors to have their demands paid in full, and it would be unjust and contrary to well-settled principles of law to permit the shareholders to profit at the expense of the trustees from an honest and excusable mistake of fact. It may be conceded that, when the distribution was made, the trustees were ignorant of the existence of the demand afterwards asserted by Mrs. Brown; but the conduct of the cashier and the assistant cashier in paying out the funds of the bank on unauthorized checks and charging such disbursement to Mrs. Brown's account was inexcusably negligent, and gave the bank a right of action against those delinquent officers, which could have been enforced by the trustees.

Two questions arise: Should the directors be held personally responsible for this negligent conduct of the officers? Or, if not, should the trustees be compelled to exhaust their remedy against the culpable officers before they may call on the stockholders for reimbursement? Should the first question be answered in the affirmative, the action must fail. The plaintiffs were directors of the bank, and,

If they are chargeable with the negligence of its officers, they are in the attitude of attempting to recover from the stockholders that which they were bound in law to render to the corporation in restitution of the loss suffered through their wrong, and which the stockholders were entitled to receive as proceeds of the liquidation. They could not occupy a position clearly so unsound in law and morals. But were the directors guilty of any wrongdoing in not preventing the disbursing officers from honoring unauthorized checks? They had no actual knowledge of the negligent acts and their fault, if it exists at all, must consist in not preventing the continuance of acts, the existence of which they should have known had they properly discharged their duty. The board of directors of a banking corporation is the executive body thereof and as such is invested with all of the powers required to be exercised in the management of its concerns. It selects the active officers and should supervise and control them in the discharge of their several duties. It should dictate the policy of the business and the course of dealing to be followed with the public whose money the institution receives and uses for profit, and should know how the funds intrusted to the corporation by stockholders and depositors are being handled by the officers and keep the officers within the bounds of law and reasonably sound business policy. The idea, seemingly so prevalent, that directors may content themselves with the performance of no other functions than electing officers and declaring dividends cannot be tolerated. Whether they are to be regarded as trustees of an express trust, or as agents of the corporation and its constituent parts, their duty requires them to perform, with reasonable care and diligence, the functions pertaining to the general supervision and control of the business, and they cannot relieve themselves of this duty by delegating its performance to the bank officers. If the bank suffers loss through the misconduct of officers in matters which the directors should have known and controlled, the directors may be held liable, regardless of their want of actual knowledge, for they will be presumed to know the things they should have known. On the other hand, the duty of the directors, being essentially managerial in its nature, does not impose on them the task of mastering and keeping in touch with the multitudinous details incident to the business, nor does it extend to acts falling within the ordinary executive functions of the various officers. Checks and drafts are paid, notes and bills indorsed, deposits received, and like transactions conducted as a matter of course by the proper officers. Neither actually nor theoretically does the board of directors sit at the cashier's desk nor stand at the paying teller's window, and the faithful performance of a purely executory act necessarily must depend solely

on the good sense, honesty, and diligence of the actor. As one author observes, such acts "do not constitute the 'management' of the bank, nor interfere with the control of its affairs. They are properly the medium through which that management and control are introduced into the practical transactions." Morse on Banks & Banking (4th Ed.) § 118. The acts of the disbursing officers in paying the unauthorized checks presented by Mr. Brown were merely executory, had no relation to the management of the bank, and therefore cannot be classed with transactions that in the regular course of things should have come under the observation of the board of directors; and, this being true, the directors should not be held at fault for the negligence of these officers. Bank v. Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615, and authorities cited.

Before proceeding to a discussion of the second question propounded we will determine the question of the cashier's negligence. That officer in his testimony casts the entire blame on the assistant cashier. The cashier was a party to the Brown suit, and one of the vital issues there litigated was the culpability of the cashier and the assistant cashier in paying these checks and charging them to Mrs. Brown's account. The fact from which the negligence of the cashier follows as a necessary conclusion was expressly found against him in this language: "The cashier and the disbursing clerk assumed that Brown had the authority to sign his wife's name to checks upon an assumption of authority based alone on his statement." Neither this fact nor its legal results are properly in issue in the present case. They are res adjudicata, and the negligence of the cashier will be assumed as a fact settled by judgment.

Turning, now, to the second question, it is clear that plaintiffs as trustees have not exhausted the assets of the corporation. Not only is there an existing cause of action against Brown—an asset of doubtful value—but a cause exists against the cashier and the sureties on his bond, as well as one against the assistant cashier and his sureties. The solvency of these parties is unquestioned, the liability of the cashier, as we have shown, is already adjudicated, and any judgment recovered against him on account of the wrong committed may be collected on execution, and yet the trustees have taken no steps to enforce liability against these officers and their sureties, nor have they even made a demand on them for restitution. Indeed, they are denying the liability of the cashier, and are urging the fact that the assistant cashier was not a party to the Brown suit, and therefore not bound by the judgment in that case, as an excuse for their failure to proceed against him, because of the possibility that he may be able to show, after all, that Mrs. Brown did authorize her husband to sign checks for her. The position of plaintiffs,

obviously, is chosen in bad faith and with the design to shield one of them, the cashier, and his subordinate officer, from liability, and shift their burden to the stockholders. A scheme so censurable in morals should not be permitted to succeed in law, and, fortunately, a very sound reason may be advanced to defeat it. Plaintiffs, as trustees, are invested with the legal title to all of the property, rights, and choses in action of the corporation, and are bound to employ reasonable diligence to collect the assets and pay over the proceeds to those entitled to receive them. They hold the legal title to collectible demands against those who are primarily liable to make good the loss, which, if enforced, will cover the loss. The mere fact that under a mistake of fact they distributed among the stockholders money that should have been paid to the creditor does not of itself give them a cause of action against the stockholders for reimbursement. The liability of the stockholders to refund depends upon the further facts that the trustees have faithfully executed their trust, have exhausted their remedy against the primary obligors, and have in hand no other assets belonging to the trust out of which to reimburse themselves. In other words, they must show that they have fully performed their duty and are the victims of an innocent mistake before they may call on those to whom they owe that duty for relief.

The judgment is affirmed. All concur.

#### MAJORS v. MAXWELL et al.

(Kansas City Court of Appeals. Missouri.  
Oct. 1, 1906.)

##### 1. APPEAL—RECORD—EXHIBIT FILED WITH PETITION.

A contract filed with the petition as an exhibit, though expressly referred to therein, is no part thereof, and so, though appearing as such exhibit in the abstract of record, is no part of the record proper and cannot be considered on an appeal on the record alone.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2348, 2349.]

##### 2. SAME—PRESUMPTION.

In the absence of the evidence from the record, a contract involved will be presumed to have imposed obligations sustaining the findings and decree.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3674.]

##### 3. VENDOR AND PURCHASER—UNCONDITIONAL CONTRACT—INTEREST OF VENDEE.

A contract of sale of land imposing an unconditional obligation on the vendee to complete the purchase vests in the vendee an equitable interest in the land.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 85.]

##### 4. SAME—VENDOR'S LIEN—ASSIGNMENT OF DEBT.

Plaintiff sold land by unconditional contract to K., who assigned it to M., and K., receiving in part payment M.'s check, assigned it to plaintiff, and on its being paid only in part M. gave his note for the balance. Held, that the assignment of the check carried with

it the vendor's lien of K., which was not destroyed by the taking of the note.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 733-739.]

##### 5. APPEAL—MODIFICATION BY REQUEST.

A decree will be modified by eliminating a personal judgment at the request of respondent, who admits it was error to render it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4490, 4491.]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by W. D. Majors against Oliver H. Maxwell and others. Judgment for plaintiff. Defendants appeal. Modified.

Omar B. Robinson and Halbert H. McCluer, for appellant. Chas. B. Adams, for respondent.

JOHNSON, J. Action to foreclose a vendor's lien. The suit was brought against Oliver H. Maxwell and the Fidelity Trust Company as defendants. The answer filed by the trust company disclosed the fact that Granville M. Cole and Charles D. Carlisle owned an interest in the land sought to be subjected to the lien, and they were made parties to the suit, entered appearance, and filed answers. In the decree rendered plaintiff was given a personal judgment against the defendant Maxwell in the sum of \$932.25, the amount was adjudged to be a lien on Maxwell's interest in the land, and an order was made foreclosing the lien. The decree was in favor of the remaining defendants, and Maxwell alone appealed. The case is before us on the record proper.

In substance, it is alleged in the petition that on the 20th day of April, 1904, William F. Smith, being the owner of the land described, which is situated in Jackson county, agreed in writing with John A. Kerr to sell and convey said land to Kerr for a consideration expressed in the contract. Afterwards, in October of that year, Kerr sold and assigned this contract to Maxwell, who agreed to pay therefor the sum of \$2,250. Immediately following this assignment of the contract Smith conveyed the land described therein to Maxwell by warranty deed. In payment of the consideration of \$2,250 for the assignment of the contract Maxwell gave Kerr \$450 in money and his check for the remaining \$1,800, which Kerr sold and assigned to plaintiff. The check was not honored, but Maxwell paid plaintiff \$900 thereon in cash, and executed and delivered to plaintiff his promissory note for \$900, dated October 12, 1904, and due in 10 days. On October 21st Maxwell executed and delivered a warranty deed to the Fidelity Trust Company, conveying the whole of the land, but it is averred the conveyance was "without consideration and with the knowledge on the part of the said trust company that Maxwell had not paid the balance of said purchase money." The contract between Smith and Kerr and the note from Kerr to plaintiff were attached to the peti-

tion as exhibits. In the answer of the trust company it is admitted that Maxwell deeded the land to that company, but it is averred that at the time the company loaned Maxwell \$6,700, which was applied in part payment of the purchase price, and the deed, though in form a warranty deed, was in fact intended to be a deed of trust securing the repayment of the loan, and was accepted by the trust company without knowledge of the fact that Maxwell was indebted to plaintiff for any part of the purchase money.

Further it is alleged that at the time of this transaction the defendant trust company, at the request of Maxwell, Cole, and Carlisle, executed and delivered a trust certificate, certifying that the company held the title to said property in trust for said Cole and Carlisle, and would on demand of Cole and reimbursement of all amounts due to it convey said property or any part thereof to such person or persons as might be designated by Cole. The court found in the decree that Cole and Carlisle, with respect to the interests held by them in the land, were innocent purchasers for value without notice of the existence of plaintiff's lien, and that the Fidelity Trust Company held the legal title to all the land in trust for the following purposes: First, as security for the repayment of the amount then due on its loan to Maxwell, \$4,033.34, which the court held to be a first lien on the land; and, second, in trust for the use and benefit of Maxwell, Cole, and Carlisle. Maxwell's undivided interest was found to be  $\frac{15}{100}$  of the whole, and against this interest alone plaintiff's lien was foreclosed.

Appellant's chief contention for a reversal of the judgment cannot be entertained for the reason that it is predicated upon a construction of the contract between Smith and Kerr, and that contract is not in the record proper and cannot be considered by us, since appellant has chosen to present his appeal on the record proper alone. True, the contract was filed with the petition as an exhibit, and as such appears in the abstract of record, but an exhibit filed with a pleading, though expressly referred to therein, is no part of the pleading. Being outside the record proper the contract must be ignored. *Vaughan v. Daniels*, 98 Mo. 230, 11 S. W. 573; *Pomeroy v. Fullerton*, 113 Mo. 440, 21 S. W. 19; *Hickory County v. Fugate*, 143 Mo. 71, 44 S. W. 789; *State ex rel. v. Crumb*, 157 Mo. 545, 57 S. W. 1030; *Reed v. Nicholson*, 158 Mo. 624, 59 S. W. 977. There is nothing in the pleadings and certainly nothing in the findings of the court to force the conclusion indulged by appellant, that the contract of sale made by Smith to Kerr imposed no obligation on the vendee to buy, but left it optional with him to complete the purchase within a stated time, and therefore did not operate as a conveyance of any interest in the land and could not serve to create a vendor's lien. In the

absence from the record of the evidence from which the findings of the court were drawn, every reasonable inference in favor of the correctness of the findings and decree must be indulged, and if, as appellant appears to think, the validity of the decree depends on the classification of the contract between Smith and Kerr, we must assume, nothing to the contrary appearing in the pleadings and decree, that the contract imposed an unconditional obligation on the vendee to complete the purchase of the land. On this hypothesis the contract of sale invested Kerr, the vendee, with an equitable interest in the land.

Equity looks upon things agreed to be done as actually performed, and when parties have bound themselves by agreement to convey land and to pay for it, the vendor is considered as a trustee for the vendee of the estate sold and the vendee as a trustee for the purchase money for the vendor. The vendee in equity is actually seised of the estate and may sell or charge it before it is conveyed to him. *Block v. Morrison*, 112 Mo. 343, 20 S. W. 840; *Jones v. Howard*, 142 Mo. 117, 43 S. W. 635, 64 Am. St. Rep. 546; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526. The assignment of the contract by Kerr to Maxwell operated as a transfer of the equitable estate owned by Kerr, and the purchase money which Maxwell bound himself to pay consisted of the consideration Kerr agreed to pay Smith for the land plus the sum of \$2,250 Maxwell agreed to pay Kerr for an assignment of the contract. As between Kerr and Maxwell the former was entitled to a vendor's lien on the equitable estate conveyed by the assignment to secure the payment of the unpaid remainder of the consideration Maxwell agreed to give for the assignment. "The lien for the unpaid purchase money of real estate is recognized to the same extent in case of a sale of an equitable title as of a legal one." *Bledsoe v. Games*, 30 Mo. 448.

As a lien existed in favor of Kerr for the amount of the check he received from Maxwell in part payment of the purchase money, the assignment of that check to plaintiff for value did not destroy the lien, but carried it over to the assignee as an auxiliary to the debt. *Adams v. Cowherd*, 30 Mo. 453; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493; *State Bank v. Robidoux*, 57 Mo. 446. And the acceptance by plaintiff of Maxwell's unsecured note for \$900, given in part payment of the amount due on the check, was without effect on the lien. "The vendor does not waive his lien by taking the unsecured note or bond of the vendee to evidence the deferred payment." *Eubank v. Finnell* (Mo. App.) 94 S. W. 591; *Delassus v. Poston*, 19 Mo. 425; *Linville v. Savage*, 58 Mo. 248; *Emison v. Whittlesey*, 55 Mo. 254; *Winn v. Investment Company*, 125 Mo. 523, 23 S. W. 998. The equitable interest in the land owned by Maxwell expanded into the full

legal title by the delivery to him of the warranty deed executed by Smith, but the estate thus acquired was burdened with plaintiff's lien, and when Maxwell, in turn, conveyed the legal title to the trust company, the lien still continued at least against the equitable interest reserved by him. Since plaintiff has not appealed, but is content with the foreclosure of his lien against Maxwell's interest alone, it is not necessary to consider whether the decree should have so restricted his lien. No error was committed in foreclosing the lien against the interest of Maxwell.

It is contended by appellant, and admitted by respondent, that error was committed in rendering a personal judgment against appellant for the amount of the debt, and respondent asks that the decree be modified to eliminate that judgment. Without expressing any opinion on the question involved in this admission, we perceive no reason for denying respondent's request. *Sweem v. Railroad*, 85 Mo. App. 87; *State ex rel. v. Evans*, 178 Mo., loc. cit. 325, 75 S. W. 914.

Accordingly the judgment is affirmed as to the lien only. All *concur*.

#### KEITHLEY v. CITY OF INDEPENDENCE. (Kansas City Court of Appeals. Missouri. Oct. 1, 1906.)

##### 1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURIES TO TRAVELERS—NOTICE.

In an action for injuries to a plaintiff by a defect in a city street, evidence that a member of the city council passed the place where the defect was located several times a day, and must have known of the condition of the street at the time of the injury, was some evidence of notice to the city.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1729, 1645.]

##### 2. APPEAL—RECORD—REVIEW.

Where, in an action for injuries to a traveler by a defect in a city street, all the evidence was not abstracted, whether it was sufficient to show notice to the city of the defect, could not be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2911.]

##### 3. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries by a defective city street, evidence held to require submission of the question of plaintiff's contributory negligence to the jury.

##### 4. SAME—EVIDENCE—NOTICE TO CONTRACTOR.

Plaintiff was injured by a defect in a city street consisting of an excavation alleged to have been opened and improperly guarded by a plumbing company. The city notified such company to appear and defend. It appeared and asked to be made a party defendant, which was granted, whereupon plaintiff dismissed, except as to the city. Held, that the notice given by the city to the plumbing company to defend, reciting the nature of the suit, etc., was inadmissible as against the city.

##### 5. DISMISSAL — CODEFENDANTS — ACTION FOR TORT.

Where plaintiff was injured by a defect in a city street, caused by the alleged negligence

of a plumbing company in failing to guard an excavation, the liability of the city and the plumbing company was not joint, so that plaintiff was entitled to dismissal as to the latter, without affecting her rights as against the city.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 46; vol. 36, Cent. Dig. Municipal Corporations, § 1688.]

##### 6. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURIES TO TRAVELERS—PRECAUTIONS.

In a common-law action for injuries to a traveler by a defect in a city street, an instruction requiring that such excavation should be guarded by lights and barriers was erroneous, what would constitute a sufficient guard against danger to travelers being a question for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1749.]

Appeal from Circuit Court, Jackson County; Andrew F. Evans, Judge.

Action by Grayce Keithley against the city of Independence. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Llewellyn Jones, for appellant. Callahan & Dryden, for respondent.

BROADBUSH, P. J. The plaintiff's suit against the city is for damages alleged as the result of its negligence in failing to keep its streets in a reasonably safe condition for travel. The injury occurred near the intersection of Maple avenue and Spring street. At about 6 o'clock on November 25, 1903, plaintiff drove into a trench that had been dug along the west side of Spring street partly across Maple avenue, which caused her to be thrown from her buggy and whereby she was injured. The Methodist Church building is located at the northwest corner of the two streets. The church people had employed the Walt Plumbing Company to dig the trench in question for the purpose of draining the basement of their building. The appellant claims that the work had only been commenced on the day in question, but there was evidence that it had been in progress two weeks prior thereto. At the time when the workmen quit their work the drain had not been completed across Maple street, which runs east and west, but it had been opened from the north to a certain distance and from the south to a certain distance, leaving a space between the two ends of about 20 feet. This drain is located west of the street crossing. Red lights to warn travelers of the danger were placed at the two ends mentioned, and barricades placed at the crossing. As the plaintiff was driving east she necessarily encountered the drain before she reached the barricades. She says she saw one of the lights and avoided that part of the street, but drove into the ditch on the other side, where she says she saw no light. The drain was dug without the permission of defendant. At the close of plaintiff's case, the city interposed an instruction in the nature of a demurrer, which the court overruled. This action of the court is as-

signed as error on the ground that, as the city did not authorize the work to be done, there was no evidence that it had notice of the condition of the street; and that the evidence showed that plaintiff was guilty of such contributory negligence as precluded her from recovering.

The evidence tended to show that Joseph J. Randall, a member of the city council, passed the place where the work was being done several times a day and must have known the condition of the street at the time of plaintiff's injury. Notwithstanding that the evidence tends to show that at least a part of the work in the crossing of Maple avenue had been done the day of plaintiff's injury, and at most only a day or two previous had any work been done there, the showing that said member of the defendant's council passed the point daily and must have been aware of its condition was some evidence of notice to the city. We do not think that defendant is in a condition to insist upon maintaining that the city did not have notice of the condition of the street, as it is evident that much of the evidence in the case is omitted from its abstract. In order for the defendant to be in a position to urge that the evidence showed that plaintiff was not entitled to recover, all the evidence should be abstracted. But there is enough of the evidence given to show that it was a question for the jury to say whether plaintiff was guilty of such contributory negligence as precluded her right to recover. The abstract, meager as it is, shows that as plaintiff approached the place she saw a light on the north side of Maple street, when she pulled her horse to the south side and went into the drain; and that there was no other light according to her recollection. The appellant, judging by its emphasizing her statement that she was driving in a trot and that she did not see any other light to her recollection, places its contention upon these statements. But it seems to us, judging her conduct by the surrounding circumstances, her act was natural and what a person of ordinary prudence would do under like conditions.

On the trial, plaintiff, over the objections of defendant, was permitted to introduce a notice of the city given to the contractor to defend the suit after it was brought. The notice after reciting the nature of the suit and the fact that the contractor made the excavation proceeds to state that, if there was any negligence, it was the negligence of the contractor and notifies it to appear and defend the action, as the city will hold the contractor responsible for the amount of any damages that may be recovered against it. H. H. Walt and the Walt Plumbing Company responded to the notice by asking to be made parties defendant, and they were made parties on their application, but it seems that,

during the trial, the plaintiff was allowed to dismiss the case as to them. It does not appear whether the dismissal was before or after the introduction of said notice. However, it can make no difference. We cannot see that it had any relevancy whatever, and the only purpose it could serve was to influence the minds of the jurors against defendant. They might have construed it as evidencing a well-grounded apprehension upon the part of the city that plaintiff would recover a judgment. We cannot tell what weight the jury gave to it as evidence. But one thing we do know and that is, that there was no good excuse for introducing it. It was not introduced incidentally, as is the case sometimes of irrelevant and incompetent evidence which the courts are inclined to overlook because the effect is harmless in its consequence, but it was independent testimony deliberately introduced for a purpose, and its admission by the court under such circumstances should be held as error. It is true that the Walt Plumbing Company was liable for the injury as well as the city, if there was negligence; but we know of no law preventing plaintiff from dismissing as to it. If plaintiff's case was made out, the contractor and the city were alike liable to the plaintiff for her injury, but it was not a joint liability. It cannot therefore be considered as error, the dismissal of the case as to the former.

The action was at common law. It is therefore insisted that the court erred in giving instruction numbered 2 at the instance of the plaintiff, wherein the jury was told that it was the duty of the city to place both lights and barricades at said drain. An ordinance of the city was introduced by plaintiff without objection, which required that excavations should be guarded by lights and barricades. The defendant asked an instruction that required defendant to place only lights at the excavation, which was refused. The plaintiff's instruction is admitted to be error under the holding in *Jackson v. Kansas City*, 106 Mo. App. 52, 79 S. W. 1174, and other cases, but it is claimed that, as the defendant tried the case upon the theory that it was required to place both lights and barricades at the excavation, it cannot now avail itself of the error in that respect.

Judging by defendant's objection to said instruction made at the time it was offered and the asking of the one we have noted, we are of the impression that its theory of the case was that the duty imposed was only to place lights, and not lights and barriers, at the point in question. The court properly overruled the latter because it did not contain good law. The jury should have been left to say under this form of action whether the place was sufficiently guarded against danger to travelers.

For the errors noted the cause is reversed and remanded. All concur.

## RATTAN v. CENTRAL ELECTRIC RY. CO.

(Kansas City Court of Appeals. Missouri.  
Oct. 1, 1906.)

## 1. CARRIERS — INJURY TO STREET RAILWAY PASSENGER—CAUSE OF INJURY—EVIDENCE.

Evidence, in an action for injury to a passenger on a street car, held sufficient to authorize a finding that the accident was caused by the passenger's heel catching on a piece of metal projecting from the step of the car.

## 2. SAME—NEGLIGENCE—PRIMA FACIE CASE—BURDEN OF PROOF.

Proof of injury to a passenger, by the heel of her shoe catching on a piece of metal projecting from the step of the street car, makes a prima facie case of negligence, putting on the carrier the burden of disproving it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1283, 1285.]

## 3. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Error, if any, in giving instructions as to negligence, without defining it, is harmless; the instructions having fully defined the degree of care resting on defendant, the absence of which was negligence.

## 4. TRIAL—REQUEST FOR INSTRUCTIONS—MORE SPECIFIC INSTRUCTIONS.

One desiring a more specific definition of what constitutes ordinary care than is contained in the charge must request it.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 628-636.]

Appeal from Circuit Court, Jackson County; Jno. G. Park, Judge.

Action by Gertrude Rattan against the Central Electric Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

John H. Lucas, Frank G. Johnson, and Henry S. Conrad, for appellant. Reed, Yates, Mastin & Howell, for respondent.

BROADBUSH, P. J. Suit for damages for personal injury. For convenience we adopt the statement of plaintiff setting out, in substance, her cause of action, viz.: "The petition \* \* \* recites that on the 16th day of December, 1903, the plaintiff was a passenger on one of defendant's south-bound cars on Grand avenue in Kansas City, and that while in the act of alighting therefrom at Twelfth street and Grand avenue, and while the car was stopped for the purpose of permitting her to do so, and while in the exercise of ordinary care and caution on her part, she caught the heel of her left shoe upon a sharp and jagged piece of steel, iron, or other metal projecting from the step of said car, and was thereby thrown violently forward and upon the pavement of said Grand avenue. That defendant carelessly and negligently suffered and permitted the said step of said car to become and remain in a dangerous, defective, and unsafe condition, in that said step had been carelessly and negligently suffered and permitted by defendant to be and remain in an old, worn, and dilapidated condition, and the iron and steel parts thereof worn, broken, and bent in such a manner that there were sharp and rough places thereon liable to cause the injury of

passengers alighting from said car." The evidence of plaintiff tended to prove the allegations of her petition. The contention of the defendant is that plaintiff's theory of the occurrence is contradicted by the physical facts of the case. The plaintiff weighed about 100 pounds and was compelled to use a crutch in walking, the result of an injury she had suffered in her girlhood. She stated substantially that as she came to the step to alight she was facing west, and that she took hold of the handle on the right side of the car, put her left foot onto the edge or broken part of a piece of metal which projected up an inch or an inch and one-half and which pushed into the heel of her shoe, and that as she started to step to the ground the heel of her shoe was held by the projection, and she was thrown upon the street, and that the heel of her shoe remained fastened to the metal after she had fallen. The metal on the step was shown to be what was known as the "Mason safety tread," fastened to the top of the wooden step of the car. She was corroborated by other witnesses, to the effect that, while she was lying on the ground, her foot was still held fast by said projection, and that there was an indentation in the heel of her left shoe which might have been made by the projecting metal.

On cross-examination the plaintiff at first stated that the edges of the metal plate were projecting upward, and that they were not smooth. She was asked if the edges on the plate were smooth or otherwise. She answered: "No, sir; it was not smooth—kind of broken." She was then asked: "Was it an even surface on the edge of the plate, or not?" She answered: "Yes, I believe it was." Question: "Now what part of this plate was the piece that caught your shoe on?" Answer: "On the back part." Question: "On the back part?" Answer: "Yes, sir." The answers appear somewhat contradictory, but it is evident that plaintiff meant to say that the outer edge of the plate was smooth, but that the back edge was broken and rough. A step with a safety tread of the kind was brought into court, which appeared to be in good condition; but plaintiff and another witness testified that it was not the one in controversy. But certain of defendant's witnesses stated that it was the same. It appeared, however, that, if it was the same, it had been painted since the occurrence. One of defendant's witnesses described the plate in controversy as follows: "They are made of rolled, plate steel. They are rolled with a little V-shaped corrugation in them just as shown here (alluding to the one present), and then there is a dovetail formed in between the V-shaped places by a thin edge—a little plane, still extending up, with a heavy dovetailed plate longitudinally in between—as you can see here just about three-eighths of an inch wide. Then in this little pocket, or dovetailed corruga-

tion, there are strips of lead fastened in there, so that the lead comes even with the top edge of that little strip of steel flange that projects up over the main plate. The lead is put in, as a nonslipping material, and the steel is just simply to reinforce the lead, and to keep it from mashing out." The witness, who was a master mechanic, was asked: "What is the purpose of the lead being put in there?" Answer: "The lead is put in because it is a nonslipping material, and, if you don't confine it in some way or another, it is soft, you know, and it will gradually mash away, and holes be worn in it, so that it is confined in this little strip, and the least quantity of steel is put up to come in contact with it. It is simply to protect the sides of the lead."

We gather from the description that the metal plate in question was merely a frame adapted to the purpose of holding the lead in place; that the parts inclosing the lead are made of thin steel. If the lead should be worn or displaced, this thin frame would extend above the surface. We take it for granted that, as a general rule, all mechanical contrivances are liable to change and deterioration from use. And it is plain that the one in dispute is no exception to the rule. We think it possible that the lead in the metal frame had become worn or displaced so as to have left the thin edge of the plate extending above the surface in its worn state, and that thus exposed it would become broken, and in that condition have caught and held the heel of the plaintiff's shoe as detailed in her testimony. But it is insisted that if the occurrence, as plaintiff gave it, was not impossible, it was improbable, and for that reason the finding should be set aside, as it was overborne by contrary evidence. In *State v. Fannon*, 158 Mo. 149, 59 S. W. 75, the court held that the statement of witnesses that a wagon load of chips was only worth 5 or 6 cents "is utterly incredible." In *Payne v. Railroad*, 136 Mo. 562, 38 S. W. 308, it was held that: "The direct testimony of a party which is contradictory of, and in opposition to, conceded and undisputed physical facts, should be disregarded by both courts and juries." *Hook v. Mo. Pac. Ry. Co.*, 162 Mo. 569, 63 S. W. 360, and other cases cited, assert the same principle. In *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 263, 76 S. W. 684, the testimony of the plaintiff was that, while his wagon was moving on defendant's tracks, it was struck behind by a moving car, which had the effect of reversing end for end both wagon and team. While the court was of the opinion such a freakish effect might have been the result of the strike, it was unable to conceive how it could have so happened.

In order to have a full understanding of the occurrence, it will be necessary to state the evidence corroborating that of the plaintiff more in detail. Mrs. Thomas Rattan, a sister-in-law of plaintiff who was present, stated that she did not notice plaintiff when

she got off the car, but "looked down [she being still on the car] and saw that she had fallen and twisted her left foot around. She had caught her left foot on the step. \* \* \* The left foot was up on the step. It was caught." Question: "What was it caught on?" Answer: "On a piece of iron that was on the step. The step was worn out. Along the center if it there was a worn condition, and there was a piece extending up, and that was what she caught her heel on. She took her hand and pulled her heel off the piece of iron, or whatever it was." Question: "What condition was the edge of the plate when your sister was caught?" Answer: "It was all worn and rough. \* \* \* I noticed that there was a piece sticking up." Mrs. Lulu De Corum testified that she got off the car before plaintiff, and that her dress got caught and torn on a piece of iron that was standing up on the step about middle way; that, while she was fixing the binding of her dress that had been torn, she looked around to see where the girls were, and saw Miss Rattan was lying on the ground with her foot caught on the step, "and my sister [Rattan] and a couple of other fellows was helping her up." Question: "Where were her feet, or either of them?" Answer: "Her left foot on the ground, her right foot upon the piece of iron, caught." Question: "You mean on that part of the step on which you caught your dress?" Answer: "Yes, sir. \* \* \* She reached up and took her foot down." It was shown that her ankle was sprained, and that her hip was injured. The distance from the step of the car to the ground is not very great, probably about one foot.

Although in the usual course of affairs the occurrence is not what might have been expected, yet it was not incredible. We can see that a jagged, thin piece of iron standing above the surface of the step might penetrate the heel of a woman's shoe when she put her whole weight upon the projection and throw her down, and that it might retain its hold after she fell, as she would not be over a foot below the step after she reached the ground. The evidence of the woman witness who preceded plaintiff that the projection caught and tore her dress when she was in the act of alighting from the car was strongly corroborative of plaintiff's description of the condition of the steps, and, under the circumstances, we do not believe that we would be justified in branding the three witnesses for plaintiff, who practically agree as to what occurred, as liars. It was for the jury to say which set of witnesses told the truth as between those for plaintiff and those for the defendant. And resting alone on plaintiff's evidence, in so far as the point made, upon which the case must stand or fall, we said in a case similar upon principle that: "So frequently do unlooked-for results attend the meeting of interacting forces that courts, in such cases,



should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable that no room is left for their entertainment by reasonable minds, or any other." *Lang v. Mo. Pac. Ry. Co.*, 115 Mo. App. 489, 91 S. W. 1012.

The point made that "there is no evidence that the defendant knew, or could have known, of any defect in the step of the car, or had time to remedy the same," is not well taken. The plaintiff made out a prima facie case without any direct proof of actionable negligence in that respect. "*Res ipsa loquitur*." Proof of an injury of a passenger on a railroad occasioned by the fall of a ventilating window cast the burden of proof on the carrier to disprove the negligence. *Och v. M., K. & T. Ry. Co.*, 130 Mo. 27, 81 S. W. 962, 36 L. R. A. 442. "When a prima facie case of the defect in an appliance is made whereby injury occurs, it devolves upon the owner to exculpate himself, showing proper inspection. \* \* \*" *Tateman v. C., R. I. & P. Ry. Co.*, 96 Mo. App. 448, 70 S. W. 514.

Instruction No. 1, given at the instance of plaintiff, is criticised because it fails to define negligence. The instruction seems to be faulty in that respect, and those given at the request of defendant are also faulty in that particular. The omission was mutual. The same question arose in *Sweeney v. K. C. Cable Co.*, 150 Mo. 385, 51 S. W. 682, where it was held, in speaking of negligence, that: "This is a word the meaning of which is well understood, and no definition of it was necessary. As used in the instruction, it could not have been misunderstood by the jury, or in any way have misled them." However, the jury was properly instructed as to what constituted reasonable care. It is said that: "There are no degrees of negligence. There are degrees of care, and a failure to exercise that proper degree of care the law requires is negligence." *Magrane v. Railway*, 183 Mo. 119, 81 S. W. 1158. The quotation from said instruction is, in part, as follows: "And that defendant was careless and negligent in operating said car with said projecting metal on said step, and that the same was liable to catch the shoe of a passenger exercising ordinary care in leaving the car, and that defendant knew, or in the exercise of ordinary care and diligence might have known, that said piece of metal did project from the step of said car long enough to have remedied the same before the happening of said injuries, then the jury will find for plaintiff." As the instruction fully defined the degree of care resting on the defendant, the absence of which was negligence, the jury could not have been misled by the omission. The St. Louis Court of Appeals, in *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518, 77 S. W. 313, held that, if a defendant had desired a more specific definition of what constituted rea-

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sonable care than contained in the charge, it was its right to ask therefor; that "mere nondirection was not error," quoting from *Fearey v. O'Neill*, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

The defendant's fifth instruction contains the following: "Before she can recover in this case, you must not only find that the defendant \* \* \* was negligent in the particular and specific respects submitted in these instructions, but you must further find that such negligence was the direct cause of her injury. \* \* \*" It seems, judging by said instruction, that defendant was satisfied to submit the issue of negligence to the jury on the presumption that it was sufficiently informed and capable of determining its duty in that respect.

The jury returned a verdict for plaintiff in the sum of \$5,000. While the motion for a new trial was pending, the plaintiff entered a remittitur of record in the sum of \$1,500, and judgment was rendered by the court for \$3,500. The verdict is attacked as excessive and as evidence of bias on the part of the jury. The judge before whom the case was tried thought otherwise, or else he would have set the verdict aside. The evidence was conflicting, as usual in such cases, but it was the province of the jury to pass upon the credibility of witnesses. There was ample evidence, if plaintiff and her witnesses are to be believed, to support the finding. The judge who tried the case, who heard all the testimony and saw all the witnesses, was much better prepared to pass upon the question than we are, and, in the absence of dereliction of duty on his part in that respect, we decline to interfere in the matter.

The cause is affirmed. All concur.

MEYERS v. MISSOURI, K. & T. RY. CO.  
(Kansas City Court of Appeals. Missouri. Oct. 1, 1906.)

# 1. CARRIERS—CONTRACT TO CARRY TO DESTINATION.

The G. Company, a common carrier, received goods of plaintiff for transportation to L., a point beyond its own line, received the full amount of charges for through transportation, and issued a bill of lading naming L. as the destination, which, though stipulating that "the responsibility of each carrier is to cease at the station where said freight leaves its line, when the property is to be delivered to connecting road or carriers," mentioned no other carrier as a party to the contract, and did not provide that G. would carry the property only to the end of its own line. Held, that the contract was one by G. alone to carry the property to its destination, and that it and the M. Company, which, as agent of G., received the goods at the end of G.'s line for carriage to L., were not joint contractors.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 760-763, 780-783.]

# 2. SAME—JOINT CONTRACT—PLEADING.

A petition alleging that defendants were common carriers, that there existed between them a joint traffic arrangement for trans-

portation of freight from points on the line of one defendant to points on the line of the other, that plaintiff delivered to defendant G., at F., and it received for transportation over its line and that of defendant M., goods of plaintiff, for which G., in consideration of freight charges, issued a bill of lading, and agreed on behalf of itself and M. to transport and deliver them to plaintiff at L., which agreement was afterwards adopted and ratified by M., and the goods were delivered to M. at K., and that M. failed to deliver part of the property to plaintiff at the place of delivery, does not state a case of joint contract by defendants.

### 3. SAME—DELIVERY OF FREIGHT TO CONNECTING CARRIER—EVIDENCE—RECEIPT.

Testimony of the agent of the G. Company at K., the terminus of G.'s line, that the goods which G. received of plaintiff at F. under a contract to carry them to L., a point beyond its line, arrived intact at K., and were sent over in wagons to the yards of the M. Company, a connecting carrier, the waybill and a receipt for the goods being sent by messenger to M.; that a few days later the receipt, bearing the signature of M.'s agent, was returned to G.'s office by railroad mail, an initial letter following the signature indicating that the name of M.'s agent had not been signed by him; that G.'s agent did not know of his own knowledge who signed the receipt, or that any of the property had been delivered to M., but that in this instance he followed the usual course of dealing observed by the two carriers in like cases, and the receipt came back to him through the customary channel, signed by the same person and in the same manner as other like receipts had been signed; and that it was not customary for freight agents to sign such receipts, but to permit that to be done by a receiving clerk, together with proof that M. delivered all the property, except a missing box, to plaintiff at L.—tend to show that the receipt was regularly issued by M., and to authorize its admission in evidence in an action against M. for the missing box; its liability depending on proof that it received the box in the course of its transportation.

### 4. SAME.

The initial carrier of goods sent them to the connecting carrier, accompanied by a receipt containing a list of the articles, among which was "1 box books," following which was "1 box household goods." The connecting carrier signed and returned the receipt, with a check mark opposite "1 box books," and with the word "short" written at the bottom of the paper opposite a similar check mark, indicating that the box of books was not with the goods received. *Held*, that prima facie the receipt was an admission by the connecting carrier that it received the box of goods, imposing on it the burden of overcoming the presumption arising therefrom, and that this was not conclusively done, but only made a question for the jury, by the fact that the consignee made no claim that the box of books was not delivered to him, but merely claimed that the box of goods was not delivered to him.

### 5. SAME — LIMITING LIABILITY FOR LOSS—CONSIDERATION.

The agreement in a contract of affreightment to limit the carrier's liability in case of loss of the goods to \$5 per hundredweight fails for lack of consideration; the contract disclosing no consideration.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 641-643.]

### 6. SAME—REDUCED RATE—EVIDENCE — PRESUMPTION.

The contract of affreightment in the case of an interstate shipment having expressed no consideration for the agreement limiting the carrier's liability, the carrier may not show a reduced rate as a consideration, unless it shows that the claimed reduced rate was included in

the schedule of rates filed with the interstate commerce commission and was duly posted, and so was a rate that the carrier could offer; there being no presumption that this was the case.

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Special Judge.

Action by Andrew J. Meyers against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. P. B. Jackson, for appellant. Sheley & White and C. C. Madison, for respondent.

JOHNSON, J. This action was brought against the Missouri, Kansas & Texas Railway Company and the St. Joseph & Grand Island Railway Company to recover the value of a box of household goods lost in transportation. Before the case was tried the Grand Island Company was dismissed at the instance of plaintiff, and the cause proceeded against the remaining defendant, resulting in a judgment for plaintiff in the sum of \$175, from which defendant appealed.

On June 25, 1903, the Grand Island Company, a common carrier, received from plaintiff at its station at Fairbury, Neb., a shipment of household goods (in which was included the box afterwards lost), for transportation from Fairbury to Lehigh, Ind. T., a point on the line of the Missouri, Kansas & Texas Railway Company. Plaintiff paid the receiving carrier \$21.80, the full amount of the charges demanded for through transportation. This was at the rate of \$1.30 per 100 pounds, a rate previously fixed by the agreement of both carriers and in force at the time the shipment was received. A shipping contract was executed by the receiving carrier and plaintiff, in which it was expressly stipulated that "the responsibility of each carrier is to cease at the station where said freight leaves its line, when the property is to be delivered to connecting road or carriers." Other stipulations in the contract provide for various limitations of the common-law liability of the carriers, but no special consideration was expressed for these agreements. The Grand Island Company carried the shipment to Kansas City, the end of its line, and there delivered it to defendant. In due time the goods were delivered to the consignee by defendant at Lehigh, with the exception of the box in controversy.

Defendant insists that the instruction in the nature of a demurrer to the evidence, asked by it, should have been given, and first we will decide the points made in support of that contention. It is urged by defendant that a different cause of action from that alleged in the petition was tried and submitted to the jury; that the cause pleaded is founded on the joint contract of the two carriers, but the recovery was had upon the separate obligation of the appealing defendant. Notwithstanding the rule expressly recogniz-

ed by statute (Rev. St. 1899, § 892), which makes the liability of joint promisors or obligors several as well as joint and consequently permits a plaintiff at his election to maintain an action on a joint contract against a part or all of those who are bound to respond to him for a breach thereof, a cause alleged that is based on a joint contract cannot be sustained by proof of a cause founded on the separate contract of one of the alleged joint promisors. In such case the difference between allegation and proof is not to be regarded as a mere variance, which is cured by a verdict under the statute, but as a total failure of proof. *Bagnell Lumber Co. v. Railroad Company*, 180 Mo. 420, 79 S. W. 1130.

After alleging in the petition that both defendants are common carriers for hire, and that there existed between them a joint traffic arrangement for the transportation of freight from points on the line of one defendant to points on the line of the other, plaintiff alleges "that on or about June 25, 1903, he delivered to defendant St. Joseph & Grand Island Railway Company, at Fairbury, Neb., and defendant received for transportation to Lehigh, I. T., over its line and the line of its codefendant, certain goods and chattels belonging to plaintiff, for which said defendant St. Joseph & Grand Island Railway Company, in consideration of certain freight charges, issued a receipt or bill of lading, and agreed, on behalf of itself and its codefendant, to transport and deliver same to C. M. Fulks, as agent of plaintiff at said Lehigh, which said agreement was afterwards adopted and ratified by said defendant Missouri, Kansas & Texas Railway Company, and the said goods were delivered to said Missouri, Kansas & Texas at Kansas City." Then follows the allegation that the connecting carrier failed to deliver the property specified, to the consignee at the place of delivery. The bill of lading issued by the Grand Island Company did not mention any other carrier as a party to the contract of affreightment, nor did it require the contracting carrier to employ the present defendant in the performance of that contract, nor to carry the shipment via Kansas City, the terminus of its line. The Grand Island Company was left free to divert the goods to a connecting carrier at an intermediate point on its own line, or to employ another carrier at Kansas City. Though it is clear the contracting carrier contemplated from the first to carry the goods to the end of its own line and there deliver them to the Missouri, Kansas & Texas Company, the latter carrier was not a party to the contract when it was made, and incurred no obligation with respect to the shipment during its transportation over the line of the initial carrier. Despite the stipulation in the contract by which the Grand Island Company endeavored to limit its liability to that resulting from its own acts, the

contract must be regarded as one for the through transportation of the property. Lehigh was named as the destination of the shipment. A charge was made and collected through to that point, and the contract did not provide that the contracting carrier would carry the property only to the end of its own line. These facts classify the contract as an undertaking on the part of the initial carrier to carry the property to its destination, and the agreement to exonerate that carrier from liability for loss or damage resulting from the acts of connecting carriers was void. *Lee et al. v. Railroad* (Mo. App.) 94 S. W. 991; *Bushnell v. Railroad* (Mo. App.) 94 S. W. 1001; *Bank v. Railway Company*, 72 Mo. App. 82; *Marshall v. Railway Company*, 74 Mo. App. 81; *Popham v. Barnard*, 77 Mo. App. 628; *Marshall v. Railway Company*, 176 Mo. 480, 75 S. W. 638, 98 Am. St. Rep. 508; *Western Sash Company v. Railroad Company*, 177 Mo. 641, 76 S. W. 998.

When the present defendant received the shipment at Kansas City, it became the agent of the contracting carrier to complete the performance of the contract; but, as the shipping contract contemplated that the services of a connecting carrier necessarily would be employed in the transportation, the receipt of the property under that contract by the connecting carrier established a contractual relation between it and the shipper, and enabled the latter to maintain an action on that contract against such connecting carrier. *Halliday v. Railway*, 74 Mo. 169, 41 Am. Rep. 309; *Alken v. Railroad*, 80 Mo. App. 8; *Shewalter v. Railway Co.*, 84 Mo. App. 589. Although the shipper could maintain an action against either the contracting or the connecting carrier for the loss of the property during the transportation while in the hands of the latter carrier, the two carriers were not joint contractors. Their relation to each other was that of principal and agent, and the contracting carrier, if compelled to reimburse the shipper for such loss, could recover in an action against the connecting carrier the amount so expended. Section 5222, Rev. St. 1899. Having ascertained that the carriers were not joint contractors, we revert to the averments of the petition to see if they were sued as such. Aside from the preliminary allegation that a joint traffic arrangement existed between them for the transportation of freight between points on one line and points on the other, there is nothing to indicate an intention to plead a joint contract. Very likely the pleader inaptly referred to the fact that rates for through transportation had been provided by the carriers to apply to such shipments; but however this may be, the averment under consideration is not an element of the cause of action asserted. The petition states the constitutive facts, namely, that the Grand Island Company was the sole contracting carrier; that it undertook to carry the property

for a consideration from Fairbury to Lehigh, and there deliver it to the agent of plaintiff; that it carried the property to Kansas City, and there delivered it to the connecting carrier; that the latter carrier received the property at that place under the shipping contract, which it then adopted and ratified. This is but the statement of the facts afterwards proven, and is no more the allegation of a joint contract than the proven facts are proof of a joint contract. There is no variance between allegation and proof, and this point must be ruled against the contention of defendant.

Further, it is argued by defendant that plaintiff failed to show the delivery of the lost box to defendant. If the property was lost while in the care of the contracting carrier, defendant cannot be held liable for such loss, and therefore the burden was on plaintiff to show that defendant actually received the property in the course of its transportation. Plaintiff introduced as a witness the agent of the Grand Island Company at Kansas City, who testified that the shipment arrived intact at Kansas City and was sent over to the defendant company's yards in wagons. At the same time the waybill and a receipt for the goods were sent by messenger to defendant. A few days later the receipt, bearing the signature of the agent of defendant, was returned to the Grand Island office by "railroad mail." An initial letter following the signature indicated that the name of defendant's agent had not been signed by him. The Grand Island agent did not know of his own knowledge who signed the receipt, nor did he know that any of the property had been delivered to defendant; but in this instance he followed the uniform course of dealing observed by the two companies in like cases, and the receipt came back to him through the customary channel, signed by the same person and in the same manner as other like receipts had been signed. Further, he said it was not customary for freight agents to sign such receipts, but to permit that to be done by a receiving clerk. In addition to these facts it is undisputed that defendant did deliver all of the property, except the missing box, to the consignee at Lehigh, and, manifestly, it must have received the property so delivered from the Grand Island Company at Kansas City. These facts tend to show the receipt was regularly issued by defendant, and no error was committed in receiving it in evidence.

It is urged by defendant that the receipt itself, considered in connection with other facts in evidence, shows conclusively that defendant did not receive the box of household goods. The receipt contained a list of the articles delivered, among which was "1 box books," followed next in the list by "1 box H. H. G'ds" (household goods). When the receipt was returned it was found that defendant had placed a check mark opposite

the box of books, and at the bottom of the paper had written the word "short" opposite a similar check mark, indicating that the box of books was not with the goods received. Counsel argued that evidently the check was mistakenly placed opposite the wrong item, and instead should have been placed to indicate the box of household goods, and in support of the contention point out that no complaint is made that the box of books was missing from the goods delivered at Lehigh. Prima facie the receipt was an admission made by defendant in writing that it received the box of household goods. Defendant, however, was not conclusively bound by that admission, but could show by other evidence that it was made in mistake, and that in fact defendant did not receive that box of goods. The burden of proof was on defendant to overcome the presumption arising from the admission. The fact relied on does strongly tend to impeach the verity of the receipt, but it goes no further than to raise an issue of fact for the triors of fact to determine, and that issue has been resolved in favor of plaintiff. No error was committed in overruling the demurrer to the evidence.

Finally, defendant complains of the instruction given on the measure of damages, which directed the jury to assess the damages "at such sum as you find from the evidence to be the reasonable value of any of plaintiff's goods which defendant received from the St. Joseph & Grand Island Railroad at Kansas City and failed and neglected to deliver," etc. Defendant claims that the contract expressed in the bill of lading fixed the maximum damages plaintiff could recover for loss or damage to the property at \$5 per 100 pounds, and insists that the recovery should have been limited to that amount. If defendant is right in this contention, the verdict should not have exceeded \$40, as it is admitted the box weighed 800 pounds. The only expression to be found in the bill of lading of an agreement to limit the amount of the carrier's liability is in this form: "O. R. Rel. 5.00 Cwt." As interpreted by defendant's witness, this means: "Owner's risk. Carrier's liability released to \$5 per 100 pounds." A shipper has the right to have his property carried without any restriction being placed on the carrier's common-law liability. But the law permits him by contract with the carrier to release the latter from all liability, except that for damages resulting from the carrier's negligence. Such agreement, however, to be valid, must be fairly obtained and must be supported by a sufficient consideration, and the mere agreement of the carrier to transport the property of itself affords no such consideration, since the carrier is bound on the shipper's demand to perform the transportation without exacting of the shipper any agreement to release it from any part of its common-law liability. *Ficklin v. Railroad* (Mo. App.)

93 S. W. 847; Kellerman v. Railroad, 136 Mo. 177, 84 S. W. 41, 37 S. W. 828; McFadden v. Railroad, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721. The written contract of affreightment before us discloses no consideration for an agreement on the part of plaintiff to release the carrier's liability to \$5 per 100 pounds, and that agreement must fail for lack of consideration.

Defendant endeavored to show by oral evidence that a reduced freight rate in fact was given plaintiff as a consideration for the release agreement; but, as the written contract recited no such consideration, the burden was on defendant to establish that fact, if it existed, by competent evidence. This being an interstate shipment, the interstate commerce act required the rates applicable thereto to be filed with the Interstate Commerce Commission and posted in the station of the contracting carrier at Fairbury. Defendant failed to produce a certificate of the secretary of that commission showing the filing of its schedule of rates, and the only witness it offered—its rate clerk—admitted he did not know that the schedules were on file, nor did he know that they were posted in the station at Fairbury. Defendant, realizing that it failed completely to prove compliance with the interstate commerce act, asks us to follow the rule announced in Wyrick v. Railway Company, 74 Mo. App. 406, where we said: "In the absence of proof to the contrary, as here, we must presume that the defendant has performed its duty of fixing its tariffs on interstate shipments and filing the schedule thereof, and that the Interstate Commerce Commission has likewise performed its duty in respect to such tariffs." But in that case the written contract of affreightment expressly recited a reduced rate as the consideration given for the release agreement, and we held that such recital was prima facie evidence of the truth thereof and cast the burden of proof on the

shipper, who admitted in the written contract executed by him that he had received a consideration, to overcome the presumption arising from that admission; and in carrying that presumption to its logical end we not only indulged in the inference that a lower rate than that applicable to a shipment under a nonrelease contract had been given, but that such rate was one authorized by the schedules on file with the Interstate Commerce Commission and duly posted in the stations of the contracting carrier, and was a rate the carrier could offer shippers under the provisions of the interstate commerce act. In the case of Ward v. Railway Company, 158 Mo. 226, 58 S. W. 28, the Supreme Court appears to hold that a reduced rate, based solely on a reduced valuation of the property shipped and the agreement of the shipper to release all damages he may sustain beyond that valuation, brings the contract within the prohibition of the interstate commerce act. Plaintiff here invokes the broad doctrine announced in that case; but we do not find it necessary to resort to it, and prefer to place our decision of the question in hand on the ground that, as the written contract expressed no other consideration for the release agreement than the mere undertaking of the carrier to transport the property, the presumption indulged in the Wyrick Case does not obtain, and, as defendant failed to show that the reduced rate it claims as the real consideration for the release agreement was included in the schedules of rates filed with the Interstate Commerce Commission and duly posted in the station at Fairbury, it failed to show that the release agreement was one it was authorized by law to make with shippers. Summers v. Railway, 114 Mo. App. 452, 79 S. W. 481. The instruction under consideration correctly declared the law applicable to the facts in evidence.

The judgment is affirmed. All concur.

**PHILLIPS v. STATE.**

(Supreme Court of Arkansas. Oct. 1, 1906.)

**1. CRIMINAL LAW — CERTIORARI — SCOPE OF WRIT.**

Certiorari cannot be used as a substitute for an appeal, except where the right of appeal has been unavoidably lost through no fault of petitioner.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2569.]

**2. SAME—PUNISHMENT—EXCESSIVENESS.**

Where the sentence imposed on petitioner was within the statutory limits for the offense charged, the alleged excessiveness of the punishment could not be reviewed on certiorari.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2569.]

**3. SAME—APPEAL—EXCESSIVE PUNISHMENT—BILL OF EXCEPTIONS.**

An objection that the punishment imposed was excessive could not be reviewed on appeal, in the absence of a bill of exceptions preserving and authenticating the evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2950.]

Certiorari to Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Certiorari by Will Phillips to vacate a judgment sentencing petitioner to pay a fine and serve a term in jail. Writ dismissed. Judgment affirmed.

A. W. Spears, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

**HILL, C. J.** This is a petition to quash on certiorari a judgment of Jefferson circuit court sentencing the petitioner to pay a fine of \$300 and to serve six months in jail. The petitioner was regularly indicted by the grand jury of Jefferson county for disturbing the peace by use of profane and insulting language. He pleaded guilty, and the circuit court, in order to ascertain the proper punishment, called the witnesses. It was shown that petitioner became very angry over being arrested and confined in the city jail, and while therein he used language towards the chief of police and all other uniformed officers who came near him which is disgusting in its depravity. A stream of vile vituperation was poured at these officers for an entire day. The petitioner seemed to have a vocabulary fertile in indecency and obscenity. The court assessed the maximum punishment permitted by the section under which he was indicted. Section 1648, Kirby's Dig. A motion for new trial on the ground of excessive punishment was filed and overruled, and time given for bill of exceptions. The bill of exceptions was never prepared, and the appeal not prosecuted until the transcript was lodged here with this petition for certiorari.

Petitioner shows no reason for failing to properly prosecute his appeal. An intimation is made that the officers were derelict in getting up the record, but the law affords an ample remedy for that. In re Barstow, 54 Ark. 551, 16 S. W. 574. His

attorneys abandoned him, but he employed his present counsel—how soon afterwards is not shown. It is alleged that his new counsel could not prepare the bill of exceptions, but the record here shows that the court stenographer took down all the proceedings. Certiorari cannot be used as a substitute for appeal, except in instances where the right of appeal has been unavoidably lost through no fault of the petitioner. *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559. It can only correct excess in jurisdiction or an illegal proceeding not reviewable otherwise, and like matters, and does not to reach to the question here presented—an alleged excessive punishment within limits of the penalty. *Burgett v. Apperson*, supra; *McKay v. Jones*, 30 Ark. 148; *Carolan v. Carolan*, 47 Ark. 511, 2 S. W. 105; *Reese v. Cannon*, 73 Ark. 605, 84 S. W. 793, and authorities therein; *Harris on Certiorari*, § 44. As the question of the alleged excessive punishment is not properly here, the court does not express an opinion on the subject. If this record be treated as an appeal, there is no bill of exceptions preserving and authenticating the evidence, and hence there is no relief on appeal. If it be treated as on certiorari, which it is, only the jurisdiction or legal course of proceeding are under review, and there is no point made against either.

The judgment should not be quashed, but should be affirmed. *Harris on Certiorari*, § 38. Let an order be entered accordingly.

**GRAND LODGE A. O. U. W. v. BANISTER.**

(Supreme Court of Arkansas. Oct. 1, 1906.)

**1. EVIDENCE—PRESUMPTIONS—LOVE OF LIFE—SUICIDE.**

Where death is self-inflicted, it is presumed to have been accidental, unless the contrary is made to appear.

**2. INSURANCE—CAUSE OF DEATH—SUICIDE—BURDEN OF PROOF.**

Where, in an action on an insurance certificate, defendant claimed nonliability because insured came to his death by suicide, the burden of proving that the case was one of suicide, and not accidental self-destruction, was on defendant.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1663, 1664, 1999.]

**3. SAME—EVIDENCE.**

In an action on a benefit certificate, evidence held sufficient to sustain a finding that insured died from accidental shooting, and that he did not commit suicide.

**4. SAME—CORONER'S JURY—VERDICT.**

In an action on an insurance certificate, the verdict of a coroner's jury, finding that insured committed suicide, was not sufficient to establish a prima facie case of death from suicide.

Appeal from Circuit Court, Pulaski County; Robt. J. Lea, Judge.

Action by Alice Banister against the Grand Lodge of the Ancient Order of United Workmen. From a judgment for plaintiff, defendant appeals. Affirmed.

Cantrell & Loughborough, for appellant.  
Rose, Hemingway & Rose, for appellee.

MCCULLOCH, J. Martin L. Banister was a member of the Ancient Order of United Workmen of the state of Arkansas, a fraternal insurance society, and the holder of a benefit certificate or policy of insurance on his life in the sum of \$2,000, payable to his wife, Alice Banister. He died from a pistol shot wound, and after payment was refused this action was brought by the beneficiary to recover the amount named in the certificate. The application for membership, which became a part of the contract of insurance contained the following clause: "I further agree that if, within two years after the date of my taking or receiving the said Workman degree, my death should occur by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, or after judicial declaration of insanity, then the only sum which can be paid, or which is payable, to my beneficiaries named in my beneficiary certificate, shall be the amount which I may have paid into the beneficiary fund of the order during the term of my membership." Banister's death occurred within two years after he became a member of the order, and payment of the benefit was refused on the alleged ground that he committed suicide. The contention of the beneficiary is that the death was the result of an accident, the cause of death being the only issue in the case, and the jury found in favor of the plaintiff.

Banister was a carpenter residing in the city of Little Rock, and was in poor health for some time before his death. He had no children; his immediate family consisting only of himself and his wife. He was a man of exemplary habits and morals, never used tobacco nor intoxicants of any kind, attended religious services regularly, and was industrious. His wife (the plaintiff) related upon the witness stand the following circumstances attending his death, viz.: "When he came home that night, he came in, and then went around to a little store and got some crackers and oranges, just before I put supper on. I fixed what I thought he would like to eat, and he ate his supper. He did not eat very much. He was sitting in the dining room, while I was ironing in the kitchen. When I was through, I went in and was sitting down, doing some darning—mending the flannels. He was through then with his figuring and was sitting by the stove with his shoes off. He got up and said, 'I am going to bed now.' He got up and went in. I got up a little afterwards. I guess he had had plenty of time to get undressed and in bed. He is a man that goes to sleep quickly. I sat there and darned quite a little bit. I then got up, and went to the kitchen, and heard the gun, and exclaimed, 'What in the world have you done, dear?' I thought he had knocked

it (the pistol) out of the bed. He made no reply, and I got scared, and ran out the front door, and hollered: 'Help! help! Something terrible has sure happened!' Mr. Davis came in with Mr. Engstrom. I went with them as far as the foot of the bed, and saw him take up the gun. Then I lost consciousness." Other persons, who came in immediately, testified that they found him lying on the bed mortally wounded, with a bullet hole through his right temple, and that he lived about three-quarters of an hour. He was dressed in his nightgown, lying on his back, with his head on the pillow; his right hand lying on top of the bed cover across his waist, with his fingers nearly touching the pistol. The hair on the right side of his temple was slightly singed, and the bed sheet near the spot was powder-burned. It was also proved that Banister kept a pistol under his pillow all the time; that he was very nervous, was not a sound sleeper, and would frequently wake up with a start, as if frightened; that he would often get out of bed to see if burglars were in the house, and sometimes would take his pistol with him in getting up to investigate noises about the premises. There is no proof of any previous conduct or declarations on his part indicating a suicidal intention. On the contrary, one of his fellow workmen testified that when they quit work in the evening Banister said that, if he was not at the appointed place on time the next morning, it would be because he had gone after material; and only an hour before his death he talked over the telephone with a neighbor, asked the latter how he was getting along with building his house, and promised to go to see the house on the next Sunday. The court permitted the defendant, over the objection of plaintiff, to introduce in evidence the verdict of the coroner's jury finding that Martin L. Banister came to his death by suicide, and the court instructed the jury that said verdict might be considered as evidence of death by suicide.

The chief insistence of counsel for appellant as ground for reversal is that the verdict is without evidence to support it, that the undisputed evidence shows that Banister came to his death by his own suicidal act, and that the trial court erred in not peremptorily instructing the jury to return a verdict in favor of the defendant. It is conceded that Banister's death was the result of a shot from a pistol held in his own hand. While no one saw him when the shot was fired, all the circumstances point with certainty to the conclusion that no other person could have fired the shot. The only disputed question is whether the shot was accidental or an act of intentional self-destruction. The burden of proving suicide was upon the defendant. It alleged that fact as a defense to the action, and must prove it; for until that fact is established liability of the defendant for the amount

of the policy is clear. There is no dispute about the facts which were susceptible of direct proof, but the case turns upon the conclusion to be drawn therefrom—whether or not they establish suicide indisputably; for, if the facts are such that men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute, then they were properly submitted to the jury for determination. Judges should not, under that state of the case, substitute their judgment for that of the jury. *Railway Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070. After careful consideration of the evidence we are of the opinion that this question was properly submitted to the jury, and that there was evidence sufficient to support the verdict. Conceding that the theory of death by suicide finds more rational support in the facts established by direct proof than the theory of death by accident—that there is greater probability from the evidence that death resulted from a suicidal act than an accident—still we cannot say that death by suicide is the only reasonable conclusion to be drawn from the evidence. The proof does not exclude with reasonable certainty death from accidental shooting, and, the burden being upon the defendant to establish the defense by proof, it was properly left to the jury to say whether or not it was a case of suicide.

In the first place, there is a presumption against suicide or death by any other unlawful act, and this presumption arises even where it is shown by proof that death was self-inflicted. It is presumed to have been accidental until the contrary is made to appear. This rule is founded upon the natural human instinct or inclination of self-preservation, which renders self-destruction an improbability with a rational being. 19 Am. & Eng. Enc. Law p. 77; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Conn. Mut. Ins. Co. v. McWhirter*, 73 Fed. 444, 19 C. C. A. 519; *Stephenson v. Bankers' Life Ass'n (Iowa)* 79 N. W. 460; *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; *Walcott v. Metropolitan Ins. Co.*, 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923; *Mutual Life Ins. Co. v. Wiswell*, 56 Kan. 705, 44 Pac. 996, 35 L. R. A. 258; *Supreme Council v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244. This presumption is greatly strengthened in this case by proof as to the habits and character of deceased. He was sober, industrious, and religiously inclined. He was married and lived happily with his wife, and had never, so far as the proof shows, said or done anything indicating a suicidal tendency; but, on the contrary, almost his last utterance expressed his plans to pursue the even tenor of his life. He went to bed, after preparing himself as usual for a night's rest, and ap-

parently fell asleep. There is not in the evidence the slightest indication of any preparation for death, and if he secretly harbored the intention of taking his own life he gave no intimation of it before death, nor left behind him any disclosure to kindred and friends. It is not impossible, nor even improbable, that the shooting was accidental. He had a self-acting revolver under his pillow, which he always kept there. He was very nervous and excitable, wakeful, and easily alarmed at night. He may have been suddenly aroused by some noise, grasped the pistol, and in a half-awakened state pulled the trigger as he drew the pistol from beneath the pillow. This is neither impossible nor improbable, though, as already stated, it may be more probable that the shooting occurred from design, and we do not, under those circumstances, feel justified in setting aside the conclusion reached by the jury and substituting our own as to the cause of death. Decisions pro and con are brought to our attention—and they are numerous—in insurance cases similar to this, where the only issue was as to the cause of death of the insured, and wherein the weight of evidence and the presumption against suicide are discussed by the courts; but they all turn upon the peculiar facts of each case. None, so far as we discover, are in conflict with the controlling principles hereinbefore announced. The case of *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160, is strikingly like the case at bar upon the facts—even stronger in favor of the insurance company—and fully sustains us in the conclusion here reached.

It is urged that the verdict of the coroner's jury finding death by suicidal act was properly admitted in evidence, and made a prima facie case of death from that cause, which was not overcome by other evidence. It is also urged that the court erred in refusing to instruct the jury that the verdict of the coroner's jury was prima facie evidence of suicide. Inasmuch as the court permitted the introduction of the verdict of the coroner's jury at the request of appellant, we find it unnecessary to decide whether or not it was proper to do so. Some of the authorities hold that it is competent evidence. 1 Greenleaf on Ev. (15th Ed.) § 556; *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; *Supreme Lodge v. Fletcher (Miss.)* 29 South. 523; *Metzradt v. Modern Brotherhood (Iowa)* 84 N. W. 498. But the weight of authority at this day seems to be against the admissibility of such evidence in civil cases of this kind. 8 Wigmore, Ev. p. 2078; *Memphis Ry. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Germania Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215; *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855; *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; *Wasey v. Travelers' Ins. Co.*, 128 Mich. 119, 85 N. W. 459; *Cox v. Royal*



Tribe, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752. Without, however, passing upon the question of admissibility of the verdict of the coroner's jury as evidence of the cause of death, we have no hesitancy in holding that it does not necessarily make out a prima facie case of death from the cause stated in the verdict, but at most may be considered by the trial jury along with other testimony in the case. This was the ruling of the court below, and it was as favorable to appellant in this respect as we could approve.

Other assignments are made by appellant of errors of the trial court in admitting evidence of deceased's habits and statements with reference to keeping a pistol under his pillow and his reasons for so doing; but we find no prejudicial error in the record.

The judgment is affirmed.

### NATIONAL SURETY CO. v. LONG.

(Supreme Court of Arkansas. July 2, 1906.  
On Rehearing, Oct. 15, 1906.)

#### 1. PRINCIPAL AND SURETY—BUILDING CONTRACTS—SURETY'S LIABILITY—NOTICE.

A building contractor's bond provided that the surety should not be liable for any damages on account of delay in the performance of any work or the furnishing of any materials unless the contractor should, without reasonable excuse, purposely and premeditatedly delay the completion beyond the time limited by the contract, and in no event should the liability of the surety on account of delay exceed 5 per cent. of the penal sum of the bond. *Held*, that the surety, having stipulated that delay should not create a liability, could not claim that it was discharged because the owner of the building did not promptly notify him of the contractor's failure to perform the contract within the time specified.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 304, 311.]

#### 2. SAME—PAYMENTS TO CONTRACTOR.

Where a building contractor's bond provided that the contract price should be paid in installments as the work progressed to an amount equal to 75 per cent. of the value of the work and materials incorporated in the building, and that failure on the part of the obligee of a bond given by the contractor to perform the stipulations required of him should relieve the surety from liability under the bond, the fact that the obligee, at the time the contractor abandoned the contract, had paid an amount largely in excess of 75 per cent. of the value of the work done and materials furnished and incorporated into the building operated to discharge the surety, though it had received a consideration for the bond.

Carmichael and Battle, JJ., dissent as to the first part, and Hill, O. J., and Riddick, J., dissent as to the second.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 284.]

Appeal from Circuit Court, St. Francis Circuit court; Hance N. Hutton, Judge.

Action by E. A. Long against the National Surety Company and others. From a judgment for plaintiff, defendant surety company appeals. Reversed and remanded.

The complaint of Long alleges that on May 23, 1901, he made a written contract with

one Humphreys by which the latter agreed to furnish the material and erect a brick building and to complete the same on or before September 1, 1901, for which Long was to pay him \$8,600; and it further alleged that the National Surety Company had, by its bond, dated May 28, 1901, guaranteed the faithful performance of Humphreys' contract. As a breach, it is alleged, that, although Long paid Humphreys \$4,908.58, the latter never did complete the house, but that, on September 9, 1901, he abandoned it and left the country and that plaintiff had to expend more than \$4,671.41 to complete the building. The plaintiff joined as defendants with the National Surety Company, T. L. Humphreys, American Bonding & Trust Co., J. S. Whiting, and S. M. Whiting. The National Surety Company, for its separate answer, denied all liability on the bond, and set up that, under the contract between Long and Humphreys, the latter agreed to complete the building by September 1, 1901, and that plaintiff did not notify this defendant of Humphreys' failure to complete the building by September 1, 1901, until September 12, 1901, and that Long had paid to Humphreys for more than three-fourths of the work done and materials furnished and incorporated into the building. The written contract contained the following stipulations: "The said party of the second part agrees to complete said building by the first day of September, 1901, and the said party of the second part further agrees that in case he fails to complete said building by the fifteenth day of September, 1901, he shall pay to the said party of the first part, as liquidated damages, the sum of \$5 for each and every day or part of a day that said building remains incomplete after said time; that sum being the actual loss accruing to the party of the first part by said delay." The contract was tached to the bond, and was expressly made a part of it. The bond contains the following stipulations: "If, at any time, the above-named principal shall in any manner fail, neglect, or refuse to keep, do or perform, any matter or thing at the time and in the manner in said contract set forth and specified to be by said principal kept, done or performed, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the company at its principal office in the city of New York." "If, at any time, it appears that the above-named principal has abandoned the work, or will not be able, or does not intend to carry out or perform the contract, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the company, at its principal offices in the city of New York, and the company shall have the right, at its option, to assume such contract and to sublet or complete the same, and, if it so elect, all moneys due or to become due thereafter, under said contract, including percentages, agreed to be withheld until com-

pletion, shall, as the same shall become due, and payable under the terms of said contract, be paid to the company, regardless of any assignment or transfer thereof by the principal." "The failure, neglect, or refusal of the obligee, to keep, strictly observe, and fully perform, any matter or thing, in this bond or in said contract stipulated and agreed to be done, kept or performed by the obligee, at the time and in the manner so specified, shall relieve the company from all liability under this bond." The evidence shows that the building was not more than three-fourths completed on September 12, 1901, and that less than this had been done on September 1, 1901. That on September 12, 1901, Long notified this defendant that Humphreys had abandoned the work, and that the building which was to have been completed by September 1, 1901, had not been completed. The written contract between the parties contained the following: "The said party of the first part agrees to pay to the party of the second part for said work the sum of six thousand six hundred dollars (\$6,600.00), the contract price to be paid in installments according to written estimates to be made by the architect or the superintendent as the work progresses, payments to be made not oftener than is allowed in the bond, and said installments are to be seventy five per cent. of the value of the work done and materials furnished and incorporated in the building, the remaining twenty-five per cent. of said contract price to be paid by the party of the first part to the party of the second part, in ten days after the building is completed and accepted." The evidence shows there was no architect or superintendent employed, but that Long acted as such on his own behalf. Long testified in his own behalf that he paid Humphreys \$4,908; that that was a little less than three-fourths of the amount of the contract price; that the work and labor done the last time he paid Humphreys was \$3,200, and that this did not embrace the material on the ground; that the material on the ground amounted to \$1,600 or \$1,700, and then said that the work and material when Humphreys left amounted to \$6,600, and that he had to pay for about \$1,700 worth of lumber above what he had paid Humphreys for material which Humphreys had bought. All the other evidence shows that a less amount of work had been done when Humphreys left and abandoned the building. There was also evidence to show that the building could have been completed at the time Humphreys abandoned it for \$2,885.

W. S. McCain, for appellant. S. H. Mann and P. D. McCulloch, for appellee.

CARMICHAEL, Special Judge (after stating the facts). A majority of the court are of the opinion that the undisputed evidence shows that Long did not notify the National

Surety Company within the time in which he was required to do so by the contract and bond. The time for the completion of the building was September 1, 1901, and the evidence shows that the appellee knew some time prior to that date that the contractor would not complete the building by that date, and the bond specially provided that, if at any time it appeared that the contractor would not be able to complete the building by that time, the appellee would immediately notify the surety company. We think, as a matter of law, the notification on September 12th did not meet the requirements of the contract and bond; that the default of Long in not notifying the surety company within the time required was a substantial breach of the contract, and that he cannot maintain an action against the other contracting party. As was said in this case, when in the federal court, in 125 Fed. 892, 60 C. C. A. 628: "This bond contains mutual covenants of the parties—covenants by the surety company that Humphreys, the principal, should construct the building and keep it free from lien; covenants by the plaintiff that, if Humphreys was unable or failed to perform the contract in the time and manner therein specified, he would immediately notify the surety, and that the latter might then take the contractor's place. The plaintiff failed to keep this covenant before the surety company had in any way failed to comply with those which it had made. On this account he cannot enforce the fulfillment of the covenant of the defendant. He who commits the first substantial breach of the contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform"—citing many authorities. National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623. Long agreed in his contract that he would pay to Humphreys in installments, according to written estimates to be made by an architect or superintendent, as the work progressed, "seventy five per cent. of the value of the work done and materials furnished and incorporated in the building." The evidence clearly shows that he failed to keep this part of his contract. He states himself that at the time Humphreys left that there was \$1,600 to \$1,700 worth of material on the ground, and that the work done and material furnished and incorporated into the building together with the amount of lumber on the ground, amounted to only \$6,600, or the contract price. Giving him the benefit of the smallest amount, or \$1,600 worth of material on the ground, and subtract this amount from the \$6,600, the contract price, and the total amount on which he says he based the 75 per cent. which he paid to the contractor, Humphreys, would leave only \$5,000 for work and material which had been incorporated into the building. Seventy-five per cent. of \$5,000 is only \$3,750, showing that he had overpaid Humphreys the sum of

\$1,158 at that time; or, taking his other statement that there was \$3,200 for work, labor, and material in the building, not embracing the material on the ground, which amounted to \$1,670, the two aggregated (that is, the work, labor, and material, not embracing the material on the ground, and the \$1,670 for the material on the ground) would only make a total of \$4,870, which would include everything, work, labor, and material incorporated into the building, and the material on the ground, so that a payment of \$4,908 was more than 100 per cent. of the work, labor, and material incorporated into the building and material on the ground—this clearly shows that Long either willfully, or from a misconception of the meaning of his contract, or out of generosity to Humphreys, paid much more than he was entitled to pay under his contract and bond.

We think his conduct in this regard released the surety company, because it affected the liability of the surety, and the clause in reference to this was not intended solely for the protection of the owner, as was said by Judge Riddick in *Lawhon v. Toors*, 73 Ark. 476, 84 S. W. 637. "Counsel for Lawhon contends with much earnestness that this provision of the contract in reference to the reservation of a portion of the contract price until after the performance of the contract was intended solely for the protection of the owner, and that the failure to retain it did not affect the liability of the surety. If this was a new question, it might be worthy of some consideration, but it is now well settled that if a stipulation of that kind in a building contract he waived without the consent of the surety, it operates to discharge him from liability on his bond for the performance of the contract." To quote the language of Lord Langdale in *Calvert v. London Dock Company*, 2 Keen (Eng. Ch.) 644, the payment of the money before the completion of the contract was calculated to make it easier for the contractor "to complete the work if he acted with prudence and good faith; but it also took away that peculiar sort of pressure which by the contract was intended to be applied to him." So we think in this case that the retention of 25 per cent. of the work done and material incorporated into the building would have been an effective incentive to compel the contractor to complete his work, while an overpayment was a temptation to abandon his work and to the injury of this surety. If there would have been any peculiar pressure upon the contractor in holding back part of the contract price, a fortiori it would have increased the pressure to hold back part of the price of the work already done. The contractor had a present interest in the work already done and incorporated into the building, when he would only have had a prospective interest in the part of the contract price retained.

We have not overlooked the fact that the

appellant in this case is not an accommodation surety, but is a paid surety, and we recognize the difference between them (*Remington v. Fidelity & Dep. Co.*, 27 Wash. 429, 67 Pac. 989; *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754), but we hold that a paid surety is only bound by the stipulations of his contract of suretyship. The evidence is not sufficient on this point to sustain the verdict where there is nothing to do but make additions of figures, and the verdict is contrary to the results so obtained. The verdict is not supported by the evidence.

Reversed and remanded.

HILL, C. J., and RIDDICK, J., dissent.

HILL, C. J. (dissenting). 1. The bond provides: "The company shall not be liable for any damages on account of delay in the performance of any work or the furnishing of any material, unless the principal shall, without reasonable excuse, purposely and premeditatedly, delay the completion beyond the time limited by the contract, and in no event shall the liability of the company on account of delay exceed a sum equal to five per cent. of the penal sum of this bond." Having expressly stipulated that delays, except a delay purposely and premeditatedly caused, should not create a liability on the bond, it seems to me that the surety company cannot in good grace say that, because not verified of delay, it is released. The undisputed evidence is that the notice was given the next day after appellee learned that the contractor had abandoned the work; that was the first time the surety company was interested, the abandonment falling within the clause of purposely and premeditatedly delaying the work and other clauses of the contract. To permit a bondsman to stipulate that delay in the work shall not create a liability against him and then to release him because he was not notified of the delay is a proposition which does not meet my concurrence.

2. The reversal on the facts, is also, in my opinion, erroneous. I fully concur in the rule that where a mathematical calculation demonstrates that there is no basis for an action, although such action is sustained by witnesses swearing against matters demonstrably otherwise, then such evidence is not substantial evidence sufficient to sustain a verdict. A familiar illustration of this principle is where a witness with good eyesight and hearing in plain daylight looks along a level and straight railroad track and says he does not see or hear an approaching train as it bears down on him till he is struck; then his evidence against such an impossibility of failing to see and hear is not substantial evidence and will not sustain a verdict. But, as I understand this case, such is far from the facts. If the material and work done was worth no more than the contract price, then the calculation made would demonstrate the correctness of the court's position. But it is evident

that this was a case of a contractor for underbidding the actual value of the work undertaken. It required \$3,032 more to complete the building than the contract price called for. Appellee and two contractors testified to the state of the building when it was abandoned. They variously estimate it from 65 to 75 per centum. If this testimony was treating the contract price as the basis to make the estimate from, then the majority of the court is right; if they were referring to the real value of the building, then manifestly the majority is in error. As the two contractors were called to explain how much the whole building was worth and estimates they made to complete it, the fair construction is that they were referring to the real value of the work and material, and not what may have been the contract price.

This question was submitted to the jury under an instruction given at instance of appellant, and I respectfully dissent from the holding that there are not facts sufficient to sustain the verdict.

#### On Rehearing.

CARMICHAEL, Special Judge. A majority of the court in the former opinion in this case held that the date for the completion of the building under the contract and bond was September 1, 1901, and that a failure on the part of the appellee to notify the surety company that the contractor would be unable to complete the building by that date, and a notification sent to said surety company on the 12th of September, 1901, was too late and prevented a recovery by the appellee. While Justice BATTLE and the writer adhere strictly to the opinions expressed in the original opinion, Justice WOOD, after careful research, has decided to concur with Chief Justice HILL on this point, and hence a majority of the court now concur on this point with the views expressed by Chief Justice HILL; but a majority of the court are still of the opinion that, under the evidence as set out in the record, there was a substantial breach of the contract and bond by the appellee herein, as set out and expressed on other points in the original opinion, and, therefore, feeling that no injustice would be done by a reversal of the case, the motion for rehearing is denied.

BATTLE, J. I think the action should be dismissed.

#### DAUGHTRY v. STATE.

(Supreme Court of Arkansas. July, 23, 1906.  
Rehearing Denied Oct. 8, 1906.)

##### 1. JURY—QUALIFICATIONS—OPINION.

That a juror formed or expressed an opinion concerning the guilt or innocence of accused, based on newspaper reports, did not disqualify him.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 449-451.]

##### 2. CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY.

Defendant was charged with killing deceased while the latter was behind the bar of a saloon. While viewing the saloon, one of the jurors went behind the bar, and another juror stood on the railing looking over, and while in this position a juror remarked to the man behind the bar that he was a larger man than deceased, and another juror said, "That is all we want to see; come on," or "That is all I want to see; let's go." Held, that the remarks of the jurors were not prejudicial to accused, and did not constitute misconduct warranting a new trial.

Appeal from Circuit Court, Pulaski County; E. W. Winfield, Judge.

R. S. Daughtry was convicted of murder in the second degree, and he appeals. Affirmed.

Jas. A. Gray, Asa C. Gracie, T. C. Trimble, and Joe T. Robinson, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

BATTLE, J. R. S. Daughtry was indicted on the 28th of September, 1905, by the grand jury of Pulaski county, for murder in the first degree, committed by killing Joe Sarlo, and was tried on the 5th of December, 1905, and convicted of murder in the second degree; and his punishment was assessed at 15 years' imprisonment in the penitentiary. He appealed to this court.

Appellant insists that the court erred in refusing to grant him a new trial:

(1) Because W. L. McRaven, a member of the jury who tried him, was an incompetent juror; because some time before the trial, and shortly after the killing, he had a controversy with one B. D. Williams concerning the guilt or innocence of the appellant, in which McRaven declared, if he were on the jury to try Daughtry, he would hang him, and Williams replied that, if he were a member of it, he would hang the jury.

(2) Because the jury that tried him was guilty of misconduct while viewing the scene of the killing.

First. The record fails to show what questions were asked McRaven, when he was examined, before his acceptance as a member of the jury, touching his qualifications to serve as such. When the court heard appellant's motion for a new trial, he testified that, in response to such questions, he had formed an opinion as to the guilt of the defendant, but that it was based upon newspaper reports, and that, if he had any opinion, it was based on such reports. His testimony was not contradicted by any other testimony. The judge of the court, who heard him testify, was the judge of his credibility and the weight to be attached to his testimony. The opinion formed or expressed on newspaper reports did not disqualify him as a juror. *Hardin v. State*, 66 Ark. 53, 48 S. W. 904; *Taylor v. State*, 72 Ark. 613, 82 S. W. 495.

And no reversible error was committed in the refusal to grant a new trial on account of McRaven being a member of the jury.

Second. The misconduct of the jury while reviewing the scene of the crime was: One of the jurors went behind the bar, and another member stood upon the railing looking over (the killing was done in a saloon), and while in that position one of the jurors made a remark to the man behind the bar that he was a larger man than Joe Sarlo, the man who was killed. The man behind the bar was about 6 feet tall and weighed 200 pounds, while Sarlo was small. About the time the juror was behind the bar and another was upon the rail, a juror said: "That is all we want to see; come on," or "That is all I want to see; let's go." We are unable to see that the appellant was prejudiced by this conduct or these remarks. The undisputed facts show that appellant killed Sarlo by shooting him while behind the bar. The evidence does not show that the conduct of the jury was calculated to throw a single ray of light upon a disputed fact, or that the remark of the juror indicated his opinion, if he had any.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

#### BANK OF COMMERCE v. LAWRENCE COUNTY BANK.

(Supreme Court of Arkansas. Oct. 1, 1906.)

#### SUBROGATION—PERSONS ADVANCING MONEY TO DISCHARGE LABOR LIENS—VOLUNTARY LOAN.

One advancing to a manufacturing concern money, which is used by it in paying labor claims constituting liens on the manufactured product and entitled to preference, is not, on the subsequent insolvency of the concern, entitled to a preference by being subrogated to the rights of the laborers; the advance being merely a voluntary loan to the concern.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, §§ 60, 62.]

Appeal from Lawrence Chancery Court; E. D. Robertson, Chancellor.

Proceedings in insolvency of the Culver Lumber & Manufacturing Company. From a judgment allowing the claim of the Lawrence County Bank as a preferred claim, the Bank of Commerce, another claimant, appeals. Reversed and remanded.

The Culver Lumber & Manufacturing Company, a corporation, was placed in the hands of a receiver by order of the chancery court of Lawrence county in a suit brought in that court by a stockholder, alleging, amongst other things, fraud and mismanagement of its affairs and insolvency, and asking for the sale and distribution of proceeds of its assets. The receiver took possession and administered the assets of the concern under orders of the court. In course of the proceedings a master in chancery was appointed to pass upon and allow claims of creditors of the corporation, and he allowed the claim of appellee, Lawrence County Bank, in the sum of \$4,554.55, and made it a preferred claim. His report on that claim, which was con-

firmed by the court, is as follows: "I took the evidence of H. A. Culver and D. Sloan in regard to the claim of the Lawrence County Bank, and found from the evidence that the indebtedness was for acceptances given by the Culver Lumber & Manufacturing Company to the Lawrence County Bank, and were used by the said lumber company in paying the labor claims due the men for the manufacture of lumber, working in timber, etc.; that by a former order of this court, made by Hon. F. D. Fulkerson, the then acting chancellor, all claims for labor or debts arising therefrom, or debts incurred on this account, were made preferred claims. The master, on account of this fund being used in the payment of labor claims just prior to the receivership, is of the opinion that it should be a preferred claim, and he hereby makes it one." Appellant, whose claims as creditor were allowed without preference, appealed to this court from the decree of the chancellor making the claim of appellee preferred.

Morris M. Cohn, for appellant. H. L. Ponder, for appellee.

McOULLOCH, J. (after stating the facts). The facts are undisputed. The Lawrence County Bank advanced money upon acceptances to the Culver Lumber & Manufacturing Company, while yet a going concern, which was used by the latter in paying off labor claims constituting liens upon lumber manufactured. The court decreed the debt to be a claim against the assets of the corporation, with priority over the claims of other creditors. Was it proper to do so? The indebtedness to appellee was created before the assets of the corporation passed into the hands of a receiver. How long before it does not appear. It was no more nor less than a loan to the corporation, and, regardless of the use made of the money, created no higher grade of indebtedness than that of any other creditor of the concern. The statutes of this state give no lien for money so advanced, and, if it be conceded that enough is shown to have entitled the alleged claims of the laborers to priority as liens, by no stretch of equitable principles can appellee enjoy the right of subrogation because the funds so advanced were used in discharging laborers' liens. Being a voluntary loan of money, it affords no grounds for application of the equitable doctrine of subrogation. If appellee's contention be sound, then all claims against corporations for advances of money used in necessary operating expenses would be preferred, and the payment of equally meritorious claims prior in point of time would be postponed; the last coming first and the first last. We are not unmindful of the doctrine enforced by many court in suits against railroad corporations to foreclose mortgages securing payment of bonds, where preference is given to claims for operating expenses recently occurred. Fosdick v.

Schall, 99 U. S. 235, 25 L. Ed. 839. This doctrine, even as applied to suits to foreclose mortgages on railroad property, is not without its limitations. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 668. But it has no application to the facts of this case, and will not warrant the giving of preference to appellee's claim against the corporation for money loaned.

Reversed and remanded, with directions to enter decree not inconsistent with this opinion.

**GRIFFIE v. ST. LOUIS, I. M. & S. RY. CO.**  
(Supreme Court of Arkansas. Oct. 1, 1906.)

**1. RAILROADS—INJURY TO PERSON AT CROSSING—CONTRIBUTORY NEGLIGENCE.**

A pedestrian was struck by an engine at a railroad crossing. On coming near the crossing he could see along the track in both directions. He looked west towards the depot, and there saw a part of a train. He looked east, and then passed onto the track without again looking toward the west, when the engine from the west struck him. *Held*, that he was guilty of contributory negligence as a matter of law, precluding a recovery, unless the employees in charge of the engine, after having discovered the pedestrian's situation, failed to exercise ordinary care to prevent injuring him.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1048.]

**2. SAME—NEGLIGENCE—QUESTION FOR JURY.**

Whether the employees in charge of a locomotive engine exercised proper care after having discovered the dangerous situation of a pedestrian in the act of crossing the track *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1165.]

Appeal from Circuit Court, Pope County; Wm. L. Moose, Judge.

Action by Frederick Griffie against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Appellant sues appellee for personal injuries, alleging various grounds of negligence. Appellee denied all material allegations, and set up the contributory negligence of appellant "in going upon or near defendant's tracks at the time and place he was injured without exercising the proper precaution to protect himself from danger." After the evidence was heard the appellee moved the court to direct a verdict in its favor, which the court granted.

U. L. Meade, for appellant. Oscar L. Miles and L. P. Miles, for appellee.

WOOD, J. (after stating the facts). Appellant was an old resident of the town of Russellville, Ark., and was familiar with the crossing of Jefferson street, where his injury occurred. On the day of the injury he approached the crossing, going from his home along a path that went in a southeast course to the crossing of Jefferson street and the

railroad. A cotton platform which obstructed his view of the railroad tracks intervened until he ascended the dump of the railroad grade and came near the tracks at the crossing. He looked west towards the depot, and there was a part of a train. He thought there was no danger, "looked east, and then got knocked down." Appellant did not stop. He "picked his way a little" to keep out of the mud." "Loose dirt" had been dumped on the ground to walk on, and it was soft. From the time appellant got upon the dump near the railroad tracks there was no obstruction to his vision in the direction of the engine that struck him. At that time he was looking toward the east. Some of the witnesses say he "had his head down." He came so close to the track that the engine knocked him down, and the second little wheel in front crushed his foot. There was some proof tending to show that the railway company was guilty of negligence. But appellant was also guilty of contributory negligence. As he approached the railway he should have looked in both directions for trains, and should have continued to look until the danger was passed. He was walking slowly and the train was moving slowly. There was nothing to obstruct his vision after getting upon the dump within a few feet of the tracks. He should have surveyed the situation, instead of walking headlong upon or so near the track as to be struck. Contributory negligence follows as matter of law under such circumstances. *Railway v. Crabtree* (Ark.) 62 S. W. 64; *Railway v. Martin*, 61 Ark. 549, 33 S. W. 1070; *Railway v. Martin*, 62 Ark. 158, 34 S. W. 545; *Railway v. Blewitt*, 65 Ark. 238, 45 S. W. 548; *Railway v. Johnson* (Ark.) 86 S. W. 282; *Railway v. Baskins* (Ark.) 93 S. W. 757; *Tiffin v. Railway* (Ark.) 93 S. W. 564; *Scott v. Railway* (Ark.) 95 S. W. 490. Therefore appellee was entitled to a peremptory verdict, unless, having discovered appellant's perilous situation, it failed to exercise such care as an ordinarily prudent person would exercise under the circumstances to prevent the apprehended danger.

The engine was switching; it was running about four to six miles an hour. The engineer said he did not think it was much faster than a "pert walk" for a man. The engine was equipped with air. The engineer "judged" that he could stop the train running from 4 to 6 miles per hour at a distance of 30 feet. He could not see the appellant from the engineer's side, and did not know that he had run over appellant until the fireman jumped off his seat when the front end of the engine was about midway the crossing and said he believed "we hit that man." After the remark, just as soon as he heard there was any danger, he applied the air in the emergency immediately, and made as quick a stop then as possible. The fireman was on the left side of the engine going east, the same side that appellant was on. When

the fireman saw appellant the engine was "pretty close" to the crossing, he did not remember exactly the distance. The engine was something near the end of the cotton platform—"may be a little past or not quite to it." Appellant was four or five feet from the track, and "looked like he was just coming across in some study with his head down," when the fireman first saw him. Appellant's back and side were rather toward the train. The fireman had known appellant a long time. When he saw appellant 4 or 5 feet from the track, going towards it, he hallooed at him. At that time the fireman was something like 20 or may be 30 feet from him, and the front of the engine and appellant were about 4 or 5 feet apart. Appellant paid no attention, and the fireman stepped down in front of the boiler, saying: "I thought it was going to kill him." From his experience the fireman thought the engine was stopped as quickly as possible. The above is the testimony of the engineer and fireman. The proof tended to show that from the east end of the cotton platform to where appellant was struck was 55 or 60 feet. The engine was stopped before the "driver" wheels got to appellant. One witness testified he heard some one halloo before the engine struck appellant, and at that time the witness said the engine he guessed was between "15 and 30 feet from Griffe." Witness was 30 or 35 yards from Griffe at the time.

We are of the opinion that it was a question of fact for the jury to determine, under this evidence, as to whether or not appellee exercised the proper care after having discovered the dangerous situation of appellant to avoid injuring him. The court erred in declaring, as matter of law, that appellee was not negligent. As the cause must be sent back for new trial, we deem it unnecessary to comment upon the testimony.

Reversed and remanded for new trial.

### PARK v. HUTCHINSON.

(Supreme Court of Arkansas. Oct. 1, 1906.)

#### JUDGMENT—SET-OFF—ATTORNEY'S LIEN.

Where defendant had recovered a judgment against plaintiff some years prior to the recovery of plaintiff's judgment against defendant, which defendant had kept in full force, and on the recovery of plaintiff's judgment defendant immediately sought to offset his judgment against it, and plaintiff's attorney had no lien on plaintiff's judgment, the fact that the attorney thereafter perfected a lien on such judgment did not defeat defendant's right of set-off, conferred by Kirby's Dig. § 4457.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1676.]

Appeal from Howard Chancery Court; Jas. D. Shaver, Chancellor.

Action by Sam Hutchinson against Sam P. Park. From a judgment denying defendant the right to set off a judgment recovered against plaintiff, he appeals. Reversed.

W. C. Rodgers, for appellant. D. B. Sain, for appellee.

HILL, C. J. This is the second appeal in this case. In the former appeal the cause was remanded to cancel the deed from Hutchinson to Park on payment of the taxes expended by Park. *Hutchinson v. Park*, 72 Ark. 509, 82 S. W. 843. On the remand it was shown that Hutchinson was unable to give a supersedeas bond, and, rather than surrender possession to Park, he paid rent to Park. The court found Park indebted to Hutchinson \$100 on this account, and deducted \$25 for taxes paid, and gave judgment for \$75 in favor of Hutchinson against Park, and canceled the deed. Park recovered in 1902 a judgment against Hutchinson for \$1,540.93, and asked to offset this judgment against him, pro tanto, against that one, under section 6238, Kirby's Digest. Mr. D. B. Sain represented Hutchinson in the litigation and became entitled to \$100 as a fee, and, immediately upon the entry of the judgment in favor of Hutchinson against Park, Sain asserted his lien upon it, under section 4462, Kirby's Digest. The court refused to permit the judgment to be offset, owing to the attorney's lien.

Appellant contends that the chancery court in this case did not have jurisdiction to do anything except enter the judgment canceling the deed upon the repayment of the taxes, and that the demand asserted was purely a legal one, enforceable at law, but not a subject of litigation in this case. Appellee contends that equity, having taken jurisdiction for one purpose, is competent to adjust all matters, legal or equitable, growing out of the transaction. This question is not important to the litigants, as the rent is due, whether in law or in equity. The point of importance to them is whether the attorney's lien on the judgment prevents its being offset. Park had recovered his judgment some years prior to this, and it was in full force when the court gave this judgment against him. He at once sought the offset, and at that time Sain had no lien upon the judgment, and Park had no knowledge of his claim upon the judgment. Sain acted within the time prescribed by statute, and preserved his lien against Hutchinson; but did his subsequently created lien defeat the right of offset? Park and Sain were creditors of Hutchinson. Park put his debt into a judgment, which, *proprio vigore*, carries certain rights—a lien upon real estate, a lien through execution upon personalty, and the right to use it as an offset against a contrary judgment. Park perfected this right before Sain established any rights. Sain also had certain rights against his client, but they had to be worked out through the judgment in favor of his client. The fact that his client failed to pay him his fee should not give his client's judgment immunity from offset. To defeat the right of

offset given by statute, the debtor can fail to pay his attorney, and then his attorney has a right to prevent the judgment then acquired being used in liquidation of a prior judgment wherein the judgment creditor is the judgment debtor. This will not be tolerated in the law. This is not a question of an assignment of part of a judgment under section 4457, Kirby's Digest. An attorney's lien, filed after the right to offset the judgment with a prior one has accrued, cannot defeat such offsetting.

The decree is reversed, and cause remanded, with directions to permit the offset as prayed.

#### RICHARDSON v. STATE.

(Supreme Court of Arkansas. Oct. 1, 1906.)

##### 1. HOMICIDE—SECOND-DEGREE MURDER—EVIDENCE.

Proof that defendant shot deceased from the rear while he was walking with bowed head along a public road, evidently oblivious of defendant's presence, was sufficient to sustain a conviction of murder in the second degree.

##### 2. WITNESSES—CROSS-EXAMINATION—LIMITATION.

Where a witness had been fully and exhaustively cross-examined, it was within the discretion of the trial judge to refuse to permit such cross-examination to be further continued.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 923.]

##### 3. CRIMINAL LAW — TRIAL — REQUESTED CHARGE.

It is not error for the trial court to refuse additional instructions requested by accused, where the instructions given covered every phase of the case proper to be sent to the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

##### 4. SAME—INSTRUCTIONS AS TO VERDICT—ORAL INSTRUCTIONS—EXCEPTIONS.

Where, in a criminal case, the record discloses no request for written instructions nor any exception to the court's oral direction as to the form of a verdict of acquittal, an objection that the jury was instructed in writing as to the forms of verdict applicable to each degree of murder, and orally as to the form of verdict in case of acquittal, was not reviewable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2046.]

##### 5. SAME—PREJUDICE.

Where it affirmatively appears that the giving of an oral instruction as to the form of the verdict of acquittal was harmless, it was not ground for reversal, though a request for written instructions had been made.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3154.]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Tom Richardson was convicted of murder in the second degree, and he appeals. Affirmed.

T. H. Nixon and H. K. Toney, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

HILL, O. J. There has been unusual and unnecessary delay in perfecting the appeal

in this case, the responsibility for which is shouldered by the court stenographer. The evidence on part of the state shows that appellant shot James McBeth from the rear while he was walking with bowed head along a public road evidently oblivious of the presence of appellant. The shot was fatal. This testimony comes from apparently disinterested eyewitnesses whose evidence reads as if given intelligently and without bias or favor. It is true, another version is given by appellant and supported by his companion at the time, one Berry, but the jury has rejected it, and found him guilty of murder in the second degree, and assessed his punishment at 10 years in the penitentiary. The state's evidence is amply sufficient to have sustained the graver grade of murder, and there is no merit in the assignment of error that the verdict is not supported by the evidence.

Appellant's attorney cross-examined one of the state's witnesses, a woman, fully and exhaustively as to a former statement regarding the posture of McBeth when he fell. The state's attorney objected to further examination, and the objection was sustained, and to this ruling error is assigned. The control of the examination of witnesses is committed to the sound judicial discretion of the trial judge, and his rulings thereupon are not reversible except in case of abuse of this discretion. There must be a limit to proper cross-examination, and, when it appears that the matter of inquiry is fully developed and the subject clearly before the jury, it is not only the right but the duty of the trial judge to terminate it. Such was the case here, and there was no error in it.

Exceptions are noted to 2 instructions and to the refusal of the court to give 15 instructions asked by appellant. The instructions contained nothing new, and no departure from established precedents is pointed out or discovered. The instructions given covered every phase of the case proper to be sent to the jury, and there was no error in refusing additional ones requested by appellant even if every one of them was correct. After the jury was instructed, the court gave them in writing forms of verdict applicable to each degree of murder, and orally gave them the form of verdict in case of acquittal.

The motion for new trial assigns error in this, but no request for written instructions is shown of record, and no exception to the oral direction as to form of verdict was noted at the time. This precludes consideration of it here even if these directions as to form of verdict be treated as part of the instructions which may be required to be in writing by section 23, art. 7, Const.

Counsel excuse their failure to except to the fact that they did not know until after verdict that this direction was not in writing. The record shows they were within a few feet of the judge when he gave these in-



structions. If there was error it affirmatively appears to have been harmless, and as indicated in *Arnold v. State*, 71 Ark. 367, 74 S. W. 513, then an oral instruction is not cause for reversal even when the request for written instructions is made.

The judgment is affirmed.

#### SPURLOCK v. SPURLOCK.

(Supreme Court of Arkansas. July 23, 1906.  
On Rehearing, Oct. 8, 1906.)

##### 1. DIVORCE — EVIDENCE — ADULTERY AFTER COMMENCEMENT OF SUIT.

Though, under Kirby's Dig. § 2678, the cause of divorce must have existed before the commencement of suit, in a suit for divorce on the ground of adultery, evidence tending to prove adultery with a certain co-respondent after the commencement of suit, was admissible, where defendant's relations with such person were shown to have commenced before suit, as tending to show a lustful rather than innocent relationship before suit.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 371-376.]

##### 2. SAME — DISPOSITION OF PROPERTY — STATUTES.

Kirby's Dig. § 2684, declaring that, in every final judgment for divorce granted a husband, an order shall be made that all property be restored to either party which either party obtained from or through the other during the marriage and in consideration and by reason thereof, means by the use of the word "consideration" the act of marriage, or some agreement or contract relating to the act of marriage, and by the phrase "by reason thereof" means such property as either party may have obtained from or through the other by the operation of laws regulating the property rights of husband and wife.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 702-709.]

##### 3. SAME—MORTGAGE ON HOMESTEAD—REMOVAL BY WIFE—SUBROGATION.

Under Kirby's Dig. § 5214, a married woman may carry on business ventures and the earnings thereof are her own. Held that, where a wife with her earnings, removed a mortgage from the homestead on a decree for divorce in favor of the husband, the wife was entitled to be subrogated to the rights of the mortgagee.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 702-709, 713-715.]

On Rehearing.

##### 4. HUSBAND AND WIFE — CONTRACTS — VALIDITY.

A contract between a husband and wife is absolutely void.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 218-220.]

##### 5. DIVORCE—DISPOSITION OF PROPERTY—ACCOUNT BETWEEN PARTIES—RENT OF HOMESTEAD.

On a divorce in favor of a husband, it appearing that the wife had conducted a hotel which constituted the homestead, and with her own earnings removed a mortgage therefrom, so that she was entitled to be subrogated to the rights of the mortgagee, she could not be charged with rent.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 702-709, 713-715.]

Appeal from Fulton Chancery Court; George T. Humphries, Chancellor.

Suit by T. J. Spurlock against Mary J. Spurlock for divorce, and from a decree

granting complainant a divorce, and determining the rights of the parties as to certain property, both parties appeal. Reversed in part, and remanded, with directions for the entry of a decree.

Sam H. Davidson, for plaintiff. Charles E. Elmore and J. L. Short, Campbell & Stevenson, for defendant.

HILL, C. J. The appellee, T. J. Spurlock, sued appellant, Mary J. Spurlock, his wife, for divorce, alleging adultery with several parties. She denied all the charges against her, and made a countercharge of cruel treatment and asked a divorce be granted her on that ground. She makes these allegations in pleadings and evidence in regard to their property interest: That she and her husband were engaged in the hotel and mercantile business at Evening Shade, and sold out there, and reinvested in like enterprises at Mammoth Spring; Spurlock conducting the mercantile business and she the hotel business; that the first hotel burned, and Spurlock collected about \$1,000 insurance which he used in his grocery and other enterprises and which did not go to her; that a mortgage to a Building & Loan Association for \$1,000 was placed on the property to pay for the rebuilding of the hotel; that she paid said mortgage herself and her husband paid no part of it; that she purchased a lot of hogs and cattle, and hotel furniture and erected a sample room, all from her separate earnings. In general she charged that she ran the hotel, earned all it made; that it was understood she had that business and her husband the mercantile; that she supported both from the hotel business and helped him, and he did not help her; "and in justice and equity should be the sole owner" of the hotel property. On the other hand, Spurlock charges that he ran the business with her help in looking after the servants when he was not there. The hotel was their home, even after their separation, both lived there in separate rooms. The chancellor granted the husband the divorce on grounds of adultery in the wife; found the hogs, cattle, and hotel furniture, and the sample room were the separate property of Mrs. Spurlock; found against her as to the hotel property, and she appeals. And Spurlock appeals from so much of the decree as finds any of the property to be Mrs. Spurlock's.

1. The first question is as to the adultery charges against Mrs. Spurlock and the countercharge of cruel treatment against Mr. Spurlock. The appellant objects to certain testimony tending to prove adultery after the suit was filed. The cause of divorce must exist, before the commencement of the suit. Kirby's Dig. § 2678. But her relations with this co-respondent were shown to have commenced before the suit, and evidence of adultery with him after the bring-

ing of the suit would be admissible, not as a cause of divorce, but as tending to prove a lustful rather than an innocent character to her relations with him prior to the suit. The chancellor found her guilty with him before the commencement of this action. The preponderance of the evidence is against Mrs. Spurlock on both of these issues, and it would serve no useful purpose to review it, and the decree as to the divorce is affirmed.

2. The chancellor found that the hogs, cattle, and hotel furniture, and the sample room built on the hotel grounds were the separate property of Mrs. Spurlock, and the court is of opinion that the weight of the evidence sustains that finding, and the decree on that issue is affirmed on the cross-appeal.

3. Mrs. Spurlock claims that the hotel property was purchased with money derived from her separate business of hotel keeper, before and after it was rebuilt; that no part of her husband's means, earnings, or services have acquired that property. Mr. Spurlock denies all of this, and it cannot be said that the preponderance is with her, and the finding of the chancellor is against her on this. But as to this fact the preponderance of the evidence is decidedly with Mrs. Spurlock: That she ran the hotel as a separate business; that her husband was no more service to her in that business than she was to him in the grocery and mercantile business. Each was conducting a business enterprise on his or her own account; and she worked hard and with fair success in the hotel business; and from the proceeds of the hotel business the mortgage of \$1,000 upon the hotel property was paid by her in monthly installments, except a balance of a few hundred dollars, and that she discharged with money borrowed from friends. While Mr. Spurlock denies most of these facts, yet Mrs. Spurlock is so strongly corroborated as to these matters that the court is convinced the above statement is the truth of the case. The question is: What are the equities on the facts above stated? It is a question of first impression in this state, and probably elsewhere, for most states have statutes giving the divorce courts discretion in dividing the property. The statute in this state, Kirby's Dig. § 2684, as construed in McNutt v. McNutt (Ark.) 95 S. W. 778, does not reach to this case. A married woman may carry on a business venture, and the earnings therefrom are her own. Kirby's Dig. § 5214. A husband has such an interest from the marital relation in the wife's homestead that he may invest his means in improving it, up to the maximum value, and the homestead character of the property will withdraw what he invests in it from the reach of his creditors. Pullen v. Simpson, 74 Ark. 592, 86 S. W. 801.

The right of subrogation to one paying a debt for another is extended to sureties, to junior encumbrances; to creditors paying an encumbrance on their debtor's property; to legatees and joint heirs, relieving the inheritance of liens; to life tenants freeing the fee of a mortgage; and to widows discharging debts against their husband's estate and to many other analogous instances. Harris on Subrogation, §§ 13, 14, 696, 697. The theory is that the payment has been made by one occupying a relation to the property other than that of a stranger or volunteer, who, on account of such interest, discharges a mortgage or other lien against the property, equity, to save an injustice being done will subrogate the one discharging the mortgage or lien to the rights the mortgagee or lien holder would have had if he, the payor, had not discharged the mortgage or lien. The Tennessee court applied this doctrine in favor of a deserted wife who had paid off a mortgage on an abandoned homestead of the husband [Roach v. Hacker, 2 Lea (Tenn.) 633] and this application is approved by a learned writer on the subject. Harris on Subrogation, § 705. Here the homestead which sheltered both of the parties was encumbered. The wife's earnings which she could have invested elsewhere, and retained beyond question as her own, she invested in the property which the law protected from the reach of creditors and gave to her as a home for life against heirs and creditors. Certainly her interest was as substantive as a life tenant's, or any of the other enumerated persons to whom subrogation has been accorded upon discharge of incumbrances against the property in which the interest inheres. It is true that it is her own misconduct which has caused the severance of the marriage tie and the falling of these tangible rights inhering in the husband's homestead. But it is inequitable for this misconduct to deprive her of the right of subrogation which equity accords to one protecting a property interest by discharging a lien upon the property. It would be contrary to good conscience for the husband to profit by the wife's earnings discharging this mortgage on his property when she devoted them to that purpose not as a gift to him, but to protect a property in which she had an interest hardly less complete than his own.

The court is of opinion that so much of the decree as denied appellant relief as to the hotel property be reversed, and the cause remanded, with directions to enter a decree subrogating her to the rights of the mortgagee whose mortgage she discharged; and it is so ordered.

#### On Rehearing.

Appellee presents strongly his case for a rehearing, and the court has gone carefully into the facts again. The first two points

made are against the conclusion reached that Mrs. Spurlock conducted the hotel as a separate business. Counsel overlook the fact that Mrs. Spurlock was corroborated on this point by many disinterested witnesses. The next point is that the court erred in finding that Mrs. Spurlock paid off the \$1,000 mortgage on the hotel. Mrs. Spurlock is corroborated on that by three witnesses who testified to statements to that effect made by Spurlock himself.

It is insisted that, because Mrs. Spurlock claimed that there was a contract between her and her husband that she was to run the hotel and pay off the mortgage and have all above the payments on the mortgage as her earnings, she cannot claim subrogation. Counsel overlook the fact that Spurlock positively denies the existence of such a contract. It rested on an affirmation by her and a denial by him, and the court paid no attention to it; for it could not be said to be proved, and if it were proved it was absolutely void, as husband and wife cannot contract between themselves. Appellee cannot defeat subrogation by interposing a void contract which he denied had any existence. Subrogation is of two kinds, conventional and equitable. Conventional subrogation rises out of contracts providing for it, and equitable subrogation springs from the equities of a case and frequently is the outgrowth of void contracts, sales, mortgages, or liens. The court was applying equitable and not conventional

subrogation in this case. Mrs. Spurlock paid the mortgage to free the common loan from its burden, and the divorce has brought to wreck all the common purposes and ends sought to be furthered by lifting the mortgage from the hotel. The rights of the parties must be readjusted, and it seems to the court to be equitable and right to subrogate Mrs. Spurlock to the interest of the mortgagee, whose mortgage on her husband's property she paid.

The next point made is that the court did not make an equitable division of the property. The court is not clothed with power, as chancery courts are in many states, to make an equitable division of property on dissolution of a marriage, and did not attempt to exercise such power. The equities of the case considered by the court were not a division of the property, but what equities she had towards the property which she had freed of mortgage. Appellee asks that Mrs. Spurlock be charged with rent during the time she ran the hotel. This would manifestly be inequitable. The hotel was a homestead, and there can be no question of rent between husband and wife for the common homestead for themselves and their daughter both occupied and enjoyed it, and he received board of himself and daughter and his taxes from Mrs. Spurlock. The court has merely applied to the peculiar facts of the case the well-known rules of subrogation.

The motion is overruled.

**JONES v. POND & DECKER MFG. CO.**

(Supreme Court of Arkansas. May 28, 1906.  
On Rehearing, Oct. 15, 1906.)

**1. INFANTS — JUDGMENT — VACATING AFTER MAJORITY.**

Under Kirby's Dig. § 4431, subd. 8, and sec. 6248, conferring on the court power to modify a judgment for errors shown by an infant in 12 months after arriving at full age, etc., a minor claiming under a tax deed adjudged void in a suit against him to quiet title, may, within 12 months after arriving at full age, maintain a suit to vacate the decree for errors therein.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 315.]

**2. SAME.**

A married woman, over 18 years of age at the time of the rendition of a decree against her, cannot maintain a suit to set aside the decree for errors therein, under Kirby's Dig. § 4431, subd. 8, and sec. 6248, conferring on the court power to vacate a judgment for errors therein shown by an infant in 12 months after arriving at full age, since by section 3756 she was of full age at the time of the rendition of the decree.

**3. ADVERSE POSSESSION—EXTENT—TAX DEED.**

Actual possession by a grantee under a tax deed of a part of the tract thereby conveyed, extends to the entire tract where the residue thereof was not in the actual occupancy of any one, and the possession will ripen into title to the whole by adverse possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 547, 563.]

On Rehearing.

**4. INFANTS — JUDGMENT — VACATING AFTER MAJORITY—STATUTES—CONSTRUCTION.**

To obtain relief under Kirby's Dig. § 4431, subd. 5, authorizing the court to vacate a judgment for erroneous proceedings against an infant or married woman where the condition does not appear in the record nor the error in the proceedings, the disabled condition of the party seeking relief must not appear in the record, and the error which should cause the judgment to be vacated must not appear in the proceedings, and where the error appears in the proceedings the remedy is by appeal, writ of error, certiorari, etc.

Appeal from Mississippi Chancery Court; Edward W. Robertson, Chancellor.

Suit by Nannie C. Jones and others against the Pond & Decker Manufacturing Company. From a decree dismissing the complaint, Plaintiffs appeal. Reversed and remanded.

The complaint in this case was filed by appellants to review and vacate a decree of the Mississippi chancery court rendered at the March term, 1900, against them divesting their interest in all of section 14, township 10, range 8 W., except 2.57 acres, and quieting the title of appellees thereto. Appellants, except Nannie C. Jones, the widow, were children and heirs at law of B. F. Jones. At the time of the rendition of the decree sought by this suit to be vacated, appellants, except Nannie C. Jones, the widow, were minors. Appellee, in the fall of 1897, filed a complaint in the Mississippi chancery court against one B. F. Jones to quiet title to section 14, township 10, range 8, in Mississippi county, Ark. Jones died, and his widow and children, appellants here, an-

swered. They admitted that appellee had derived title from the state through the Arnold heirs, under whom appellee claimed by deed executed to it in 1897. But they claimed that this title had been divested out of appellee and had been invested in them by a tax deed duly executed to B. F. Jones in 1882. They set up this deed, and also the two and seven year statutes of limitation. They also set up that their ancestor had paid taxes on the land since 1877, and that appellee was barred by laches. The court found that the tax title under which appellants claimed was void, but found that appellants had been in adverse possession under their tax deed of 2.57 acres and quieted the title of appellants to this, but divested their title to the residue of the section, and quieted the title of appellee to same. The court also rendered a decree in favor of appellants for \$1,039.80 for taxes and improvements. The tax deed to B. F. Jones was for all of section 14, township 10, range 8. The proof showed that 2.57 acres was cleared by him, and had been in cultivation continuously for seven or eight years before suit was brought by appellee to quiet its title. Appellants seek by their complaint in this case to review and vacate that decree as to all except the 2.57 acres and to quiet their title to the whole of section 14, township 10, range 8, supra. In their complaint after setting up their claim of title under the tax deed to B. F. Jones, and the death of Jones, and their relationship to him as the widow and heirs, and after reciting, among other things, that appellee claims title under a decree of the chancery court of Mississippi county, rendered in March, 1900, in its favor against them, they allege the minority of appellants, the children of Jones at the time of the rendition of the decree, and set up various grounds for annulling same and among them the following: That said B. F. Jones paid all taxes on said land from the date of his purchase until the day of his death; that he took possession of said land in 1884, and continued in the actual, open, notorious, hostile, and exclusive possession of the same, until the day of his death, and after his death the plaintiffs continued said possession until the rendition of said decree in March, 1900; that as an incident, at the rendition of said decree the defendants refunded to the said Nannie C. Jones as administratrix, the taxes paid by her and the said B. F. Jones on said land, which sum the plaintiff Nannie C. Jones now brings into court and tenders the same to defendants. The prayer was that the decree be vacated, and for general relief. Appellee denied all the material allegations of the complaint, and its denial of the paragraph of the complaint above set forth is as follows: Defendants deny that said B. F. Jones, deceased, took possession of said land in the year 1884, or that he held actual, open, hos-

title, exclusive possession of the same up until the time of his death, or that plaintiffs held possession of the same up until his death, or that plaintiffs held possession of the same until the rendition of the decree mentioned in the complaint, but if the said B. F. Jones ever held actual, open, exclusive, and continuous possession of any part of said land for any length of time, his possession covered only  $2\frac{3}{4}$  acres, which was held by mistake, and under the belief that it was a part of a tract lying contiguous to the tract in question; and defendants deny that plaintiffs' possession or the possession of their ancestor was ever intended to cover any portion of the land in controversy, and deny that said possession extended to the entire section. This suit was begun January 8, 1903. Appellant Mamie Adkins, née Jones, was born September 10, 1881. Appellant Minnie Jones was born March 17, 1884, and the other children were younger than she. The tax deed under which B. F. Jones claimed was executed Jan. 12, 1880. It conveyed section 14, township 10, range 8. The proof showed that as early as 1884 the timber on the land on the line between sections 13 and 14 was deadened, and in 1889,  $3\frac{3}{4}$  acres were cleared and put in cultivation in section 14 for B. F. Jones. This land joined other land owned by Jones. In 1887, 300 acres were deadened by Jones, and 30 acres were put in cultivation, in January, 1895. Jones paid taxes on the land and used firewood from it continuously from the time he brought it until 1897. No one else was in the actual occupancy of the other land in section 14. The chancery court refused to vacate the decree, and dismissed appellant's complaint.

J. T. Coston, for appellant. L. O. Going, for appellee.

WOOD, J. (after stating the facts). This action was brought under section 6248, and section 4431, subd. 8, Kirby's Digest. This court has construed these provisions in *Blanton v. Rose*, 70 Ark. 418, 68 S. W. 674. According to that case appellants, except Mamie Adkins, the children of B. F. Jones, had the right to bring this suit. The decree which they seek to vacate divested their title in the lands and was tantamount to ordering a conveyance from them in favor of appellee. They, except Mamie Adkins, were minors when the decree was rendered, and, under the above section, had a day in court within 12 months "after arriving at the age of 21 years" to show cause against the decree, and to vacate same for errors therein. Section 4431, subd. 8, *supra*. As to Mamie Adkins, she was over 18 years of age when the decree sought to be vacated was rendered. The statutes (section 4431, subd. 8, and section 6248, Kirby's Dig.) preserve the right to appear and show cause why the judgment should be vacated to infants. Section 3756 Kirby's Dig., provides: "Males of the age of

eighteen years, shall be considered of full age for all purposes, and until those ages are attained they shall be considered minors." Under this section Mamie Adkins could have brought suit in her own name, or defended a suit brought against her at the time the decree sought to be canceled was rendered. Under the law she was not an infant. The language of the statutes is so plain there is no room for construction. It follows that Mamie Adkins was not entitled to any relief under the complaint, and the decree, so far as her interest is concerned, must be affirmed. The other appellants should have been granted the relief prayed, for they show that their ancestor took actual possession of at least  $3\frac{3}{4}$  acres of the land described in his tax deed. Indeed, the proof tends to show that he took possession of 300 acres, for he deadened that amount. Under the decisions of this court in *Carpenter v. Smith* (Ark.) 88 S. W. 976, *Sparks v. Farris* (Ark.) 71 S. W. 255, 945, and *Crill v. Hudson* (Ark.) 74 S. W. 299, when appellants' ancestors took possession of part of the land described in his tax deed, that possession extended to the limit of his grant. There was no one in the actual occupancy of the residue of the land, not occupied by B. F. Jones, thus distinguishing the case in that particular from *Woolfork v. Buckner* (Ark.) 29 S. W. 372.

The decree of the Mississippi chancery court, dismissing appellants' complaint, is reversed, and the cause is remanded, with directions to enter a decree quieting the title of appellants to the land in controversy, except as to Mamie Adkins, and affirming the judgment dismissing the complaint for want of equity as to her. The court, however, before entering decree quieting the title of appellants to the lands in controversy as indicated, should make an order requiring appellants to make good to appellee the tender, with interest.

#### On Rehearing.

HILL, C. J. Appellees seek to have the judgment changed except as to Mrs. Adkins and appellants seek to have it changed so as to permit her recovery. The court has carefully gone into the case again and adheres to the decision rendered. It is pointed out that an undenied allegation of the complaint is that Mamie Adkins, née Jones, was a married woman at the time of the rendition of the original decree. It is sought to bring her within the fifth paragraph of section 4431, Kirby's Digest instead of the eighth paragraph under which this recovery was sustained for all the Jones heirs who were minors at the time of the rendition of the decree sought to be vacated.

To obtain relief under paragraph 5, two elements must concur: (1) The disabled condition of the moving party must not appear in the record; and (2) the error which should cause the judgment to be vacated must not appear in the proceedings. It was not intended to give married women, minors, and luna-

tics a remedy cumulative to their existing remedies by appeal, writ of error, certiorari, or other appropriate method of review, which would correct the error where it was apparent in the proceedings. When the error and condition do not appear in the proceedings, therefore these remedies are unavailing, then this statute reaches erroneous proceedings not otherwise correctible in favor of the persons laboring under disabilities therein mentioned. *Richardson v. Matthews*, 58 Ark. 484, 25 S. W. 502, is an application of this statute. A judgment on a promissory note was rendered against a married woman. She had not appeared, and on its face the judgment was valid; but, as a matter of fact, she was surety for her husband and son on the note and was a feme covert; the proof of her condition and those other facts rendered it an erroneous proceeding, but one not correctible without this statute, and it was held to apply.

In this case the coverture of Mrs. Adkins did not affect the questions involved, and she appeared and put into the proceedings the facts of the case, and these facts disclosed the error of the court in the decree rendered. The court and her counsel put a construction on the decision in *Woolfork v. Buckner*, 60 Ark. 165, 29 S. W. 372, which rendered it fatal to appellants' cause, and, therefore, an appeal was abandoned; but that was an erroneous construction, as was shown when *Sparks v. Farris*, 71 Ark. 117, 71 S. W. 255, 945, was decided. Recently this court on appeal corrected a similar misconception of it in *Rucker v. Dixon* (Ark.) 93 S. W. 750. Therefore, the error did appear in the proceeding in the original case and could have been corrected on appeal, and this statute is not applicable, and the rights of appellants must stand or fall on the eighth paragraph of section 4431 of Kirby's Digest and, for the reason pointed out, Mrs. Adkins is precluded from recovery under it.

Justices BATTLE and RIDDICK differ with the majority of the court on the point that Mrs. Adkins is barred. They contend that she had one year after reaching 21 years to vacate the decree.

The motion is overruled.

#### CINCINNATI, N. O. & T. P. R. CO. v. HOLLAND.

(Supreme Court of Tennessee. Oct. 16, 1906.)

#### MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—STATUTORY PRECAUTIONS—CONTRIBUTORY NEGLIGENCE.

The statute providing precautions to be taken by employes in charge of a train to prevent accident to persons on the track is for the benefit of the general public only, so that, where an employe of the company is injured on the tracks, its liability depends on the determination of the questions of negligence and contributory negligence under the rules of the common law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 159.]

Appeal from Circuit Court, Hamilton County; M. M. Allison, Judge.

Action by Fannie Holland against the Cincinnati, New Orleans & Texas Pacific Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Early & Ford, for appellant. Pritchard & Sizler, for appellee.

**WILKES, J.** This is an action to recover damages for the alleged wrongful killing of Dock Holland, colored, the husband of the plaintiff, Fannie Holland. There was a verdict and judgment for \$1,000 in favor of the plaintiff, and the defendant has appealed.

Dock Holland was killed while riding upon and operating a railway velocipede on the main track of the defendant's road between Boyce Station and Chattanooga. He was an employe of the road, and his duties were to attend to the switch and signal lights and to switch the mail from the defendant's mail train to those of the Western & Atlantic Railroad at Boyce. He must, necessarily, have passed over the road to attend to his duties.

On the morning of his death Holland had changed the mail from one train to the other at Boyce, and, putting a velocipede on the track, he mounted and followed the first section of the defendant's fast passenger train, No. 3, in the direction of Chattanooga. The train was being run in two sections, and Holland, being between the two, was run down and killed by the last section, which was running at 60 miles an hour, or more, when he was stricken.

Without going into all the features of the case, it is sufficient to say that it is assigned as error that there is no evidence to support the verdict of the jury.

It is insisted upon the part of the railroad company that the statutory precautions were observed; but this is denied by the plaintiff, and there is some evidence to support the contention of the plaintiff upon this point.

Conceding, therefore, that the statutory precautions were not observed, we think the crucial question is whether or not this was a case which required the observance of the statutory precautions.

We think there is ample evidence to show that the plaintiff's intestate was guilty of the grossest contributory negligence in attempting to operate a velocipede upon the railroad track between the two sections of a train which were running at the rate of 60 miles an hour. He was entirely familiar with the schedule of the trains. He knew that the first section had passed Boyce going in the direction of Chattanooga, and that the second section would immediately follow after; and yet he placed himself upon this velocipede in front of the rear section, and attempted to go down the road between the two sections, his rate of speed being about 10 miles per hour.

It is not shown that he was authorized to use a velocipede, or that it was done with the consent of the railroad company, nor that it

was necessary in the discharge of his duty; but, on the contrary, it is charged, and, we think, clearly appears, that he was using it for his own convenience and without the consent of the defendant.

If the rule of common-law liability is applied, we think it clear that because of his negligence and we may say recklessness, he would not be entitled to any recovery, and, if he is entitled to any recovery it must be solely on the ground that the company failed to observe the statutory precautions; for there is no evidence to show that he was run down recklessly or maliciously by the railroad employes, but everything was done that could be done to stop the train after deceased was discovered.

We are of opinion that the principles laid down in the cases of *Railroad v. Burke*, 6 Cold. 45, *Railroad v. Rush*, 15 Lea, 145, *Railroad v. Robertson*, 9 Helsk. 276, and *Railroad Co. v. Hicks*, 89 Tenn. 301, 17 S. W. 1036, should govern and control in the determination of this suit.

In the last case, *Railroad Co. v. Hicks*, 89 Tenn. 301, 17 S. W. 1036, the plaintiff was using a velocipede on the track rightfully. It was completely under his control, and could be easily removed from and replaced upon the track. On a trial the circuit judge charged that the statutory precautions were applicable; but this court held that the application of the rule to employes upon the track, even in the discharge of their duties, would necessitate the stopping of all trains whenever they came in sight of section hands upon the road, although it was altogether reasonable that such hands would get out of the way without making it necessary to stop at all, and that a proper charge would have been that the road, when it sees an employe on the track in peril of being run over, must do all in its power to avert a collision, and prevent an injury, which is, in effect applying the rule of the common law.

In the case of *Railroad v. Rush*, 15 Lea, 145, a brakeman of a freight train was sent by his conductor to display a danger signal to a passenger train, but fell asleep on the track and was killed by the train he was attempting to flag; and it was held, in substance, that the statutory provisions are not applicable in case of injuries caused by moving trains in favor of employes whose negligence caused or contributed to the accident. In that case the court quotes with approval from *Railroad v. Burke*, 6 Cold. 45, to the effect that an action will not lie on behalf of an agent or servant whose negligence or willful act caused, or contributed to cause, the accident or collision which occasioned the injury.

Judge Cooper states that this latter clause in the Coldwell Case strikes the true note: "The statute was intended for the benefit of the general public, not for the servants of the company, and clearly not for a servant whose negligence caused, or contributed to cause, the accident. The Legislature surely never intended that a railroad company by a mere noncompliance with certain forms made obligatory as to a stranger, whether their observance would have prevented the act or not, should become liable to an employe whose plain dereliction of duty caused the accident."

In the language of Judge McFarland in *Railroad v. Robertson*, 9 Helsk. 276: "The liability of the company to its agent for injuries resulting from the misconduct or negligence of that agent must be determined, not by the statute, but by the common-law principles."

Under the facts as we find them in the record, we think that there is no liability on the part of the defendant railroad; and the judgment of the court below is reversed, and the cause is remanded for a new trial.

The appellee will pay the costs of the appeal.

**GERMAN INS. CO. v. GIBBS, WILSON & CO.**

(Court of Civil Appeals of Texas. April 28, 1906.)

On rehearing. Motion for rehearing overruled.

For original opinion, see 92 S. W. 1068.

**BOOKHOUT, J.** Our attention is called in the motion for rehearing to a statement in the opinion which is misleading. In speaking of the declarations in the deposition of Hewitt purporting to have been taken before Ponder S. Carter, notary public of Natchitoches parish, La., we say: "The declarations and admissions were to the effect that about 600 bundles of ties and 300 rolls of bagging, composing part of the stock at the time the insurance policy was written, belonged to the Rotan Grocery Company." The exact declaration as shown by the bill of exception was: "I had in stock at the time of the fire several cars of grain and hulls, and also about 600 bundles of ties and 300 rolls of bagging, which belonged to the Rotan Grocery Company." This declaration is substituted for the statement in the opinion, and in this respect the opinion is corrected.

This correction does not affect the conclusion reached, and the motion for rehearing is overruled.

**McALLEN et al. v. RAPHAEL et al.\***

(Court of Civil Appeals of Texas. June 13, 1906. Rehearing Denied Oct. 10, 1906.)

**1. EXECUTORS AND ADMINISTRATORS — INDEPENDENT EXECUTRIX — CONVEYANCES OF REAL ESTATE—VALIDITY.**

Under Pasch. Dig. art. 1284, providing that, when a married woman is an executrix, she and her husband shall act jointly in all matters pertaining to her representative capacity, a widow, becoming independent executrix, under article 1371, by qualifying as executrix of the will of her husband, has on her subsequent marriage the power to act as independent executrix, and has the power to make a conveyance, in which her husband joins, in satisfaction of an obligation incurred by her testator.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 226.]

**2. DEEDS—EXECUTION.**

A person may execute a deed by requesting another to sign his name thereto, or, when another has signed his name thereto without his request, by the acceptance of it as his own.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 89-93.]

**3. EVIDENCE—CONTRACTS — AUTHENTICATION.**

A party filed an affidavit of forgery of an alleged agreement by a grantee to reconvey. The signature of the grantee, who was dead, was in the handwriting of one of the attesting witnesses. The persons whose names appeared as attesting witnesses, including the notary taking the grantee's acknowledgment, were dead. They had, when living, a good standing in the community. *Held* that, as the proof of the execution of the agreement was the proof required at common law, the agreement was shown to be genuine as a matter of law.

\*Writ of error denied by Supreme Court.

**4. SPECIFIC PERFORMANCE—CONTRACTS — DEFINITENESS.**

An instrument reciting a conveyance of land described to save costs by enabling the grantee to prosecute suits to settle title, binding the grantee to reconvey at the termination of the litigation or when the grantor might require, is sufficiently definite for a basis for a decree of specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 61-68.]

**5. VENDOR AND PURCHASER—AGREEMENT TO RECONVEY—VALIDITY.**

A grantor conveyed land for the expressed consideration of \$1,500. The grantee executed a contract to reconvey. The two instruments formed one transaction. *Held*, that the agreement to reconvey must be given effect, notwithstanding the expression of a consideration in the deed.

**6. CONTRACTS—CONSIDERATION.**

A grantor conveyed land for an expressed consideration of \$1,500. The grantee executed a contract to reconvey. The two instruments formed one transaction. The purpose of the conveyance was to enable the grantee to litigate the title. *Held*, that the agreement to reconvey was supported by a sufficient consideration.

**7. APPEAL—ASSIGNMENT OF ERROR—PROPOSITION—BRIEFS.**

An assignment of error cannot be considered, where, as briefed, the proposition subjoined to it deals with more than one subject.

**8. SAME.**

Court of Civil Appeals, Rules 20-31 (67 S. W. xvi) require that the particular points sought to be made by an assignment shall be stated in the form of propositions, followed by an appropriate statement. Assignments of error related to rulings on special exceptions to different pleadings. There was no statement in the brief giving the nature of any particular exception that was ruled on, nor its application to the pleadings demurred to, but it referred generally to the pleadings. *Held*, that the assignments were not briefed as prescribed by the rules, and would not be considered on appeal.

**9. SAME—RULINGS—DEMURRERS—EXCEPTIONS — PROPOSITIONS.**

Where exceptions to a pleading are raised by special demurrers, the question is whether the matters attacked are properly pleaded, and an assignment that the court erred in its rulings must be followed by a proposition dealing with that question.

**10. JUDGES—DISQUALIFICATION OF JUDGE—EFFECT ON VALIDITY OF JUDGMENT.**

That the regular district judge appeared to some extent as one of the counsel for the successful party is no ground for reversal of the judgment, where on the agreed statement of facts no other result is possible than the verdict which the court directed.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, §§ 235-239.]

**11. APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.**

Under an assignment of error complaining of the error of the court in not granting a change of venue, the proposition that the motion for a change of venue should have been granted is not an appropriate proposition, and the assignment will not be reviewed on appeal.

**12. JUDGES—SPECIAL TERMS—AUTHORITY TO CALL.**

The regular district judge alone has power to create a special term.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 99; vol. 13, Cent. Dig. Courts, § 219.]

**13. PLEADING—SIGNATURE — SIGNATURE OF COUNSEL.**

Rev. St. 1895, art. 271, prohibits judges of courts of record from appearing and plead-



ing as attorneys. A pleading by a party in the district court was signed by two attorneys, one of whom was the judge of the court. *Held*, that the court properly allowed the pleading to stand; it being signed by one who was allowed to sign it.

**14. SPECIFIC PERFORMANCE—LACHES—STALE DEMAND.**

A grantee executed an instrument binding him to reconvey. His independent executrix, joined by her husband, executed a deed of reconveyance, which the parties believed was valid, and a satisfaction of the obligation to reconvey. For many years the validity of the reconveyance was not contested. *Held*, that the failure of the original grantor to bring suit to compel specific performance was excused, and the agreement to reconvey was not a stale demand.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 327-335.]

Appeal from District Court, Cameron County; E. A. Stevens, Judge.

Action by Salome McAllen and others against G. M. Raphael and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. C. Sullivan, J. D. Childs and W. N. Parks, for appellants. Jas. B. Wells and Kleberg, Davidson & Neethe, for appellees.

**JAMES, C. J.** This is the second appeal in this litigation; a former judgment on demurrers having been reversed and the cause remanded. 11 Tex. Civ. App. 116, 32 S. W. 449.

On February 8, 1905, plaintiffs (appellants) filed their fourth amended original petition upon which the recent trial was had. It alleged the death of plaintiff Salome McAllen, and made the proper parties plaintiffs in her stead. It alleged that plaintiffs were, on January 1, 1893, owners in fee simple and in possession of an undivided interest of 12 leagues in the Las Mestenas grant, describing same; that on April 25, 1859, Mifflin Kenedy, the then owner of such interest, conveyed same to John Young, it constituting in fact all of said Kenedy's interest in the grant; that on September 3, 1885, said Mifflin Kenedy made a deed for same interest to his son Thomas Kenedy; that on January 1, 1893, plaintiffs were dispossessed by defendants; that the claim of defendants is based upon an instrument purporting to be an agreement to reconvey from John Young to Mifflin Kenedy, dated April 25, 1859, which instrument is charged by plaintiffs to be a forgery; that on May 30, 1867, Salome McAllen and her husband, John McAllen, were induced by certain false and fraudulent representations concerning the said writing, made by Mifflin Kenedy, through his agent and attorney, William G. Hale, to execute the instrument of reconveyance dated May 30, 1867, and without any consideration; that said Salome McAllen and John Young did not discover said fraud until on or about January 1, 1893, when this suit to set aside said reconveyance was promptly begun. The petition further set

forth that on said date, May 30, 1867, the plaintiff John Young, Jr., was a minor and owned one-half of the property, and did not execute the same; that the reconveyance was an attempted conveyance of a trust estate by Salome McAllen and her husband, John McAllen, and purported to have been made by them as executor and executrix of the will of John Young, without any order of the probate court, and without any consideration, and not in the capacity of independent executor or executrix, nor individually, and it was for these reasons void and of no effect, the said John McAllen never having qualified as her coexecutor, and he had no authority to convey the land, or to join his wife in such conveyance; that as a conveyance of Salome McAllen's half interest in the land it had no effect because not acknowledged by her as required by law of married women for the conveyance of their separate estate, and it was void as a conveyance of her son's interest because there was no order of any probate court in reference thereto; that, if said instrument created a trust in John Young, it was barred by the statute of limitations of four years after his death; that said Salome had been his executrix for more than four years, and the reconveyance was void or voidable because it purports to have been executed by them as executrix and coexecutor of John Young, and, more than four years having elapsed since her qualification as executrix, it was their duty to assert the statute against such trust, and their act could not bind the estate under such circumstances, etc. This reference to plaintiffs' pleading is all that is deemed necessary to give the nature of the case. To parts of the pleading exceptions seem to have been sustained. The defendant Fant disclaimed, and appellees filed their third amended original answer and a fourth supplemental answer, which contained a general denial, a plea of not guilty, and other matters which we deem it unnecessary to set forth here. After the evidence was introduced the court instructed the jury to find for the defendants.

The instrument to which this controversy relates appears as follows:

"Whereas, on this 25th day of April, 1859, Mifflin Kenedy, by deed in fee, in consideration of one thousand five hundred dollars expressed as a consideration, has conveyed to the undersigned John Young all the right, title and claim and interest which he, said Mifflin Kenedy, had in and to twelve leagues of land situated, lying and being in the county of Cameron and state of Texas, being part and parcel of a tract or parcel of land granted by the proper officers of the crown of Spain in America on the 19th day of April, 1798, to Vicente Hinojosa, containing thirty-four leagues of land for large stock, one league for smaller stock, eight caballerias, and two hundred and seventy-two thousand six hundred and twenty-two

square varas, be the same more or less, all which will more fully and at large appear by reference to said deed; and whereas, said conveyance was made to save costs to enable the said John Young to commence and prosecute all such suits in his own name which may be necessary to settle the title to and recover the said twelve leagues of land from those who are in possession or who claim title to the same, and said Young has employed counsel, and with consent of said Kenedy has as a fee agreed to convey to said counsel one-fourth of all the land recovered, or as to which said title is settled: Now, in consideration of the premises, said Young agrees, when said litigation is ended, or when said Kenedy may require, to reconvey to him all the said land so conveyed, except that agreed to be conveyed as a fee as aforesaid; the said Kenedy accounting with and paying to said Young his proper proportion of all the legal fees, costs, and charges of the said litigation. In testimony whereof the said John Young hereto subscribes his name the day and the year first hereinbefore mentioned. John Young.

"Signed and delivered in presence of (the words 'one thousand five hundred' interlined before signed) J. Galvan, Rob Hughes, Israel B. Bigelow.

"The State of Texas, County of Cameron. Be it known that on this the 29th day of April, A. D. 1859, personally appeared before me, Jeremiah Galvan, a notary public in and for the county and state aforesaid, duly commissioned and sworn, John Young, to me well and personally known, who stated to me that he executed the foregoing instrument of writing and acknowledged the same to be his act and deed, for the consideration and purposes therein set forth and expressed. In testimony whereof, I have hereunto set my hand and seal of office this the 29th day of April, A. D. 1859. Jeremiah Galvan, Notary Public. [L. S.]

"The State of Texas, County of Cameron. The above and foregoing instrument of writing was filed for record May 25th, A. D. 1867, and recorded same day in Book A of Supplemental Records of Cameron County, Texas, on pages 472 and 473. To certify which, witness my hand and seal of office this 25th day of May, A. D. 1867. Wm. W. Davis, Dep. Clk. Co. Court, Cameron Co., Texas."

The reconveyance of May 30, 1867, after certain recitals, concludes as follows:

"Now, therefore, know all men by these presents, that we, Salome McAllen, executrix of the last will and testament of John Young, deceased, acting with her said husband, John McAllen, for the consideration of one dollar to us in hand paid, the receipt whereof is hereby confessed and acknowledged, and in further consideration of the foregoing recitals, do sell and convey unto the said Mifflin Kenedy, and to his heirs and assigns, all and singular the rights, interest and estate

in and to the aforesaid twelve leagues of land, with its hereditaments and appurtenances, as conveyed by the said Kenedy to the said John Young in and by the said first herein recited conveyance, so as in all respects to vest in the said Kenedy, his heirs and assigns, the same estate as held by him in the said lands before the said first recited conveyance. To have and to hold all and singular the lands in question, with their hereditaments and appurtenances, unto the said Kenedy, his heirs and assigns, forever. In witness whereof, we do hereto set our hands this 30th day of May, A. D. 1867. Salome Balli de McAllen, Executrix of the Last Will of J. Young, Dec'd. John McAllen, Coexecutor with Salome McAllen of Last Will of John Young, Dec'd.

"The State of Texas, County of Cameron. Before me, the undersigned authority, personally appeared Salome Balli de McAllen, executrix of the last will of John Young, dec'd, and John McAllen, her husband and coexecutor with her of said will, both parties being to me personally and well known, and who signed the within instrument of writing in my presence and severally acknowledged to me that they had made and executed the same for the consideration, objects and purposes therein expressed and set forth; and the said Salome Balli McAllen, having been examined by me privily and apart from her said husband, after having the said instrument fully explained to her, declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. To certify which, witness my hand and seal of office this sixth day of June, A. D. 1867. F. E. Starck, Clk. Co. Court, Cameron Co., Tex. [Seal.]

"The State of Texas, County of Cameron. The above and foregoing instrument of writing was filed for record June 6th, A. D. 1867, and recorded June 9th, A. D. 1867, in Book B, Supplemental Records of Real Estate of Cameron County, Texas, pages 1, 2, and 3. To certify which, witness my hand and seal of office the day above written. [Signed] William W. Davis, Depy. Clk. County Court, Cam. Co., Texas. [Seal.]"

It was proved that John Young had died in 1859, and that his widow, Salome, qualified as the independent executrix of his will.

Several contentions made by appellants as to the effect of the instrument of May 30, 1867, as a conveyance, or reconveyance, of the land, may be disposed of at this point. The subsequent marriage of Salome to John McAllen did not affect her capacity or power to act as independent executrix for reasons hereinafter explained. If John Young had taken the deed from Kenedy with the agreement on his part to reconvey it, such an obligation was one which could have been enforced in the probate court, had the estate of John Young been administered there. The statute, in our opinion, extends to any written agreement for the conveyance of proper-

ty. *Peters v. Phillips*, 19 Tex. 70, 70 Am. Dec. 819. Consequently, Mrs. Young, being independent executrix, had power as executrix to satisfy that obligation by means of a reconveyance. The question whether or not this agreement was sufficient, under the statute of frauds, to admit of specific performance, will be considered later. She executed the reconveyance as executrix, was joined by her husband in the act, and the deed had the effect of passing the title of herself and son to all the land back to Kenedy, unless appellants were entitled to have it set aside for fraud in its procurement.

The statute in force at the time of Young's death, and at the time of the reconveyance with reference to the capacity of a married woman to act as executrix or administratrix, is as follows: Pasch. Dig. art. 1284: "Whenever a married woman may be appointed executrix or administratrix and shall wish to accept and qualify as such, she may, jointly with her husband execute such bond as the law requires, and acknowledge the same before the chief justice, \* \* \* and such bond shall bind her estate in the same manner as if she were a feme sole, and whenever an executrix or administratrix may be a married woman she and her husband shall act jointly in all matters pertaining to said representative capacity." The will of John Young appointed his wife, Salome Young, his sole executrix, and directed that only an inventory should be taken of his estate, and that no other proceedings take place in the probate court in reference to his estate. She qualified by taking the oath. She thereby became the independent executrix of the will under article 1371, Pasch. Dig. The above article 1284, Pasch. Dig., was intended to apply particularly to regular administrations in the probate court, or cases where it was necessary for the executrix or administratrix to give bond. Where the surviving wife qualified as executrix, and married again, it probably became necessary, ordinarily, under such statute, for her husband to join her in the bond, in order for her to continue to exercise her powers, which thereafter had to be performed jointly by both. But here she was relieved by the terms of the will from giving any bond, and if the direction of the will was to be observed, as we think it must, after as well as before her remarriage, there was no bond to be given by her, nor for him to join her in giving. The provision as to their acting jointly was, if essential, fully complied with in the execution of this deed of reconveyance.

Plaintiffs filed an affidavit of forgery with reference to the agreement to reconvey. The testimony introduced showed indisputably the following facts: That the only party whose name is connected with that instrument, who was living at the time suit was brought, was Miffilin Kenedy, and he did not see it executed. That the three persons whose

names appear as subscribing witnesses, including Jeremiah Galvan, who appears also as the notary who took Young's acknowledgment, have all long since passed away; also Young. That John Young, Miffilin Kenedy, and the subscribing witnesses, J. Galvan, Robert Hughes, and Israel B. Bigelow, all resided in Brownsville, Cameron county, and were persons well known. That the three witnesses were men of good character and standing in that community. That the signatures of the witnesses, and of the notary to the certificate of acknowledgment, were their genuine signatures. That the body of the instrument was in the handwriting of the subscribing witness Hughes, as was the deed from Kenedy to Young bearing the same date. On behalf of the plaintiffs there was testimony showing that the signature of Young was not in his handwriting, and was in the handwriting of Bigelow, one of the subscribing witnesses. This was the state of the evidence when the court directed the jury to find for defendants. Appellants contend that the issue of forgery should have been submitted to the jury. The affidavit of forgery required from the defendants proof of the execution of the instrument by Young as at common law, assuming, as plaintiffs contend, that the circumstances did not entitle it to the dignity of an ancient instrument. It was difficult to conceive how an instrument signed by one person, through another, of the age of this one, when all the persons that appear to have been connected with the preparation and execution of the instrument are dead, could be proved, if the proof here was not sufficient. We do not understand appellants to claim that it was not sufficient, but that the fact should have been left to the jury, and not assumed by the court.

A person may execute a deed and make it his act by requesting another to sign his name thereto, or when another has signed his name thereto without his request, if he should adopt it as his own. Hence, when it was shown that the name of Young, subscribed to this instrument, was in the handwriting of another person, it was not of necessity a forged instrument; but, in view of the affidavit of forgery, it was, we think, incumbent upon defendants to go further, and show by facts or circumstances an adoption of the instrument by Young, or a condition of things which would tend to remove the suspicion that the signature was an unauthorized act. If this instrument had no certificate of acknowledgment, but simply the name of Young signed to it as grantor, and the names of the three persons as subscribing witnesses, and the proof was that Young's name was in the handwriting of one of the witnesses, and the signatures of the witnesses were shown to be genuine, together with the further proof that the men whose names appear as witnesses, including

the one in whose handwriting the grantor's name was written, were men of probity, and all said persons were dead, we seriously doubt that a finding that the deed was a forgery would be permitted to stand upon such a state of evidence. But we are more firmly of this opinion when it appears, as in this case, that an officer has placed his certificate upon the instrument, certifying that the person whose name appears therein as the grantor—in this instance John Young—who was well known to him, personally appeared before him and acknowledged that he had executed it. We realize that the affidavit of forgery reached and affected the entire instrument, and that to give the certificate of acknowledgment effect for its recitals, in view of the affidavit, it may have been necessary to show something more than the genuineness of the notary's signature. That something more could not consist of the testimony of the notary, as in the case of *Willis v. Lewis*, 28 Tex. 190, because here the notary was dead. The same could only be substantiated by circumstances, and in our opinion, when it appeared as an undisputed fact that the notary knew John Young, as he must have from all the testimony, and that the notary himself was a man of high character, as was undisputed, the suspicion created by the affidavit that the notary gave a false certificate, or that he was mistaken in the person who appeared before him, was removed, and the verity of the certificate was indicated, and, this testimony being undisputed, the jury would have had nothing before them on which to base a contrary finding. There is nothing in the case of *Belcher v. Fox*, 60 Tex. 527, to the contrary. We deem it proper to state, before leaving this subject, that one of the witnesses, the plaintiff McAllen, who made the affidavit of forgery, testified that, while he believed Jeremiah Galvan's signature to the acknowledgment as genuine, his signature as witness he questioned. Another witness, Forto, while recognizing Galvan's signature to the acknowledgment, stated, as to the latter's signature as a witness, that he could not say very well whether it was his signature or not. None of this testimony was positive one way or the other, and our purpose is merely to call attention to it and to show why we think it was entitled to no weight in the presence of the testimony that was positive on the subject.

Appellants refer to some matters as amounting to circumstances of suspicion and as indicating forgery, but we find none calculated to change the attitude of the case as above stated. One of these matters is that the deed from Kenedy to Young was placed of record at once, while the agreement to reconvey was not recorded for about eight years. What would be more natural, if, as the agreement recites, the deed was made for the purpose of enabling Young in his

own name to conduct suits with reference to the land, than for Kenedy to withhold the agreement from record? Another matter is that while the record proof showed that Young, a few days after the transaction, filed a suit for the property in his own name, and this suit stayed on the docket until 1871, when it was dismissed for want of prosecution after his executrix had been cited as a party plaintiff therein, and Kenedy stated in a deposition that, "before entering into or becoming involved in any litigation relating to the claims of these people to the Ojo de Agua, John McAllen and I were convinced and satisfied by their attorney, Stephen Powers, and our attorneys, that these people had a better claim to said part of said grant, commonly known as the Ojo de Agua, than we had, and we then decided to abandon it." Appellant does not make it plain how this indicates that the agreement was a forgery. This statement of Kenedy may not have been reconcilable with what was shown by the records, but the fact remains that Young did file, in his own name, a suit almost immediately after the transaction involving the property, and this suit continued upon the docket until 1871, and was continuing when the deed of reconveyance was made in 1867. We suppose appellants' idea is that Kenedy's statement, taken to be true, would indicate that, the litigation having been abandoned some years before, he called for a reconveyance, and that it was under these circumstances a suspicious circumstance, indicative of forgery, that he neither placed this instrument on record at that time nor called for a reconveyance at that time. The records in the case filed by Young show conclusively that Kenedy must have been mistaken in what he said about the suit being abandoned prior to the reconveyance. Still, there was nothing in his deposition showing when he had this interview with John McAllen, except that it was some time subsequent to the marriage of John McAllen and Salome Young, which occurred in 1861. How long after, or how near it may have been to the time of the deed of reconveyance, does not appear. How, then, could it be inferred from Kenedy's statement that an understanding was had to abandon the matter so long before the reconveyance as to afford a reasonable basis for suspicion concerning the existence of the agreement to reconvey? However, if Kenedy's statement concerning the interview be taken as true as to the agreement to abandon the litigation, the fact that he and McAllen concluded to abandon it would indicate that it was understood between them that he had an interest in the subject-matter, and indicated the existence of a claim on his part rather than the absence of any. In our opinion there was no circumstance shown that indicated that the agreement to reconvey did not come into existence

until after Young's death, and there was nothing to prevent the common-law proof of its execution having its effect, and nothing which rendered it necessary to submit its execution to the jury.

Under the second assignment of error we have presented to us many propositions. The first is that, if the agreement to reconvey was not a forgery, it is too vague, uncertain, and indefinite in its terms to defeat the fee-simple title evidenced by the deed of same date from Kenedy to Young. The two instruments would be construed as one. The agreement to reconvey evidenced upon its face that Young had taken the title merely for the convenience and uses of Kenedy for the purpose of some litigation, and that he was to reconvey to Kenedy when such purpose was subserved, or at any time Kenedy might desire, all the land except one-fourth of what was recovered or title settled, in the land, and which had with Kennedy's consent been agreed upon as a fee for counsel; the said Kenedy accounting with and paying to Young his proper proportion of all the legal fees, costs, and charges of the litigation. There was nothing uncertain about the terms of this contract. It was shown by the records that two days after the date of the deed and the agreement to reconvey suit was brought by Young for the Mestenas grant, including this land, against Nicolas Chans, and that it was finally dismissed for want of prosecution on August 7, 1871. It was shown that in May, 1860, the death of John Young was suggested, and Salome Young, his executrix, was cited by *scire facias* and appeared as plaintiff in that cause. In 1867, about eight years after Young's death, she, as executrix, made the reconveyance to Kenedy upon Hale's representation that Kenedy had an instrument from John Young agreeing to reconvey the 12 leagues. The question arises whether or not the agreement evidenced the contract sufficiently to authorize a decree of specific performance thereof. In *Jones v. Carver*, 59 Tex. 295, the rule is thus stated: "It has often been held, and correctly held, that specific performance of a contract to convey land will not be enforced, unless the parties have described the land to be conveyed in the contract, or unless the contract furnishes the means by which the land can be identified with reasonable certainty. The rule is that a written agreement for the sale of land must contain the essential terms of a contract, expressed with such certainty that it may be understood without recourse to parol evidence to show the intention of the parties." By this latter expression it was not meant that parol evidence could not be resorted to for any purpose. It is only the essentials of the contract that must appear in the writing. The particulars explanatory of same may be shown by parol testimony. *Pom. Spec. Per.* § 161. Upon this view the contract was suf-

ficient to be the subject of specific performance. It showed upon its face the considerations upon which it was founded. It described the land, both in itself and by reference to the deed to which it relates. It sets forth the time and terms upon which a reconveyance is to be made. If Kenedy had brought a suit for specific performance thereof, there would have been no reason to deny relief upon such grounds as are suggested by appellant, to wit, indefiniteness of the amount of costs and charges, or what suit or suits were to be brought, or who the parties were who were to be proceeded against, or what part of the land had been contracted to attorneys, etc. All such matters, in so far as they may have been of any consequence, were capable of being supplied or made definite in their details and particulars by parol evidence. The only question material in this connection is the existence of an agreement to convey which could be specifically enforced. This being such a contract, it might have been enforced by suit against the independent executrix, her then husband being a necessary party probably, and, if it could have been enforced by suit, she had power to perform the agreement without suit. We consider the fact that Young may have made a contract with attorneys for one-fourth of the land as a contingent fee no reason why plaintiffs should now question the reconveyance. It appears that no such claim has to this day been asserted, and, if such claim was in fact outstanding at the time of the reconveyance it was still enforceable against the land in the hands of Kenedy. Neither is the fact that Mrs. McAllen did not exact payment or indemnity for the costs and charges of the litigation or of the \$1,500 consideration (if really paid) before making the reconveyance any reason that went to her power to make the reconveyance. Kenedy remained liable to her for all such matters so far as they existed, and she could, if she desired, make the reconveyance and look to him for such sum or sums.

Under the same assignment (the second) the second, third, fourth, sixth, and fifteenth propositions present matters which are immaterial, in view of what has been said. The fifth, seventh, ninth, and tenth propositions have already been discussed and disposed of. The eleventh proposition, to wit, "That Kenedy was estopped, by his deed reciting a consideration of \$1,500 paid, from claiming a resulting trust or to deny that the deed was executed for the consideration expressed in it," is answered by the fact that the instruments were contemporaneous and formed one transaction, and, reading them together, their effect, notwithstanding the expression of a consideration in the deed, was an agreement to reconvey upon the terms expressed. Nor was the agreement to reconvey a mere gratuitous undertaking on the part of Young. Kenedy had conveyed him the land, he (Young)

himself had an undivided interest in the grant as the testimony shows, and for the purpose of both in litigating their claims with others their interests were combined in Young for their mutual convenience. To hold that there was no consideration to support the agreement to reconvey would be preposterous.

The third assignment cannot be considered under the rules, because, as briefed, the proposition subjoined to it deals with more than one subject. The proceeding referred to in the fourth assignment was not prejudicial to appellants.

Assignments from 5 to 20, inclusive, are grouped in the brief. Upon their face they relate to rulings on special exceptions to different pleadings. Under rules 29, 30, and 31 (67 S. W. xvi), the particular point or points sought to be made by an assignment should be stated in the form of propositions followed by an appropriate statement. There is no statement in the brief giving the nature of any particular exception that was ruled on nor its application to the pleading demurred to. It refers us generally to the voluminous pleadings to get for ourselves this information. In other words, the work is placed upon us to find that which it is the function of the brief to furnish us. These assignments are not briefed as prescribed by the rules and therefore are not entitled to be considered. It may be true that the court should not have stricken from plaintiffs' pleadings allegations of coverture of Mrs. McAllen and minority of John Young, Jr., properly pleaded. But the exceptions ruled on appear to have been special demurrers, and in such case the question would be, were such matters properly pleaded? There is nothing in the proposition subjoined to those assignments, nor elsewhere in connection with them, that deals with any such question, or that throws any light upon it.

The twenty-first, twenty-second, twenty-third, and twenty-eighth assignments are clearly not well taken. The twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh refer to immaterial matters. The proposition under assignments 29 to 32 also relate to an immaterial matter.

The thirty-third and thirty-fourth present this matter, viz., that the regular district judge appeared, to some extent, as one of the counsel for defendants at the trial. This can be no ground for reversal of the judgment, if upon the statement of facts, which in this instance was agreed to, no other result was possible than the verdict which the court directed.

The thirty-fifth assignment is not considered, because what purports to be a proposition under it does not disclose any point. It is as follows: "The plaintiffs' motion for a change of venue should have been granted." Under an assignment complaining that the court erred in not granting a change of venue,

the above is clearly not an appropriate proposition.

There is the further contention that, the regular district judge having been of counsel for defendants, there exists a fundamental error in the fact that he made an order setting this case for trial at a special term called by himself. The brief does not refer to where we may find such order in the record. We find, however, a general order of the court for a special term (the term at which this cause came up for trial) as made necessary by the accumulation of business on the docket. The judge, and no one else, had power to create the special term.

Recurring to the thirty-third and thirty-fourth assignments, we should explain that the pleadings of defendants upon which the trial was had were signed by James B. Wells and Stanley Welch as their attorneys. It appears that the latter was the regular district judge, and by article 271, Rev. St. 1895, our courts of record were prohibited from allowing him to appear and plead therein as an attorney. If these pleadings had been signed by him alone, they should have been treated by the trial judge as a nullity, and would, no doubt, be so treated here. The judge overruled special exceptions to said pleadings which raised the question, and we think the ruling allowing them to stand was correct; they being signed by one who was allowed to sign them.

The above opinion leads us to an affirmation of the judgment.

There is another view that may, correctly we think, be taken of this case in disposing of it. The agreement to reconvey being established as the act of John Young, would the result be different if the deed of reconveyance executed in 1867 did not have the effect of reconveying the land to Kenedy for want of power in the executrix to make it? It cannot be denied that the parties at the time believed it to be an effectual reconveyance. Nor is it denied that the instrument was made for the very purpose of satisfying the agreement to reconvey, and with the belief of McAllen and wife and Kenedy that it did satisfy it. What occasion was there, as long as this condition existed, for Kenedy or his assignees to bring a suit for specific performance of the agreement? They certainly would be excused in a court of equity from proceeding by litigation to compel that which had, as they had reason to suppose, been performed without suit, and which all parties believed had been performed, at least so long as that belief was entertained by all of them. Mrs. McAllen was dead, and therefore did not give any testimony. Mr. McAllen gave testimony to the following effect: "The first time I ever saw the paper, it was among my papers, in my possession. It was only a few months before this suit was brought. The document may have been in my possession six or seven years without

my knowing it. It was not recorded until about 1867. I don't know how it became recorded. It may have been a year or so, or maybe more, after the instrument was recorded, that I discovered it in my possession. I first discovered it only a few months before this suit was filed. \* \* \* I don't think I ever made any claim for the 12 leagues which I now sue for, because I had no reason to; nobody ever asked me anything. I never claimed the 12 leagues of the Mestenas grant in suit here, because he nor nobody else ever claimed them from me. We paid taxes on the land belonging to us, but I did not know, until I found this paper about January, 1893, that we owned the 12 leagues. I did not know it was a forgery until I saw it a few months before this suit was filed. I thought it was a genuine deed on record. I would never have questioned Capt. Kenedy's veracity, nor any one else, if I had not run across that document. I never suspected a forgery until I saw the instrument of date April 25, 1859. If that paper had not come to light then, we would never have known but that Capt. Kenedy had a good title. Just as soon as I saw the instrument I knew it was a forgery—that John Young had never signed it—and I promptly took the instrument to Judge Evans with the intention of bringing suit, and I did bring suit a few months afterwards." It seems clear to us that the fact that Kenedy did assert the instrument in 1867, and obtained from the person who, apparently at least, represented Young's estate as independent executrix, joined by her then husband, a deed of reconveyance, which he believed and they believed was a valid reconveyance, and a satisfaction of the obligation to reconvey, and that all parties rested upon this belief until, as McAllen's testimony shows, he concluded differently shortly before this suit was brought, would, in a court of equity, be considered a sufficient excuse for not having brought a suit to compel specific performance. If this be so, it follows that the agreement to reconvey was not a stale demand, and of itself showed the equitable title to the land in Kenedy and his vendees, these defendants, and for this reason the instruction for a verdict for defendants was right.

Affirmed.

MANN et al. v. HOSSACK et al.\*

(Court of Civil Appeals of Texas, June 23, 1906. Rehearing Denied Oct. 13, 1906.)

**1. TRESPASS TO TRY TITLE—TITLE TO SUPPORT ACTION.**

Plaintiff, in trespass to try title, must recover on the strength of his own title, and proof of a superior outstanding title in a third person is a good defense, although the defendant may not claim under such title.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespas to Try Title, § 21.]

\*Writ of error denied by Supreme Court Nov. 14, 1906.

**2. ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY.**

In trespass to try title, evidence held insufficient to show such possession or results in acquisition of title under the 5 or 10 years statutes of limitation.

**3. TRESPASS TO TRY TITLE—EVIDENCE—SUFFICIENCY.**

While, as a general rule, in trespass to try title, prior possession affords such prima facie evidence of title as warrants a recovery against a mere trespasser, it is a rule of evidence merely, and the prima facie inference that such possessor is the owner of the property is rebutted by proof of a superior outstanding title in another.

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by J. Mann and others, as executors of the will of R. S. Willis, deceased, against J. H. Hossack and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

Geo. D. Green, for appellants. Ramsey & Odell and Jas. W. Brown, for appellees.

TALBOT, J. This suit was brought by appellants as the executors of the will of R. S. Willis, deceased, against appellees to recover the land described in their petition, which is a part of the C. C. Chaney survey, situated in Johnson county, Tex. The petition is in the usual form of trespass to try title, and defendants answered by general demurrer, general denial, and plea of not guilty. A jury was called and, after hearing the evidence, the court instructed them to return a verdict in favor of the defendants, which was done, and judgment entered in accordance therewith. From this judgment appellants have appealed.

Did the court err in directing a verdict for the appellees? Appellants contend that it did and insist, in substance, that the evidence was sufficient to show (1) that they had and held, from and under the sovereignty of the soil, the legal title to the land in controversy; (2) that they had acquired title to said land by the statutes of limitation of five and ten years; (3) that appellees had no paper title, were trespassers upon the land, and appellants entitled to recover by reason of prior possession. The evidence, upon which a decision of the case depends, is substantially as follows: Appellants introduced the following instruments: (1) A patent to the land in controversy issued by the state of Texas to C. C. Chaney, dated October 25, 1854. (2) A special warranty deed from Chambers & Brown, conveying said land to J. G. Warren, dated October 21, 1872. (3) A warranty deed from J. G. Warren and wife conveying said land to P. J. Willis & Bro., P. B. Brotherston, and A. W. and E. W. Clegg, dated April 25, 1874, the consideration expressed being \$1,474.19 paid. (4) A deed from P. J. Willis & Bro., P. B. Brotherston, and A. W. and E. W. Clegg, dated May 26, 1874, conveying said land in "special trust and confidence" to

Richard Willis to be by him sold and conveyed "whenever and to whomsoever in his judgment proper at public or private sale whichever he may deem best" with instructions to distribute the proceeds of such sale pro rata among the said grantors according to their respective interests in said land, as follows: P. J. Willis & Bro., \$717.91, P. B. Brotherstou, \$495.85, and A. W. and E. W. Clegg, \$265.43. All of the foregoing instruments were duly recorded in Johnson county, Tex. (5) The last will of the said Richard S. Willis, which had been duly probated, showing that appellants were therein appointed its executors and that, with the exception of certain special bequests, which do not include the property involved in this suit, all the rest of the testator's property, real, personal, and mixed, was bequeathed to his several children.

It was shown that R. S. Willis died July 26, 1892, and with regard to the possession and occupancy of the land Phil T. Allen, a witness for plaintiffs, testified that he knew J. G. Warren, that he knew him in 1868 or 1870. "He lived on this property at the time I knew him. I think, perhaps, he lived there in 1877 or 1880. I also knew a man named Beard. He was the first person I knew who lived on the property. Don't remember when Warren lived there, but it was right shortly after Beard left the place, about six months. There was a small house on the place and my recollection is, there was a picket fence around the place. Don't know how long the house remained on the place. Expect about ten years. I think it gradually rotted down, or was torn down by first one and then another and, I think, finally the roof fell in. The wind blew it down. I could not say how long the fence remained, probably four or five years. After Warren moved out, Dr. Lorange had charge of the place for, I think, the firm of Clegg & Co. Don't know how long he had it in charge, but it was some time, he may have had charge of it up to the time of his death. I think he died in 1884. I don't know. Don't know whether Lorange rented the property to any one or not. Different parties lived in it at different times after Warren vacated it. After Lorange's death, Henry & Louis took charge of the property for Clegg & Co. It is possible Tilman Smith had charge of the property. I was justice of the peace about 1890. There was then some sort of a forcible entry and detainer case brought in reference to this property. Tilman Smith represented the parties in possession or claiming the property. Henry & Louis were the agents of the property at that time." Witness further testified: "I can't tell what time, but it occurs to me, that this lot was vacant about four or five years, that is, it was not occupied by any one for that time, but don't remember when that was, during that time it was not fenced. It was under fence when I first

knew the property, about two months after Oldfather purchased it. It was fenced again about two or three years ago. There was no fence on it when Oldfather bought it. My fence on the west, and Craig's fence fenced it partly on the south. It was fenced entirely on the west by my fence and on the south, all but a small distance. On the east there was the fence of Mr. Lester. The lot has never been entirely fenced since Warren left there, except by using their neighbors' fences." The statement of facts shows that counsel for defendants admitted that Dr. Lorange died in 1878. J. A. Harman, witness for plaintiffs, testified: "Know J. G. Warren, knew him in 1873. At the time I knew him he lived on the property in question. I don't know how long Warren lived there on that place. While Mr. Warren lived there he was using the place as his homestead." Mrs. M. J. Sanders testified: "I lived on the lot in controversy at one time. Rented the property from Col. Henry, in 1882 or 1883." Col. Henry testified: "I was at one time a member of the firm of Henry & Louis, real estate agents, at Cleburne, Tex. I don't remember exactly when we formed our partnership or when we dissolved, but think it was right about 1881 or 1882. We were partners two or three years." That he was agent for Clegg & Co. Remembers to have rented the property to Mrs. Sanders. "I rented it to so many other parties that I don't remember the names of all of them. I remember very distinctly that I rented the property to Mrs. Sanders and I must have rented it to others. We rented the property while we were agents, and sent the rent to Clegg & Co."

Defendants offered no title in themselves, but were in possession of the land and introduced, beginning with the patent issued by the state of Texas to C. C. Chaney, dated October 25, 1854, a regular chain of transfers, duly acknowledged and recorded in Johnson county, Tex., of the land in controversy, to J. P. Beard. Under this evidence, we think, neither of appellants' propositions can be maintained, and that the trial court did not err in instructing a verdict for appellees. The conclusion is reached by an application of the familiar rule, that the plaintiff, in an action of trespass to try title, must recover upon the strength of his own title and that proof of a superior outstanding title in a third person is a good defense in such action, although the defendant may not claim under such title. Appellants do not show an unbroken chain of title in themselves from the state; nor is the evidence sufficient to show claim of title from a common source. The land sued for was patented to C. C. Chaney and appellants claim through mesne conveyances emanating from Chambers & Brown, but there is no evidence tending to show how Chambers & Brown ever acquired the land, or that either of them was ever in possession of it. Nor do appellants, by any convey-



ance through which they claim, connect themselves with the patentee. On the other hand, as has been seen, appellees established by a consecutive chain of transfers from the state a paramount outstanding legal title to said land in J. P. Beard, and prior possession of the same by him. The evidence was insufficient to authorize a finding by the jury that appellants had acquired title to the land by limitation. There was no evidence as to when J. G. Warren abandoned the land, or when Clegg & Co., through whom appellants claim, took possession, except in so far as it appears that Mrs. Sanders occupied the property in 1882 or 1883, and there is no proof of the payment of taxes or of such continuous adverse holding for the length of time required under a deed duly registered as would confer title under the five years' statute of limitations. Nor is there any evidence of such continuous peaceable and adverse possession of the property on the part of appellants or of any one through whom they claim for such length of time as would mature their claim of title under the ten years' statute of limitation. The witness Allen, practically without contradiction, testified that the place was unoccupied for four or five years after Warren left it, that the house had rotted down, and the premises had become uninhabitable, and there is no evidence that the same were made habitable thereafter, except during the time occupied by Mrs. Sanders, until purchased by Oldfather in 1900.

Touching the claim that appellees were trespassers upon the land, and that appellants were entitled to recover the same by reason of prior possession, it may be said, that while it is a general rule that prior possession of land affords such prima facie evidence of title as warrants a recovery in a suit of this character against a mere trespasser, still this is a rule of evidence merely and the prima facie inference that such possessor is the owner of the property is rebutted and overthrown by proof of a superior outstanding title in another. *Bates v. Bacon*, 66 Tex. 348, 1 S. W. 256; *Branch v. Baker*, 70 Tex. 190, 7 S. W. 808; *Collyns v. Cain*, 9 Tex. Civ. App. 193, 28 S. W. 544; *Austin v. Land & Cattle Co.*, 34 Tex. Civ. App. 39, 77 S. W. 830. Besides, we think the evidence conclusively establishes that J. P. Beard in whom the outstanding title to the land here sued for is shown to be, was first in possession thereof, and it does not appear when or how he was dispossessed of the same.

In the view we take of the case it becomes unnecessary to discuss and determine the legal effect of the tax suit by the state against P. J. Willis & Bro., Clegg & Co., and P. B. Brotherston to recover the taxes due on the land in controversy, resulting in a foreclosure of the lien thereon, and the purchase at foreclosure sale thereof by H. B. Oldfather. We hold that appellees estab-

lished in J. P. Beard an outstanding title superior to any title shown by appellants, and that the trial court committed no error in directing the jury to return a verdict in their favor.

The judgment of the court below is affirmed.

## ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS et al. v. WESTER.

(Court of Civil Appeals of Texas. June 30, 1906. Rehearing Denied Oct. 13, 1906.)

### 1. TRIAL—INSTRUCTIONS—REQUESTED CHARGE.

It is not error for the court to refuse a requested charge where the issue embraced in such request was sufficiently presented by instructions given.

### 2. APPEAL—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE.

Where, in an action against a carrier for injuries to fruit, the evidence was sufficient to raise an issue of fact whether the fruit was damaged on defendant's road through the negligence of its servants, a verdict in favor of plaintiff for an amount justified by the evidence, will not be disturbed on appeal.

### 3. COMMERCE—INTERSTATE COMMERCE—REGULATION BY STATE—VENUE.

Act March 13, 1905 (Gen. Laws 1905, p. 29, c. 25) § 1, prescribes the parties to, and venue of, suits against railroad corporations operating within the state, or having an agent or representative therein, and provides that whenever freight has been transported by two or more such corporations, or partly by one or more of them, suit for damages or loss, or any cause of action arising out of such carriage, may be brought against any one or all of the carriers in any court of competent jurisdiction in in any county in which either operates or does business, or has an agent or representative. *Held*, that such act was a proper exercise of the state's police power, and was not invalid as to an interstate carrier, as imposing burdens on interstate commerce greater than those imposed on commerce within the state, and as amounting to an infringement on the power of Congress to regulate interstate commerce.

### 4. CARRIERS—LIABILITIES OF CONNECTING CARRIERS—PERISHABLE FREIGHT—ACTIONS—PLEADING AND PROOF.

Plaintiff's peaches were shipped in a car which became disabled on the line of the initial carrier, whereupon the peaches were transferred to another car which was delivered to the connecting carrier for transportation to destination, and, by reason of the transfer, the peaches were not promptly delivered to the shipper's agent, and were injured. In an action for such injuries, the initial carrier sought to recover over against the connecting carrier for damages recovered against it, and alleged that the connecting carrier had notice of the transfer of the peaches by an entry on the way bill accompanying the shipment. *Held*, that such allegation was sufficient to justify proof that it was a general practice of such carrier, when contents of a carload shipment were transferred in transit, to enter on the way bill a memorandum showing the transfer, with the numbers and initials of the cars from which and to which the transfer was made.

### 5. SAME—TRIAL—INSTRUCTIONS—REQUESTS.

In an action for injuries to a consignment of peaches, a charge that it was the duty of the initial carrier to give the connecting carrier sufficient notice that the car delivered to the latter was in lieu of the car in which the peaches were originally loaded, and of the consignment of the car, fully covered a requested charge that

It was the duty of the connecting carrier to deliver the peaches to the consignee, and unless it received notice from the initial carrier directing the delivery of the car delivered to it to the consignee's agent, which was so clear in its terms that the connecting carrier's agent using ordinary prudence, should not have been misled thereby, such connecting carrier was not liable.

Appeal from Hopkins County Court; T. J. Russell, Judge.

Action by Theo. Wester against the St. Louis Southwestern Railway Company of Texas and another. From a judgment for plaintiff, defendants appeal. Affirmed.

E. B. Perkins, Templeton, Crosby & Dinsmore, and W. T. Henry, for appellants. D. Thornton and L. L. Wood, for appellee.

TALBOT, J. This is a suit by appellee, Wester, against appellants, St. Louis Southwestern Railway Company of Texas and St. Louis, Iron Mountain & Southern Railway Company, for damages sustained by him through the negligence of appellants in the shipment of a car load of peaches from Sulphur Springs, Tex., to St. Louis, Mo. The St. Louis Southwestern Railway Company of Texas pleaded that appellee's agent, the F. W. Brockman Commission Company, failed to present his bill of lading to the St. Louis, Iron Mountain & Southern Railway Company at St. Louis, and was therein guilty of negligence which contributed to cause his damage; also that the shipment was an interstate shipment and that, by the conditions of the contract of shipment, this appellant's liability was limited to damages caused while the fruit was on its road. This appellant also pleaded that it delivered the car of peaches to appellant the St. Louis, Iron Mountain & Southern Railway Company at Texarkana in good condition, which was, by said last-named company, transported to St. Louis, arriving there on July 10, 1904, in good condition, but that this company knowing that said car of peaches had arrived, failed to notify appellee's agent, F. W. Brockman Commission Company, of the fact, and failed and refused to deliver said peaches to said agent until July 14, 1904; that by reason of said negligence in failing and refusing to deliver said peaches at St. Louis all appellee's damages, if any, were caused, and prayed that, in the event appellee recovered judgment against it, it have judgment over against the St. Louis, Iron Mountain & Southern Railway Company for the same amount. The St. Louis, Iron Mountain & Southern Railway Company answered first by a plea of privilege, asserting the right to be sued in Dallas county. It further specially answered that its liability was limited to its own line and to its negligence, and that the delay in delivery, if that was the cause of the injury to appellee's shipment, arose out of the failure of the first carrier to deliver to it proper notice to deliver the car to the F. W. Brockman Commission Company, and to deliver to it, any proper notice of the trans-

fer of the peaches from one car to the other while in transit. That it was never advised until the 13th day of July that it was intended to deliver A. R. T. car No. 10,029 to the F. W. Brockman Commission Company. Upon these allegations this appellant prayed that, if judgment in any amount should be rendered against it, it have like judgment over against appellant, the St. Louis Southwestern Railway Company of Texas. Both defendants denied under oath the existence of a partnership between them. By its plea of privilege to be sued in Dallas county the St. Louis, Iron Mountain & Southern Railway Company alleged that it was a foreign corporation duly incorporated and not incorporated by the state of Texas; that it owns and operates a line of railway without the state of Texas, but does not own and does not operate any of its road in the state of Texas; that it has an agent and representative in Dallas county, Tex., in the person of C. A. Waterman and there maintains an office for the transaction of its business. It further alleged that it had no office, agent, or representative in Hopkins county, Tex., and that its principal office in the state of Texas is in Dallas county, Tex.; that appellee's cause of action, if any he has, as against this appellant, did not arise or accrue either in whole or in part in the said county of Hopkins; that this appellant is not a partner of the St. Louis Southwestern Railway Company of Texas, and that the residence or domicile of that company is not in the said Hopkins county, but is in Smith county, Tex.; that all of the facts stated in any of the pleadings of this cause which would have the effect of laying venue, as against this appellant, in Hopkins county, Tex., are untrue and fraudulently made for the purpose of giving jurisdiction to the court in that county. This plea "negatived every ground which could give jurisdiction" to the county court of Hopkins county, and further alleged that in so far as it is sought to justify venue in this cause as against this defendant in Hopkins county, Tex., under and by virtue of the terms and provisions of an act of the Legislature of the state of Texas, approved March 13, 1905 (Gen. Laws 1905, p. 29, c. 25) entitled "an act to amend section 1 of an act approved May 20, 1899," etc., it is ineffectual in that the said act is in violation of various provisions of the Constitution of the state of Texas, and is especially in violation of and repugnant to subdivision 3 of section 8 of article 1 of the Constitution of the United States of America, which confers upon the Congress of the United States the power to regulate commerce among the several states, and is repugnant to other provisions of the Constitution of the United States, and a federal question is here presented for decision; that the said act of the Legislature, if valid and enforceable, would have the effect of imposing a direct and improper impediment and burden upon the pursuit of interstate com-

merce as conducted by this defendant and all common carriers engaged in that commerce coming within the operation of the said act of the Legislature. Appellee presented and urged a general demurrer to the plea of privilege which was by the court sustained, and the case proceeded to trial before a jury. The trial resulted in a verdict and judgment for appellee against the St. Louis Southwestern Railway Company of Texas for \$154.23, and for appellee against the St. Louis, Iron Mountain & Southern Railway Company for the sum of \$300. Both appellants filed motions for a new trial which were overruled, and they have appealed.

The material facts are as follows: On July 7, 1904, the appellee, Theo. Wester, a resident of Sulphur Springs, Hopkins county, Tex., delivered to W. M. Prince, local agent of the St. Louis Southwestern Railway Company of Texas, 1,056 crates of Elberta peaches, to be shipped to St. Louis, Mo. The peaches were received by W. M. Prince at Sulphur Springs, and by him placed in A. R. T. car No. 9,273, and consigned to Theo. Wester, appellee, at St. Louis, Mo., and a bill of lading dated July 7, 1904, was on that day delivered to Theo. Wester. This bill of lading described the shipment simply as 1,056 crates of Elberta peaches contained in A. R. T. car No. 9,273, and showing that they were shipped by Theo. Wester, of Sulphur Springs, to St. Louis, Mo., to Theo. Wester as consignee. This car of peaches left Sulphur Springs at 9 o'clock p. m., July 7, 1904, and should have arrived in Texarkana at 3 or 4 o'clock a. m. July 8, and in St. Louis, Mo., on the afternoon of July 9th. The car No. 9,273 was derailed on the night of the 7th of July at Fouke Station on the railroad of the St. Louis Southwestern Railway Company of Texas, between Sulphur Springs and Texarkana, and the fruit was, on the evening of the 8th, transferred by the agents of that company from car No. 9,273, which was unable to go further, into A. R. T. car No. 10,029. Car No. 10,029, containing the fruit, was then forwarded to Texarkana, and was there delivered to the St. Louis, Iron Mountain & Southern Railway Company at 2:36 a. m. on July 9th. The car 10,029 left Texarkana over the St. Louis, Iron Mountain & Southern Railroad at 6:55 a. m. July 9, 1904, and arrived in St. Louis, July 10, 1904, at 12:05 p. m. and was immediately by appellant the St. Louis, Iron Mountain & Southern Railway Company, turned over to the American Refrigerator Transit Company for delivery to the consignee. The American Refrigerator Transit Company was acting as the agent of the St. Louis, Iron Mountain & Southern Railway Company. At the time the car 10,029 arrived in St. Louis, the F. W. Brockman Commission Company of St. Louis held the original bill of lading for car No. 9,273, which had been sent to it by the appellee, and previous to the arrival of the car No. 10,029, in St. Louis, W. M. Prince the

local agent of the St. Louis Southwestern Railway Company of Texas at Sulphur Springs, had wired the proper agent of the St. Louis, Iron Mountain & Southern Railway Company at St. Louis, at the instance of appellee, to deliver car No. 9,273 to the F. W. Brockman Commission Company, which telegram the agent of the said Iron Mountain Company received prior to the arrival of car No. 10,029. W. M. Prince, agent of the St. Louis Southwestern Railway Company of Texas at Sulphur Springs never learned of the transfer of the fruit from car No. 9,273 to car No. 10,029 until the 14th day of July. The appellee was not informed of the derailment and transfer of the fruit from car No. 9,273 to car No. 10,029 until the 18th or 14th of July. The F. W. Brockman Commission Company had no information that the fruit had been transferred from car No. 9,273 to car No. 10,029 until July 13th. Car No. 10,029 containing plaintiff's fruit, was delivered to F. W. Brockman Commission Company on July 14, 1904. The fruit, when delivered, was almost ruined. It netted appellee only \$29.72. F. W. Brockman called at the office of the American Refrigerator Transit Company on the 10th, 11th, and 12th of July to see if car No. 9,273 had arrived, and was informed each day that it had not. On July 10, 1904, with one of the railroad yardmen at St. Louis he went over the yards of the American Refrigerator Transit Company to see whether or not car No. 9,273 had arrived, but did not find it. Brockman understood that car No. 10,029 was on the track from Theo. Wester, appellee, and suggested to the American Refrigerator Transit Company that as Mr. Wester had stated he would ship three cars to various places, possibly the wrong car had come to St. Louis and that car No. 10,029 was intended for his company. But as he did not have a bill of lading for that car the A. R. T. Company refused to deliver it to him. Brockman was informed at the A. R. T. office on the 18th of July, 1904, for the first time that car No. 9,273 had been derailed and the fruit was transferred to car No. 10,029. When car No. 10,029, into which appellee's peaches had been transferred, from A. R. T. car No. 9,273, was delivered to the St. Louis, Iron Mountain & Southern Railway Company, at Texarkana, it was accompanied by a waybill issued by the St. Louis Southwestern Railway Company, which was also delivered to said St. Louis, Iron Mountain & Southern Railway Company's agent at Texarkana, and by him forwarded to its agents at St. Louis, Mo., and received by them in St. Louis July 10, 1904, at about 12:05 o'clock p. m. This waybill showed consignment by Theo. Wester, the appellee, Sulphur Springs, Tex., to Theo. Wester, St. Louis, Mo., of 1,056 crates of peaches in A. R. T. car 9,273 and shows that the waybill is series I. M. X. R. No. 3, and shows the car routed over St. L. S. W. Railway Company of Texas, to Texarkana and over St. L., I. M. & S. Ry. Co. This waybill

showed that the peaches were originally shipped in car No. 9,273, and were transferred to car No. 10,029 in which they were received by the St. Louis, Iron Mountain & Southern Railway Company, under said waybill, and during the month of July, 1904, it was the general practice and custom of appellants when the contents of a car load shipment were transferred from one car to another to write on the waybill accompanying and covering such shipment, a memorandum showing the transfer and showing the number and initials of the car from which and the car to which the transfer was made. The bill of lading issued to appellee at Sulphur Springs, Tex., and which was sent to F. W. Brockman Commission Company at St. Louis, showed that the peaches were originally shipped in A. R. T. car No. 9,273, and did not show that they had been transferred in transit to car No. 10,029. The following telegrams in regard to the shipment of peaches passed between the agent of St. Louis Southwestern Railway Company of Texas and the agent of the St. Louis, Iron Mountain & Southern Railway Company at St. Louis: "Sulphur Springs, 7/8. Agent, I. M. M. Ry. St. Louis. To you my W. B. I. M. X. R. 3 July, 7, # A. R. T. 9273 peaches consigned to Theo. Wester. Deliver this car to S. W. Brockman Com. Co. St. Louis, B. L. will be mailed you. [Signed] W. M. Prince, Agent." "St. Louis, July 18, 04. Agent, Sul. Springs. Your W. B. I. M. X. R. 3 July 7th, Car 10029 A. R. T. peaches Theo. Wester is unclaimed, consignee unknown. Notify shipper so they can protect themselves. Ana. No. 3 a. [Signed] J. H. G." "Sulphur Springs, 7/14. J. H. G. Agent, I. M. St. Louis. Your wire 13th, my W. B. I. M. X. R. 3 July 7 covers A. R. T. 9273 We did not load A. R. T. 10029. I understand the car was transferred acct. trouble, bill should have shown. Consignor complain car lay in yard 24 hours after arrival. Has since been delivered to Brockman Commission Co. who held B. L. for 9273. Is this so, see my wire 8th. [Signed] W. M. Prince."

The St. Louis Southwestern Railway Company of Texas has presented but two assignments of error. The first complains of the refusal of the court to give in charge to the jury its requested instruction to the effect that if appellee, or his agent, F. W. Brockman Commission Company, failed to present at St. Louis, Mo., to the St. Louis, Iron Mountain & Southern Railway Company or the American Refrigerator Transit Company any bill of lading or other sufficient authority entitling them to receive the peaches, and if such failure was negligence, and that, if such bill of lading or other authority had been so presented, said peaches would have been located in car No. 10,029, and would have been delivered to F. W. Brockman Commission Company within such time that said peaches could have been sold by said company for such sum as would have been the full market value of said

peaches in good condition in said market, then plaintiff would not be entitled to recover. The second complains that the court erred in refusing to grant this appellant a new trial because the verdict of the jury is against the law and the great weight of the evidence in this, that the evidence showed conclusively that appellee's peaches suffered no injury or damage while on the line of its road, and that no decrease in the market value of the peaches resulted from any negligent act or omission of said appellant.

We are of the opinion that neither of these assignments is well taken. It is doubtful, to say the least of it, whether the requested instruction, in view of the facts, should have been given at all, but, however, that may be, the issue embraced in it was sufficiently presented by the court's main charge, and the special charge given at the instance of appellee. As to the proposition that the court erred in refusing to grant this appellant's motion for a new trial, it is sufficient to say that the evidence did not conclusively establish the facts as claimed by appellant, but it was, in our opinion, sufficient to raise an issue of fact, whether or not appellee's peaches were damaged while on its road through the negligence of its servants, and, the jury having decided the question against appellant, and having fixed its liability at an amount justified by the evidence, we are not authorized to disturb their verdict.

It is assigned by the St. Louis, Iron Mountain & Southern Railway Company, first, That the court erred in sustaining the demurrer of appellee to its plea of privilege, asserting the right to be sued in Dallas county, Tex., and not in Hopkins county, Tex. The following propositions are presented and insisted upon under this assignment: First. "A statute which imposes a burden upon interstate commerce as distinguished from commerce within the state is in violation of the provisions of the federal Constitution, which confers upon Congress the exclusive power to regulate commerce between the states." Second. "Prior to the act of 1905, which undertakes to regulate the venue of suits against connecting lines of railway, it was inadmissible to sue a railway corporation, not operating any part of its railroad in the state, in a county where another railway company joined in the suit had an agent merely on account of such joinder when venue would not obtain irrespective of the jurisdiction as to the other company, and, the statute of 1905 being unconstitutional, it is not permissible to sue a foreign railway corporation, not operating any part of its railway in the state, in a county where it has no agent, or the cause of action did not arise, or where the other defendant did not reside, and no exception under the venue statute existed to give jurisdiction in the county in which suit was brought." It is unquestionably true that,

prior to the passage of the act of the Twenty-Ninth Legislature, prescribing the venue of suits against railroad corporations, etc., approved March 13, 1905, it was settled that appellant's plea of privilege should be sustained. And it is contended, as indicated by appellant's propositions which have been quoted above, that the same result should have been reached in this case because said act "operates more burdensome upon interstate commerce than upon commerce carried on within the states, and thereby discriminates against interstate commerce, is void, and leaves the law in the condition it was prior to the passage of said act; that a plain distinction is made in the operation of the act as between foreign and domestic carriers in that foreign corporations may be subjected much more readily to the burdensome provisions of the act than domestic corporations, because, before a domestic corporation can be sued away from the county where it operates or has an agent, it is necessary that an actual agent of the company be served, but that the act under consideration constitutes new agents for the foreign corporation which really are not its agents, except through the arbitrary edict of the statute itself."

We do not concur in the contention and views expressed by counsel for appellant. The provisions or requirements of the statute in question are in no sense a regulation of commerce. The first section of the act simply prescribes the parties to, and venue of, suits against railroad corporations operating or doing business in this state or having an agent or representative in this state. It provides that, whenever freight has been transported by two or more such corporations or partly by one, or more of them, operating or doing business as common carriers in this state, or having an agent or representative in this state, suit for damages or loss, or for any other cause of action arising out of such carriage, may be brought against any one or all of such common carriers in any court of competent jurisdiction in any county in which either operates or does business, or has an agent or representative. Sections 2 and 3 provide additional means of obtaining service on foreign or nonresident corporations having agents in this state, by designating for that purpose conductors who are engaged in handling trains and agents engaged in the sale of tickets, or making contracts for the transportation of property as agents of such foreign corporations, upon whom such service may be had. This statute, in our opinion, does not impose any such burden upon interstate commerce, as distinguished from commerce within the state, as amounts to an infringement upon the power of Congress to regulate interstate commerce. It is, we think, a legitimate exercise of the police power of the state in matters which concern the regulation and control of its internal affairs only, and "does not, in the sense of the Constitution, intrench upon any authority

which has been confided to the national government."

This appellant's second and third assignments of error complain of the court's action in permitting the witnesses Adams and Gregory to testify that it was a general practice of the appellants, when the contents of a car load shipment were transferred in transit from one car to another car to write or otherwise enter upon the waybill accompanying such shipment a memorandum showing the transfer and showing the numbers and initials of the cars from which and to which the transfer was made. This testimony was objected to on the ground that there was no pleading on the part of either party to the suit justifying its admission. We think the objection is not well taken. The design of this testimony was to show that the St. Louis, Iron Mountain & Southern Railway Company had notice of the transfer of appellee's peaches from car No. 9,273 into car No. 10,029, and could, in this case, have no other material bearing or effect. It was alleged in the plea of the St. Louis Southwestern Railway Company of Texas, over against this appellant, that it had such notice by an entry on the waybill accompanying the shipment showing that fact, which waybill was in possession of this appellant. This allegation was sufficient to authorize the admission of the evidence for the purpose stated. Besides, it appears that testimony practically to the same effect was admitted without objection.

Error is also assigned to the refusal of the court to give the following charge requested by appellant: "The jury is instructed that, under the original contract of shipment, it was the duty of the St. Louis, Iron Mountain & Southern Railway Company to deliver the shipment of peaches to Theo. Wester, and to no one else, and, unless you find and believe from the evidence that the St. Louis, Iron Mountain & Southern Railway Company received from the St. Louis Southwestern Railway Company of Texas a notice directing the delivery of A. R. T. car No. 10,029 to the F. W. Brockman Commission Company, which was so clear in its terms that the agent of the St. Louis, Iron Mountain & Southern Railway Company, using ordinary prudence, should not have been misled thereby, you cannot find against the St. Louis, Iron Mountain & Southern Railway Company in any amount." There was no error in refusing this charge. The jury was instructed by the court, that "under the facts and law of this case it was the duty of the St. Louis S. W. Ry. Co. to give the St. L., I. M. & S. Ry. Co. sufficient notice that car No. 10,029 was in lieu of car No. 9,273, and to give said St. L., I. M. & S. Ry. Co. sufficient notice of the consignment of the car of peaches." This was sufficient.

There are other assignments of this appellant complaining of charges given and refused, but we deem a discussion of them un-

necessary. They have been examined and carefully considered with the conclusion reached that none of them disclosed reversible error. We think the issues raised by the evidence were fairly submitted to the jury; that the evidence is sufficient to sustain their verdict, and the judgment of the lower court is therefore, in all things, affirmed.

Affirmed.

**TEXAS SHORT LINE RY. CO. v. PATTON.**  
(Court of Civil Appeals of Texas. Oct. 13, 1906.)

**DAMAGES—PERSONAL INJURIES—ISSUES AND PROOF.**

Where, in a suit for personal injuries, plaintiff by his pleading limits his claim for expenses on account of medicines and medical treatment to the sums paid out, he may not recover for debts owing by him for medicines and medical attention.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 445.]

Appeal from Wood County Court; J. O. Rouse, Judge.

Action by J. E. Patton against the Texas Short Line Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. M. McCormick, Mounts & Jones, and W. A. Davidson, for appellant. Looney & Clark, R. E. Boseman, and C. A. Leddy, for appellee.

**TALBOT, J.** This is a personal injury suit. Appellee was in the employ of appellant as a section hand, and while riding upon a push car in going out on its line of road to work was, through the negligence of appellant's servants operating said car, thrown therefrom and injured. From a judgment in favor of appellee for the sum of \$975 appellant appealed to this court, and said judgment was affirmed at the last term without a written opinion. The case is now before us on a motion for rehearing, and after further consideration we are of the opinion that appellant's twenty-fourth assignment of error is well taken.

This assignment complains of that portion of the trial court's charge which reads as follows: "If you find from the evidence that the plaintiff is entitled to recover for his injuries under the rules of law as hereinbefore defined to you, if you find that he received such injuries, you will find for medicine and doctors' bills the reasonable value and charge for such." This charge was error, because not authorized by the pleadings. Appellee's only allegations with respect to damages for medical attention and medicines are: "That by reason of the said injuries plaintiff has been compelled to pay out for medicines and medical attention sums of money amounting to the sum of \$100." There was testimony tending to show that the reasonable value of the medical services rendered appellee

and contracted to be paid by him was at least \$60, that he had only paid out the sum of \$35, and that this amount was for medicines. It has been held by this court that where, in a suit for personal injuries, the plaintiff by his pleading limited his claim for expenses on account of medicines and medical treatment to the sums paid out, he could not recover for debts owing by him for medicines and medical attention. *Railway Company v. Reasor*, 68 S. W. 332, 5 Tex. Ct. Rep. 85. This case is applicable here and decisive of the question.

On all other questions presented in its brief and motion for a rehearing we rule against appellant. Appellee's injuries are the result of appellant's negligence and he was not guilty of contributory negligence. There is no reversible error pointed out in the court's charge or other proceedings had, except as above stated. That error does not necessarily require a reversal of the case. Counsel for appellee in their brief offer to remit any amount awarded him for medicine and medical attention which this court may be of opinion is not warranted by the pleadings or by the proof.

It is therefore ordered that if appellee shall, within 10 days from the filing of this opinion, remit of the amount awarded him by the verdict of the jury and judgment of the lower court for medicines and medical treatment the sum of \$40, appellant's motion for rehearing will be overruled, and said judgment for the amount remaining will stand affirmed; otherwise, said motion will be granted, and the judgment of the court below will be reversed, and cause remanded.

**CAVEN et al. v. COLEMAN.**

(Court of Civil Appeals of Texas. June 30, 1906. Rehearing Denied Oct 13, 1906.)

**1. MANDAMUS—PETITION—SUFFICIENCY.**

A petition for mandamus to compel the council of a city, as required by Act 25th Leg. Laws 1897, p. 236, c. 163, to appoint an examining board of plumbers, to consist of a member of the local board of health, the city engineer, and others, which alleged that if the city had no board of health, and no city engineer, it had authority to create and appoint them, and that it was the duty of the council to do so, and that the city came within the provisions of the act, was sufficient to authorize a hearing on the merits as against an objection that the petition did not allege that the city had a board of health and city engineer.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 296-304.]

**2. SAME—CONTROL OF ACTS OF CITY COUNCIL.**

Where a duty is imposed on the council of a city, so that in its performance it acts in a ministerial capacity, without exercising its own judgment, mandamus is the only adequate remedy to compel it to act.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 63, 133-136.]

**3. MUNICIPAL CORPORATIONS—OFFICERS—BOARD FOR EXAMINATION OF PLUMBERS—MANDAMUS—MINISTERIAL ACT.**

Act 25th Leg. Laws 1897, p. 236, c. 163, requiring every city having underground sewers

to appoint a board for the examination of plumbers, consisting of a member of the board of health, the city engineer, and other persons, and prohibiting any person from conducting the business of plumbing without a license from the board, is not repealed by the subsequent charter of a city, which provides that its municipal government shall consist of a council, and that the other officers thereof shall be a treasurer, assessor, etc., and such other officers as the council may establish, and it is the duty of the council to put itself in a position by the creation of the necessary officers to enable it to appoint the examining board of plumbers, and mandamus will lie to compel it to do so.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Mandamus, §§ 158-160.]

#### 4. LICENSES — CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF PLUMBERS.

Act 25th Leg. Laws 1897, p. 236, c. 163, requiring every city having underground sewers to create a board for the examination of plumbers with authority to issue license to plumbers who have passed a regular examination and prohibiting any person from conducting the business of plumbing without such license, is valid as within the police power of the state.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 5, 6, 24.]

#### 5. CONSTITUTIONAL LAW—CLASS LEGISLATION—REGULATION OF OCCUPATIONS.

Act 25th Leg. Laws 1897, p. 236, c. 163, requiring every city having underground sewers to appoint a board for the examination of plumbers with authority to issue licenses to plumbers who have passed the regular examination therefor, and providing that a license shall not be issued to any person or firm to carry on the business of plumbing until he or they shall have passed the required examination, and every firm carrying on the business shall have at least one member who is a practical plumber, is not open to the objection that it discriminates against individual plumbers, not members of a firm, in that it allows a firm of any number of members to do plumbing if only one member has the license required, for the statute requires all who engage in the business of plumbing to pass the examination and procure the license.

#### 6. SAME.

A statute which selects particular individuals from a class and imposes on them special obligations from which others in the same class are exempt is invalid.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 649-651, 667.]

Appeal from District Court, Harrison County; R. B. Levy, Judge.

Mandamus by W. P. Coleman against T. S. Caven and others. From a judgment for plaintiff, defendants appeal. Affirmed.

T. P. Young, for appellants. Scott & Lane, for appellee.

TALBOT, J. This is a suit brought by appellee for a mandamus to compel the appellants, as mayor and aldermen of the city of Marshall, in Harrison county, Tex., to appoint an "examining and supervising board of plumbers," as required by the act of the Twenty-Fifth Legislature of Texas, which took effect August 20, 1897 (Laws 1897, p. 236, c. 163). The act provides:

"Section 1. Be it enacted by the Legislature of the state of Texas: That every city in this state having underground sewers or cesspools, shall pass ordinances regulating the tapping of said sewers and cesspools, regulating house drainage and plumbing,

creating a board for the examination of plumbers, to be known as 'The Examining and Supervising Board of Plumbers'; to provide for an inspection of plumbing. Said board shall consist of the following five persons; a member of the local board of health, the city engineer, the chief plumbing inspector, a master plumber of not less than ten years active, continuous business experience, and a journeyman plumber of not less than five years active continuous practical experience. The mayor and the local board of health shall make said appointment, and shall regulate the length of term each member shall serve; they shall fill all vacancies occurring in the examining and supervising board of plumbers; appointments to said vacancies to be for the unexpired term of the member whose place is filled.

"Sec. 2. The examining and supervising board of plumbers herein created shall examine and pass upon all persons now engaged in the business of plumbing, whether as a master plumber, employing plumber, or journeyman plumber, in their respective cities, and all persons who may hereafter wish to engage in the business of plumbing as master plumber, employing plumber, or journeyman plumber, within their respective jurisdictions, and also all persons who may apply for the office of plumbing inspector. They shall issue a license to such persons only as shall successfully pass a required examination. They shall also register in a book to be kept for that purpose, the names and places of business of all persons to whom a plumber's license is issued. They shall not issue license for more than one year, but the same shall be renewed from year to year, upon proper application."

The petition alleged that the city of Marshall was a municipal corporation and that relator was a resident thereof, and interested in the proper and efficient execution of its laws and ordinances by those legally charged therewith; that said city has a system of underground sewers and cesspools such as are contemplated by said act of the Twenty-Fifth Legislature, and that it is of vital concern to the citizens thereof that all plumbing, tapping of mains and underground sewers and cesspools and the construction of vaults, be performed in a proper manner to prevent the escape of water and foul drainage from entering and rendering valueless cellars and filling and impregnating houses and homes with foul gases, etc. It was further averred that although often requested, respondents have failed and refused to create said board for the examination of plumbers. The respondents answered by general and special exceptions, that they were the officers of the city of Marshall, as averred in the petition. That said city was a municipal corporation, incorporated under a law of Legislature, giving said city a special charter, passed and approved the 23d of March, 1903 (Sp. Laws 1903, p. 64, c. 17), to be taken notice of as a general law. That said charter

did not require the city council to appoint a board of health, and did not require the city council to appoint a city engineer. That there was not and never had been, any board of health, or city engineer, in said city; there were no ordinances providing for any such offices, and never had been. That if appellants had any authority to appoint a board of health, or city engineer it was purely discretionary, and not mandatory. That said city had underground sewers, and had passed ordinances regulating the tapping of same, etc. To this answer relator replied that if the city had no board of health and no city engineer the city council thereof under the laws of the state, and its charter had full power to create all the offices and appoint all the officers in said act of the Twenty-Fifth Legislature mentioned, and that it was its duty to do so. On December 5, 1905, at a special term of the district court the case was tried without a jury and judgment rendered awarding a peremptory writ of mandamus against respondents commanding them to pass ordinances for said city, creating a board of health and appointing officers thereof, and creating the office of and appointing a city engineer for said city. Respondents were further commanded to appoint an examining and supervising board of plumbers as required by the act of the Legislature mentioned. To this judgment of the court respondents excepted and have perfected an appeal to this court.

There is no dispute about the facts. The trial court found all the material allegations in both the petition and answer to be true, and such finding is sustained by the evidence. The petition was not obnoxious to the demurrers urged against it on the ground that it was not alleged that the city of Marshall had a board of health and city engineer. As has been stated, it was alleged in effect, that if said city had no such offices and officers, its city council had full power and authority to create and appoint them, and that it was the duty of said council to do so. These allegations, together with the other averments of the petition, were sufficient to authorize a hearing of the case on its merits.

It is insisted that the court erred in holding that the mandamus should issue compelling the respondents, as mayor and aldermen of the city, to appoint a board of health and city engineer for said city; (1) because said acts involved discretion and judgment on their part; (2) because the act of the Twenty-Fifth Legislature requiring cities to provide for a board of plumbers to be known as the "examining and supervising board of plumbers," to regulate the duties of said board and to provide penalties for a violation thereof, interferes with the rights of citizens to do business and make contracts, confers special privileges on a certain class, and bars others from such privileges without any reasonable or just basis for such discrimina-

tion, and is therefore unconstitutional and void. It is an undoubted principle of law "that the process of mandamus will not issue against a public officer, unless to compel the performance of an act clearly defined and enjoined by law and which is, therefore, ministerial in its nature and neither involves the exercise of discretion, nor leaves any alternative." *Glasscock v. The Commissioner of General Land Office*, 3 Tex. 51; *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791; *Ewing v. Cohen*, 63 Tex. 483; *Sarsome v. Mercer*, 68 Tex. 492, 5 S. W. 62, 2 Am. St. Rep. 506. And with respect to municipal corporations it has been said that their functions are wholly of a public nature and their creation a matter of public convenience and governmental necessity, and in order that they may the better subserve the public interest, certain corporate powers are conferred upon them. These powers may be qualified, enlarged or withdrawn at the pleasure of the Legislature and may consist of imperative powers of those whose exercise is obligatory, and the performance of which can be compelled by proper process; and discretionary powers or those to be exercised or not within the sound discretion of the officers having in charge the management, or the transaction of the specific act. "So, it may be affirmed," says Mr. High in his work on *Extraordinary Legal Remedies* (sections 324, 325), "that where municipal authorities are by law entrusted with jurisdiction over certain matters, the decision of which rests in their sound discretion and requires the exercise of their judgment, mandamus will not lie to control or in any manner interfere with their decision, since the courts will not direct in what manner the discretion of inferior tribunals and officers shall be exercised. But when a plain and imperative duty is specifically imposed by law upon such officers, so that in its performance they act merely in the ministerial capacity, without being called upon to exercise their own judgment as to whether the duty shall or shall not be performed, mandamus is the only adequate remedy to set them in motion, and the writ is freely granted in such cases, the ordinary remedies at law being unavailing." Excellent illustrations of those rules are given in the work cited, and they are abundantly supported by the highest authorities.

The question recurs, do the acts which respondents have been commanded by the trial court to perform, involve the exercise of discretion and judgment on their part? We have reached the conclusion they do not. Respondents' contention to the contrary seems to be predicated upon and sought to be sustained by those portions of their city's charter reading thus:

"Sec. 2. The municipal government of the city shall consist of the city council, which shall be composed of nine aldermen and the mayor."



"Sec. 4. The other officers of said corporation shall be a treasurer, and assessor and collector, a secretary, a city attorney and chief of police and such other officers and agents as the council may, from time to time, establish. \* \* \*

"Sec. 21. The council, except as hereinbefore provided, shall have the power to establish any office that may, in its opinion, be necessary or expedient for the city's business or government, may fix its salaries and duties; but no city official shall be elected by popular vote except the mayor and members of the city council, the city secretary and chief of police. The city secretary and chief of police, and the incumbents of all offices established by the council shall be selected by the council as herein provided."

"Sec. 7. The city council may from time to time require further duties of all officers whose duties are herein prescribed and define the duties and powers of all officers appointed or elected to any office in the city, and whose duties are not herein specially mentioned, and fix their compensation, when herein not fixed."

As has been seen, the act of the Twenty-Fifth Legislature requiring the appointment of an examining and supervising board of plumbers in cities having a system of underground sewers and cesspools went into effect in August, 1897, and requires one member of said board to be taken from the local board of health, and one to be the city engineer. The city of Marshall has never had a board of health or city engineer; and there no ordinances providing for these offices or officers and never were. Its charter does not expressly require the creation of a board of health or the appointment of a city engineer, but does confer power upon the city council to create offices, other than those named therein and to provide for the tenure, term, and salaries thereof. From these facts and the foregoing provisions of the charter, it is argued with plausibility that the creation of the board of health and the office of city engineer is purely discretionary with the city council and not mandatory; that the special charter is in conflict with the act of 1897, and necessarily repeals the latter act, so far as the city of Marshall is concerned. With this contention we do not agree. The city of Marshall is a municipal corporation, of over 10,000 people, and has a system of underground sewers and cesspools. The powers conferred upon it in its corporate capacity are to be exercised, through its governing body, for the promotion of the general welfare of its inhabitants. And among those powers none, perhaps, is of more vital importance to its citizens than the power to provide for the preservation of the public health. Indeed, the subject was regarded by the Legislature of this state to be of such vital interest that the law sought to be enforced by this suit was enacted, making it an imperative duty of every city in this

state, having underground sewers or cesspools, to pass ordinances "regulating the tapping of such sewers and cesspools; regulating house drainage and plumbing and creating a board for the examination of plumbers," whose duty should be to examine and pass upon the qualification or fitness of all plumbers doing or who wish to engage in the business of plumbing in their respective cities. This act is clearly mandatory and, in our opinion, applicable to the city of Marshall, notwithstanding, the seeming inconsistent provisions of said city's charter, above set out, with said act.

We are of the opinion that it became and was the duty of respondents, under this law and the powers conferred upon them as the city council of the city of Marshall, to put themselves in a position, by the passage of such ordinances and the creation of such offices as were necessary to the appointment of the "examining and supervising board of plumbers" as required by the act of the Legislature referred to, and to appoint such board and that having failed and refused to do so, the writ of mandamus will lie to compel them. If it can be said that the language of the city charter, viz: "shall have power to establish any office that may, in its opinion, be necessary or expedient for the city's business or government," standing alone, would have the effect, notwithstanding the public good and welfare involved, to clothe the city council with discretionary power in the appointment of such officers as are not named in the charter, to be exercised or not within its sound discretion (which may be doubted) yet when the two acts under consideration are construed together, and read in the light of the legislative purpose and intent, the language quoted should not be given controlling effect. On the contrary, we think that, inasmuch as the city of Marshall has a system of underground sewers and cesspools, it must be held that the Legislature did not intend that the discretionary power, whatever it may be, conferred by said language, should be applied or exercised in dealing with the matters involved in this suit, but that the mandatory provisions of the act of the Twenty-Fifth Legislature should govern and control the council's action in respect thereof. There is nothing on the face of the special charter granted to the city of Marshall, except the language quoted, that indicates any design on the part of the Legislature to interfere with the provisions of the act of 1897. If there is any repeal of this act it is by implication only. Such repeals are not favored, and it seems to be well settled that the earliest statute continues in force, unless the two are clearly inconsistent with, and repugnant to, each other, or unless, in the latest statute, some express notice is taken of the former, plainly indicating an intention to repeal it. And where two acts are seemingly repugnant, they should, if possible, be so construed that the latter

may not operate as a repeal of the former by implication. *Bowen v. Lease*, 5 Hill (N. Y.) 221; *town of Ottawa v. County of La Salle*, 12 Ill. 339; *Kinney v. Mallory*, 3 Ala. 626. Applying these principles, we hold that the act of 1897 in question was not repealed as to the city of Marshall by the provisions of said city's charter granted in 1903, but that said act is in full force and the observance of its provisions obligatory upon said city.

Referring to respondents' contention, that the act of the Twenty-Fifth Legislature under consideration, "interferes with the rights of citizens to do business, and confers special privileges on a certain class, etc., and is therefore unconstitutional and void," it may be said that said act comes clearly within the police powers of the state. The sum of the many definitions attempted of this power is well expressed in *Am. & Eng. Enc. of Law*, vol. 22, p. 916, in this language: "The police power in its broadest acceptance, means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property, as may be conducive to the public interest." It is said that this "power" is an attribute of sovereignty and inherent in the several states and, in the absence of any constitutional restrictions upon the subject, may be delegated to the various municipalities throughout the state to be exercised by them within the corporate limits. *Am. & Eng. Enc. of Law*, vol. 22, pp. 918-919. An indisputable function of the police power, and one frequently exercised by the state municipalities, is to provide for the preservation of the health of the people. And while the right of the individual to labor and enjoy the fruits thereof is recognized as a "natural right which may not be unreasonably interfered with by legislation," yet whenever the "pursuit concerns the public health and is of such a character as to require special training or experience to qualify one to pursue such occupation with safety to the public interest, the Legislature may enact reasonable regulations to protect the public against the evils which may result from incapacity and ignorance." Such regulations, which have been uniformly upheld, will be found in statutes prohibiting the practice of medicine or surgery by persons not licensed, or the compounding of medicines by any other person than a licensed or registered pharmacist. Other examples of this principle are found in our Sunday laws and the laws which require study and an examination before a person is permitted to practice law or engage in the occupation of a dentist.

But in *State v. Gardner*, 58 Ohio St. 509, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785, we have a case directly in point. In that case it is held in a well-expressed opinion, that a statute, which provides that

no person shall engage in the business of plumbing unless he shall have passed an examination as to his competency and qualifications and procured a license, and providing a penalty for a violation thereof, does not infringe in any sense the constitutional rights of the workman and is but an ordinary exercise of the police power of the state. Nor does the statute in question, as contended by counsel for respondents discriminate against individual plumbers not members of a firm, in that it allows a firm of any number of members to do plumbing, if only one member has the license required. Neither does it allow members of a corporation to do a plumbing business without having passed the required examination and procured a license. Section 5 of the statute is sufficiently broad and comprehensive to include every person engaged in the work of plumbing, whether he be a member of a firm or of a corporation. It provides: "That license shall not be issued to any person or firm to carry on or work at the business of plumbing or to act as inspector of plumbing until he or they shall have appeared before the examining and supervising board for examination and registration, and shall have successfully passed the required examination. Every firm carrying on the business of plumbing shall have at least one member who is a practical plumber." A distinction seems to be made of a licensed plumber and a practical plumber, and, in the case of a firm, the members must not only pass the required examination, but one of the members must be a "practical plumber." It cannot be said that the provision, "every firm, carrying on the business of plumbing shall have at least one practical plumber," means that only one member of the firm is required to pass the examination. The section quoted requires all who engage in the work to stand the examination. We think it well settled that a statute which selects particular individuals from a class and imposes upon them special obligations or burdens, from which others in the same class are exempt, is unconstitutional; but such is not, in our opinion, the character of the statute under consideration.

Believing the proper judgment was rendered in the court below, it is affirmed.

Affirmed.

#### NATIONAL LIFE INS. CO. OF UNITED STATES OF AMERICA v. REPPOND.

(Court of Civil Appeals of Texas. June 23, 1906. On Rehearing, Oct. 13, 1906.)

#### 1. INSURANCE — LIFE INSURANCE — WARRANTIES.

Where the statements in an application for a life policy are made warranties, it is essential to the validity of the policy that the statements are true, without reference to the question of their materiality.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Insurance, § 565.]

**2. SAME.**

Where a life policy made the statements in the application warranties, and insured did not give the name of the physician who had treated him within five years when answering the question calling on him to give the name and address of each physician consulted during the past five years, there was a misstatement avoiding the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 691.]

**3. SAME.**

An application for life insurance provided that the statements made by the insured in the application were warranted to be true, and "without suppression of any fact \* \* \* which would tend to influence the company in issuing a policy" under the application, and stipulated that the insured warranted that he had reviewed all answers made to questions asked in the application, and that the answers were true. *Held*, that the quoted words did not modify the warranty and make the answers of the insured mere representations.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 562.]

**4. SAME—PREMIUM NOTES—NONPAYMENT—EFFECT.**

Where a life policy provides that failure to pay premium notes shall render the policy void, the failure to pay a premium note, the receipt for which contains a similar provision, avoids the policy, unless waived.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 897.]

**5. SAME.**

A life policy stipulated that it should be void on nonpayment of a premium note. The agent of the insurer testified that in settling for the first premium the insured gave him an order on his employer for a specified sum and executed notes for the balance, each payable to the agent; that the agent took the notes for the account of the insurer, and not for his personal account. A third person testified that he was present when the first premium was settled, and that insured paid the agent some money, and that the agent told insured to give him some money to pay the insurer for the policy for a year. The insurer did not receive any part of the premium in money, and the agent indorsed the notes to the insurer, which notes were never paid. *Held*, that the policy became void.

On Rehearing.

**6. SAME—WARRANTIES—FALSE REPRESENTATIONS.**

An application for a life policy made the statements therein warranties. Insured, in response to the question requiring him to give the names of the physicians who had treated him within five years, gave the name of only one physician. The application further stated that the insured had been affected with a disease within five years, which lasted a specified number of days, and was attended by the physician mentioned, while in fact he had been attended by another physician, and that insured had had another disease and had been attended by the health physician of a city. *Held* insufficient to notify the insurer that any other physician than the one named and the health physician had attended the insured during the preceding five years, and the policy was not enforceable.

[Ed. Note.—For cases in point, see vol. 28 Cent. Dig. Insurance, § 691.]

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by Annie Reppond against the National Life Insurance Company of the United States of America. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Locke & Locke, for appellant. W. J. Weaver, McClellan & Prince, Callicutt & Call, and H. L. Stone, for appellee.

**RAINEY, C. J.** This action was brought by Annie Reppond to recover upon a policy of insurance in the sum of \$5,000, issued by National Life Insurance Company of the United States of America upon the life of John T. Reppond. The defendant pleaded that several statements contained in the application for the policy and warranted to be true were in fact untrue, that the policy had lapsed before the death of Reppond by reason of his failure to pay two premium notes when due, and that his death was caused by his own violation of law. Besides a denial of the defendant's allegations, the plaintiff replied that the notes claimed by appellant to have been given by the insured to the company for part of the first or term premium were in fact not given to the company, but were given to T. P. Adams for an indebtedness due Adams by Reppond, and that Adams indorsed and delivered said notes to the insurance company on account of an indebtedness due the company by him; that the premium for the first year, or term premium, was paid in full at the date of the delivery of the policies; that the defendant had waived any forfeiture of the policy consequent upon the nonpayment of the notes or the untruthfulness of Reppond's statement in regard to his medical history. The defendant requested the court to direct a verdict in its favor. The court refused to do this, and submitted the case to the jury upon the general issue. The jury returned a verdict for the plaintiff for the face of the policy, attorney's fees, damages, and interest, aggregating \$7,541.66, upon which verdict a judgment was entered.

The facts pertinent to the issues raised are as follows: The policy provides: "National Life Insurance Company of the United States of America, Washington, D. C., in consideration of the statements, agreements, and warranties in the application herefor (copy of which is hereto attached), which is hereby made a part of this contract, hereby promises to pay five thousand dollars." The application made by John T. Reppond for the policy sued upon was in two parts, known as "part 1" and "part 2," each filled out upon a printed form prepared by the defendant for that purpose. Part 1 of said application consisted of answers to questions, agreements, and the following warranty: "The statements and agreements made by me in this application, as well as those I have made or shall make to the company's medical examiner, are hereby warranted by me to be full, complete, and true, and without suppression of any fact or circumstance which would tend to influence the company in issuing a policy under this application, and shall be taken as the basis of, and as a consideration of, the contract." One of the agreements above referred to was as follows: "I

hereby agree that no statement or representation made to or by the person soliciting this application, or any other person, shall be binding upon the company unless reduced to writing and made a part hereof." Part 1 of the application was signed by John T. Reppond under date of July 5, 1902, and was witnessed by T. P. Adams, solicitor. It was an application for \$10,000 of insurance, to be issued in two policies of \$5,000 each; one payable to Annie Reppond and the other to the estate of the insured. In answer to questions contained in part 1, Reppond stated that he was born at Sulphur Springs, Hopkins county, Tex., March 10, 1872, and stated that his wife, Annie Reppond, lived at Corsicana, Tex. Part 2 of the application consisted of written answers made to the defendant's medical examiner in response to printed questions, and was stated to be in continuation of, and forming a part of, the application for insurance. In answer to the fourth question in part 2 Reppond stated that he had lived in his present locality, which was Guffey,  $1\frac{1}{2}$  years; that he was born in Sulphur Springs, Tex., lived there 23 years, and thereafter lived at Corsicana until he moved to Guffey. Under division A of the seventh question Reppond was asked whether he had at the time of making such application, or ever had had, any of certain named diseases, and was required to answer "yes" or "no" as to each disease. Under this division of question 7 there was a reference to a footnote reading as follows: "The examiner will make special inquiry with regard to each item on the health record, taking care to distinguish diseases from mere symptoms. Where answers are 'yes,' the examiner will elicit a clinical history of the case and record same under 'Record of Health,' on the reverse page of this sheet." One of the diseases so inquired about was smallpox or varioloid, which Reppond answered that he had had, and another was typhoid fever, which he answered that he had not had. Subdivision C of question 7 and its answer were as follows: "7. Have you ever had any ailment, injury, or infirmity whatever, not already named? (Answer 'yes' or 'no.' See note 111 below.) C. Malaria." Note 111 referred to in this question is the note above copied. Subdivision D of question 7 and its answer were as follows: "D. Give name and address of each physician consulted or who has prescribed for you during the past five years, and the dates and cause of consultation. D. Dr. McElroy, Riley Springs, Texas." Below all of said questions and answers in part 2 of this application and above the signature of John T. Reppond thereto, was a printed agreement as follows: "I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, that I have carefully reviewed all answers made to the medical examiner in the foregoing

examination, which answers have been written by said medical examiner at my request, and that said answers, and each of them, as hereinabove written, are as answered by me, and that each of the above answers are full, complete and true." Part 2 of the application was dated July 5, 1902, and witnessed by L. Goldstein, M. D.

A copy of the application, parts 1 and 2, was attached to the policy when delivered to Reppond. When it issued the policy in suit and its companion policy, the defendant had no information concerning the family history of Reppond, other than that contained in the application and the accompanying report of the medical examiner. Reppond never in any way signified a desire to correct, change, or modify in any way the statements or answers to questions made by him in his application. On the back of the sheet containing part 2 of the application was the special report of L. Goldstein, M. D., medical examiner for the defendant, giving the results of his physical examination of Reppond, and containing among other things, the "Record of Health" referred to in note 111 to question 7 of part 2 of the application. In said record of health it was shown that three years before the date of the application Reppond had had a mild attack of malarial fever, lasting 28 days, resulting in a complete recovery, and in which his medical attendant was Dr. McElroy. It was further shown that two years before the date of the application he had had a mild attack of smallpox, lasting 21 days, resulting in a complete recovery, and in which his medical attendant was the Corsicana health physician. Appended to this special report was a certificate signed by Dr. Goldstein in which, among other things, he certified that the questions in part 2 of the application were read by him to Reppond, and separately answered by Reppond; that the answers given to the questions were the identical answers given by Reppond and reviewed by him in the presence of Dr. Goldstein; and that the answers in part 2, as well as the statements made in the special report, were true, to the best of the knowledge and belief of said Dr. Goldstein.

The undisputed evidence of the plaintiff, Dr. Miller, and other witnesses, showed that in 1899 Dr. T. A. Miller attended John T. Reppond professionally from October 22d to November 11th, in Corsicana, Tex., and that between those dates he gave Reppond several prescriptions which were duly filled. Dr. Miller testified that during that time he attended Reppond almost every day, and sometimes two or three times a day, and that the disease which Reppond had at the time was typhoid fever. There was evidence tending to show that Dr. Miller's diagnosis of the disease was erroneous, and that Reppond really had malarial fever, and that he and the other members of the family so understood the matter; and the jury found that

he did not have typhoid fever. The plaintiff testified that John T. Reppond had a spell of smallpox at the home of her sister, Mrs. Trimble, in Corsicana, and that this was before he had the spell of fever for which Dr. Miller treated him, but she did not know how long before. She further testified that after Reppond got up from the spell of fever for which Dr. Miller treated him, he went to his father's home at Riley Springs and stayed there about a week, and then returned to Navarro county where she was; she not having gone with him to Riley Springs. She testified that Dr. McElroy was Reppond's father's family physician, but she did not know whether he prescribed for Reppond. She testified that she was married to Reppond in 1896, and that aside from this one spell of what she called malarial fever and the spell of smallpox, he never had any sickness up to the time of his death, either in Navarro county or elsewhere. The foregoing sets out the warranty clauses in the policy and the questions and answers in the application for the policy, which answers the insurance company contends are false and render the policy void.

1. In the case of National Life Insurance Company of the United States of America v. Reppond, 81 S. W. 1012, a companion case to this, which was decided by this court and a writ of error refused by the Supreme Court, we held that "by the provisions of the contract the answers of Reppond in relation to medical attendance were made warranties, and the failure to answer fully, though apparently so, makes his answers false, and renders the policy void"; and we see no reason for changing our holding. Being warranties, it is essential to the validity of the policy that the statements therein warranted be correct. It is not a question of materiality, but are the statements true? Insurance Co. v. Pinson, 94 Tex. 553, 63 S. W. 531; Fitzmaurice v. Insurance Co., 84 Tex. 61, 19 S. W. 801; Flippen v. Insurance Co. (Tex. Civ. App.) 70 S. W. 787; Life Ass'n v. Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813. Reppond, in his application, in answer to the question, "Give name and address of each physician consulted or who has prescribed for you during the past five years, and the dates and causes of consultation," answered, "Dr. McElroy, Riley Springs, Tex." This answer imports that no other physician than Dr. McElroy attended Reppond during the five years, but such is not the case. It is undisputed that Dr. Miller attended and treated Reppond for 28 days in a spell of fever. It follows that the answer is false. The omission in the answer to name Dr. Miller renders it incomplete and untrue, and therefore as much obnoxious to the warranty as though he had given the name of some physician that had not attended him. Brock v. United Moderns (Tex. Civ. App.) 81 S. W. 340; Flippen v. Insurance Co., *supra*. The clause in part 1 of the applica-

tion relating to warranties reads: "The statements and agreements made by me in this application, as well as those I have made or shall make to the company's medical examiner, are hereby warranted by me to be full, complete, and true, and without suppression of any fact or circumstance which would tend to influence the company in issuing a policy under this application, and shall be the basis of, and as a consideration of, the contract." It is contended by the appellee that the words, "and without suppression of any fact or circumstance which would tend to influence the company in issuing a policy under this application," contained in the warranty clause, modifies the warranty and makes the answers of Reppond mere representations, and the untrue answers, being immaterial to the risk, would not void the policy. This contention was made in the companion case (81 S. W. 1012), and overruled, though not discussed in the opinion. We do not think the words in any way purport to modify what precedes or follows. In part 2 of the application is found the incomplete and untrue statement, and in which is another warranty clause reading: "I warrant, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, that I have carefully reviewed all answers made to the medical examiner in the foregoing examination, which answers have been written by said medical examiner at my request, and that said answers, and each of them, as hereinabove written, are as answered by me, and that each of the above answers are full, complete, and true." When all of the parts of the contract are read and construed together, we think it clear that the intention of the parties was that the answers of Reppond were warranties and that the proper construction of the instrument itself is that they are warranties.

2. The second proposition of appellant is that Reppond having failed to pay two notes given by him for part of the premium voided the policy. The evidence shows two policies were issued for \$5,000 each upon the same application, which contained the same provisions, except payable to different parties. The annual premiums for the two policies amounted in the aggregate to \$343.60. Adams, the company's agent, testified that in settling the first premium Reppond gave him an order on his employers for \$100, and executed his two notes for \$100 each, payable to Adams; that he took the notes for the account of the company, and not for his personal account. One Frazier testifies that he was present when the first premium was settled, and that Reppond paid Adams some money, he thinks \$30 or \$40; that "he [Adams] told Reppond to give him some money to pay the insurance company for these policies for a year, and his business and Reppond's was their own, and he would take notes for his part." The company never re-

ceived any of this premium in money. Adams indorsed and transferred the two notes without recourse to the company, which were never paid. The company had no notice of the transaction as to these notes, further than that they were payable to Adams and were given for part of the first premium. When the first note was due it was sent to a Beaumont bank for collection and presented for payment, which Reppond refused to pay, and, when threatened with suit, said "they could sue and be damned; that he was through with the matter." The second note was never presented and never paid. The policy provided that if a note was given for any premium or part thereof, and not paid at maturity, it "shall cancel the insurance and this policy." A receipt was given for the first premium, on the back of which was the stipulation, "If note be given for the payment of the premium, or any part thereof, and the same is not paid at maturity, the said policy shall cease and determine." Adams was to receive 70 per cent. of the premium, and his contract with the company provided that no commissions were to be paid him upon the premium notes until the same were paid in cash to the defendant. The effect of the nonpayment of the notes was to cancel the insurance, and unless there was a waiver of this provision the plaintiff cannot recover. In the former case we held that as to the first note there was a waiver as to it by attempting to enforce collection by suit and judgment, but not so as to the second note. That not having been paid, the policy was canceled. The testimony of Frazier, if true, does not change the legal effect of the transaction. *Insurance Co. v. Bussell* (Ark.) 86 S. W. 814. The notes were given for part of the premium. It was provided in the contract that the failure to pay them would cancel the policy. There is no evidence that such provision was waived, and, the company coming into the possession of the notes and holding them under the circumstances it did, it is not liable.

Believing, as we do, that the evidence shows a breach of the warranty clauses in the policy, the plaintiff should not recover. The judgment is reversed, and here rendered for appellant.

Reversed and rendered.

#### On Rehearing.

Appellee complains that we did not pass upon nor find conclusions of fact upon the issue that the insurance company had waived the warranty as to complete answer in the application by the insured to the question, "Give name and address of each physician consulted, or who has prescribed for you during the past five years and the dates and the cause of the consultation," for the reason that the answer to said question, together with the certificate of the examining physician on said application, gave the company knowledge of the facts, or showed that the

answer was incomplete and estopped said company from relying on the warranty. We were of the opinion that there was no merit in this issue and did not discuss it in our original opinion. We are requested to find additional conclusions on the said issue. The insured, Reppond, in response to the foregoing question, answered, "Dr. McElroy, Riley Springs, Tex." This is the only answer made to this question. He stated that he had had smallpox. The examining physician, in recording a clinical history of the case on the reverse side of the application, certified, in effect, that Reppond had been affected with malarial fever, which lasted 28 days and was attended by Dr. McElroy, and that Reppond had had smallpox, which lasted 21 days and was attended by the Corsicana health physician. The foregoing is all the notice the company had as to what diseases Reppond had and the physicians that attended him. This, in our opinion, is not sufficient to notify the company that any other physician than Dr. McElroy and the Corsicana health physician had attended him. Dr. Miller was not named, and he attended Reppond during a spell which lasted for 28 days, and which Dr. Miller testified "was typhoid fever, evidently complicated with malarial trouble from the beginning of the disease." Had the company had notice of Dr. Miller's attendance, whether it would have issued the policy, we are not prepared to say; but it did not have notice. Reppond warranted his answers to be full and complete, and, not being so, the policy was nonenforceable.

In support of the motion for rehearing a written argument signed by H. L. Stone, one of appellee's counsel, has been filed. This argument contains language highly improper and disrespectful to the court, and would probably warrant the imposition of a fine for contempt. We have concluded, however, to pass the matter with the admonition that such language must not be used in argument to this court.

#### ROANE et al. v. MURPHY et al.

(Court of Civil Appeals of Texas, April 14, 1906. Rehearing Denied May 12, 1906.)

#### 1. MECHANICS' LIENS — HOMESTEAD — BUILDING CONTRACT — SUBSTANTIAL PERFORMANCE.

Plaintiffs executed notes secured by a mechanic's lien contract on their homestead to a trustee, to be delivered to the contractors on performance of the contract for the construction of a house on such property; plaintiffs expecting and intending that the notes should be negotiated. The contractors, after partial performance, notified plaintiffs of their abandonment of the contract, but plaintiffs refused to consent to the abandonment; and arranged to have the contractors continue the work until the building was finished by paying them day wages. The work was so continued until one of the plaintiffs, acting for himself and his wife, the other plaintiff, directed the trustee to deliver the notes to the contractors as for a full completion of the building, after which plaintiffs sued the contractors' sureties and recovered the excess of the cost over the contract

price. *Held*, to justify a finding that the contractors had substantially complied with the contract and that plaintiffs could not object to the validity of the mechanic's lien notes on the ground that the contract was abandoned and the work completed under a different arrangement.

**2. HOMESTEAD—LIENS—EXECUTION BY WIFE—AGENCY OF HUSBAND—ESTOPPEL TO DENY.**

Notes secured by a mechanic's lien were executed by a husband and wife and delivered to a trustee, to be delivered to contractors on completion of a house designed for a homestead. Thereafter the husband executed a declaration to the trustee, signed by himself and wife, without the wife's authority, that the house was fully completed, on which the trustee delivered the notes to the contractors. The notes were thereafter sold to bona fide purchasers for value, after which they were extended at the joint request of both husband and wife. *Held*, that the wife was thereby estopped to deny, as against the purchasers of such notes, that her husband had authority to declare the completion of the contract.

**3. ACKNOWLEDGMENT—AUTHORITY TO TAKE.**

Where a firm of brokers was employed to negotiate certain notes secured by a mechanic's lien, and one of the firm, who took the acknowledgment to the mechanic's lien contract, testified that the firm's fee of \$50 was fixed, and was earned when the notes were negotiated, whether a loan was made to the makers or not, he was not disqualified by the interest of his firm to take such acknowledgment.

Appeal from District Court, Dallas County; D. Frank Carden, Special Judge.

Action by C. O. Roane and others against J. P. Murphy and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This suit was brought by C. O. Roane and Mattie P. Roane, his wife, against Mrs. Emma K. Murphy and her husband, J. P. Murphy, and against J. P. Murphy, as trustee. By their original petition filed January 23, 1905, plaintiffs below alleged that they were married prior to March 31, 1899; that on said date they acquired the premises in controversy, then unimproved, with intention to erect a house thereon and make it their homestead, and that they promptly thereafter improved the same for said purpose, and upon the completion of said improvements at once occupied the premises as a home, and have ever since so occupied them; that Murphy & Bolanz, a firm composed of J. P. Murphy and Charles F. Bolanz, were general real estate and loan agents, representing various lenders of money, and, learning of plaintiffs' purpose to build a home, offered, for a commission, to procure a loan for them for that purpose; that on April 19, 1899, said agents prepared and plaintiffs executed a contract with Dillon & Stallings, contractors, containing a power of sale, wherein it was agreed that the contractors would, at their own cost, furnish labor and material and complete, on or before June 20, 1899, a one-story frame dwelling, to be erected in accordance with plans and specifications prepared by E. H. Silven, architect, for the sum of \$2,439.25 to be paid said contractors, \$639.25 cash,

and balance by four notes for \$450 each, payable to the order of said contractors, 1, 2, 3, and 4 years from date, with interest at 8 per cent.; that it was provided in the contract that said notes should be delivered to J. P. Murphy, the trustee therein named, and should be delivered to the contractors only upon the completion of the work and acceptance thereof by plaintiffs; that the sum of \$639.25 cash, mentioned in the contract, was by agreement with said contractors to be paid by plaintiffs supplying the plumbing, electric work, fixtures, mantels, papering, and painting, which was to be deducted from the total price to be paid for the work, the contractors agreeing to supply all the remainder of the work embraced in the plans and specifications for the sum of \$1,800 evidenced by said notes; that the contract further granted to said contractors a lien on the lot in controversy to secure the notes; that the contract contained the usual provisions for sale by trustee upon default in payment of principal or interest; that said contractors did not perform their contract or complete said building, but on May 29, 1905, being only partially completed, expressly refused to so complete it, without the fault of or procurement of plaintiffs; that plaintiffs were thereby compelled to complete the building, and did so complete it, at a cost largely in excess of the contract price; that the notes were delivered by J. P. Murphy, trustee, to said contractors, and by them indorsed to a customer of Murphy & Bolanz, and said notes are now by indorsement held by Mrs. Emma K. Murphy, wife of J. P. Murphy, who also claims a lien on the premises in controversy under said mechanic's lien contract. Plaintiffs allege that said purported lien created by said contract is null and void and a cloud upon their title; that the acknowledgment to said contract was taken and certified by Charles F. Bolanz, a member of the firm of Murphy & Bolanz, who was to receive a commission by means of its execution, and did receive such commission, and was directly interested in the execution of said instrument. Plaintiffs prayed for cancellation of the lien of said mechanic's lien contract, and its removal as a cloud on plaintiffs' title, and for costs. Defendants filed their first amended answer May 2, 1905, pleading a general demurrer, general denial, and answered specially that defendant Emma K. Murphy had acquired the notes for value without notice of any defect in the lien, or that the contract had not been carried out by contractors; that W. K. Homan, executor of S. E. Johnson, deceased, had acquired the notes on the 13th of June, 1899, from the contractors by indorsement, for value, in good faith, and without notice of any defense to the notes or lien; that the notes and contract created an apparent lien, and were offered for sale by Murphy & Bolanz at plaintiffs' instance and request; that said

agents, acting for plaintiffs, submitted to Homan abstract of title and represented to him that the improvements were completed, and that plaintiffs had accepted the house, and that among other things Murphy & Bolanz submitted to said Homan a statement dated June 13, 1899, signed by plaintiffs, in which they represented that the contractors had completed the house as required by the contract, and that plaintiffs accepted same, and requesting the trustee to deliver the notes to the contractor; that this was known and approved by plaintiffs, and intended to induce Homan to purchase the notes, and induced him to purchase them. Defendants further alleged that plaintiffs had paid interest on the notes without protest prior to their purchase by Mrs. Murphy, and at the maturity of said notes requested her to take them up and extend them, offering to her the same abstract and statements made to Homan; and that, relying thereon and without any knowledge of any vice in said lien, she purchased said notes from Homan for face value, and since said date has been paid interest thereon without protest from plaintiffs. Defendants alleged that plaintiffs are estopped to set up the invalidity of said lien, and prayed judgment thereof and for costs. The cause was tried without a jury before Hon. D. Frank Carden, special judge, on May 4, 1905, and judgment rendered for defendants. Plaintiffs perfected an appeal.

Neill & Dabney, for appellants. D. H. Morrow and F. W. Bartlett, for appellees.

BOOKHOUT, J. (after stating the facts). The first, second, third, fourth, fifth, seventh, thirteenth, and fourteenth assignments are grouped, and appellants contend thereunder that where the husband and wife execute a contract and mechanic's lien upon the homestead for the erection of improvements thereon, that no lien is fixed thereon, unless the contractors substantially comply with and carry out the contract, and when the issue is whether the contractors have substantially complied with their contract, if there is evidence to show noncompliance, it is error for the court, in a trial before the court, to fall and refuse to make findings of fact and law upon such issue. The court filed conclusions of fact, in substance, "that appellants, who are husband and wife, on April 19, 1899, executed a mechanic's lien contract with Dillon & Stallings, a firm of contractors, whereby said contractors agreed to construct a residence for appellants on their homestead lot in the city of Dallas, in accordance with plans and specifications prepared by E. H. Silven, architect, and to complete the same by the 20th day of June, 1899, and turn the same over to appellants free from all liens, except the mechanic's lien thereby created. The contract provided that in consideration of the foregoing agreements of said contractors plaintiffs bound themselves to pay to them or their order the

sum of \$2,439.25, \$639.25 in cash, receipt of which is acknowledged; the balance of the contract price, the sum of \$1,800, being evidenced by the four notes above described and set out, which are recited to have been delivered to J. P. Murphy, as trustee. The contract was duly signed and acknowledged by C. O. Roane and his wife, and complied with the requirements of the Constitution and statutes for creating a lien upon the homestead. It was understood between all parties, and with Murphy & Bolanz, a brokerage firm of the city of Dallas, Tex.: That the notes described in said contract should be negotiated through said brokerage firm, and until the work and labor was completed and accepted should be held by J. P. Murphy as trustee, who was a member of said firm. That shortly afterwards, on application from the contractors and before said notes and lien were delivered to said contractors, that Dillon & Stallings on their personal credit borrowed from Murphy & Bolanz Land & Loan Company, a corporation organized under the laws of Texas, in which C. F. Bolanz owned no stock, the sum of \$1,800, which was advanced, as the work progressed, for the purpose of making said improvements. That Murphy & Bolanz Land & Loan Company furnished said contractors some \$1,300 with which the improvements contracted for were partially made, when the contractors notified C. O. Roane that it was impossible for them to get the material and labor to complete their contract. That therefore they abandoned the same, and wished him to take charge of and complete same. That C. O. Roane declined to release said contractors from their obligations, but agreed with them that if they would continue on the job, he would furnish the remainder of the material and pay for the labor necessary to complete the job, including their own labor. That the building contemplated by the original contract was thus finished; \$500 additional to the first \$1,300, making \$1,800 in total, being furnished by the said Murphy & Bolanz Land & Loan Company on orders from C. O. Roane and the contractors together, and being expended on said building. In addition to the \$1,800 thus furnished by the Murphy & Bolanz Land & Loan Company and \$639.25 previously furnished by Roane according to the terms of the contract, the said Roane furnished between \$200 and \$300 which, together with the said \$639.25 and said \$1,800, went into and completed the building according to contract. That all of the money thus furnished by Murphy & Bolanz Land & Loan Company was used in the construction of said building and was thus furnished and used by and with the consent of both C. O. Roane and the contractors. That on the day after the balance of said \$1,800 was paid out by said Murphy & Bolanz Land & Loan Company and before said building was completed, C. O. Roane deliv-



ered to J. P. Murphy, trustee, the following instrument: 'Dallas, Texas, June 13, 1899. To J. P. Murphy, Trustee: Messrs. Dillon & Stallings, having completed contract for our building on Thomas avenue as stated in mechanic's lien dated April 19, 1899, we hereby accept same and authorize you to deliver the four notes for \$450.00 each to said Dillon and Stallings as provided in said mechanic's lien, recorded in vol. 234, page 63, Mechanics' Lien Records, Dallas County, Texas. C. O. Roane & Wife, by C. O. Roane.' That Mattie P. Roane did not know of or authorize the execution or delivery of said written instrument. That subsequent to the execution and delivery of said written instrument and on the date thereof, Murphy & Bolanz negotiated the sale of said notes to W. K. Homan, executor of the estate of S. E. Johnson, for the sum of \$1,800, and at the same time Dillon & Stallings executed a transfer of the lien securing said notes to said W. K. Homan, executor, etc. That before purchasing said notes W. K. Homan examined the abstract of title to said land, inspected the improvements thereon, which seemed to him to be complete, and was assured by Murphy & Bolanz and the written instrument above set out that the work had been completed according to contract. That W. K. Homan had no notice of any equity affecting the validity of the lien securing said notes. That on April 23, 1901, while said notes were in the hands of W. K. Homan, C. O. Roane and Mrs. Mattie P. Roane signed the following written statement upon the back of two of said notes: 'At our request, the principal of this note is extended for one year from April 19, 1901, at the same rate and upon the same terms as heretofore.' That on May 25, 1902, W. K. Homan, executor, etc., assigned said notes and lien to Mrs. Emma K. Murphy for the sum of \$1,800, which was paid out of her separate estate. That on November 10, 1903, C. O. Roane and wife, Mrs. Mattie P. Roane, signed the following written statement on the back of each of said four notes: 'At our request, the principal of this note is extended to mature April 19, 1906, at the same rate of interest and upon the same terms and conditions as mentioned in relative mechanic's lien contract.' That the interest on said notes was paid by the makers thereof as it matured, up to about the date of the filing of this suit. That at and before the dates of the sale of said notes to W. K. Homan, executor, etc., and Mrs. Emma K. Murphy, both makers of said notes, plaintiffs herein, knew of the contemplated sales and at various times sought extension of said notes, and never at any time, until long after the purchase of the same by Mrs. Emma K. Murphy, did or said anything to put either W. K. Homan or Mrs. Emma K. Murphy upon notice of any defense they had or proposed to urge against the payment of said notes."

The evidence shows that the house was

completed in accordance with the contract and the full amount of the money called for by the mechanic's lien notes was advanced on the notes and went into the building on the order of C. O. Roane. But it is argued that although the house was completed in accordance with the contract, and although the money called for by the notes was expended in the construction of the building, it was not done under the written contract, but that Roane entered into a different arrangement with the contractors, under which arrangement the house was completed. This contention arises upon the letter written by the contractors, Dillon & Stallings, to C. O. Roane, on May 9, 1899, as follows: "Dallas, Texas, May 29, 1899. Mr. C. O. Roane, City—Dear Sir: We find that it is impossible for us to get material and labor to complete our contract for the erection and completion of your residence at No. 318 Thomas avenue, and we therefore notify you that we have abandoned the same and wish you to take charge of and complete the same as provided for in our contract. Yours very truly, Dillon & Stallings, by B. F. Stallings." At that time the house was not fully completed, but the contractors had put in the house \$1,300.42 in labor and material, on the faith of the mechanic's lien. This amount was paid by the Murphy & Bolanz Land & Loan Company to Dillon & Stallings, on estimates signed by E. H. Silven, architect, addressed to C. O. Roane, and indorsed: "Murphy & Bolanz, please pay to Dillon & Stallings. [Signed] C. O. Roane." These certificates, after payment, were delivered to the Murphy & Bolanz Land & Loan Company. When Roane received the letter from the contractors, he declined to permit them to abandon the contract, but arranged for them to continue the work until finished by paying them day wages. The work was so continued; the architect giving estimates addressed to C. O. Roane, which, after being indorsed by him as above indicated, were presented to the Murphy & Bolanz Land & Loan Company and paid until the full \$1,800 called for by the notes was paid by said company. The house, as completed, cost more than the amount stipulated in the contract, and the difference between said cost and the contract price was paid by Roane, who subsequently sued the contractors on their contract and bond and recovered the amount paid by him over and above the contract price. In the case of Paschall v. Pioneer Savings & Loan Company (Tex. Civ. App.) 47 S. W. 98, cited and relied upon by appellants, the house contracted for was not in fact, erected, but a different house than the one contracted for, and less than two-thirds of the money evidenced by the mechanic's lien went into the house. In that case this court held that there had not been a substantial compliance with the contract, and that the contractor had no lien. In the case at bar, it is undisputed that the house

was constructed in compliance with the plans and specifications set out in the contract, and that all the money evidenced by the mechanic's lien was advanced by the contractors, and went into the house. The contention here is that the change in the manner in which the contractors were to be paid for the work was, in law, an abandonment of the contract by them, and for this reason the lien was lost. Roane refused to consent to an abandonment of the contract by the contractors, but insisted on their finishing the work, and agreed to pay them wages until the house was properly finished. His intention was at that time to sue them for any excess of the cost over the contract price. The contractors did continue in charge of the work and were paid wages. The cost of the house over the contract price was between \$200 and \$600. It seems from the evidence there was some extra work done over and above that called for by the contract. These facts do not invalidate the mechanic's lien. The contract provided for just such a contingency, and the action of the parties was in accord with the terms of the contract. It is evident that when the contract was entered into the contractors intended to perform and complete the building in good faith, and their desire to be relieved of performance was neither illegal nor fraudulent, but the result of an honest belief that they would not be able to procure the material and labor to fully complete the work. Under this belief they requested the owner to take charge of the work and complete the same as provided for in the contract. The contract contained a provision authorizing the owner, on default of the contractors, to complete the building at the expense of the contractors. The owner refused to release them, but they were continued in charge and fully completed the building. It is true, it cost more than the the contract price, but for this additional cost the owner brought suit on the contract, and recovered judgment against the contractors and their bondsmen, for the excess. The house was thus completed, and we are of the opinion that the trial judge was justified in finding, which it must be inferred from the judgment he did, that the contract was substantially complied with. This was a question of fact for the determination of the trial court and it was properly determined against the contention of appellants. *Ringle v. Wallis Iron Works*, 149 N. Y. 444, 44 N. E. 175.

Again, upon the execution of the mechanic's lien and notes by Roane and wife they were delivered to J. P. Murphy, trustee, to be delivered to the contractors when the house was completed. On June 13, 1899, a statement signed "C. O. Roane & Wife," but executed by C. O. Roane, was presented to the trustee, in which it was recited, in effect, that the house had been completed in accordance with the contract, and that Roane and wife

had accepted the same, and authorizing the trustee to deliver the mechanic's lien notes to the contractors. The trustee, acting on this statement, delivered the notes to the contractors. Roane did not have authority from his wife to sign her name to such instrument, and she did not know of the instrument; although she testified that she was willing that the notes and mechanic's lien should be turned over to the contractors. She further stated she supposed her husband would look after her interests: it was in his hands. Murphy & Bolanz negotiated a sale of the notes to W. K. Homan, executor, who, before purchasing the same, examined the abstract of title, inspected the improvements, believed them to be complete, and was assured by Murphy & Bolanz that the building was complete, and was shown the instrument signed: "C. O. Roane & Wife" by "C. O. Roane," accepting the same as complete. Homan had no notice of any fact affecting the validity of the notes at the time he purchased them, and none of them was then due. On April 23, 1901, the notes were extended at the request of C. O. Roane and Mrs. Mattie P. Roane by the following statement written on the back of each note, and signed by them: "At our request the principal of this note is extended for one year from April 19, 1901, at the same rate and upon the same terms as heretofore." Subsequently Mrs. Emma K. Murphy purchased the notes of Homan, paying their face value therefor, out of her separate estate. Thereafter, C. O. Roane and Mrs. Mattie P. Roane signed the following written statement on the back of each of said notes: "At our request the principal of this note is extended to mature April 19, 1906, at the same rate of interest and upon the same terms and conditions in relative mechanic's lien contract." The trial court found, in effect, that W. K. Homan purchased the notes in due course of trade, for value, and without notice of any vice therein or in the mechanic's lien given to secure the same, and that Mrs. Murphy is also a good faith purchaser of the notes, relying on the validity of the mechanic's lien. These findings are fully supported by the evidence.

Can Mrs. Mattie P. Roane now be heard to say that the lien is not binding on the homestead? It is clear that when the mechanic's lien contract was executed by the appellants, they intended to give a valid lien upon the property. They entered into a contract with the contractors which fully complied with the requirements of the Constitution and statutes providing for the creating of a mechanic's lien on the homestead. The notes and contract evidencing such lien were placed in the hands of a trustee, to be delivered to the contractors when the work was completed. Roane, acting for himself and wife, delivered to the trustee a statement to the effect that the contract was completed, and authorizing him to turn over the

notes and lien to the contractors. This he did. No fraud is charged, and no facts are shown in the evidence tending to show fraud against Mrs. Roane on the part of Roane or of the trustee. Homan purchased the notes the same day, believing that the contract had been completed. He was shown the statement made by Roane for himself and wife to the trustee, to the effect that the house was completed and had been accepted. He was assured by Murphy & Bolanz that it had been completed. Under these facts, and with these assurances, he purchased the notes on the faith of their being secured by a valid mechanic's lien on the property. It is true, Mrs. Roane says she did not authorize her husband to sign the statement for her to the trustee, and that she had no knowledge of such statement. She also says she was willing that the notes and lien should be turned over to the contractors, and, further, that her husband looks after her interests. Roane and his wife did take possession of the property as a home, and are still residing on it. The interest on the notes had been regularly paid by the appellants. Two years after the execution of the notes, appellants requested Homan, the then holder, to extend the same for one year, and signed a statement written on the back of each of the notes, requesting an extension and agreeing to an extension of the same for one year "at the same rate of interest and on the same terms as heretofore." Each note recited that it was secured by a mechanic's lien on the property in controversy. Thus it is seen that Mrs. Roane, with full knowledge of all the facts, signed an extension of each of the notes, fully recognizing the validity of the notes, and the mechanic's lien on the homestead. Before said extension had expired and relying thereon, and the validity of the lien, Mrs. Murphy purchased said notes and lien. We are clearly of the opinion that, under these facts, Mrs. Mattie P. Roane was estopped from questioning the validity of the mechanic's lien; the notes having been purchased on the faith of the validity of the lien. *Cole v. Bammel*, 62 Tex. 117; *Thompson v. Samuels* (Tex. Sup.) 14 S. W. 145; *Mortgage Co. v. Norton*, 71 Tex. 688, 10 S. W. 301. Having, by her acts and written statement, induced the holder of the notes to purchase the same, she will not now be permitted to repudiate such statement and acts, when the effect of her doing so would work a legal fraud upon the holder. *Cravens v. Booth*, 8 Tex. 249, 58 Am. Dec. 112.

It is contended that the trial court erred in failing to find, as a conclusion of fact, that Chas. F. Bolanz was disqualified to take the acknowledgments to the mechanic's lien in controversy. This assignment is not sustained. The firm of Murphy & Bolanz was employed to negotiate the notes. Their fee was a fixed fee of \$50. Bolanz testified, and is not contradicted, that the fee was earned when he negotiated the notes and his fee

was earned whether the loan was made or not. Neither he nor his firm had any interest in the subject-matter of the contract. He was not disqualified to take the acknowledgments of the appellants to the mechanic's lien. *Kutch v. Holley*, 77 Tex. 222, 14 S. W. 32.

Finding no error in the record, the judgment is affirmed.

#### Additional Conclusions of Fact.

In response to appellants' motion for additional conclusions of fact we find the following: The mechanic's lien contract, among other things, provided, that the promissory notes referred to in said mechanic's lien should be delivered by the trustee, J. P. Murphy, to the contractors upon the completion of the work therein contracted by them to be done and its acceptance by the parties of the first part, C. O. Roane and Mattie P. Roane, and only in that event. And further, "that if the proprietor at any time during the progress of the work requires any alterations or deviation from or additions to or omissions in the said contract, specifications or plans, he shall have the right to make such changes and the same shall not void this contract; the deductions and omissions to be deducted from the contract upon a fair and reasonable valuation, and for additional work and material required in alterations and additions; the contractors are to supply the same at actual cost of material and work furnished but no such work should be done or considered as extra unless upon a separate estimate of the same before begun submitted by the contractor to the superintendent or proprietor and their signatures obtained to same. That should the contractor become bankrupt or refuse or neglect to supply a sufficient amount of material or workmen, or cause suspension of the work, or refuse to comply with the articles of agreement, the proprietor should have the right to take possession of the premises and terminate the contract, whereupon all claims of the contractor and assigns shall cease and the proprietor would have the right to complete the work at the expense of the contractor, and the cost thereof deducted therefrom."

We find the above.

#### DAVIDSON et al. v. EQUITABLE SECURITIES CO.

(Court of Civil Appeals of Texas. April 28, 1906. Rehearing Denied May 19, 1906.)

#### 1. ADVERSE POSSESSION—EXTENT—ACTUAL AND CONSTRUCTIVE POSSESSION.

Where one claiming land under a deed duly registered, enters upon and improves or incloses part of the land embraced in the boundaries specified in his deed, his possession extends to all the land embraced in the true boundaries of such deed and to the extent of his inclosure he is in actual possession, and as to the land in-

cluded in the boundary of his deed, but not within the inclosure, he is in constructive possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 547.]

## 2. BOUNDARIES—SUFFICIENCY OF EVIDENCE.

In trespass to try title, evidence examined, and held to show that the boundary line of a survey was located as claimed by defendants.

## 3. SAME—CONSTRUCTIVE POSSESSION—HOW ACQUIRED—EVIDENCE.

The fact that one owning a survey had the lines thereof run when he acquired title thereto, and continued in actual possession of a portion thereof since that time, paying taxes and claiming title to the extent of the lines then run, gave him constructive possession of all the land within the true boundaries only of the survey.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 559.]

## 4. APPEAL—TRIAL BY COURT—JUDGMENT.

Where the trial court errs in rendering judgment in a cause tried without a jury, the appellate court will render the proper judgment.

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Trespass to try title by the Equitable Securities Company against O. L. Davidson and others. From the judgment, defendants appeal. Reversed.

The appellee brought this suit against C. B. Merchant, R. C. Crawford, J. D. and Willie Thomas (heirs of A. F. Thomas, deceased), O. L. Davidson, and the minors, Owen D., Walter W., and Gabriel H. Burnett, in trespass to try title to about 130 acres of land. Appellee, plaintiff below, was the owner of the James Hamilton survey No. 29, consisting of 640 acres, and claimed the land in controversy as part of said survey. The land was shown without dispute to be part on the E. D. Lux, Jr., and part on the Q. A. Finley surveys both of which surveys were junior to the Hamilton survey owned by plaintiff. Plaintiff also plead the 3, 5, and 10 years' statute of limitation. The defendants' answers consisted of general denial, pleas of not guilty and the 3, 5, and 10 years' statute of limitation. The original field notes of the Hamilton survey describe the land by calls for natural and artificial objects as well as for course and distance, and the survey has been handed down without division by a regular chain of title from the state to plaintiff; all the deeds in said chain of title defining the boundaries of the land as in the field notes of the original survey. The plaintiff took actual possession of a part of the Hamilton survey by building on and inclosing a part of the same more than 10 years before filing its suit, but none of its improvements were upon any part of the land in controversy. The calls for course and distance in the field notes to the Hamilton survey and in plaintiff's chain of title would place the N. B. line of the Hamilton survey north of the land in controversy, make it part of the Hamilton survey, and hence constitute a conflict of the Hamilton with the Lux and Finley sur-

veys. Defendants sought to show by proof of artificial objects called for in the deeds and field notes of the original survey, that said N. B. Line was south of the land in controversy, that there was no conflict in any of said surveys, and that the land in controversy was not covered by plaintiff's monuments of title. In his findings of fact the court finds the true north boundary line of the Hamilton survey to be south of the land in controversy, as contended by defendants, but finds for plaintiff upon its plea of limitation against appellants and finds for the defendants, Merchant and Crawford, upon their pleas of limitation. From the judgment of the court against them the appellants O. L. Davidson, J. D. and Willie Thomas, and Owen D., Walter W., and Gabriel H. Burnett, have duly perfected their appeal.

Yates & Carpenter, for appellants. The Bonners and Jones & Connor, for appellee.

BOOKHOUT, J. (after stating the facts). The trial judge filed conclusions of fact wherein he found, among other things, the following facts: (1) That the true north boundary line of the James Hamilton survey owned by plaintiff as surveyed and located by the surveyor in originally locating said land is on or just south of the Nacogdoches land district line as claimed by defendants. (2) I find that the Hamilton survey owned by the plaintiff is older than either the Lux or Finley surveys, and that for more than ten years plaintiff has held adverse peaceable possession of the land in controversy with the exception of the land claimed by defendants Crawford and Merchant. (3) That the original boundary line as run for the south boundary of the Lux and Finley surveys was on the line shown by the evidence and as claimed by defendant, to be the line for the Nacogdoches land district and was intended originally to be the north boundary line of the Hamilton survey, and the defendants, Crawford and Merchant, have been in the adverse possession of the land claimed by them using or enjoying the same and paying taxes thereon, and claiming the same under a deed or deeds fully registered for more than five years. (4) That the plaintiff holds possession of the Hamilton survey under a consecutive chain of transfer from and under the sovereignty of the soil down to plaintiff, and that to run the lines of said survey according to course and distance it will cover the land in controversy, and that the northwest corner of the James McAdams survey is well established and undisputed and the field notes of the Hamilton survey called to begin as follows: 3,305 varas north and 1,411 varas west of said northwest corner and that for 12 or 13 years it has actually been claiming said land adversely within said calls, and that it has paid taxes thereon and all its deeds are duly

registered. Its improvements and enclosures are south of the land claimed by defendants. We adopt these findings, except that part of the second hereinafter set out.

It is contended that where one claiming land under a deed duly registered, enters upon and improves or incloses a part of the land embraced in the boundaries specified in his deed his possession extends to all the land embraced in the true boundaries of his deed. This contention announces a correct proposition of law. *Evitts v. Roth*, 61 Tex. 81; *Parker v. Baines*, 65 Tex. 605. To the extent of his inclosure he is in actual possession, and as to the land included in the boundary of his deed and which is not in his inclosure he is in constructive possession. *Evitts v. Roth*, supra. The appellee does not controvert this proposition, but contends that the possessor is in constructive possession and can hold the land within the boundaries specified in his deed, whether they be the true boundaries or not. In other words that, one in possession of land under a deed duly registered who has the land surveyed at the time he takes possession, or soon thereafter, and who actually occupies a part thereof openly, notoriously, and adversely against the world, is not confined to the boundaries as originally run by the surveyor who located the original surveys out of which the land is taken; but such constructive possession extends to and includes all of the land within the calls of said deed by said actual survey made at the time of taking possession or soon thereafter. It was shown that the appellee became the owner of the James Hamilton 640 acre survey in 1890 or 1891. In 1892 it had a survey made and the boundaries as then run includes the land in dispute. The field notes of the Hamilton survey call for to begin at its northeast corner 3,305½ varas north and 1,411.5 varas west of the northeast corner of a survey made for James McAdams, a stake from which a post oak 18 inches in diameter bears south 74 west 4 varas. Another 12 inches in diameter; thence west 140 varas a post oak 12 inches in diameter, 1,411.5 varas a stake the second (northwest corner) corner from which a post oak 20 inches in diameter bears south 24 west 8 varas, another 12 inches in diameter bears south 63 east 10 varas. Thus, it is seen the northeast and northwest corners were witnessed by bearing trees. When the land was surveyed for appellee in 1892 no bearing trees and no marked lines were found. The surveyor testified that he found no trees corresponding with the calls for trees in the field notes of the original survey. He ran according to the course and distance called for in the field notes of the survey, and, if course and distance are to control, then the James Hamilton survey embraces the land in controversy. If natural and artificial objects and the lines run and marked in making the ori-

ginal survey control, then the land sued for is not in that survey. The trial court found "that the true north boundary line of the James Hamilton survey owned by plaintiff as surveyed and located by the surveyor locating the said land is on or just south of the Nacogdoches land district line as claimed by defendants." This finding is amply supported by the evidence. It was shown by witnesses living in the vicinity of the land and who were acquainted with and had known the north boundary line of the Hamilton survey for 40 years that it ran about 30 yards south of the old Nacogdoches land district line. This line has been recognized as the north boundary line of the Hamilton survey ever since. One of the witnesses testified that he carried one end of the chain when the survey was originally located. The E. D. Lux survey and the S. A. Finley survey join and are north of and adjoining the James Hamilton survey. The south boundary line of the Lux and Finley surveys is the old line of the Nacogdoches land district. The appellant, O. L. Davidson, is in possession of the land in the southeast corner of the Lux survey; and the other appellants are in possession of land in the southern part of the Finley survey.

It is clear that the north line of the Hamilton survey as originally located is on or south of the Nacogdoches land district line, and hence none of the land occupied by the appellants is within the boundary of that survey. Does the fact that appellee had the lines of the Hamilton survey run when it acquired title to the same and that it has been in actual possession of a portion thereof since that time, paying taxes, and claiming title to the extent of the lines then run, give it constructive possession of all the land within the boundaries of those lines, although such lines are not the true boundary lines of the survey? The appellee was permitted to recover on its plea of limitation, and unless it had possession, actual or constructive, of the land in dispute, the judgment cannot be sustained. The evidence fails to show actual possession by appellee, and unless the evidence is sufficient to show constructive possession the judgment cannot stand. We are clearly of the opinion that under the facts the appellee did not have constructive possession of any land except such as was embraced within the Hamilton survey. We disapprove of that part of the second finding of the trial court above quoted that "for more than 10 years plaintiff has held adverse peaceable possession of the land in controversy." The plaintiff, appellee, owned the James Hamilton survey of 640 acres and was in actual possession of a part thereof by its tenant, and claiming the entire survey and such actual possession gave it constructive possession of all the land within the true boundaries of that survey. The plaintiff did not have constructive posses-

slon of the 130 acres in dispute; the same not being within the boundaries of that survey, notwithstanding the plaintiff, about the time it acquired the Hamilton survey, had it surveyed, and such survey located the land in dispute within the Hamilton survey, and plaintiff has claimed it for more than 10 years. *Porter v. Miller*, 76 Tex. 597, 13 S. W. 555, 14 S. W. 334. There was evidence that each of the appellants had his land cleared and fenced, and that appellant Davidson fenced his about five years before the trial, and that Burnett and Thomas each fenced about three years before the trial.

We conclude that the trial court erred in rendering judgment for appellee, and the cause having been tried by the court without a jury, we will proceed to render such judgment as should have been rendered by that court. The judgment is reversed, and here rendered that appellee take nothing by its suit, and that appellants go hence without day and recover of appellee their costs.

Reversed and rendered.

#### O'SHENNESSEY v. STATE.

(Court of Criminal Appeals of Texas. April 18, 1906.)

##### 1. INTOXICATING LIQUORS—UNLAWFUL SALE—EVIDENCE.

Where an indictment charged an unlawful sale of liquor to two persons, evidence of such sale to one did not authorize a conviction.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 274.]

##### 2. SAME—INSTRUCTIONS.

Where, on a prosecution for an unlawful sale of liquor, the alleged purchaser testified that he did not pay for the liquor as he considered it a gift, a mere general instruction was not sufficient; but the court should have charged that if at the time of the delivery of the alleged liquor it was the understanding of the parties, or of defendant that he was giving it away, he should be acquitted.

##### 3. SAME—EVIDENCE.

On a prosecution for an unlawful sale of liquor, evidence that defendant had empty beer bottles in the back part of his place of business was inadmissible.

Appeal from Bell County Court; W. R. Butler, Judge.

J. F. O'Shennessy was convicted of violating the local option law, and he appeals. Reversed.

J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law. The indictment charged the sale to have been made to Will Houston and Walter Griggs. The court authorized a conviction alone upon a sale to Griggs. To this charge exception was reserved. We believe this exception is well taken. The sale charged was to the

two parties. The limitation in the charge was as to a sale to one. This is not the transaction averred.

A question arose as to whether it was a sale or a gift. Griggs testified "that he did not pay for the beer, nor had he paid for it at the time of the trial. He further states that at the time it was handed out to me I considered from what defendant said he was giving it to me. If I had not, I would have paid for it." The court submitted this issue in a general way, but appellant asked for a more specific charge, to the effect that "if at the time of the delivery, if any, of the alleged beer, it was the understanding of the parties, or of the defendant, that he was giving the beer to the witnesses, then he should be acquitted, that he would not be guilty of a sale." Upon another trial we believe that this issue should be more specifically stated as in the special charge.

After Griggs had testified in substance that he had gone into the place of business where appellant was working on the 7th of October, to take a drink in company with others, and asked for Ino, defendant handed out to him and his companion five bottles of beer, which they drank; and after Houston had testified substantially as did witness Griggs, and after two other witnesses had testified that the liquor they drank was Budweiser beer—at least had Budweiser labels on the bottles and was intoxicating—Blair (one of the last-named witnesses) was permitted to state that subsequent to the arrest of defendant he went into the back room, and found in said back room several barrels of empty beer bottles. All of the bottles examined had on them the Budweiser label. Several exceptions were reserved to this testimony. We believe these exceptions are well taken. This could shed no light on the transaction as to whether the transfer of the five bottles was a gift or sale; nor could it tend to prove that the contents of the bottles that were given or sold Griggs and Houston was intoxicating. The fact that appellant may have had empty beer bottles in the back of his house could not illustrate any question on the trial of this case.

The same observations may be made to the further answer of Blair that, after he left appellant at the justice's court, he went back to the house where appellant had been arrested, and found that somebody had removed two barrels of beer that had just been opened, and all the other beer in the house. What somebody else may have done in the defendant's absence certainly could not bind him.

The judgment is reversed, and the cause remanded.

BROOKS, J. absent.

## McPHERSON v. GORDON.

(Court of Appeals of Kentucky. Sept. 25, 1906.  
On Rehearing, Oct. 25, 1906.)

## 1. STATUTES — AMENDMENT — PUBLISHING AMENDED ACT.

Ky. St. 1903, §§ 501-503, relate to the execution of deeds by persons other than married women. Section 507 applies to the execution of deeds by married women. Section 511 requires the clerk to record deeds when properly certified, which shall be acknowledged or approved before him as required by law. Section 522 imposes a penalty on clerks for failing to perform the duties enjoined by chapter 29 relative to conveyances. Section 495 provides that conveyances, required to be recorded to be effectual against purchasers without notice, shall be recorded in the clerk's office of the court of the county in which the property conveyed, or the greater part thereof, shall be. Act March 21, 1904 (Acts 1904, p. 148, c. 67), recites that it is amendatory of section 495, and makes it unlawful for any clerk to admit to record any deed unless it specifies the next immediate source from which the grantor derived title, and makes it unlawful for any grantor to lodge a deed for record unless it complies with the statute. *Held*, that the statute is not violative of the constitutional provision that no law shall be amended, unless re-enacted and published at length, on the theory that the statute is amendatory of sections 501-503, 507, 511, 522.

## 2. SAME — SUBJECTS AND TITLES — CONVEYANCES.

Act March 21, 1904 (Acts 1904, p. 148, c. 67), entitled "An act to amend and re-enact an act entitled 'An act concerning conveyances,'" being section 495, Ky. St. 1903, and which statute in substance makes it unlawful for any clerk to admit to record any deed unless it specifies the next immediate source from which the grantor derived title, is not unconstitutional on the ground that the subject is not embraced in the title.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 150, 151.]

## 3. VENDOR AND PURCHASER—TITLE OF VENDOR—RECORD.

Acts 1904, p. 148, c. 67, in relation to the recording of conveyances, imposes a penalty on any clerk admitting to record a conveyance which does not specify and refer to the next immediate source from which the grantor therein derived title, and imposes a penalty on any grantor lodging for record a conveyance not complying with the statute, but provides that the statute shall not be construed to invalidate any deed lodged contrary to the statute. *Held*, that the fact that the deed to the vendor in a contract for the sale of land did not specify the source of title was no justification for the vendee's refusal to perform, where the deed to the grantor was recorded.

## 4. SAME—CONVEYANCE—SUFFICIENCY.

A deed tendered by the vendor in a contract for the sale of land, which referred to the deed book and page in which the conveyance to the vendor was recorded, was sufficient.

Appeal from Circuit Court, Jefferson County. Chancery Branch, First Division.

"Not to be officially reported."

Action by A. L. McPherson against Robert G. Gordon. From a judgment in favor of defendant, plaintiff appeals. Affirmed with directions to enforce specific performance of the contract between plaintiff and defendant.

Mason Barrett, for appellant. Pope Nicholas, for appellee.

NUNN, J. On the 7th day of June, 1906, the appellant addressed a written proposition

to the appellee, offering him \$875 for a lot of ground, describing it minutely, and closed with the following words: "You are to convey to me a fee-simple marketable title to said property, which shall be free from any incumbrance except state and county taxes for the year 1906, which I will assume." The appellee on the same day wrote on the same paper and signed the following: "I hereby accept the above proposition." The appellee on the next day made and duly executed a deed of conveyance to appellant, reciting in the deed all the conditions and stipulations contained in the written proposition referred to, but omitted to state or refer to the next immediate source from which the grantor, appellee, derived his title to the lot conveyed. The appellant refused to accept the deed, and it has never been lodged for record or recorded. The appellee instituted this action to compel the appellant to comply with his contract. He answered, setting forth the defects in the deed referred to, and also filed the deed made by the Louisville Land Company, a corporation, to the appellee, Gordon, dated June 5, 1906, which deed also fails to state or refer to the next immediate source from which the grantor, the land company, derived its title to the lot. This deed appears to have been lodged for record and recorded in the county clerk's office on the 8th day of June, 1906. The appellant contends that this deed was lodged and recorded contrary to the provisions of the act of the General Assembly approved March 21, 1904, and the deed tendered to him by appellee is contrary to this act, and cannot be legally recorded, and by reason of the defects in the two deeds he cannot be vested with the legal title to the property purchased by him. The lower court by its judgment enforced specific performance of the contract. From this judgment, appellant appeals.

We quote so much of the act of 1904 (Acts 1904, p. 148, c. 67) as is pertinent to the question to be determined upon this appeal: "That section 6 of an act entitled, 'An act concerning conveyances,' and approved April 22, 1893, and being section 495 of the Kentucky Statutes, be, and the same is, hereby amended and re-enacted, so that the same shall read as follows: 'All deeds and mortgages and other instruments of writing which are required by law to be recorded to be effectual against purchasers without notice, or creditors, shall be recorded in the clerk's office of the county in which the property conveyed, or the greater part thereof, shall be. But it shall be unlawful for any county clerk or deputy clerk to admit to record in such office any deed of conveyance of any interest in real estate equal to or greater than a life estate, unless such deed shall plainly specify and refer to the next immediate source from which the grantor or grantors therein derived title to the said real estate or the interest conveyed therein. \* \* \* It shall be unlawful for any grantor to lodge

for record, or for any county court clerk or deputy to receive and permit to be lodged for record, any deed that does not comply with the provisions of this section. Any grantor who shall lodge for record, and any county court clerk, or deputy county court clerk, who shall receive and permit to be lodged for record any deed contrary to the provisions of this section, shall be fined not less than twenty-five nor more than fifty dollars for each offense." The section continues with provisions and stipulations stating wherein the clerk and others may not be punished for a violation of the section, and closes with the following words: "Nor shall anything in this act be construed to invalidate any deed lodged contrary to the provisions hereof."

The appellee contends that the action of the lower court was right for two reasons: First, that the act of 1904, above quoted, is invalid for the reason that it was enacted by the General Assembly in violation of section 51 of the Constitution. Second, that, even if the act is valid, the last provision of the act above quoted makes the deeds referred to valid and sufficient to pass a good and perfect title to the appellant. The provision of the Constitution referred to is as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length." The contention is that the act of 1904 relates to more than one subject, which is not expressed in its title, and amends other laws, to wit: Sections 501, 502, 503, 507, 511, and 522 of the Statutes, without re-enacting or publishing them at length. In our opinion, the title of the act of 1904 is sufficiently explicit and definite. In view of the many decisions of this court construing this provision of the Constitution with reference to the sufficiency of the title to acts, we deem it useless and unnecessary to present any reasons for upholding the title of this act. See the opinions cited under section 51 of the new Constitution, and the case of *Commonwealth v. Reinecke Coal Mining Company*, 79 S. W. 287, 25 Ky. Law Rep. 2027. But appellee says that the act of 1904, in addition to amending section 495, amends the other six sections of the statute referred to, and they were not re-enacted or published at length. In this the appellee is mistaken. They were not amended by the act referred to. Section 501 refers to the execution of deeds in the state by persons other than married women. Section 502 has reference to the execution of deeds out of the state by persons other than married women. Section 503 refers to the execution of deeds in a foreign country by others than married women. Section 507

applies to the execution of a deed by married women. Section 511 requires the clerk to record the deeds when properly certified which shall be acknowledged or approved before him as required by law, while section 522 only imposes a penalty on clerks for failing to perform the duties enjoined by the twenty-ninth chapter of the Statutes as it then existed. These sections are not at all affected by the act of 1904. They are left in full force, and are not changed in any way. Section 495, as amended, only imposes an additional duty upon clerks and grantors, and fixes a penalty for the violation of it.

The only purpose of this amendment was to make it more convenient and easy for purchasers of real estate to trace the title thereto, and to avoid imposition and losses. In our opinion, it would have been better if such a requirement had always been the law. As stated, the effect of the amendment is only to require the name of the next preceding grantor of the grantor to be named in the deed, and places a penalty upon clerks and grantors who violate it. The violation of it, however, does not prevent the title to the real estate from passing from the grantor to the grantee. It results, therefore, that the deed of the land company to the appellee passed the title to him. It is recorded, and appellant has no right to complain of the alleged defect in it. But we are of a different opinion with reference to the deed tendered by appellee. It has never been lodged for record or recorded, and it is very necessary to his interest that it should be, to protect himself as against subsequent purchasers and mortgagees, which he cannot have done without the county clerk or his deputy violates the statute, and subjects himself to the penalty imposed therein, which the clerk is not likely to do if apprised of the penalty. We are of opinion that appellant should not have been compelled to accept the deed tendered.

The judgment is reversed, with directions to the lower court to require appellee to tender a deed in conformity with this opinion, and then enforce a specific performance of the contract, and, if the appellee refuses to tender such a deed within a reasonable time, this action should be dismissed. Appellant should not be required to pay the costs until after the tender of a sufficient deed, as he was not in fault.

#### On Rehearing.

In the opinion delivered in this case September 25, 1906, by some inadvertence, possibly caused by the briefs of counsel, we overlooked the fact that the deed tendered by appellee to the appellant, contained a reference to the deed book and page, in which the conveyance from the Louisville Land Company to the appellee, was recorded. This being true, the lower court was right in requiring the appellant to accept the deed tendered. For this reason the judgment of the lower



court should not have been reversed, but affirmed.

The former opinion is modified to this extent, and the judgment of the lower court is affirmed.

# JONES v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

## 1. MALICIOUS PROSECUTION—PROBABLE CAUSE—SUFFICIENCY OF SHOWING.

The finding of an indictment is *prima facie* evidence of probable cause for the prosecution of accused, and his acquittal does not show malice or want of probable cause; and he, in an action for malicious prosecution, must prove other facts establishing a want of probable cause.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 69, 115, 152.]

## 2. SAME—MALICE—PRESUMPTIONS.

Where a plaintiff in an action for malicious prosecution has given evidence establishing a want of probable cause for the prosecution, malice on the part of the prosecutor will be inferred.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 67, 68.]

## 3. SAME—EVIDENCE OF PROBABLE CAUSE.

In an action for malicious prosecution plaintiff showed that defendant was instrumental in having plaintiff arrested and in procuring an indictment against him, and that plaintiff was innocent of the charge. Plaintiff was acquitted. *Held* sufficient to overcome the presumption arising from the indictment that defendant had reasonable grounds for the prosecution.

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by Hiram Jones against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See 82 S. W. 416.

E. N. Ingram and N. J. Weller, for appellant. Benjamin D. Warfield, E. W. Hines, and J. W. Alcorn, for appellee.

CARROLL, C. The appellant brought this action for malicious prosecution against appellee, and upon a trial the circuit court peremptorily instructed the jury to find for appellee. The evidence introduced on behalf of appellant conducted to establish the following facts: An engine attached to one of appellee's trains was wrecked, killing the engineer. The following day appellant was arrested by a claim agent employed by the appellee, or by its direction, and was confined in jail several days. Afterwards the grand jury of Bell county returned two indictments against appellant, charging him in one with wrecking the train by placing obstructions on the track, and in the other with the murder of the engineer who was killed. Subsequently, the indictment for murder was filed away on motion of the attorney for the commonwealth, and on motion of the same officer the indictment for obstructing the track and wrecking the train was dismissed.

The record does not show upon whose testimony these indictments were found, but the names of several employees of the appellee appear as witnesses on the indictment in connection with other witnesses not in its employment. O. B. Hollinsworth, appellee's superintendent on the division where the wreck occurred, testified in substance that he directed the claim agent to investigate the matter, and decided to let the witnesses go before the grand jury. The indictments were introduced by appellant as evidence in his behalf, and it is the contention of appellee that these indictments are *prima facie* evidence of appellant's guilt, and, having failed to overcome the presumption of guilt made out against him by these indictments, or to show malice on the part of appellee, the ruling of the lower court was proper. In *Wood v. Weir*, 5 B. Mon. 544, it was held that, to maintain an action for malicious prosecution, three things are necessary to be made out by the plaintiff: First, a want of probable cause; second, malice of the defendant; and third, damage to plaintiff; and that malice may be implied from the want of probable cause, but this implication may be explained and repelled by facts and circumstances. In *Yocum v. Polly*, 1 B. Mon. 358, 86 Am. Dec. 583, the court said both malice and want of probable cause must concur to sustain an action for malicious prosecution, and evidence must be introduced tending to show that the prosecution was without probable cause from which malice will be implied. It is invariably necessary to give some evidence arising out of the prosecution to show that it was groundless. It is not sufficient to prove the mere acquittal, or to prove any neglect or omission on the part of the defendant to make good his charge. In *Garrard v. Willett*, 4 J. J. Marsh. 628, the court, speaking by Judge Roberson, said: "His acquittal by the venire is evidence of his innocence, but it does not prove malice of the prosecutor. The defendant will not be required to prove anything until the plaintiff shall have given some evidence of malice, independent of any inference from the verdict of acquittal. To presume that every person who has been acquitted by a venire was prosecuted maliciously, would be, not only unreasonable and false, but subversive of justice. To establish such a presumption as a deduction of law would tend to deter the honest from prosecuting the guilty, and would indirectly stimulate malice to secure immunity by corrupt means. The allegation of malice or want of probable cause is indispensable in an action for malicious prosecution. As it is necessary to aver malice, it is equally necessary to prove malice; and, as malice will not necessarily result from the averment of acquittal by the venire, it cannot be inferred on the trial from the proof of such acquittal alone. If a plaintiff should prove nothing more than that he was acquitted by the verdict of a petit jury, sure-

ly he would not be entitled to a verdict. Before he can be entitled to damages he must prove some other facts tending to evince a want of probable cause for the prosecution. When a grand jury, upon other evidence than that of the prosecutor, finds an indictment to be a true bill, the presumption is *prima facie* that, as they on their oaths have said that the person indicted is guilty, the prosecutor had reasonable grounds for the prosecution. Nevertheless, the law still presumes that the person indicted is innocent. But this presumption will not repel the inference that there was probable cause, and consequently the final acquittal of the accused will not per se prove a want of probable cause. The true doctrine is that the finding by the grand jury is *prima facie* evidence of probable cause." *Ulman v. Abrams*, 9 Bush, 738; *Burks v. Ferrell*, 80 S. W. 809, 26 Ky. Law Rep. 36; *Lancaster v. Langston*, 36 S. W. 521, 18 Ky. Law Rep. 299.

From these harmonious authorities it may be considered settled that the finding of an indictment by the grand jury is *prima facie* evidence of probable cause, and the acquittal of the person indicted is evidence of his innocence; but the acquittal does not of itself show evidence of malice or the want of probable cause, and, therefore, the plaintiff in an action for malicious prosecution must prove some other facts tending to establish a want of probable cause for the prosecution, and, when he has introduced evidence of this character, malice on the part of the prosecutor will be inferred.

In this action the appellant introduced evidence, independent of the record showing a dismissal of the prosecutions, tending to support his plea that the prosecution against him was instituted by appellee without probable cause. Without detailing the evidence or expressing any opinion as to its weight or sufficiency, it tended to show that appellee was instrumental in having appellant arrested and in procuring the indictments against him, and, also, that appellant was innocent of the charges preferred. This evidence, in connection with the verdict of acquittal, was sufficient to overcome the presumption arising from the indictments that appellee had reasonable grounds for the prosecution.

The lower court erred in taking the case from the jury, and the judgment is reversed for proceedings in conformity to this opinion.

NELSON et al. v. NELSON.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

1. DESCENT AND DISTRIBUTION—ACTION BY HEIRS—CONCERNING PERSONALTY.

The heirs of a decedent cannot maintain an action to recover a share of decedent's personal estate, unless there is a personal representative who has refused to sue.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 252, 253, 360.]

2. SAME—PARTIES.

Where the personal representative refuses to sue to recover a share of decedent's personal estate, and the heirs sue themselves, the representative must be made a party defendant.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 364.]

3. TRUSTS—EVIDENCE TO ESTABLISH TRUST—SUFFICIENCY.

In an action by the heirs of a decedent against his widow to recover real estate standing in the name of the widow, on the ground that decedent had purchased and paid for the property, but that it had been conveyed to defendant under a parol trust for the heirs, evidence considered, and held insufficient to sustain the claim.

4. APPEAL—QUESTIONS REVIEWABLE—FAILURE TO PRESENT QUESTION ON TRIAL—ADMISSION OF EVIDENCE.

Evidence, as to the admission of which no exception was taken, cannot be complained of on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1503.]

5. WITNESSES—COMPETENCY—TESTIMONY AGAINST INFANT HEIRS.

In a suit by the heirs of a decedent against his widow to recover real estate standing in her name, on the ground that it had been purchased by decedent and conveyed to her under a parol trust for plaintiffs, the greater part of the widow's deposition, being made up of denials and explanations in contradiction of testimony brought out by plaintiffs in respect to acts and statements attributed to her, was, in the main, competent, though otherwise she would have been incompetent, owing to plaintiffs' infancy.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 718.]

6. HOMESTEAD—ABANDONMENT.

A widow cannot claim a homestead in the deceased husband's home place, if she has removed from the property and lived elsewhere after a second marriage.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 285, 312-328.]

7. TRUSTS—RESULTING TRUST—NATURE OF TRUST.

By the express provisions of Ky. St. § 2353, resulting trusts are forbidden, except where the grantee has taken a deed in his own name without the consent of the person paying the consideration, or where, in violation of some trust, he has purchased the land deeded with the money or property of another.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 90.]

8. SAME—PROOF OF TRUST—PAROL EVIDENCE.

A resulting trust may be proved by parol, but the evidence must be clear and satisfactory.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 130, 137.]

9. DESCENT AND DISTRIBUTION—ADVANCEMENTS.

Where a deed was made to a wife by direction of her husband, he voluntarily having paid part of the purchase money, it is presumably an advancement or gift to the wife.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 428.]

Appeal from Circuit Court, Laurel County.  
"Not to be officially reported."

Action by Earl Nelson and another, by their next friend, W. T. Fagan, against Belle Nelson, alias Belle Hillers. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Sam C. Hardin, for appellants. James Sparks and D. K. Rawlings, for appellee.

**SETTLE, J.** This appeal involves the consideration of two cases which were consolidated and heard together in the circuit court, as they were between the same parties, based upon the same facts, and sought practically the same relief. Both actions were brought by appellants Earl and Irene Nelson, 9 and 11 years of age, respectively, infant children and only heirs at law of John W. Nelson, deceased, by their next friend, W. T. Fagan, against appellee, Belle Nelson (now Belle Hillers), widow of John W. Nelson. In one of the actions appellants sought to recover of appellee their distributive share of the personalty alleged to have been left by their father at his death—it being averred in the petition that he died intestate, and was the owner at that time of personal estate of the value of \$1,500, which appellee, his widow, had wrongfully converted to her own use and refused to account for; that they were entitled as heirs at law of the decedent to one-half of this personalty—that is, each to a fourth thereof. It was also alleged in the petition that there had been no administration of the decedent's personal estate, or administrator thereof appointed by the county court. But it does not appear from the petition what debts, if any, were owing by the decedent, or whether they have been paid. In the other action a recovery was sought of certain real estate of which, it was alleged, John W. Nelson was in the possession at the time of his death, consisting of three lots in the town of East Bernstadt and three acres of land in the country a short distance from the same town; that these lots and the land contain good buildings and other valuable improvements; that one of the town lots was occupied by their father as a place of residence at the time of his death, and was incumbered by a mortgage executed by him and appellee, shortly before his death, to an East Bernstadt bank, to secure a loan of \$500 made him by the bank. It was further alleged in the petition that the several parcels of real estate mentioned had been purchased and paid for by their father, but the title to each parcel, except the home place, had been conveyed by the several vendors thereof to his wife, the appellee, by direction of their father, and with the understanding between himself and appellee that the several conveyances were accepted by her in trust for appellants, subject to her right of dower and homestead; that this trust, though in parol, was and is nevertheless a valid trust, which appellee is bound to perform, but has failed and refused to execute, though requested by appellants to do so. The prayer of the petition asked the enforcement of the alleged trust. Appellee filed answer to the petition in each case, each answer containing a traverse. After completion of the issues and taking of proof the actions were con-

solidated and submitted for trial, which resulted in the entering of a judgment dismissing both actions as to appellee, but continuing the one as to the real estate for preparation and hearing of the cross-petition of the bank, which had been made a party as holder of the mortgage debt upon the lot occupied as a place of residence by the decedent at the time of his death. Appellants complain of that part of the judgment dismissing the actions as to appellee, and by this appeal seek its reversal.

As to the dismissal of the action brought to recover appellants' alleged shares of the personal estate, it is only necessary to say that the judgment rendered was clearly proper. Such an action cannot be maintained by the heir or distributee, but must be brought by the personal representative, who, upon his appointment and qualification, takes the title to and possession of all the personal property of the decedent. If he refuses to sue for a claim or demand due the decedent's estate, suit may then be brought by the heir, but in such case the personal representative must be made a defendant, and his refusal to sue be alleged. In the case at bar there was no personal representative; but this did not authorize the appellants to bring the action. They might have had an administrator appointed by the county court, and it was their duty to do so. The lower court should have sustained the special demurrer filed to the petition, which raised the question of appellants' want of capacity to sue, instead of deferring the dismissal of the action until the final hearing.

The second action presents the following state of facts: In the early part of the year 1898 the appellee became the wife of John W. Nelson, who was then a widower; the infant appellants being the children of the first wife. For several years before his second marriage Nelson had been in the mercantile business at East Bernstadt, but did not prosper. At the time of, or immediately before, the second marriage, he was so embarrassed financially that he failed in business, and by composition with his creditors settled his debts at 10 cents on the dollar. After that settlement he never held any property, real or personal, in his own name, except the lot on which he resided at his death; but appellee, after his failure, conducted in the same building in which he had done business a general store, also embarked in the livery business, and possibly other undertakings, in some or all of which she continued down to and following the husband's death in 1904. During these years she acquired the title to the several parcels of real estate involved in this case, and accumulated some personal property, all in her own name. It appears that John W. Nelson gave her little assistance in the various enterprises in which she engaged; indeed, he could not do much, as he had but one leg, was very corpulent, and much of the time

in a state of intoxication. It is evident from the proof that the property accumulated in her name was acquired mainly through her own industry and frugality. According to the evidence, she had no estate and only a little money at the time of her marriage to Nelson; but at his death the real and personal estate of which she was the ostensible owner was worth \$2,500 or \$3,000. It also appears from the evidence that she is a woman of unusual business capacity and great industry, and that from the time of her marriage with Nelson she assiduously devoted herself to work and business. Some time after Nelson's death appellee married A. J. Hillers, with whom she now resides. There is some evidence to the effect that John W. Nelson, both before and after the conveyance of the real estate to appellee, admitted his recklessness and disposition to get in debt, and said, though he had paid for the property, it was conveyed to his wife for her benefit and that of his children, and to prevent its being sold for his debts, if he again became involved; but it does not satisfactorily appear that any of these statements were made with her approval. It was also proved by two or three witnesses, all closely related to appellant, that appellee, after her husband's death, admitted appellants were entitled to some part of the real estate, and intimated that she would divide it with them, but desired time to consult her friends about it. These statements were, however, denied by her; but, if they were made as stated, the fact that she wished to take advice indicated that they did not amount to a recognition of the alleged trust, but rather that she did not fully understand the situation, and was then unwilling to commit herself to an agreement to surrender any part of the realty to appellants.

The principal statement made by Nelson that he paid for the real estate and caused it to be conveyed to appellee occurred when he purchased of his brother the home place. It appears from the brother's testimony that Nelson then asked him to convey that lot to appellee, as the others had been conveyed; but the witness refused to do so, and instead made the deed to Nelson himself. Appellee was not present when this conversation occurred, and there is no evidence appearing in the record which conduces to show that there was in fact any agreement on her part, or anything said at the time of the several conveyances to appellee, that she was to take the title to the property conveyed in trust for appellants. Nor is there any proof that she accepted the deeds with the understanding that the conveyances were coupled with any such trust, except the declarations made by her husband before and after the purchase of the realty and the execution and delivery of the deeds, which are not of themselves sufficient to establish the trust, in view of the evidence to the contrary shown by the record, including the positive denial

of a trust contained in the deposition of appellee. As exceptions were not filed to the evidence relating to the declarations of John W. Nelson as to the alleged trust, or to any part of the deposition of appellee, complaint thereof will not be regarded on appeal; but we deem it not improper to say that proof of declarations similar to those made by Nelson were held to be competent in *Baker v. Dobyns*, 84 Ky. (4 Dana) 220, and, as the greater part of appellee's deposition is made up of denials and explanations, in contradiction of testimony brought out by appellants in respect to acts and statements attributed to her, it is, in the main, competent. Otherwise, she would not have been a competent witness, owing to the infancy of appellants.

It was proved by appellants, and admitted by appellee, that Nelson furnished \$293 of the \$400 paid for the three-acre tract near East Bernstadt conveyed to appellee, and that this amount was a part of the \$500 borrowed of the bank, for which the mortgage on the home place was given; but the evidence strongly conduces to prove that the balance of the purchase money for the land, as well as the entire purchase price of the town lots deeded appellee, was paid out of the proceeds of the store and other business enterprises conducted by appellee, and with money earned by her industry. According to the evidence, the house and lot upon which Nelson lived, and to which he held the title, is worth from \$1,200 to \$1,500, nearly as much as all the real estate to which appellee acquired title while she was his wife. Appellants, as heirs at law of their father, take the home place, subject to the bank's mortgage and appellee's right of dower or homestead, if she should assert such right; but she cannot claim a homestead therein if she removed from the property and has lived elsewhere since her second marriage.

Appellants did not live with their father and stepmother, but have made their home with their grandfather and uncle ever since the death of their mother. Perhaps greater association with appellants while she was the wife of their father would have produced upon appellee's part an affection for them, and upon their part a like feeling for her, that would have prevented a disagreement between them after the death of the father as to the adjustment of property rights. Be that as it may, we are not called on in this case to distribute an estate under the statute, or to settle a family quarrel, but to decide the case upon the record presented, which does not, in our opinion, establish the trust sought to be enforced by appellants. Resulting trusts are forbidden by section 2353, Ky. St. 1903, except where the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where, in violation of some trust, he shall have purchased the land deeded with the money or property of another person.

Curd v. Curd's Adm'r, 53 S. W. 522, 21 Ky. Law Rep. 919; Coleman v. Bowles' Adm'r, 56 S. W. 851, 22 Ky. Law Rep. 15; Clay v. Clay's Guardian, 72 S. W. 810, 24 Ky. Law Rep. 2016; Mannen v. Bradberry, 81 Ky. 951; Fields' Heirs v. Napier, 80 S. W. 1110, 28 Ky. Law Rep. 240; Russell v. Russell, 12 S. W. 709, 11 Ky. Law Rep. 547; Pool, etc., v. Thomas, 8 S. W. 198, 10 Ky. Law Rep. 92; Commonwealth, for Use, etc., v. M. & B. S. Ry. Co., 94 Ky. 16, 21 S. W. 342. We do not mean to say that a resulting trust may not be proved by parol evidence, for numerous cases so holding appear in the books. Snelling v. Utterback, 4 Ky. (1 Bibb) 609, 4 Am. Dec. 661; Farls v. Dunn, 70 Ky. 276; Caldwell v. Caldwell, 70 Ky. 515; Webb v. Foley, 49 S. W. 40, 20 Ky. Law Rep. 1207; Row v. Johnson, 78 S. W. 906, 25 Ky. Law Rep. 1799. But these were cases in which it was clearly made to appear, either that the deed to the land conveyed was received by the grantee under an agreement with the grantor, or one paying the consideration, to hold the title in trust for a third person, or where the grantee in violation of a trust purchased the land with the means of another. There are yet other cases in which, upon parol evidence of a secret trust in behalf of an insolvent debtor, created by his act in conveying or causing to be conveyed to another property which, but for such conveyance, would be liable for his debts, the courts, at the suit of creditors, have declared the conveyance a fraud upon them, and subjected the property to the payment of his debts.

Appellants insist that the case at bar belongs to the class coming within the rule first mentioned, but we do not think the evidence sufficient to sustain this contention. Indeed, it rests upon testimony which this court in the case of Pool, etc., v. Thomas, etc., 8 S. W. 198, 10 Ky. Law Rep. 92, condemned as the weakest known to the law, and insufficient of itself to establish a parol trust. In the case *supra* it was also said: "While it is the established law of this state that parol trusts may be established by parol evidence, yet it is equally well established that the evidence establishing such trusts should be clear and satisfactory." *Carey v. Callans' Ex'r*, 45 Ky. (6 B. Mon.) 44.

As to the \$293 it is admitted Nelson paid on the purchase price of the small tract of land near East Bernstadt conveyed appellee, it is sufficient to say the proof fails to show that it was paid because of any agreement or understanding on appellee's part that she would take the title to the land, charged with a trust. Therefore, as to that matter, the case clearly comes within the inhibition of the statute declaring that no trust results where the consideration is paid by one person, and the deed is made to another. The deed having been made to appellee by direction of her husband, and he having voluntarily paid part of the purchase money, it will, upon the record here present-

ed, be presumed that it was done as an advancement or gift to her by the husband. *Clay, Jr., v. Clay's Guardian*, 72 S. W. 810, 24 Ky. Law Rep. 2016.

All that is herein said as to the insufficiency of the proof to establish the alleged trust in respect to the realty applies with equal force to appellee's alleged conversion of the personal property claimed by appellants to have been left by their father. The evidence failed to show that she converted the personalty.

Finding in the record no cause for rejecting the conclusions reached by the chancellor, the judgment is affirmed.

#### BOSWELL et al. v. CITIZENS' SAVINGS BANK.

(Court of Appeals of Kentucky. Oct. 11, 1906.)

##### 1. ASSIGNMENTS—CHECKS—APPROPRIATION OF BANK DEPOSIT.

As between the holder of a check for value in due course and one asserting a junior lien on the drawer's bank deposit, the check operated as a pro tanto appropriation of the deposit prior to the change in the law by Negotiable Instruments Law (Acts 1904, p. 250) § 189.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, §§ 89, 94; vol. 6, Cent. Dig. Banks and Banking, §§ 328, 393.]

##### 2. SAME—NEGOTIABILITY OF CHECKS.

Checks are negotiable instruments both at common law and under the express provisions of Ky. St. 1903, § 478.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 373.]

##### 3. GARNISHMENT — DEBTS EVIDENCED BY CHECK.

Debts evidenced by bank checks are not subject to garnishment if the check is actually discounted for value in due course by an innocent purchaser, although it may not be discounted until after service of the writ.

##### 4. SAME.

Where a check was drawn merely to transfer the amount thereof to the drawer's account in a different bank, it did not operate as a pro tanto appropriation of the drawer's account in the drawee bank as against a garnishing creditor of the drawer prior to actual payment by the drawee bank, though the bank prior to the payment had notified the payee bank that the check would be paid on presentation.

##### 5. SAME—DEBTS INCLUDED IN GARNISHMENT.

Civ. Code Prac. § 203, provides that, if property attached be stock in a corporation, the corporation may be summoned as garnishee, and section 223 declares that, in proceedings on such attachment, the garnishee may pay the debt owing to, or deliver the property held for, his debtor, to the sheriff, and to that extent be discharged from liability to the debtor, but section 224 declares that each garnishee summoned must appear, though he may have delivered the property or fund to the sheriff, and that, in case of a corporation, any shares of stock held therein by or for the benefit of the defendant "at or after the service of the order of attachment" shall be subject to the writ. *Held*, that the words "at or after" in section 224 related only to corporate stock, and that the writ did not cover other indebtedness which accrued after service.

##### 6. SAME—CORRECTION OF RECORD—NOTICE TO GARNISHEE.

Where a correction of the record with reference to the name of the defendant was not

made until after the garnishee had appeared, answered, and been discharged, the garnishee was not bound to notice such correction unless a new order of attachment was served on it.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by C. W. Boswell and others against the Citizens' Savings Bank. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded.

D. G. Park, for appellants. J. D. Mocquot, for appellee.

O'REAR, J. Appellants sued the Odell Commission Company, alias dictus the Odell Company, incorporated, to recover money bet and lost by them to those companies in a gamble upon the stock market. The statutes of this state allow a recovery in such an action by the loser. The plaintiffs sued out general attachments, causing the Citizens' Savings Bank of Paducah to be summoned as garnishee therein. The attachments were served on the bank about 7 o'clock a. m., June 11, 1903. The bank answered as garnishee on June 30, 1903, saying that it owed the defendant nothing. The principal defendant sued was styled, in the suit and in the garnishee process, the "Odell Commission Company." While that suit was pending, on October 29, 1903, the plaintiffs filed amended petitions, charging that the acts complained of were committed also by the "Odell Company," which was another name under which the same parties were conducting their bucket shop business. After judgment in behalf of the plaintiffs in that action against the Odell Company and others joined and sued in the action as principals in the play, the plaintiffs filed this suit against the Citizens' Savings Bank charging that it, in that former action, had not truly made disclosure of the money it owed to the principal defendants; that it then had on deposit when the attachment was served upon it, \$6,000 to the credit of the Odell Company; that afterward, but on the same day, it received on deposit \$8,800 additional—none of which did it report when it filed its answer in the attachment suit. The Code allows such an action against the garnishee who has failed to make true disclosure.

The answer of appellee as garnishee it claims was true, because of the following facts: Appellee, a bank of deposit, had an account with the Odell Company, which it had been advised was an incorporated concern under the laws of Ohio and doing business at Cincinnati, by which there was deposited with the bank, to the credit of the Odell Company, from time to time, by the representatives or customers of that company at Paducah, various cash items. The sum of these it remitted daily, or nearly every day, to the Odell Company by this process. It, according to previous arrangement, wired

the Merchants' National Bank of Cincinnati, Ohio, also a depository of the Odell Company, that it would pay the check of the Odell Company for so much, the amount to the latter's credit that day, whereupon the Cincinnati bank would advise the Odell Company by telephone of the receipt of the message from the Paducah bank. The Odell Company would then draw its check for the amount reported in favor of the Merchants' National Bank of Cincinnati, upon the Citizens' Savings Bank of Paducah and deliver it to the Merchants' National Bank, who gave the Odell Company credit for it as a cash item. The Merchants' National Bank then sent the check, with telegram attached, to the Citizens' Savings Bank for payment, whereupon the latter would send the former New York Exchange to cover the sum of the check. That was the ordinary course of the transactions. The particular transaction was that, on June 9, 1903, Odell's agents or customers, whichever they were, deposited with the Citizens' Savings Bank to the credit of the Odell Company, the sum of \$3,000. On the following day they deposited \$3,000 more. The Citizens' Savings Bank then sent the Merchants' National Bank of Cincinnati this telegram: "Will pay check of the Odell Company for six thousand dollars. Candoma. [Signed] Citizens' Savings Bank." The word "Candoma" is an arbitrary cipher, which was adopted by the parties for purpose of identification in telegrams. The message reached Cincinnati on the same day, June 10th. The Odell Company, being notified, drew its check for \$6,000 on the Citizens' Savings Bank in favor of the Merchants' National Bank and delivered it to the latter, who credited the account of the Odell Company with \$6,000. The Odell Company then had on general deposit to their credit in the Merchants' Savings Bank more than \$400,000. The Merchants' National Bank placed the check in the mail for collection. But before it was presented the attachment was served in the suits of appellants above named. Appellee treated the attachments as ineffectual and paid the check. It regarded that its telegram was equivalent to, if not indeed actually, a certifying of the check for \$6,000, which placed the fund against which it was drawn beyond attachment against the depositor.

Some point is made in the pleadings, and some show attempted in the evidence, that appellee was also misled by the name used in the attachment—that of the Odell Commission Company. But the evidence leaves scant room for doubt that this idea is more of a makeshift. The Odell Commission Company had done business as a depositor on the same terms with appellee. It was immediately followed by the Odell Company, whose letters were signed by the same person as president, notifying the bank that the Odell Commission Company had quit

business, and that the Odell Company would thereafter do the business as was done previously by the former company. They knew the same person, W. J. Odell, was manager of the new concern as he was of the old. The bank's officers were aware of the character of this business; they personally knew the local representatives conducting it, and must have known whence came the large deposits with which they were favored. The case was tried out before a jury, who, under instructions hereafter to be noticed, found a verdict for the defendant bank.

The questions of law presented by this appeal are: (1) Whether a check drawn against a deposit in bank before an attachment or garnishment served upon the bank, takes precedence of the attachment, although the check may not be presented to the bank for payment till after the service of the attachment. (2) Whether a certified check places the deposit beyond garnishment process, although it may not have gone into the hands of another holder for value in the usual course of business. (3) Whether the service of the attachment holds funds deposited with the garnishee after the service, but before answer. (4) Whether the garnishee must look to the record of the attachment suit to see whose funds are attached, or whether it may look alone to the garnishment process and ignore the proceedings in court.

It will be observed that the first two propositions submitted arise under the law merchant, and the latter two under the practice in this state concerning attachment proceedings. Whether a check drawn by a depositor against his credit on deposit with his banker is pro tanto an appropriation of the sum owing him by the bank may be treated, under the facts in this case, as settled in this state in the affirmative (*Taylor's Adm'r v. Taylor's Assignee*, 78 Ky. 470; *Winchester Bank v. Clark County Bank*, 51 S. W. 315, 21 Ky. Law Rep. 311; *Lester v. Given*, 8 Bush, 361), although we note that such is not always held to be the common law, and such is not now, by statute enacted since this case was made up (section 189 of "An act relating to negotiable instruments," approved March 24, 1904 [Acts 1904, p. 250]), the law in Kentucky. But the doctrine stated was applied always in this state to cases where there was a contest between a holder of such check for value in due course, and one asserting a junior lien upon the fund. Where that was not the case, the court has indicated that the rule did not apply. *Weiland's Adm'r v. Bank*, 112 Ky. 310, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178. So the two propositions are reduced to one, which is whether a check drawn against the deposit is an appropriation pro tanto as of its date when the check had not passed into the hands of a holder for value in due course. Checks are, by statute, as they were

at common law, bills of exchange, and negotiable instruments. Section 478, Ky. St. 1903. Debts evidenced by such instruments are not subject to garnishment if the negotiable bill or check is actually discounted for value in due course by an innocent purchaser (*Kelley v. Smith*, 1 Metc. 313; *Payne v. Bank*, 10 Bush, 176; *Ritchie v. Cralle*, 56 S. W. 963, 22 Ky. Law Rep. 160), although it may not be discounted until after service of the attachment. The trial court so ruled the law.

But the inquiry here necessarily goes to the point of determining whether the check was sold or discounted to another for value in due course. We do not deem the fact material whether the check was certified. Manifestly the certification of the depositor's check did not alter the bank's relation as his debtor, further than that notice was thereby given that the drawer intended to assign the fund and the bank's assent to it so that any subsequent purchaser might take it with the bank's assurance that it would be paid when presented. It might be said it was equivalent to an accepted bill of exchange where both drawer and acceptor had become bound to the holder. But so long as the check remained in the hands of the depositor there was no enhancement of the bank's liability to him. It still owed him the same amount of money, which it would pay to him upon the presentation of that check. Not until the check had passed into the possession of a purchaser for value in due course would the bank's liability to its depositor be changed or relieved. If, for example, the check had been stolen from the depositor and his indorsement forged upon it and then it had been sold to a stranger for value, the bank would not have been released from its original liability to the depositor. So long as the property in the check continued in the depositor he had the right to collect the money on it from the bank, and, for that reason, his creditors had the right to attach it for a liability of his. The depositor could not, by merely taking a certified check payable to himself, or his order, remove the fund from the effect of the attachment process, yet leave the fund where it was. If the depositor made the check payable to his clerk, or agent, to enable the latter to draw the money on it so that the cash might be handed over to the depositor, that would not alter the relation of the bank and the depositor; for the fund would still belong to the depositor. When the depositor drew his check in favor of another bank, which was also his depository, and delivered it to the latter for credit on his account, so far the transaction was in nowise changed from its character as a debt owing by the first bank to the depositor, until the former had actually paid it. That the check had been certified in that transaction counted for nothing. The second bank, by crediting the check to the open account of its customer, the drawer of the check, it is true, took the title to the fund

it represented. But there was this implied contract between them concerning it: If, for any reason other than the negligence of the latter bank, the check was not honored, the drawer would repay to the latter bank the amount so credited to him. In fact, in this case that was the express agreement between the parties, with the addition that the latter bank would charge the item back to the depositor's account to offset the credit.

The real transaction here amounted to this: The Odell Company had \$6,000 in appellee bank at Paducah. Desiring to have it brought to its depository in Cincinnati, it drew its check for \$6,000 on the Paducah bank, payable to its Cincinnati banker, the latter thereby undertaking to collect it for its depositor and giving him credit in anticipation of its collection, but to be revoked if the collection miscarried. The Cincinnati bank parted with nothing. Its actual position was not changed. The fact that Odell Company might have checked against the credit in the Cincinnati bank, but did not, does not alter the case. It was not a sale of the check to the Cincinnati bank. There was not a discounting of it. When the Cincinnati bank got the money, or the New York exchange, which would have been the same when accepted, then it would have assumed a new relation to the Odell Company with reference to the deposit, for it would then have become an unconditional, instead of a conditional deposit, and the Cincinnati bank would have been compelled to pay the checks of the depositor against it, because it had actually received the depositor's money. Until the money was received, or until the money had been checked against and paid out, the Cincinnati bank had parted with nothing. Its condition was not different from what it would have been if it had agreed to buy the check and to pay \$6,000 for it, payable when the check was actually collected, credit being given, though, on the books of the bank to show the transaction, but before any payment was made the check was not paid by the drawee for any reason. The Cincinnati bank, though a purchaser, was not, in the eye of the law, a purchaser for value in due course. That term implies an irrevocable contract of purchase by which title passes, and an adequate consideration then parted with, so that, unless the purchaser gets what he has bought, he would sustain actual loss. The question, whether the Cincinnati bank was such a purchaser for value on the undisputed facts, was one of law. The court erred in the instructions in submitting it to be found by the jury.

The circuit court held that funds deposited with the bank after the service of the attachment and before the bank answered as garnishee were not covered by the attachment, and hence need not be disclosed by the garnishee. The method of attaching by garnishment is to serve a copy of the attach-

ment upon the person holding the property of, or owing a debt to, the defendant, and summoning the debtor to answer as garnishee. If the property attached be stock in a corporation, the corporation may be summoned as garnishee. Section 203, Civ. Code Prac. In proceeding upon such attachment the garnishee may pay the debt owing to, or deliver the property held for, his debtor, to the sheriff, and to that extent be discharged from liability to his debtor. Section 223, Civ. Code Prac. But each garnishee summoned must appear (section 224, Civ. Code Prac.) although he may have delivered the property or fund to the sheriff. This is to have him disclose to the court issuing the attachment the nature and extent of his liability to the debtor defendant. The appearance may be in person or by affidavit, disclosing under oath the liability to the debtor. The section concludes: "And in the case of a corporation, any shares of stocks held therein by or for the benefit of the defendant, at or after the service of the order of attachment."

Appellants contend that the words "at or after" refer not alone to the shares of stock in a corporation, but to debts or other property in the hands of the garnishee to which the defendant may be entitled. The next section of the Code (225), which was enacted upon the Code revision in 1877, in lieu of section 246 of the old Code, says as to the disclosure to be made by the garnishee: " \* \* \* And if it be discovered on such examination that, at the service of the order of attachment upon him, he or the corporation was possessed of any property of the defendant, or was indebted to him, the court may order a delivery of such property, and the payment, or the security for the payment of such sum into court," etc. As only the sum or property required to be disclosed by the garnishee is directed to be paid into court, or to the officer executing the attachment, the process takes hold of that alone. We see then that, as to all property and debts held or owing by the garnishee, the statute fixed the time of disclosure, and thereby the measure of the lien created by the attachment at what was held or owing when the writ was served upon the garnishee. But as to stocks in corporations, it takes hold of all then owned in it by the defendant, or thereafter up until the appearance and disclosure by the garnishee. In the old Code this same provision existed as to corporate shares. Section 245, Myers' Code. It is carried into the new Code without change. Section 224, Civ. Code Prac. But as to debts and other property the old Code (section 246, Myers' Code) required the disclosure of the garnishee, using the expression "at or after the service of the order of attachment." Construing section 246, old Code, this court in *Smith v. Gower*, 3 Metc. 171, held the garnishee liable to answer for debt owing at or after the service up until he should have



answered. In framing the present Code, the codifiers have omitted from section 225 the words "or after," and we must conclude that they intended to effect the change in the practice that this change of language clearly implies. The trial court ruled correctly in excluding from the jury the consideration of the deposits made after the service of the attachment upon appellee bank as garnishee.

The remaining question is whether the garnishee is affected by what appears of record in the suit out of which the attachment issued. If the record had disclosed that the Odell Company was the defendant sued and the writ served on appellee as garnishee had shown that it was the property of the Odell Commission Company that was attached, this clerical error would have been perceived by an inspection of the record. But it sometimes happens that an attachment summoning garnishees is executed in a county far distant from the place where the action is pending. It seems to us if the mistake is one that is reasonably calculated to mislead, and does mislead, the garnishee so that he fails to hold the fund or property in his possession belonging to the real defendant, he ought not to be held liable for a mistake not his own. Whether he was so misled, and whether the fact was reasonably calculated to mislead him, are matters of fact referable to the jury. There may be instances in which he should also be held to look to the record. But in this case the correction of the record was not made as to the defendant's true name until after the garnishee had appeared and answered and been discharged. After his discharge he need not notice the record further, unless a new order of attachment is served upon him.

But for the errors indicated the judgment is reversed, and cause remanded for proceedings consistent herewith.

#### COMMONWEALTH, to Use of GREEN, v. JOHNSON et al.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

##### 1. ACKNOWLEDGMENT—FALSE CERTIFICATE—LIABILITY OF OFFICER—CLERK OF COURT.

A county clerk, who, in taking an acknowledgment, exercises such diligence as a reasonably prudent person would exercise under like circumstances, performs faithfully his official duties and complies with his bond and oath of office.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, §§ 241, 243.]

##### 2. SAME—NEGLIGENCE—EVIDENCE.

In an action on the official bond of a county clerk for damages occasioned by a false certificate of acknowledgment, evidence that the deputy clerk took the acknowledgment of an imposter made a prima facie case of negligence, casting on the clerk the burden of showing that his deputy in taking the acknowledgment used care and diligence to prevent the fraud.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, §§ 123, 243.]

96 S.W.—51

##### 3. SAME—QUESTIONS FOR JURY.

In such case evidence that the imposter whose acknowledgment was taken was introduced to the deputy by a reputable business man, who attested the signature of the person whose acknowledgment purported to be taken, was competent to show the clerk's diligence, but whether it was sufficient to overcome the prima facie case was for the jury.

##### 4. APPEAL—FINDINGS BY COURT—REVERSAL.

Where the parties waive a jury and submit the case to the court, its judgment on the facts is entitled to the same force as a verdict, and will not be disturbed unless flagrantly against the evidence.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "To be officially reported."

Action by the commonwealth, for the use of Margaret Green, against William P. Johnson and others for damages resulting from defendant, Johnson's deputy, giving a false certificate of acknowledgment. From a judgment for defendants, plaintiff appeals. Affirmed.

James T. A. Baker and John Roberts, for appellant. Bodley, Baskin & Flexner, for appellees.

NUNN, J. Appellee, William P. Johnson, was for many years clerk of the Jefferson county court, and Walter Ratcliffe, during all those years, was his deputy. On December 21, 1900, E. D. Fryer, a real estate agent, went to the county clerk's office and introduced to Mr. Ratcliffe a woman as Mrs. Mary E. Schneider, and presented to him a mortgage which purported to be a mortgage from Mary E. Schneider to Margaret Green. The woman thus introduced acknowledged the mortgage as the act and deed of Mary E. Schneider, making her mark instead of writing her signature, and the signature thus made, was witnessed by E. D. Fryer and Ratcliffe. Ratcliffe then, as deputy clerk, appended a certificate that it had been acknowledged by Mary E. Schneider, and handed it back to the woman, and she some time thereafter delivered it, through E. D. Fryer, to James T. A. Baker, who was attorney for appellant, Margaret Green. Upon this pretended mortgage, the woman referred to being an imposter, the appellant, Green, made a loan of \$600. The mortgage debt not being paid at maturity, the appellant brought against the real Mary Schneider, who defended upon the ground that the mortgage and note were not executed by her. Judgment was rendered in her favor. Thereupon Mrs. Green brought this action against the clerk William P. Johnson, and his bondsman, alleging in substance the making of the false certificate of acknowledgment, her reliance upon same in loaning her money, and her loss of it. An issue was formed, the law and facts were tried by the court, without a jury and judgment was rendered in behalf of appellees.

The parties do not disagree upon the point that the woman who actually acknowledged

the mortgage was an impostor. The appellant contends that, as the certificate of the clerk was untrue and she, relying on the truth of it, lost \$600, the clerk should make good to her the loss. The appellee contends that the clerk and his bondsman are not liable for the negligence of the deputy clerk; that the county alone is responsible therefor. Second. That, even if the clerk was liable for the deputy's wrongful or negligent acts, the deputy, Ratcliffe, was not guilty of any wrongful or negligent act in the matter referred to; that he used reasonable diligence and proper care in ascertaining the identity of the mortgagor; and that he was imposed upon by the woman and E. D. Fryer.

We will consider these questions in the order stated.

We cannot agree with appellant's claim that the clerk is liable because his certificate is untrue; that he is an insurer of the identity of persons who execute conveyances. If the county clerk, in taking such acknowledgments, is to be charged with such a responsibility and held liable for all losses, it matters not how careful and diligent he may be, then it would be extremely difficult to get an intelligent person to accept the office. It is conceded that the clerk in this state, in taking the acknowledgment of conveyances, acts in a ministerial and not in a judicial capacity. If they acted in a judicial capacity, of course, they would not be responsible for mere error of judgment, but, acting in a ministerial capacity, they are responsible for their errors unless they can show that they occurred notwithstanding the use of reasonable care and diligence on their part to prevent same. The appellant's counsel refers to the case of *Samuels v. Brand*, 82 S. W. 977, 28 Ky. Law Rep. 943, in support of their position that the clerk is an insurer of the identity of a grantor or mortgagor. In that case the clerk certified to the genuineness of the signature of one of his deputies. It turned out, as a matter of fact, that the indorsement on the deed and the signature of the deputy were forgeries, and the court held that the clerk was chargeable with the duty of knowing the signature of his own deputy, whose acts in effect were the acts of the clerk. That case is unlike this. There is no case which we have been able to find which supports the contention that the clerk must know at his peril every man and woman who acknowledges a conveyance before him, but on the contrary the authorities are to the effect that, if a clerk, in taking an acknowledgment, exercises that diligence which a reasonably prudent and cautious man would exercise under like circumstances, he performs faithfully the duties of his office, and complies with the terms of the bond and oath of office.

We cannot agree with the appellant's counsel in their claim that the clerk is not liable in damages resulting from the negligent and careless act of his deputy. It is true that

there is authority in support of the contention that in certain cases the clerk is not liable for the acts of his deputy, but this court has never announced this principle. In *American & English Ency. of Law*, vol. 9 (2d Ed.), p. 390, it is said: "The principal is liable civiliter for the misfeasance, malfeasance, or nonfeasance of his deputy in the performance of his official duties, and this, it has been held, whether the deputy is regarded as a district and independent officer or as the mere agent or servant of the principal." And refers to many cases in support of the text, and several of them Kentucky decisions. In our opinion when the appellant proved that the clerk of his deputy took the acknowledgment of this woman, the impostor, as Mrs. Schneider, then a prima facie case of negligence was made out against the clerk, and it devolved upon him to show that his deputy, in taking the acknowledgment, used care and diligence to prevent the fraud and imposition.

The only remaining question is, was there any evidence tending to show care and diligence on the part of the deputy clerk to prevent the fraud perpetrated in this case? It appears, and it is conceded, that Fryer, who brought the woman, the impostor, to the clerk's office was a business man of long standing and good reputation in the city of Louisville; that he introduced this woman to the clerk as Mrs. Schneider; that he attested her signature as that of Mrs. Schneider; that, in the manner followed in the general course of business, he vouched to the clerk for the identity of the person who was present as Mrs. Schneider. The clerk accepted this introduction and took the acknowledgment and made the certificate. In our opinion this was competent evidence tending to show care and diligence on the part of the clerk, whether it was sufficient to overcome the prima facie case made out by appellant was a question peculiarly within the province of the court trying the case.

The parties waived a jury and submitted the law and facts to the court, and its judgment upon the facts is entitled to the same force and effect as the verdict of a jury, and should not be disturbed unless flagrantly against the evidence.

For these reasons, the judgment is affirmed.

#### BLAES et al. v. COMMONWEALTH, to Use of ADKINS.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

##### 1. NOTARIES—ACKNOWLEDGMENT—FALSE CERTIFICATE—LIABILITY OF OFFICER—PETITION—SUFFICIENCY.

A petition, in an action on the official bond of a notary for a false certificate of acknowledgment which alleges that the certificate was false, that the notary made it, and that plaintiff, on the faith of its truth, parted with money, states a prima facie case of negligence on the part of the notary.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Notaries, § 31; vol. 1, Cent. Dig. Acknowledgment, §§ 242, 243.]

**2. SAME—EVIDENCE—BURDEN OF PROOF.**

Where, in an action on the official bond of a notary for a false certificate of acknowledgment, plaintiff shows that the certificate was false, that he parted with money on the faith of its truth, and that the notary made it, the notary, to avoid the *prima facie* case of negligence on his part, must prove that, in taking the acknowledgment, he acted in good faith and with due care in ascertaining the identity of the person who acknowledged the instrument, and that, notwithstanding this, he was deceived.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Notaries, § 31; vol. 1, Cent. Dig. Acknowledgment, §§ 241, 242, 226-335.]

**3. TRIAL—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.**

It is not error to refuse an instruction where there is no evidence on which to base it.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by the commonwealth of Kentucky, for the use of Julia P. Adkins, against John Blaes and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Benjamin F. Washer and Norton L. Goldsmith, for appellants. C. B. Seymour and James T. A. Baker, for appellee.

**NUNN, J.** This is an appeal from a judgment against appellant Blaes and his surety on his official bond, M. J. Herrmann, in favor of the appellee Julia P. Adkins for \$800. The appellee Adkins loaned, or thought she was loaning, \$800 to one Margaret Diebold, and received what purported to be a mortgage on a house and lot in the city of Louisville worth over \$2,000 to secure the loan. Afterwards Mrs. Diebold, receiving information that such a mortgage existed, brought suit against Mrs. Adkins for the purpose of having it canceled. She alleged, in substance, that she did not sign the mortgage and note, nor did she receive any consideration therefor, nor were they executed with her knowledge or consent, and that they were fraudulently made and were forgeries. She succeeded on the trial, and the court declared them forgeries and canceled them. The appellee Adkins then instituted this action against John Blaes, the notary public who took and certified to the acknowledgment of Margaret Diebold to the mortgage, and his surety, Herrmann. Upon a trial before a jury, she recovered a judgment for \$800.

The appellants ask a reversal for several reasons. First, that appellee's petition was insufficient in that she did not charge that Blaes, in taking and certifying to the acknowledgment, acted corruptly, carelessly, or negligently. She alleged, in substance, that the certificate was false; that Blaes made it; that she, upon the faith of the truth of it, parted with the \$800. She stated a *prima facie* case of negligence against him, and, when she proved the facts alleged, on the trial, she made out a *prima facie* case of negligence, and to avoid the effect thereof it was necessary for appellants to allege and

prove that in taking the acknowledgment he acted in good faith and with due care and diligence in ascertaining the identity of the person who acknowledged the mortgage, but, notwithstanding this, he was deceived. They did not do this, but elected to stand by the allegation and proof that his certificate was not false, but was true, and that Margaret Diebold, the person referred to, did sign and acknowledge the mortgage. The sole issue made by the pleadings and proof was, did Margaret Diebold sign and acknowledge the mortgage? The court gave an instruction on this point and the jury found against the appellants. See the opinion this day delivered, in the case of Commonwealth of Kentucky, etc., against W. P. Johnson, etc., 96 S. W. 801 which is applicable to the questions involved herein.

The appellants only asked an instruction upon one point, which was refused by the court. That was to the effect if the jury believed from the evidence that the property upon which the mortgage lien was attempted to be placed was not worth as much as \$800, then, if the jury found for plaintiff, they could only find the value of the property. There was not any evidence upon which to base such an instruction. It was proven on the trial, without any contradiction, that the house and lot were worth \$2,000, or more.

The judgment of the lower court is affirmed.

**MATHEWS v. PURSIFULL et al.**

(Court of Appeals of Kentucky. Oct. 12, 1906.)  
**BOUNDARIES—CONFLICTING CALLS IN PATENT — COURSES AND DISTANCES — ARTIFICIAL LINES.**

The calls for courses and distances in a patent, whereby it will embrace even more than the 200 acres which it calls for, will prevail over the call for a stake in the boundary of another patent, which is but a stake line, as the terminus of a line, which will involve the extension of such line from 80 poles, as called for, to 385 poles, and cause the patent to embrace 827 acres.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 18, 19, 38-40.]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by Pascal Pursifull and others against the Louisville & Nashville Railroad Company. John G. Mathews intervened. Judgment for plaintiffs. Intervener appeals. Affirmed.

Otis V. Riley and Logan & Jeffries, for appellant. N. J. Weller, for appellees.

**CARROLL, C.** The appellees, as the children and heirs at law of M. J. and Orpha Pursifull, filed this action to recover damages against the Louisville & Nashville Railroad Company, and other defendants, for trespass upon a boundary of land claimed by them. The appellant filed an intervening petition, asserting that he was the owner of the land

upon which the trespass was committed, and upon his motion he was made a party defendant, and sought judgment on his cross-petition against defendants in the original action. Upon a trial of the case, under peremptory instructions, appellees were adjudged the owners of the land, and entitled to recover the damages, and from this judgment the appellant prosecutes this appeal.

It appears that in 1866 five patents for 200 acres each were issued to John G. Eve, a remote vendor of appellant. These patents were numbered 38,433, 38,434, 38,435, 38,436, and 38,437. It is admitted that patents numbered 38,433, 38,435, 38,436, and 38,434 adjoin, and it is the contention of appellant that patent 38,433 adjoins the land covered by patent 38,437, making one connected boundary of land covered by these five patents. Appellees insist that the tract embraced in patent 38,433, does not adjoin the land described in patent 38,437, and that between these two tracts of land there was a large body of vacant land for which patents were issued to M. J. and Orpha Pursifull in 1890. If the land covered by patent 38,433 adjoins the land included in patent 38,437, appellant and not appellees are entitled to recover damages; so that the principal question is: Does patent 38,433 adjoin patent 38,437?

Patents 38,436, 38,434, and 38,435 adjoin and lie next in the order named to patent 38,437 on the west thereof. Patent 38,433 lies east of 38,437. It appears that the surveys of these several patents were made at the same time and bear the same date. Patent 38,437 is described as follows: "Beginning at two chestnut trees on top of said mountain (Pine); thence N. 45° E. 90 poles, with the top of said mountain, to two black oaks and red oak; thence N. 52° E. 38 poles, to a stake on top of said mountain; thence S. 38° E. 220 poles, to a stake at the foot of said mountain on Philip Lee's line; thence with the foot of said mountain, with Lee's and Gibson's line, S. 52° W. 160 poles, to a stake, corner of said Eve's; thence N. 38° W. 220 poles, to a stake, another corner of said Eve's; thence N. 48° E. 40 poles, to the beginning." The call in this boundary, "corner of said Eve's," refers to patent numbered 38,436, which lies immediately west of 38,437. Patent No. 38,433 is bounded and described as being on the south side of the Pine Mountain, adjoining a survey made to said Eve of this date, as follows: "Beginning at a Spanish oak and dogwood in a gap in the Pine Mountain on the west side of the road leading from Phil Lee's crossing the mountain; thence S. 57° W. 32 poles, to two chestnut oaks; thence S. 52° W. 80 poles to a stake, corner to said Eve's former survey of this date; thence S. 80° E. 220 poles with a line of said survey, to a stake at the foot of Pine Mountain on Phil Lee's line; thence down the mountain with the foot thereof N. 55° E. 187 poles with Lee's and Mason's line, to a stake on John Mason's

line; thence up the mountain N. 38° W. 220 poles, to a stake on top of said mountain; thence with the top S. 55° W. 80 poles, to the beginning."

If the lines of patent 38,433 are run according to the calls of the patent, there will be embraced in the boundary about 298 acres of land, or nearly 100 acres more than the patent calls for; and if appellant's contention is correct, and the lines of patent 38,433 are extended on the west to meet the lines of patent 38,437, there will be included in patent 38,433 about 827 acres of land—involving the extension of the second line from 80 poles to 385 poles. The argument of counsel for appellant is that the calls for courses and distances in patent 38,433 must give way to the objects called for as forming the westerly boundary of his patent, which in this case would be the easterly line of patent 38,437. The rule is well settled that courses and distances yield to natural objects mentioned in a deed as the boundary line thereof; but this well-established rule does not apply to this case, because the calls relied on by appellant are not natural objects or monuments. They are merely artificial lines named in a patent under which the patentee claims both 38,437 and 38,433. The eastern line of patent 38,437, and which the western line of patent 38,433 calls for, is not marked by natural objects, but is only a stake line: "Beginning at a stake on top of the mountain; thence S. 38° E. 220 poles, to a stake at the foot of the mountain." To extend the lines of patent 38,433 to this stake line would not only add more than 600 acres to the boundary, but 305 poles to the second line of the patent; whereas, to run the lines of the patent according to the distances called for will embrace in the patent somewhat more land than it calls for—and the lines of the patent in this case and the calls and distances therein mentioned must be adhered to.

As said in *Ralston v. McClurg*, 9 Dana, 338, a case in many respects similar to this: "There is no mistake in the courses and lengths of the lines actually run, and the remaining courses and distances lead with certainty to the beginning. Why then abandon them, and adhere to a vague and repugnant call for a stake in a line of which the surveyor knew nothing, and for running with that line, in a direction widely variant from its course, and for a distance greatly exceeding its whole length? It does not even appear that the line of Richards was itself a marked line. And this circumstance, though not essential to the conclusion to which we have come, certainly weakens the opposite construction of the survey, so far as it depends upon the position that an actual marked boundary, or a call for physical objects, must control the call for course and distance." In *Mercer v. Bate*, 4 J. J. Marsh. 334, in respect to a controversy as to whether the line of Mercer's patent was the boundary line of a

patent subsequently issued to Madison, the court said: "If Mercer's closing line had been marked throughout its whole extent, it could not be denied that the line so marked would be also a line of Madison's boundary. Because calling for it, he had adopted it as it was, and, wherever it was, he would have a right to go, unless it had been so remote and so repugnant to other calls of Madison as thereby to show that, in calling for it, he was mistaken. The simple fact of a surplus, extending to even more than a duplication of Madison's proper quantity, would not be sufficient to establish such a mistake. Notwithstanding such an unusual surplus, Madison would have as much right to go to Mercer's line, if it had been marked, as he would have to extend his boundary to a natural barrier, if there had been such, and he had called for it as his boundary. But there is in this respect a palpable and essential difference between an actual and an ideal line, or a marked and open line. And as, in the one case, Madison might be bound by the marked line wheresoever it might be, so, in the other, he must be restricted to the line as it appeared to be, and as he believed it was when he called to adjoin it. In the first case, he would have a right to the marked line, because, being visible, he knew where it was, and therefore intended that, as marked, it should be his boundary. In the last case, for the very same reason, wherever he supposed the invisible line to run, he must be bounded, because he intended when he made his survey to be, and therefore was, bounded by it." These cases seem conclusive of the question here involved.

The judgment of the lower court is affirmed.

# NEW SOUTH BREWING & ICE CO. v. COMMONWEALTH.

## CREEDLE v. SAME.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

### INTOXICATING LIQUORS—LOCAL OPTION—SALE BY MANUFACTURER.

Ky. St. 1903, § 2558, a part of the local option act of March 10, 1894, provides that the provisions of this act shall not apply to any manufacturer or wholesale dealer, who, in good faith, and in the usual course of trade, sells by the wholesale, in at least five-gallon quantities. Acts 1904, p. 160, c. 76, entitled "An act to regulate the sale of intoxicating liquors by wholesale in this commonwealth," declares it unlawful to sell by wholesale intoxicating liquors (except manufacturers selling liquors of their own make) in any local option district. Held that the act of 1904 forbids wholesaling of intoxicants in local option districts, excepting only that a manufacturer may sell at his manufactory, though that be in such a district.

Appeal from Circuit Court, Laurel County.

Appeal from Circuit Court, Fulton County.

"To be officially reported."

The New South Brewing & Ice Company

and D. T. Creedle were convicted of violating the local option law, and appeal. Affirmed.

C. W. Metcalfe, Malcolm Yeaman, Kohn, Baird & Spindle, Geo. Washington, and Yeaman & Yeaman, for appellants. N. B. Hays, Atty. Gen., C. H. Morris, and W. H. Hester, for the Commonwealth.

HOBSON, C. J. Section 2558, Ky. St. 1903, which is a part of the local option act of March 10, 1894, among other things, provided: "The provisions of this act shall not apply to any manufacturer or wholesale dealer, who, in good faith, and in the usual course of trade, sells by the wholesale, in quantities of not less than five gallons, delivered at one time, and not to be drunk on the premises." Under this provision any manufacturer or wholesale dealer could sell intoxicants in quantities of not less than five gallons. Thus the law stood until March 22, 1904, when the General Assembly passed the following act (Acts 1904, p. 160, c. 76).

"An act to regulate the sale of intoxicating liquors by wholesale in this commonwealth.

"Be it enacted by the General Assembly of the commonwealth of Kentucky:

"Section 1. It shall be unlawful to sell by wholesale any spirituous, vinous, malt or other intoxicating liquors, regardless of the name by which it is called (except manufacturers selling liquors of their own make) in any county, district, precinct, town or city, where the sale of such liquor has been prohibited by special act of the General Assembly, or by vote of the people under the local option law. Any person violating this act shall be deemed guilty of violating the local option law, and shall be subject to trial and punishment according to the provisions of the same and its amendments.

"Sec. 2. All laws inconsistent or in conflict with this act are hereby repealed."

In the first of the above cases the New South Brewing Company, a corporation located in Bell County, Ky., sold in Laurel county where the local option law was in force, beer which it manufactured. In the second case the Cook Brewing Company, a corporation located in Evansville, Ind., sold beer of its own make through its agent D. T. Creedle in Fulton county where the local option law also prevailed. The defendants in both cases were fined, and they appeal insisting that, as the beer sold was of their own make and the sale was in quantities exceeding five gallons in good faith and according to the usual course of trade, they came within the exception made in the act just above quoted exempting from its operation "manufacturers selling liquors of their own make."

Under the original act either manufacturers or wholesale dealers could sell in local option districts in quantities exceeding five

gallons. A great many indictments grew out of the provisions of the act in cases where it was insisted that the sales were not made in good faith, and according to the usual course of trade. In not a few parts of the state there was great difficulty in enforcing the local option law with this qualification to it. The purpose of the Legislature in passing the act of 1904 was to secure the better enforcement of the law. It was not intended to take away from the wholesale dealer the right to sell and to give the exclusive privilege of selling intoxicants in local option districts to manufacturers selling liquors of their own make. The Legislature did not have in mind merely regulating the class of persons who should sell in local option districts. Its purpose was to regulate the sale of intoxicants by wholesale in these districts. If we construe the act as claimed by appellants its only effect would be to stop the wholesale dealer from selling while it permitted the manufacturer to sell his own make without regard to where his manufactory was situated, in or out of this state. The Legislature did not intend to forbid the wholesale dealers in this state from selling in local option districts and to authorize manufacturers in Indiana, Ohio, and other states to sell their products in such districts. When the Legislature provided that it should be unlawful to sell by wholesale any spirituous, vinous, or malt liquors in any local option district it was perceived that if the act stopped here great injustice would be done many persons whose manufactories were situated in local option districts and who would thus be unable to sell their product from their warehouses at their plant. To avoid this hardship manufacturers selling liquors of their own make were excepted out of the operation of the act. What the Legislature had in mind was the regulating of local option districts. It forbade the selling by wholesale of intoxicants in such districts. It excepted out of the operation of the act manufacturers in such districts selling liquors of their own make. When a foreign corporation comes into this state to sell beer it is not material who made it. It sells as wholesale whether the beer is of its own make or some one else's. We must, therefore, except from the operation of the act manufactories located in other states; but the act was not intended to make a distinction between manufactories in this state and other states. The manufacturer in one state is entitled to sell his goods in another state under the same privileges as are enjoyed by a manufacturer of the same goods in that state. What the Legislature had in mind was manufacturers manufacturing in the local option district where the sale is made. The Legislature may not grant special privileges except in consideration of public services. If the Legislature had undertaken to grant manufacturers the exclusive right to sell their own make in local option districts

and to exclude wholesale dealers the act could not be sustained; for the Legislature cannot grant any such special privilege to one class of persons who perform no public service. In *Bailey v. Commonwealth*, 74 Ky. 691, this court in laying down the rules for the construction of statutes, said: "Words in a statute were always to be understood according to the approved use of language. But there are other rules of construction of equal dignity and importance which must not be overlooked, and which, although not incorporated in our statute, are as binding upon the courts as if embodied in it. One of these rules is that 'every statute ought to be expounded, not according to the letter, but according to the meaning;' and another that 'every interpretation that leads to an absurdity ought to be rejected;' and still another that a law 'ought to be interpreted in such manner as that it may have effect and not be found vain and illusive.'"

The act in question, if the construction urged by appellants is adopted, would be vain and illusive. It would lead to just the opposite result from that the Legislature intended as it would then authorize manufacturers everywhere to sell in local option districts, and would be no protection to such districts at all. Every act must be construed liberally to effectuate its purpose; it must not be so construed as to have no effect. The title of the act is to be read with the body of it. It is "An act to regulate the sale of intoxicating liquors by wholesale in this commonwealth." By the second section all laws in conflict with it are repealed. The purpose of the repealing clause was to repel so much of section 2558, Ky. St. 1903, above quoted as authorized manufacturers and wholesale dealers to sell in local option districts. If appellants' construction of the act were correct, it would not regulate the sale of intoxicants by wholesale at all, but would simply take away from the wholesale dealer a privilege he had enjoyed and give it to the manufacturer. This would make the act one for the benefit of the manufacturers, and not one for the benefit of the local option districts. Something like two-thirds of the state is under the local option law. We must attribute a fair purpose to the legislative department of the state, and it cannot be presumed it intended to give wholesale dealers who sell their own make such an advantage over their neighbors who sell by wholesale, but do not manufacture. The first part of section 1 makes it unlawful to sell by wholesale in local option districts. The exception relates to sales by manufacturers. When a manufacturer sells away from his manufactory he sells as a wholesale dealer under this act. To give the act any other construction would be to defeat the evident legislative purpose and adjudge it a vain attempt on the part of the Legislature to vest a special and peculiar privilege in manufacturers rendering no public service.

We are not unaware that at the last session of the General Assembly the act of 1904 was amended so as to except from the operation of the act manufacturers selling their own make at the place of manufacture. The amendment was passed to remove the doubt which had arisen as to the construction of the original act. It was simply declaratory, and added nothing to the sense of the original act.

The judgment in both cases is affirmed.

**NEW SOUTH BREWING & ICE CO.  
v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Oct. 10, 1906.)

Appeal from Circuit Court, Laurel County.  
"Not to be officially reported."

The New South Brewing & Ice Company was convicted of violating the local option law, and appeals. Affirmed.

C. W. Metcalfe, Malcolm Yeaman, Kohn, Baird & Spindle, and George Washington, for appellant. N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

**BARKER, J.** The appellant, the New South Brewing & Ice Company, was indicted by the grand jury of Laurel county, charged with violating the local option law prevailing therein. Admitting the sale of the liquor in question, the defendant seeks to defend itself under section 2558 of the Kentucky Statutes of 1903, which is a part of the local option act of March 10, 1894 (Acts 1894, p. 123, c. 52), and which, among other things, provides: "The provision of this act shall not apply to any manufacturer or wholesale dealer, who, in good faith, and in the usual course of trade, sells by the wholesale, in quantities of not less than five gallons, delivered at one time, and not to be drunk on the premises." The agreed facts show the appellant to be a manufacturer of beer in Bell county, Ky., and that it sold five gallons or more to T. S. Sandusky in Laurel county. The case was submitted to the judge of the Laurel circuit court on the law and facts, a jury being waived, with the result that the appellant was found guilty and a fine of \$100 assessed against it. From this judgment it prosecutes an appeal.

Appellant contends that being a manufacturer of beer it may lawfully sell in a local option district under the provisions of the local option law above cited. This question was settled adversely to this contention in the case of the New South Brewing & Ice Company v. Commonwealth of Kentucky, (decided October 9, 1906) 96 S. W. 805; the opinion of the court being by Chief Justice Hobson.

The judgment in this case is affirmed upon the authority of the opinion in that.

**MORTON et al. v. SULLIVAN.**

(Court of Appeals of Kentucky. Oct. 12, 1906.)

**1. MUNICIPAL CORPORATIONS—IMPROVEMENTS  
—ASSESSMENT OF COST TO ABUTTING PROP-  
ERTY OWNERS—STATUTES.**

Ky. St. 1903, § 3708, providing that the expense incurred in constructing streets shall be paid out of the general fund or by the owners of the land abutting on the street, as the trustees may determine, authorizing improvements to be made on the 10-year bond plan, and declaring that all property abutting on the improvements belonging to the town shall be considered as property belonging to individuals, and the assessment thereon, together with the cost of intersections at crossings, shall be paid by the town out of the general fund and charged to the street improvement fund, gives to the board of a town the right to provide that the work of improving a street shall be done on a cash system or under the 10-year bond plan, and to determine whether the improvement, or what part of it, shall be paid by the town or by the abutting property owners, and whether the improvement be made under the cash system or the 10-year bond plan, the board may determine that the cost of all the improvements, including intersections and crossings, shall be paid by the property owners.

**2. SAME—COST OF IMPROVEMENT—ACTS IN-  
CREASING COST.**

Stipulations for a street improvement provided that the contractor should keep the street in repair for six months and guaranty the curbing and gutter for five years. If the work was done in a proper manner, and the material furnished was sufficient, the conditions imposed no greater burden on the contractor than he assumed on assuming to do the work in a workmanlike manner and with good material. *Held*, that the owners of abutting property chargeable with the cost of the improvement were not prejudiced by the stipulations, and they were not made chargeable with the cost of keeping the street in repair during the time specified.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 871.]

**3. SAME—POWER TO MAKE STREET IMPROVE-  
MENT AT COST OF ABUTTING OWNERS—ORDI-  
NANCE—CONSTRUCTION.**

The word "street," in an ordinance ordering a street to be improved at the cost of abutting property, means the entire width of the public way, and includes the sidewalk.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 812.]

**4. SAME—ASSESSMENT FOR PUBLIC IMPROVE-  
MENTS—CORRECTION—AUTHORITY OF COURT.**

Under Ky. St. 1903, § 3706, providing that local assessments for a street improvement shall not exceed 50 per cent. of the value of the abutting property, etc., the court may correct excessive assessments, where the assessments amount to more than 50 per cent. of the value of the ground.

**5. SAME—ACTIONS FOR SPECIAL ASSESSMENTS  
—PARTY ENTITLED TO SUE.**

An ordinance providing for a street improvement declared that the contractor should collect from the owners of the abutting property the tax imposed. Another ordinance made the contractor the special collector for the collection of such taxes. *Held*, that the contractor had the right to sue the owners of the abutting property for the taxes imposed; he being the beneficial owner of the fund due.

**6. SAME—PARTY DEFENDANTS.**

An ordinance for a street improvement provided that the contractor should collect from the owners of the abutting property the tax imposed for the cost of the improvement, and gave to the contractor the right to recover

from the municipality the contract price that could not be collected from the abutting property owners. Another ordinance made the contractor the special collector to collect the taxes. *Held*, in an action by the contractor to collect the taxes imposed on the property of the abutting owners, the municipality was properly made a party defendant.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1274.]

**7. SAME—SPECIAL ASSESSMENT FOR LOCAL IMPROVEMENTS—VALIDITY.**

The owners of property abutting on a street improved pursuant to a municipal ordinance, who are made chargeable for the improvement, are properly chargeable with the cost of grading the street so far as is necessary to construct the improvement.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1102.]

Appeal from Circuit Court, Kenton County.  
"Not to be officially reported."

Action by Jerry Sullivan against E. W. Morton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

R. S. Holmes, for appellants. T. B. Wise, for appellee.

**CARROLL, C.** These actions were instituted by the appellee, who was a contractor, to recover from appellants, owners of land abutting on Edwards street in the town of Central Covington, the cost of improving that street. Central Covington is a town of the sixth class.

It is contended by appellants that the town had no right to include the cost of foot-crossings in the assessments against the property; that the cost of these must be paid for by the town; that the stipulation in the specifications requiring the contractor to keep the street in repair for six months, and guaranteeing the curbing and guttering for five years, was erroneous; that it was improper to charge the property with the cost of re-grading the sidewalks; that the contractor has no right to maintain the action, and the court no right to correct assessments. The improvements were made under authority of section 3706 of the Kentucky Statutes of 1903. This section, in part, provides that: "The cost and expense incurred in constructing or reconstructing sidewalks, curbing, streets, avenues and public places shall be paid out of the general fund of the town, or by the owners of the land fronting and abutting thereon as the board of trustees may in each case determine, but the local assessment shall not exceed fifty per centum of the value of the ground after such improvement is made, excluding the value of the buildings and other improvements upon the property so improved." The statute also authorizes improvements to be made upon the 10-year bond plan, and in another part provides that: "All property fronting or abutting or bordering upon said improvements belonging to the town shall be considered as property belonging to individuals, and the assessment thereon, together with the cost of intersections

and crossings, shall be paid by the town out of a general fund, and charged to the street improvement fund." The street improvement fund is made up of money realized from the sale of bonds when the work is done on the 10-year plan. This statute gives to the board of trustees the right to enact that the work shall be done on the cash system, or under the 10-year bond plan; and, in either case, a lien is allowed on the property fronting on the improvements to pay for the same.

Counsel for appellants insist that the cost of "intersections and crossings" must be paid for by the town, and cannot be charged to the individuals, while appellee's contention is that, when the improvement is made on the 10-year bond plan, the cost of intersections and crossings shall be paid by the town; but if the improvement is made under the cash system, it shall be paid by the town or the property owners, as the board of trustees may elect. There is an apparent conflict between these two provisions in the same section, but they may be harmonized by vesting in the board of trustees, as authorized by the statute, the power to say whether the improvement, or what part of it, shall be paid by the town or by the property owners, whether the improvement be made under the cash system or the 10-year bond plan. The board of trustees in this instance directed—as they had the right to do—that the cost of all the improvements be paid by the property owners.

The specifications under which the improvements were made provided that the contractor should keep the street in repair for six months and guaranty the curbing and guttering for five years, and it is said for appellee that this was in effect charging the property owners with the cost of keeping the streets in repair during this time, when under the charter the property owners can only be charged with the construction of the street improvements, and not their repair. We think it was entirely proper that the council should impose on the contractor these conditions to compel him not only to do his work in a workmanlike manner, but with good material, and the evidence is to the effect that when the work is done in a proper manner, and the material sufficient for the purpose, these conditions impose no greater burden on the contractor than he must have assumed if they had not been exacted, and he had performed his work in an honest and faithful manner.

In respect to the argument of counsel that the ordinance ordering the street to be improved did not include the sidewalk, we are of the opinion that the word "street," as used in the ordinance, meant the entire width of the public way, and included the sidewalk.

Complaint is also made of the action of the court in correcting the assessments. Under the section, *supra*, local assessments cannot exceed 50 per cent. of the value of



the ground, and it appeared that in some instances the assessment amounted to more than 50 per cent. of the value of the ground, and, where this was shown to the court, it corrected the assessment by reducing the amount of it to 50 per cent., requiring the town to pay the remainder. The right to correct excessive assessments in cases like this is lodged in the court, and the court may exercise this power in the interest of the property holder and to prevent exorbitant assessments from being charged against him.

It is further said that the contractor had no right to maintain the action; that the right of action to recover the cost of improvements rests exclusively in the town. The ordinance involved provided that the contractor should collect from the property owners the tax imposed, and by another ordinance the contractor was appointed the special collector to collect these taxes. The contractor was the real party in interest, the beneficial owner of the fund due by the property owners. In view of the fact that under the ordinance the contractor had the right to recover from the town the contract price that could not be exacted or collected from the property owners, it was entirely proper that the action should be instituted in his name and against the property owners and the town, as was done in this case.

It is also assigned as error that the property owners were required to pay the cost of regrading the sidewalks. It does not appear that the property owners were charged with the cost of regrading, except in so far as was necessary to construct the street, and the cost of this construction they were properly chargeable with.

The judgment is affirmed.

#### BRYANT et al. v. McKINNEY et al.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

##### 1. INFANTS—AGE—PROOF.

Where plaintiff testified that she was married in January, 1880, and that she was then going on 14 years of age and would be 14 in April; that her father died in 1880, and that she was married shortly after his death—a finding that she was 21 years of age on November 26, 1887, when she joined in a deed, was proper, though she contradicted such statements as to her marriage by stating she was born in April, 1867.

##### 2. EVIDENCE—PROOF OF BIRTH—BIBLE ENTRIES.

The rule that entries in a family Bible stating the fact and date of the birth of a child are admissible as the declarations of the person by whom the entries were made, though such person is dead, is confined to original entries made in a Bible which contains a history of the facts concerning which it purports to speak, and does not authorize the admission of entries copied from the original on the fly leaf of a different Bible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1145.]

Appeal from Circuit Court, McCracken County.

“Not to be officially reported.”

Action by Cynthia J. Bryant and others against J. M. McKinney and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Taylor & Lucas, for appellants. Hendrick & Miller, for appellees.

CARROLL, C. The principal question in this case is whether or not on November 26, 1887, when she joined as vendor in a deed conveying a small tract of land to D. M. Rudolph, the appellant was 21 years of age. Alleging that she was not of age when the deed was made, she brought this action against appellee, a vendee of Rudolph, to recover her interest in the land. The appellant, testifying in her own behalf, said repeatedly that she was married in January, 1880, and at the time of her marriage she was going on 14 years of age, and would be 14 in April, 1880. She also testified that her father died in January, 1880, and that she married shortly after his death. Accepting as true her statements in this respect that she was 14 years of age in April, 1880, she was 21 years of age in April, 1887, and consequently was of age when the deed was made. It is true that she in one or two instances contradicted these statements as to her marriage by saying that she was born in April, 1867, and by evidence concerning the birth of her children; but there is no reason why she should not be bound by her reiterated statements fixing her age by the date of her marriage, and showing thereby that she was 21 years of age when the deed was made.

Appellant introduced a family Bible, and on the fly leaf of this Bible are the following entries: “My first child was born April 4, 1867. C. B. Brown died January 5, 1881.” And she testified that the entry as to the date when the first child was born referred to her and was made by her father, whose name was C. B. Brown. She declined to file the leaf upon which the entries were made, and which was detached from the Bible, or the Bible, with her deposition; but exhibited the Bible and the leaf to the attorney for appellee during her examination. It appears from her testimony and that of her sister that the entry giving the date of her birth was first made by her father in another Bible and transferred by him to this one some 10 years after her birth, and that the entry was not made in the place set apart in the Bible for such entries; and it is insisted for appellant that this entry is competent evidence to show the date of her birth. It is a significant fact discrediting the competency of this record that it was not made in the place set apart in the Bible for entries of such records, and it does not show the date of the birth of any of the other children, or any other fact in the family history, except the date of the death of her father, and it does

not appear by whom the entry respecting him was made. It is firmly established that entries in a family Bible stating the fact and date of the birth, marriage, or death of a child or other relative are competent evidence as declarations of the person by whom they were made, and may be admitted in evidence although the person who made them is dead. *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188; *Woodard v. Spiller*, 1 Dana, 179, 25 Am. Dec. 139; *Supreme Council v. Margaret Conkling* (N. J. Err. & App.) 38 Atl. 659, 41 L. R. A. 449. But their admission is confined to original entries made in a Bible that contains a history of the facts about which it purports to speak. We are not aware that the admissibility of evidence of this character has ever been carried so far as to permit isolated and incomplete entries in irregular places to be admitted as competent evidence, and especially is this true when the entries do not appear to be original entries, and bear on their face, when considered in connection with other facts in this case, intrinsic evidence of their improbability as a true record of a family history.

We are of the opinion that the appellant was 21 years of age when she executed the conveyance, and therefore the judgment of the lower court is affirmed.

#### PFIRMAN et al. v. DISTRICT OF CLIFTON.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

##### 1. MUNICIPAL CORPORATIONS—TAXATION—ENFORCEMENT—ACTION—BURDEN OF PROOF.

The petition, in an action to enforce a tax, and the exhibits filed therewith, consisting of the tax bills and ordinances relating thereto, regular on their face, make out a prima facie case, so that, on defendants' failure to take proof in support of the averments of the answer, putting in issue the validity of the ordinances and exhibits, it is proper to accept as true the allegations of the petition in respect thereto.

##### 2. SAME—INTEREST.

Act Feb. 15, 1888 (Acts 1888, p. 255, c. 158) creating a district with power to construct streets, and to issue bonds for the payment thereof, provides that the bonds shall bear interest from date, payable annually, with interest coupons attached for each annual installment of interest, and gives the district a lien therefor against the property fronting on such streets. It is further provided that tax bills shall be made out against owners of such property, in such manner as to pay off the lien in 10 years, attaching to the same the amount due from the taxpayer for district purposes, including interest on the sum unpaid each year. *Held*, that it was improper, in an action to collect the tax for construction of a street, to add to the principal sum the total amount of interest due for the 10 years, and then allow interest on the total.

##### 3. TAXATION—ENFORCEMENT—ACTION—MODE OF COLLECTION.

Where taxes have been assessed against property, and are liens on it, and there are also other liens against it, assessed by municipal authority, all the taxes due and unpaid, no matter for what purpose imposed, may be collected in one action instituted in a court

of competent jurisdiction, in the absence of a statute forbidding their collection in such way.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by the District of Clifton against Casper Pfirman and others. Judgment for plaintiff. Defendants appeal. Reversed.

Jno. S. Roebuck, Jr., for appellants. C. L. Raison, Jr., for appellee.

CARROLL, C. The appellee, district of Clifton, was created by a special act of the Legislature, approved February 15, 1888 (Acts 1888, p. 255, c. 158). It has the power to levy and collect an ad valorem tax of 50 cents on each \$100 of the property in the district, and also the power to improve by original construction streets and other highways in the town. It had the power to construct streets upon the 10-year plan, and to issue bonds for the payment of the work, payable in 10 years, and a lien was given to the district on the property fronting on the streets that might be improved. In 1902 an act authorizing taxing districts to issue refunding bonds and to levy a tax to pay the same was enacted, and may be found in the Acts of 1902, p. 260, c. 118. Under this act, the trustees levied a special ad valorem tax of 75 cents, and, under the act of 1888, a general ad valorem tax of 25 cents; and constructed street improvements in front of property owned by appellants. Appellants failing to pay either the street improvement tax or the general levy tax of 25 cents, or the special refunding tax of 75 cents, the appellee brought suit to recover these taxes and to subject to the payment thereof the real property of appellants situated in the district and fronting on the street that was improved. Appellee filed with its petition, as exhibits, the tax bills, ordinances, and proceedings of the board of trustees, showing that the tax was properly levied, and the amount it was entitled to recover. The appellants filed an answer, controverting all the allegations of the petition. No evidence was taken by either party, and, upon a hearing of the case, the appellee was adjudged a lien on the property for all of the taxes mentioned, and an order was made directing a sale of the property to satisfy the same. The property was sold under this judgment, when appellee became the purchaser for the amount of the taxes, and afterwards a deed was made, conveying to it the property purchased. The judgment was rendered in April, 1903, and an appeal was granted by the lower court, but not perfected in time; and this appeal was granted by the clerk of this court.

Appellants insist that the judgment is erroneous because the allegations of the petition having been traversed by answer, the copies of the ordinances, tax bills, and the proceedings of the board of trustees were not sufficient in the absence of evidence to au-

thorize a judgment. When an action of this character is filed, and the petition sets out in proper form the imposition of the tax, and the ordinances relating thereto, the burden is upon the defendant to show any irregularity in the proceedings of the council. The petition and exhibits, regular on their face, make out a prima facie case for the plaintiff. As the appellants failed to take any proof in support of the averments of the answer, putting in issue the validity of these ordinances and exhibits, it was proper for the lower court to accept as true the allegations of the petition in the respect mentioned. *Weatherhead v. Cody*, 85 S. W. 1099, 27 Ky. Law Rep. 631; *Muir's Adm'r v. City of Bardstown*, 87 S. W. 1096, 27 Ky. Law Rep. 1150. It appears that the street improvement tax assessed against the appellants was \$937.60, due in 10 yearly installments, with 6 per cent. interest on the amount unpaid in any year. In computing the amount due under this assessment, the total of \$937.60 was divided by 10, making the principal sum due each year \$93.76; to this was added \$56.20 as interest on \$93.76 for 10 years, making a total due each year for 10 years of \$150.02, and 6 per cent. interest was allowed on this sum. In other words, judgment was rendered for the amount of the assessment, \$937.60, and for \$562.26 interest thereon for the 10 years, and then interest was allowed on the total of these two sums. Of this method of computing interest, the appellants complain, because it allows compound interest.

Appellee contends that where the property owner has failed to pay the street improvement tax for which bonds payable in 10 years have been issued, that it is proper in determining the amount due by him in an action to enforce a lien upon the property, to add the principal and interest together, and award interest on the total sum until paid, in order to meet the bonds issued for the payment of the street which bear interest payable annually at the rate of 6 per cent.; and argue that unless this method of computing interest against defaulting property owners is allowed, the amount raised will not be sufficient to meet the bonds and interest thereon. The act of 1888, creating the district of Clifton, provides that the bonds "shall bear interest from date at the rate of 6 per cent. per annum, payable annually, and shall have interest coupons attached for each annual installment of interest"; and further provides that tax bills shall be made out against the owners of real estate fronting and abutting on the street improvements "in such a manner as to pay off the lien against such realty for such improvements in 10 years, attaching to the same the amount due from the taxpayer for district purposes, including interest on the sum unpaid each year." Under this statute, it is proper to charge and collect from the property owner the amount of the assessment for street improvements, with interest

thereon, payable annually, the interest so payable to bear simple interest from the time it becomes due. In this case, the total amount of interest due for 10 years was added to the principal sum, and interest allowed on the total. This method of computing the interest was in violation of the act, and imposed an unnecessary and unreasonable burden on the taxpayer, and was not needed to pay off the bonds, and, in this respect, the judgment is erroneous.

Appellant further insists that it was not proper to bring an action to enforce the collection of the general tax of 25 cents or the refunding tax of 75 cents; that these taxes must be collected in the ordinary way provided for the collection of taxes due to counties and the state. The act creating the district does not provide how the tax shall be collected. The act of 1902, authorizing the imposition of a funding tax, provides that, upon failure to pay this tax, the trustees may proceed in any court of competent jurisdiction to enforce the lien for its payment, and may recover personal judgment for the amount due. Where taxes have been assessed against property, and are liens upon it, and there are also other liens assessed by municipal authorities, all the taxes due and unpaid, no matter for what purpose imposed, may be collected in one action instituted in a court of competent jurisdiction, in the absence of a statute forbidding their collection in this way. It is manifestly to the interest of both the city and the taxpayer that the tax due shall be collected in one proceeding, and the property upon which the tax is a lien sold at one time to pay all the taxes due. If it were necessary to sell at different times the property of a taxpayer for the several classes of taxes due by him, it would impose an unnecessary burden on the taxpayer, and result in encumbering his property with liens that would injuriously affect his interest. Therefore, it was proper for appellee to proceed in one action to collect the taxes due by appellant for street improvements and the tax imposed under the act of 1888 and the act of 1902, and to sell in this action so much of his property as might be necessary to pay the whole amount of these taxes.

For the error mentioned, the judgment is reversed for proceedings in conformity to this opinion.

#### STEVENS v. STEVENS.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

##### 1. DIVORCE—ANSWER.

Under Civ. Code Prac. § 95, providing that an answer may contain "(1) a traverse; (2) a statement of facts which constitute an estoppel against, or avoidance of, a cause of action stated in the petition"—the answer, in an action for divorce on the ground that the parties had lived apart for five years, may state that the separation had been on account of plaintiff's absence, ostensibly in search of work.

and that during such time defendant furnished him money, and urged him to return, and he promised to do so, and she relied on his promise, but he failed to keep it, though the same facts would have been provable under a proper traverse.

**2. SAME—LIVING APART FOR FIVE YEARS.**

To authorize a divorce on the ground that the parties have lived apart for the last five years, there must have been some act or statement by the party not in fault signifying an intention to cease living with the other; and mere absence of the husband on the pretense of seeking employment, without notice to the wife of any other purpose, is not enough.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 107–113.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by John Stevens against Hulda Stevens. Judgment for defendant. Plaintiff appeals. Affirmed.

Kinney & Fitzgerald, for appellant. Patrick Curtis, for appellee.

LASSING, J. Plaintiff, John Stevens, filed his petition in the Jefferson circuit court in April, 1903, against his wife, Hulda Stevens, seeking divorce from her on the grounds of their having lived separate and apart for more than five years last past, without any cohabitation between them. To this petition the wife, Hulda, filed her answer, admitting their marriage in 1863, but denying that they had lived separate and apart for more than five years last past, without any cohabitation between them, and alleging affirmatively that she had at all times, and always, lived as plaintiff's wife and subject to his command. She says it is true that they have been separated for several years on account of her husband's being from home, ostensibly in search of work; that during all of this time, since he first went away for that purpose in 1892, she has furnished him money from time to time, the result of her own labor; that she has, during these years, followed him to other cities and urged him to return with her, and that he promised to do so, but he failed to keep his promise and return to her, or to do anything towards supporting her; that she continued to rely upon his promise to return to her, and has at all times been ready and willing to do and perform all the duties which a wife owes her husband, and prays for an allowance pending the litigation, as she is without means and sick. Plaintiff moved the court to strike out of the answer all the affirmative matter contained therein, and to strike the answer from the files, both of which motions were overruled. Thereupon the defendant filed an amended answer and counterclaim in which she set up the fact that plaintiff had abandoned her for more than one year without any fault on her part, and that he had habitually behaved toward her, for not less than six months,

in such a cruel and inhuman manner as to indicate a settled aversion to her and destroy permanently her peace and happiness, and prayed that the petition of plaintiff be dismissed, and that she be given judgment a mensa et thoro against the plaintiff, for costs, reasonable attorney's fee, and all proper relief. Plaintiff replied, denying the affirmative matter of the answer as amended. The proof shows that plaintiff and defendant had been married about 40 years at the date of the filing of the suit for divorce; that they had four children, all of them married; that for from 10 to 15 years before the filing of the suit plaintiff had been very improvident, and had gone over the country presumably in search of work. His wife had followed him to various places, and had at all times manifested a great deal of interest in her husband's movements. She had furnished him means out of the savings from her work to enable him to live whilst seeking employment. Since 1892, plaintiff has not lived with or in anywise provided for the support of his wife, nor have they, within five years last past, as testified to by two of their children, cohabited together. During this time plaintiff has promised to return to his wife. She has followed him in person or by letter over the country wherever he went, has sent him money from time to time as he requested it, even selling the silver plate given her on the twenty-fifth anniversary of their wedding, to supply him with money. These are the facts proven, and upon this proof the court rendered a judgment dismissing the petition for divorce and granting the wife a divorce from bed and board, and allowed her alimony, and from this judgment the plaintiff appeals.

Three errors are complained of by appellant: First, that the chancellor erred in overruling his motion to strike from the answer certain words designated in his motion; second, in failing to sustain his exceptions to the depositions taken by appellee; and third, that the judgment of the chancellor was contrary to the law and the evidence.

It is true that, as the petition set up, as the ground for the relief asked, that plaintiff and the defendant had been living separate and apart for more than five years last past without any cohabitation between them, defendant might have contented herself with a traverse of the allegations of the petition; but, as provided in section 95 of the Civil Code of Practice, she may also, where it is necessary to present her entire defense, plead other matter constituting an estoppel or avoidance. We are of opinion that the matter complained of, and which plaintiff sought to have stricken from the answer, was necessary, if true, to present her entire defense to plaintiff's petition, and the court properly refused to strike such

matter from the answer, or to strike the answer from the files.

The record does not disclose the fact that the chancellor passed upon the exceptions filed by appellant to the depositions taken by appellee, and, having failed to sustain or overrule them, the depositions complained of remained in the case, and doubtless were considered by the chancellor in arriving at his judgment. We are of opinion that the testimony in the depositions complained of, where material, tended to support the allegations set forth in appellee's answer, and the trial court should have overruled the exceptions filed thereto.

We come now to the third error complained of, which is that the judgment refusing the divorce and dismissing the petition is contrary to the law and the evidence, and appellant relies upon the case of *Clark v. Clark*, 53 S. W. 644, 21 Ky. Law Rep. 955. This case, however, differs in one material respect from that of *Clark v. Clark*. In this case appellant left home ostensibly in search of employment. Appellee had no notice whatever that it was the intention of appellant to cease living with her. On the contrary, by her every act and deed it is clearly manifest that she took the opposite view, and expected him either to return to her, or, upon obtaining permanent employment, to send for her. He does not attempt to show that she was in anywise at fault. In the *Clark Case* it is evident the wife abandoned the husband because of misconduct on his part, and the court in that case held that, even though he were in fault, if they had lived separate and apart for five years, without cohabitation, the court should grant the divorce. But there was in that case—as there must of necessity be in every case where a decree is granted—some act done, or statement made, by the party not in fault signifying an intention to cease living with the other party. Otherwise a designing husband, desiring to rid himself of his wife and having no meritorious ground, could go abroad, and, under the guise of seeking knowledge or wealth, could remain away from his wife for a period of five years or more, and then return, institute his proceeding, and be divorced upon the ground of having lived separate and apart from his wife the statutory length of time, although his wife may have been waiting all the while for his return to their home, and have had not the slightest notice of his intention not to do so. This court has held that the husband is not entitled to a divorce from his wife on the ground of abandonment where she has become a lunatic and is confined in the asylum for five years (*Pile v. Pile*, 94 Ky. 308, 22 S. W. 215), for in this case the court properly held that there was no legal, although an actual, separation, because the mind of the wife being impaired, she could not know they were living separate

and apart. The statute clearly means that in computing the five years next before the commencement of the suit each party must have notice by some word, act, or deed of the other that he or she, as the case may be, intends no longer to live with the other, as in the case of *Clark v. Clark* where, for some fault on the husband's part, the wife abandoned him and refused to longer live with him, or as in a case where the husband, for some violation of his country's laws, is convicted and confined in the penitentiary for life. In such a case the wife, after the expiration of five years from the date of his conviction, would be entitled to a divorce on this ground. But we are unable to find any case, anywhere, which supports the contention of appellant that he could leave the home of his wife under the guise of seeking employment, and in this way remain away from her for five years, or any number of years, and make it a ground for divorce. The fact that he was away from her will not be construed as a separation from, or a living apart from, his wife within the meaning of the statute. The first notice that the wife had, so far as the proof in this case shows, that appellant considered himself as living separate and apart from her was the filing of his petition seeking a divorce. He cannot, and should not now, be permitted by his own wrongful acts to so distort the facts as to manufacture grounds upon which a court of equity would divorce him from his wife.

For the reasons given, the judgment is affirmed.

#### HOLCOMB-LOBB CO. v. KAUFMAN.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

##### 1. WITNESSES—TRANSACTION WITH DECEASED PERSON.

Where a contract is made with an agent since deceased, the other party to the negotiations is not competent to testify as to what was said between him and the agent at the time the contract was made.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 664, 703.]

##### 2. APPEAL—PREJUDICE.

The exclusion of evidence is not prejudicial where the court later permitted the same witness to testify fully as to the subject of the inquiry.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4194-4199.]

##### 3. EVIDENCE—RECEIPT—VARIANCE BY PAROL.

Where a receipt showed on its face what it was for, the court properly refused to permit the maker to testify that it was given for a purpose other than that stated therein.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1829-1833.]

##### 4. CONTINUANCE—ABSENCE OF WITNESS—AFFIDAVIT.

Where an application for a continuance for absence of witnesses was denied on the understanding that the affidavit made for the continuance might be read as the deposition of the witnesses, it was not error for the court to permit the reading of such affidavit over as

objection that the statements therein contained were too indefinite and vague.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 113-115.]

#### 5. CONTRACTS — PERFORMANCE — ACTION FOR ADVANCEMENTS — INSTRUCTIONS.

In a suit for advancements on a contract for the sale of ties, plaintiff alleged and proved that the ties were to be delivered on the bank of the Tennessee river, and the court charged that, unless the delivery was made as alleged and claimed in the pleading and under the contract, the jury should find for plaintiff. *Held*, that an instruction that if plaintiff agreed to and did advance money to defendant with which she was to buy ties and deliver the same to plaintiff at the price agreed on, and defendant failed to deliver a sufficient number of ties under the contract to repay plaintiff the amounts advanced, then plaintiff was entitled to recover, etc., was not objectionable, for failure to require that the ties delivered must have been delivered "on the bank of the Tennessee river."

#### 6. TRIAL — VERDICT — SPECIAL INTERROGATORIES.

Where an action to recover advancements involved only the questions whether defendant had failed to deliver to plaintiff, according to contract, the ties for which she had been paid, and, if not, to what extent she had failed to comply with her contract, and whether the parties had adjusted and settled their differences, it was not error for the court to refuse to propound special interrogatories to the jury.

#### 7. SAME — INSTRUCTIONS — REFUSAL.

Where the charge given contained the whole law of the case, it was not error for the court to refuse additional instructions.

#### 8. APPEAL — VERDICT — EVIDENCE — REVIEW.

Where there is evidence tending to support the verdict, it will not be disturbed on appeal, though the weight of the evidence is against it.

Appeal from Circuit Court, Marshall County.

"Not to be officially reported."

Action by the Holcomb-Lobb Company against Helen M. Kaufman. From a judgment for defendant, plaintiff appeals. Affirmed.

Oliver, Oliver & McGregor, for appellant. Wheeler, Hughes & Berry, for appellee.

LASSING, J. This is an appeal from a judgment of the Marshall circuit court. Appellant filed its suit in the Marshall circuit court in February, 1905, seeking to recover the sum of \$3,433.90, with interest from appellee; said sum alleged to have been advanced to her for the purpose of paying for railroad ties which she contracted to deliver to appellant on the banks of the Tennessee river, and which she failed to deliver. Appellee answered, saying that if any contract of the nature or kind described in the petition was made with appellant, it was made and entered into by Robert Holmes, who was then her husband, and who has since, to wit, in January, 1902, died; that if her said husband made said contract, it was without her knowledge or consent, and she, therefore, having no knowledge or information sufficient to form a belief as to whether or not any such contract, as set out in the petition, was entered into or made, denied each and

every allegation of the petition, and denied that she was indebted to appellant for money had and received, as claimed in the petition, or for any sum whatever. Pleading further; she says, that on the — April, 1903, and more than a year after her husband's death, appellant's authorized representative informed her that she was indebted to appellant in the sum of \$122.08, on final settlement; that she knew nothing about the matter, but for the purpose of securing an adjustment, and to save herself from worry and trouble, and to buy her peace with appellant company, she did, on April 22, 1903, deliver her check to said agent for \$122.08 in full settlement and satisfaction of claims and demands of any kind or nature said company should have against her, and that said company, through its authorized agent, executed to her a receipt in full in words and figures as follows: "Paducah, Ky. April 22, 1903. Received of H. M. Kaufman, check on Bank of Benton for one hundred twenty-two and <sup>08</sup>/<sub>100</sub> dollars in full payment of account against Mrs. H. M. Holmes, as appears on our books. The Holcomb-Lobb Co., by G. F. McCabe, Gen'l Agent." And she pleads and relies upon said settlement, payment, and receipt, as a bar to the company's right to recover. The appellant replied, traversing the affirmative matter of the answer, and, by agreement, any affirmative matter in the reply was traversed of record. Thereupon, appellee moved for a continuance, and filed an affidavit in support of her motion. The court overruled her motion for a continuance, but permitted her affidavit to be read as the deposition of the absent witnesses. The case was tried before a jury, and the testimony introduced showed the following state of facts: That in the year of 1901, the appellant company entered into an agreement with R. H. Holmes, then husband of appellee, who acted for her, by the terms of which he was to purchase railroad ties for the company and deliver them to designated points on the Tennessee river. That, as the ties were delivered, drafts would be issued by the agent of the company, on the company, for the amount of ties delivered from time to time. The bills of sale accompanied the drafts, and each bill of sale described the number of ties, the price per tie, and the point of delivery, and was signed by H. M. Holmes, and attested by J. E. Bugg, agent of the company, as follows: "I hereby certify that the above-named material has been inspected, received, and branded by me for the Holcomb-Lobb Company as stated; that the account is correct, and that I have given draft of the above date and number in settlement of same. [Signed] J. E. Bugg."

The bills of sale filed with the proof call for the full number of ties which the contract with Holmes provided for, and for which he was paid; but the company's agents testified that they never received that number of ties, and that they only received some-

thing over 14,000, and the agent, Bugg, who countersigned the bills and drew the drafts in payment of same, testified that the company furnished him but one form of bill of sale, and that he used this without noticing that it had the clause therein reciting that the ties had been inspected, branded, and received by him, and that while the bills showed that he received the number of ties, to-wit, something over 30,000, he did not, in fact, receive more than one-half of that number. Appellee testified that she knew nothing about the business, but that shortly after her husband's death, the agent, Bugg, came to her and told her not to worry about the ties, that he would have them all gathered up and shipped in, and that he was satisfied that there would be a number sufficient to square her with the company, and that she, relying upon his statements, paid no attention to the matter. Another agent of the company told her practically the same thing, or, rather, told her that he had been employed by the company to count or assist in gathering up the ties, and that "Bugg said" he thought that there would be enough to bring her out even with the company, or "about that." The proof further shows that in April, 1903, the company notified appellee that their books showed that she was indebted to them in the sum of \$122.08; that she paid this sum with the understanding and belief that it was a full and final settlement of all matters between herself and the company; that a month or so thereafter she met the agent, Bugg, and he told her that he had discovered that she was entitled to pay for ties which had not been taken up or received by him theretofore, and he thereupon paid her something like \$100. The affidavit filed in support of the motion for a continuance was read to the jury, and the agent of the company was permitted to testify as to what the books of the company would show in regard to the account in suit.

At the conclusion of the testimony appellant moved the court to give the jury certain instructions, which it conceived to be the law of the case, and to propound to the jury nine interrogatories, to which the appellee objected; and appellee moved the court to give certain instructions, which were refused, and the court on its own motion gave the following instructions: "If you shall believe from the evidence in this case that a contract was entered into by and between the plaintiff, Holcomb-Lobb Company, and the defendant, Helen M. Kaufman, formerly Helen M. Holmes, by herself or agent, and that under the terms of said contract plaintiff, Holcomb-Lobb Company, agreed to, and did, advance to the defendant the sums of money set out and claimed in plaintiff's petition, or any part thereof, with which money the defendant was to buy railroad cross-ties, and deliver same to said com-

pany, at the prices agreed upon between plaintiff and defendant, as alleged and claimed in the pleadings herein, and shall further believe from the evidence in this case that the defendant Helen M. Holmes, failed to deliver to plaintiff a sufficient number of cross-ties under said contract to repay to plaintiff the amounts of money advanced by it, if any, to her or her agent, then you will find for the plaintiff such sum of money as you may believe from the evidence in this case would be equal to the value of the number of cross-ties so failed to be delivered by defendant to plaintiff, if any, at the prices agreed upon between them, under said contract, but not exceeding the amount claimed in the petition, to-wit: \$3,433.90. But unless you shall so believe from the evidence, then the law is for the defendant, and you will so find, and this instruction is given you subject to No. 2." Instruction No. 2: "If, however, you shall believe from the evidence in this case that before the commencement of this action, the plaintiff and defendant had a settlement of all matters in controversy in this action, and that the plaintiff, through its authorized agent, accepted \$122.08, and defendant paid said sum, in full settlement and satisfaction of the matters now in controversy in this action, then the law is for the defendant, and you will so find. But unless you shall so believe, then the law is for the plaintiff, as defined in Instruction No. 1, and you will so find."

The jury having considered the case, returned a verdict for appellee, and the company appeals.

Three grounds are relied upon for reversal: (1) The trial court erred in refusing to allow appellant to introduce before the jury competent evidence, and by allowing the appellee to introduce before the jury incompetent evidence; (2) the court erred in instructing the jury, and in refusing to propound to the jury the interrogatories asked; and (3) that the verdict is contrary to the law, and is against the law and evidence, and not supported by the evidence.

Appellant complains that the court refused to permit the witness Bugg to tell what contract he made with R. H. Holmes, husband of appellee, on the ground that Holmes, with whom the conversation was had, was then dead, and in so ruling, the court said: "I believe that the law is that where a contract is made with an agent, and the agent is dead, I do not think you can prove what was said." This ruling of the court was correct; but, even if it was not, appellant was not prejudiced thereby, for the reason that the court later permitted this same witness to testify fully as to the terms and provisions of the contract. And, again, the appellant complains that the court erred in refusing to permit the witness McCabe to tell what the receipt in question was for. Where a receipt shows

on its face what it is for, that is the best evidence as to the purpose for which it was given. And the court properly refused to permit the witness who gave it to testify that it was given for a purpose other than that stated in the receipt; and it was for the jury to say what was meant by what it said, judging from the receipt and the circumstances surrounding the giving and receiving of same by the parties, as shown by the proof. The witness W. A. Pinkerton was asked this question: "Did you attempt to make a settlement with her for the company?" And the witness answered, "No, sir," and the court, on motion, excluded both the question and answer, on the ground, we presume, that the witness might state what he did, but not what he attempted to do. Appellant also complains that the court erred in permitting the affidavit filed with appellee's motion for a continuance to be read to the jury as the deposition of the absent witnesses, because the statements therein as to what the witnesses, if present, would say, are too indefinite and vague. It is true that this affidavit does not throw much light upon the question at issue; but, nevertheless, the court, having forced appellee to trial with the understanding that this affidavit was to be read as the deposition of the absent witnesses, it would have been a manifest injustice to appellee to refuse to allow it to be read, and appellant could have avoided same by consenting to a continuance of the case.

Appellant complains of the instructions given by the court, and especially to Instruction No. 1, for the reason that it failed to name the place of delivery, to wit, "on the bank of the Tennessee river." Appellant alleged in its pleadings that the ties were to be delivered on the bank of the Tennessee river, and the court, in its instructions, told the jury that if they believed that plaintiff furnished money to defendant with which to buy railroad ties, and deliver same to plaintiff, at prices agreed upon between plaintiff and defendant, as alleged and claimed in the pleadings in this case, then they should find, etc. Plaintiff's agent, Bugg, testified that, under their contract, the ties were to be delivered on the bank of the Tennessee river, and the court instructed the jury that if they believed that the defendant failed to deliver to plaintiff a sufficient number of ties under said contract, then they should find, etc. In this case the contract itself, and every clause thereof, was denied, and the jury were the judges of the fact whether or not the ties were to be delivered on the bank of the river as alleged and claimed in the pleadings; and, as testified to by witnesses for plaintiff, the instructions, as given by the court, were not prejudicial to the plaintiff, when the court told the jury

that unless the delivery was made as alleged and claimed in the pleadings and under the contract, then they should find for plaintiff. We are of opinion that in these two instructions the court gave to the jury fairly the law of this case.

But two questions were involved in this case: (1) Had appellee failed to deliver to appellant, according to contract, the ties for which she received pay, and, if not, to what extent had she failed to comply with her contract; (2) had appellant and appellee adjusted and settled the matters of difference between them as alleged by appellee, at the time of the payment of the \$122.08 and the execution of the receipt therefor? We are of opinion that there was no necessity for, and that the trial court was not called upon or required, to propound to the jury the interrogatories which the plaintiff asked to have propounded, and, having given the whole law of the case, it was not error to refuse additional instructions. *Exchange Bank v. Gaitskill*, 37 S. W. 100, 18 Ky. Law Rep. 532. Where there is evidence tending to support the verdict of the jury, even though the weight of the evidence is against it, this court has repeatedly held that the verdict will not be disturbed upon review here. The proof shows that R. H. Holmes, husband of appellee, died in January, 1902; that shortly thereafter appellee alleges that appellant's agent called upon her and notified her not to worry about the ties, that his company would look after them, and that he felt from the way they were turning out that she would come out all right, if not ahead. Another man, representing himself as the agent of the company, and claimed to be in the employ of the company, told her practically the same thing. These agents deny making these statements. It was for the jury to determine whether they did or not, and as to whether or not they had gathered up the ties from the woods, as she alleges they told her they would do. The jury were the sole judges of the weight to be given the testimony of the witnesses who appeared in this case. If they believed the testimony of appellee, as they evidently did, there was abundant evidence to support their finding, on either hypothesis; that is, that appellee had furnished the requisite number of ties to appellant, and that they had been received by appellant, whether on the bank of the river or in the woods, or that appellee and appellant had settled and adjusted their differences at the time of the payment of the \$122.08.

There were no errors prejudicial to the appellant in the conduct of the trial. The jury was fairly instructed as to the law of the case, and, there being evidence to sustain the verdict of the jury, the judgment is affirmed.



**BULL et al. v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Oct. 16, 1906.)

**1. HOMICIDE—PROOF OF DEATH OF PERSON MURDERED—EVIDENCE—SUFFICIENCY.**

On a trial for the murder of a person named, the description of the man by that name when living corresponded with the description of the dead man found. A witness identified the dead man as the man alleged to have been murdered. There was no contrary evidence. Held sufficient to show that the man alleged to have been murdered was dead.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 477.]

**2. CRIMINAL LAW—TRIAL—EVIDENCE—ADMISSIBILITY.**

Where, on a trial for homicide, the evidence showed a conspiracy between several persons to commit it, evidence that articles found near the dead body were the property of one of such persons was admissible.

**3. SAME.**

Where, on a trial for homicide, the proof showed a conspiracy between several persons to commit it, evidence of a witness that one of several men in a wagon seen driving towards the place where the body of decedent was found was one of the conspirators was admissible.

**4. SAME.**

Where, on a trial for homicide, a witness testified that he saw defendants at the place where decedent was, that he heard decedent ask that they do not hit him any more, and that he subsequently saw a horse and wagon drive up and four or five men throw decedent into the wagon and drive off, the evidence of another witness that he recognized one of the men in the wagon as one of the defendants was admissible as corroborating the testimony of the former witness.

**5. HOMICIDE—EVIDENCE—SUFFICIENCY.**

On a trial for homicide, evidence examined, and held to justify a conviction of murder.

**6. CRIMINAL LAW—TRIAL—INSTRUCTIONS.**

Where, on a trial for homicide, the court charged that the law presumed that the defendants were innocent until their guilt had been proved beyond a reasonable doubt, and that if on the whole case the jury had a reasonable doubt of the guilt of the defendants, or either of them, they should find them not guilty, or such one of them not guilty as to whom they might entertain such doubt, an instruction that if they believed that defendants, or either of them, conspired to kill decedent, and pursuant thereto killed him, they should find them guilty of murder, was not open to the objection that, if the jury believed any of the defendants to be guilty, they should find them all guilty.

Appeal from Circuit Court, Bell County.  
"Not to be officially reported."

Jesse Bull and another were convicted of murder, and they appeal. Affirmed.

O. V. Riley and J. L. Reeder, for appellants. N. B. Hays and C. H. Morris, for the Commonwealth.

**HOBSON, C. J.** On the 13th of February, 1905, the body of a dead negro man was found in a gully about two miles from Middlesboro. The place where he was found was a thicket about 30 steps from the road. The body had been there several days, and some snow was upon it. The shoes had been removed from the feet. A piece of a watch chain was hanging to the vest. The head was bare. Not far from the body was

found a billy, also a man's cap and an old coat. The man was about 25 years old, was dressed in a suit of blue overalls, and was a black negro. In his pocket was found a miner's time card made out to Henry Love. His pocketbook was also found, but empty. The body was taken to Middlesboro, and was there identified by a witness as that of Henry Love. Henry Love, three or four days before the finding of the body, was at the Keg House, a saloon in Middlesboro, about midnight, and went up to the barkeeper with three \$20 bills in his hands, asking the barkeeper to change them. This he did not do, and soon after went home, leaving another man in charge of the bar. Will Young, Clarence Gray, and Jesse Bull, with others, were in the saloon that night. A witness who had gotten drunk and gone across the street and laid down testified that late in the night he was waked by a noise; that he saw Will Young, Jesse Bull, Clarence Gray, and two others around Henry Love; that he heard Love say, "Oh Lordy! Don't hit me any more; I am killed now!" that he was afraid they would kill him and crawled out of sight; the next thing he saw a one-horse wagon drove up, and four or five men threw Love in the wagon and drove off; that he recognized Young, Gray, and Bull. Another witness testified to hearing these men late in the night talking together, and saying they had killed him, and counseling as to what they would do with him. A third witness, who lived on the road between the saloon and where the body was found, testified to seeing the wagon come up the road with four or five men in it, and that after a while it returned. He also recognized Young as one of the men in the wagon. The body, when found, had three mortal wounds in the head, inflicted by some instrument like a billy, either one of which was sufficient to have killed him. The billy, which was found near the body, and the cap, were identified as the property of Young. Love was shown to have had on that night a pair of patent leather shoes. The defendant Bull left the next day, and when he returned had on a new suit of clothes and patent leather shoes. He also had money, and said that he did not have to work for it. The defendant Gray, when arrested, had on a watch from which the ring had been torn. He gave it to his brother-in-law, who gave it to his mother, and she testified that she had lost it. The defendant Gray's version as to how he came by the watch, which he said he had bought from some man a few days before, was vague and not confirmed in any way. The defendant Bull claimed that his sister, who lived in Knoxville, had given him the money to buy the clothes and shoes; but she was not introduced. The defendants both denied being present, or knowing anything about the death of Love, but admitted that they

were in the saloon that night, and offered no proof as to their whereabouts at the time referred to that was at all satisfactory. The jury on these facts found them guilty of murder, and fixed their punishment at confinement in the penitentiary for life.

It is insisted for the defendants that the commonwealth does not show that Henry Love is dead. We cannot accede to this view. The description of the living man, his size, color, and dress, all correspond with the description of the dead man and substantiate the testimony of the witness who identified the dead man as Henry Love. There was no contrary evidence introduced by the defendants. There was no evidence that the dead man was any other than Henry Love. There was clear proof of a conspiracy between the defendants and Young, and therefore the proof that the billy and cap found near the dead man were the property of Young was competent. The proof, also, of the witness who recognized Young in the wagon was competent. The proof of this witness also served to corroborate the testimony of the witness who testified to seeing them load the dead man in the wagon. The verdict is not against the weight of the evidence. On the contrary, considering all the circumstances shown by the evidence, the jury were warranted in finding the defendants guilty.

It is insisted that the first instruction was erroneous, in that it told the jury, in effect, that if they believed from the evidence beyond a reasonable doubt that the defendants Jesse Bull and Clarence Gray, or either of them, in connection with the other defendants, feloniously conspired together to kill Love and pursuant to such conspiracy did kill him, they should find them guilty of murder. In other words, it is insisted that the jury were told by this instruction that, if the jury believed either of the defendants to be guilty, they should find them both guilty. The jury could not have so understood the instructions, for the third instruction is in these words: "The court further says to the jury that the law presumes the defendants innocent of said charge until their guilt has been proven beyond a reasonable doubt, and if upon the whole case the jury has a reasonable doubt of the defendants, or either of them, having been proven guilty they should find them not guilty, or such one of them not guilty as to whom you may entertain such doubt."

It is also insisted that the court did not give the jury the whole law of the case; but we do not see that there is any merit in this contention. There is no doubt, under the evidence, that Henry Love was murdered and robbed; that after he was killed his body was taken in a wagon out near the gully where it was found, for the place where the wagon was turned around was shown by the testimony, the track being still visible after the body was found. The

only real question in the case was whether the defendants were parties to the murder. This question was clearly and fairly submitted to the jury by the instructions.

Judgment affirmed.

#### ALEXANDER v. GARDNER -et al.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

##### 1. LANDLORD AND TENANT—CREATION OF RELATION—PAYMENT OF RENT.

Reservation of rent is not essential to the creation of the relation of landlord and tenant.

##### 2. SAME—TENANCY OR LICENSE.

Plaintiffs conveyed to defendant by deed all the timber and trees on the tract of land described, the deed providing that the grantee should have all the rights of way and privileges over and upon the land usually extended to lumbermen, provided that the timber should be removed within three years, and that all refuse, timber, barns, houses, cabins, sheds, etc., remaining on the premises at that time should revert to and become the property of plaintiffs. *Held*, that such deed was not a mere license, but was sufficient to create the relation of landlord and tenant.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 8.]

##### 3. SAME — WRIT OF FORCIBLE DETAINER — SCOPE OF REMEDY.

Where plaintiffs conveyed to defendant the right to remove certain standing timber under an instrument which was in effect a lease, the grantee on termination of his rights under the lease could be ejected by a writ of forcible detainer.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 1205.]

Appeal from Circuit Court, Magoffin County.

"To be officially reported."

Action by R. A. and H. G. Gardner against William Alexander. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

D. D. Sublett, for appellant. A. F. Byrd, for appellees.

CARROLL, C. In 1901 the appellees sold and conveyed to appellant by deed duly acknowledged all the timber and trees on a tract of land described in the conveyance—the deed providing that the grantee should have all the rights of way and privileges over and upon the land usually extended to lumbermen including the right to erect tramways, cabins, buildings, and machinery necessary for the manufacture and removal of timber; and provided that the timber was to be removed within three years from May 1, 1901, and that all refuse, timber, barns, houses, cabins, sheds, erected on the premises by the second party (appellant) and remaining in the premises should revert and become the property of the present owners (appellees). On the 16th day of May, 1904, appellees procured a warrant of forcible detainer against the appellant, to recover the possession of the leased premises, and the only question to be determined on this appeal is whether or not a warrant of forcible detainer is the proper remedy

in a case like this. Code, § 452, defines a forcible entry as "the refusal of a tenant to give possession to his landlord after the expiration of his term"; and it has been held that to maintain the writ of forcible detainer the relationship of landlord and tenant must exist, and that the reservation of rent in some form, and allegiance to the title are the distinguishing characteristics of a contract by which the relation of landlord and tenant exist. *Goldsberry v. Bishop*, 2 Duv. 143; *Cuyler v. Estis*, 64 S. W. 673, 23 Ky. Law Rep. 1063.

Did the relation of landlord and tenant exist in any degree between these parties by virtue of the contract or conveyance referred to. A tenant has been defined to be one who occupies the lands or premises of another in subordination to that other's title, and with his assent express or implied. *Wood on Landlord & Tenant*, § 1, *Taylor on Landlord & Tenant*, § 14. No particular form of words is necessary to create the relation, nor does the length of the term or the amount of the compensation paid affect the question. Under the contract in this case, the appellant had the right to occupy the land for three years in consideration of a stipulated sum and the privilege of erecting buildings, putting machinery on the land, and making roads and tramways to enable him to enjoy the premises for the purpose for which they were granted. He was not given the right to use the land except in the manner pointed out in the contract, nor is the use of the soil essential to create the relation of landlord and tenant. If a tenant has the right to enter upon the premises granted for a specified purpose, and to this extent may enjoy them, and he does this in subordination to the title of the owner and with his assent, and, as a consideration, pays money or other thing of value, or even without the payment of any consideration, the relation of landlord and tenant is created. The reservation of rent is not essential to create the relation, although it is a usual incident of tenancy.

It is insisted that this contract was a license, and not a lease, and it is often difficult to determine the difference between the two; but we think the difficulty in this case is removed by the terms of the contract itself. A license is defined to be: "An authority to do some act or a series of acts on the land of another without passing an estate in the land. It amounts to nothing more than an excuse for the act which would otherwise be a trespass. Being a personal privilege, it can be enjoyed only by the licensee. It is not assignable, so that an undertenant can claim the benefit of the license to the licensee." *Taylor on Landlord & Tenant*, § 237; *Wood on Landlord & Tenant*, § 227; 18 Am. & Eng. Ency. of Law, 1127; *Haywood v. Fulmer* (Ind. Sup.) 32 N. E. 574, 18 L. R. A. 491. Under

the conveyance here involved, the grantee had the right to sell, convey, or assign the rights and privileges granted by the contract, and the right to the use for the purposes mentioned of all the land described therein, and at the expiration of the term was to surrender the premises; therefore the contract had all the elements of a lease, and the grantee was in effect a tenant of the grantor, and consequently upon the termination of the lease could be ejected by writ of forcible detainer.

The judgment of the lower court is affirmed.

#### HOPKINS COUNTY v. GIVENS.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

#### COUNTIES—UNLAWFUL APPROPRIATION — AUTHORIZING ACTION TO RECOVER.

Where an unlawful appropriation of funds of a county is made by the fiscal court, and it declines to authorize the institution of an action to recover the same, the county judge, acting as the county court, may direct the institution and prosecution by the county attorney of an action in the name of the county for such purpose.

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by Hopkins County against C. C. Givens. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Ruby Laffoon, for appellant. M. C. Givens and Jonson & Jennings for appellee.

CARROLL, C. In 1902 and 1903 the appellee, Givens, was county judge of Hopkins county, and in each of those years the fiscal court of that county allowed Judge Givens \$225 for the purpose of paying the salary of a clerk in the county judge's office; the salary being made payable out of the county levy. In 1905 an effort was made to have the fiscal court enter an order directing the county attorney to institute an action to recover from Judge Givens the allowances made him, but the fiscal court declined to give such direction, and, thereupon, the presiding judge of the county, by an order entered on the records of the county court, ordered and directed the county attorney to institute an action against appellee to recover the money. A special demurrer was entered to the petition, and sustained by the court, and the county appeals.

The principal question to be determined is whether or not the county court presided over by the county judge alone is authorized to direct the institution of an action in the name of the county to recover funds illegally allowed by the fiscal court, when the fiscal court declines to authorize the action. It is insisted for appellee that the fiscal court, under sections 1834 and 1840 of the Kentucky Statutes, is invested with sole power and authority over all the fiscal affairs of the county, and with the exclusive right to au-

thorize actions to be prosecuted concerning matters that involve the fiscal affairs of the county, and that, in the absence of direction by it, an action such as this cannot be maintained. The salary of appellee as county judge was fixed by the fiscal court previous to his election, and there is no statute allowing the county judge to appoint a clerk of the county court, or making provision for the payment of such clerk if one should be appointed by the county judge, and it is therefore insisted for appellant that the allowance was made without authority of law, and that the county court composed alone of the county judge has a right to direct the county attorney to institute and maintain an action in the name of the county to recover the funds thus unlawfully appropriated.

In *County of Jefferson v. Young*, 86 S. W. 985, 27 Ky. Law Rep. 849, the fiscal court appropriated \$2,000 to pay R. H. Young for a map of the county outside of the city, showing the locations of lands, upon the idea that this map would aid the assessor in assessing the property, and thereby result in gain to the county. From this allowance the county attorney appealed. In disposing of the questions raised in the case, this court said that the fiscal court had no authority to make the allowance; that it was restricted in the matter of appropriations to the subjects specified in the statute. Nor did the fiscal court have the power to appropriate money to pay the salary of a clerk for the county judge or county court, as there is no provision in the statute authorizing or permitting the fiscal court to make an appropriation for this purpose. In support of the judgment sustaining the special demurrer to the petition, upon the ground that the county court had no power to make an order directing the institution or prosecution of this action, our attention is called to the cases of *Com. v. Tilton*, 48 S. W. 148, 20 Ky. Law Rep. 1056, *Id.*, 49 S. W. 2, 20 Ky. Law Rep. 1216, and *Id.*, 54 S. W. 11, 21 Ky. Law Rep. 1079. In these cases the only question decided was that the taxpayers of the county could not maintain an action against the county judge involving matters concerning the fiscal affairs of the county, in the absence of an averment that the fiscal court had refused to authorize the institution of such suit. After quoting section 1834 of the Kentucky Statutes, which reads: "Unless otherwise provided by law, the corporate powers of the several counties of this state shall be exercised by the fiscal courts thereof respectively," and section 1840, which provides that "the fiscal court shall regulate and control the fiscal affairs and property of the county," the court said: "We are of the opinion that by these two sections of the statute, all right of action for and on behalf of the county is in the fiscal court, and that, until that court refuses to institute suit, no

one else may do so." But it was not held that an action could not be instituted in the name of the county by direction of the county judge when the fiscal court had refused to direct an action to be brought.

In *County of Jefferson v. Waters*, 63 S. W. 613, 23 Ky. Law Rep. 669, the fiscal court of Jefferson County allowed Waters \$1,000. The Jefferson county court made an order directing the county attorney to prosecute an appeal from the judgment of the fiscal court allowing the claim to the Jefferson circuit court. Subsequently the circuit court, upon it being made to appear that the fiscal court had entered an order directing the county attorney to dismiss the appeal, entered an order dismissing it. In discussing the right of the county attorney to prosecute the appeal, this court said: "The right to institute, defend, and conduct actions, motions, and proceedings of every description vested in the county attorney includes the right to prosecute an appeal from the action of the court in a matter in which the county is interested when directed by the county court. The authority to give such directions seems to be vested in the county or fiscal court. If the fiscal court can make an allowance, and then prevent by its order the county attorney from prosecuting an appeal from it, although directed by the county court, it has the power to say that there shall be no appeal to the circuit court from its judgment except with its consent. We are of opinion that the order of the county court directing the county attorney to prosecute the appeal cannot be superseded or rendered ineffectual by the action of the fiscal court in attempting to control that appeal. The county attorney is a law officer of the county to look after its business, prosecute and defend actions against it, and it seems to us that where a claim has been allowed against the county by the fiscal court, it ought not to be heard to object to having a court of appellate jurisdiction review its action."

In *Boyd County v. Arthur*, 82 S. W. 613, 26 Ky. Law Rep. 906, the fiscal court entered an order directing that allowances be made to certain justices of the peace. The county judge objected to the order, and ordered that an appeal be prosecuted, and appointed and employed John W. Wood, an attorney, to represent the county. In its opinion, this court said: "It was the duty of the county attorney to prosecute the appeal when directed to do so by the county court. When he declined to discharge his duty, the county judge himself in the name of the county prosecuted the appeal. The county judge as a member of the fiscal court is given authority to direct actions to be brought on behalf of the county. When the county attorney refused to obey his order, he was not required to sit by and see the interests of the county suffer, but might himself prosecute the appeal." We consider these cases

as conclusive of the question here presented, and, as settling the question that when the fiscal court makes an unauthorized appropriation of public funds, the county judge, acting as a county court, or the county attorney, may, in the name of the county, appeal from such order; and if an unlawful appropriation is made by the fiscal court, and it declines to authorize the institution of an action for the purpose of recovering it, the county judge, acting as the county court, may direct the institution and prosecution of an action in the name of the county for this purpose. The county attorney is the law officer of the county. It is his duty under sections 126 and 127 of the Kentucky Statutes to protect its interests, independent of any direction to do so, by either the county or fiscal courts, and, to accomplish this end, he may prosecute an appeal to the circuit court from any order making an unlawful appropriation of public money, or, after it has been appropriated, may institute an action to recover it, when so directed by the county or fiscal court.

It therefore follows that the judgment of the lower court must be reversed, with directions to proceed in conformity to this opinion.

#### ILLINOIS CENT. R. CO. v. CRUSE.

(Court of Appeals of Kentucky. Oct. 10, 1906.)

##### 1. CARRIERS—DUTY TO ASSIST PASSENGER—INSTRUCTION.

It not being the duty of the employés of a carrier to assist a passenger in alighting, because of her sickness or other misfortune, unless such condition is known to them, it is error to charge that it was their duty to assist her if her feebleness was known to them. "or was apparent," this implying that it was their duty to observe her condition to see whether she needed assistance.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1232, 1233.]

##### 2. SAME—DUTY TO LIGHT CAR STEPS AND DEPOT PLATFORM—INSTRUCTION.

Having its car steps and depot platform so reasonably lighted that the ordinary traveler can see sufficiently to alight in safety, being all that is required of a carrier, it is error to instruct that it was its duty to have them so lighted that "plaintiff" might clearly see them.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1148, 1149, 1329.]

Appeal from Circuit Court, Larue County.

"To be officially reported."

Action by Elizabeth Cruse against the Illinois Central Railroad Company. Judgment for plaintiff, defendant appeals. Reversed and remanded.

L. B. Handley, J. M. Dickinson, and Trabue, Doolan & Cox, for appellant. Mather & Creal, for appellee.

**BARKER, J.** During the month of September, 1904, the appellee, Elizabeth Cruse, took passage on one of appellant's trains running from Cecilia Junction to Louisville, Ky.;

the latter place being reached about 8 o'clock p. m. on the day of the passage. She was accompanied by two small children, and had as baggage two valises. When the train reached the depot in Louisville, the younger of the children was asleep, and when the mother undertook to alight from the car she carried the sleeping child, and one of the valises; the other child, who seems to have been old enough to perform that duty, carried the second valise. There were some 25 or 30 passengers in the coach; appellee being among the last to leave. When on the steps of the car, her foot slipped, causing her to fall, and, as she claims, seriously injured herself by striking her back against the side of the car. To recover damages for this injury she instituted this action, basing her right to recover, first, upon the insufficient lighting of the platform of the coach in which she was riding; and, second, the failure of the employés of appellant to render her the necessary assistance, considering her condition, to enable her to alight with safety. There is no complaint that either the steps or the platform were not in an ordinarily safe condition; the basis of the complaint being the want of sufficient light, and the absence of the assistance from the employés before stated. Upon the trial the jury awarded appellee a judgment of \$500 in damages.

The court, among others, gave the following instructions to the jury:

"No. 1. The court instructs the jury that it was the duty of the defendant's servants in charge of the train on which plaintiff was a passenger, to observe the utmost care, which a prudent man engaged in that business would exercise under like circumstances for the safety of plaintiff, while she was attempting to alight from the car; and if you believe from the evidence that at the time she attempted to alight from said train the steps and platform, or either, was insufficiently lighted for plaintiff to see clearly said steps or platform, and that defendant's agents in charge of said train failed to exercise such care for plaintiff's safety in alighting as would appear to a prudent man to be reasonably necessary under like circumstances, or if you believe from the evidence that plaintiff was in feeble health, and, by reason thereof, required aid to alight in safety, and that her feebleness was known to defendant's agents in charge of said train, or was apparent, and that said agents failed to exercise such care for plaintiff's safety as would appear to a prudent man engaged in like business to be reasonably necessary, and that by reason of said agent's failure, if any, to render such aid, plaintiff was injured, you should find for the plaintiff."

"No. 5½. The court instructs the jury that if they believe from the evidence that the car steps from which plaintiff alighted, and the station platform upon which she alighted, were both sufficiently lighted at the time

the plaintiff so attempted to alight, so that she could have seen clearly how to alight in safety, or unless the jury believe from the evidence that the plaintiff was in such feeble health as to require more than ordinary care and assistance from the defendant's agents and servants in charge of the train, and that said feebleness was known to the said agents and servants, or was apparent to them, then the law is for the defendant, and the jury should so find. And the court further instructs the jury, although they believe from the evidence that the car steps and station platform, or either, were insufficiently lighted, and that the plaintiff was in feeble health, and this was known to said agents and servants, or was apparent, they will find for the defendant, unless they believe from the evidence that the defendant's agents and servants in charge of the said train did not exercise such care for plaintiff's safety in alighting as would appear to a prudent man to be reasonably necessary under like circumstances."

The main question to be disposed of is the correct ascertainment of the duty of assistance a common carrier owes a passenger situated as was appellee at the end of her journey. The question, so far as we know, has never been adjudicated by this court, and we are thus forced to borrow what light we can from other authority.

In the case of the Missouri Pacific Railroad Company v. Wortham (Tex.) 10 S. W. 471, 3 L. R. A. 368, it was said: "It may be conceded that if appellants had had a proper platform at the station, upon which the passengers could have alighted, their duty as to this matter would have been discharged, and that they were not called upon to render personal assistance."

In *Raben v. Central Iowa Railway Company* (Iowa) 34 N. W. 621, the court, in criticising an instruction given upon the trial of the case, said: "The doctrine of this instruction is that it was the duty of defendant's employes to assist plaintiff to alight from the train, and if they negligently failed to perform that duty, and started the train, without looking and seeing that she had left, defendant is liable for the injury. This doctrine cannot be sustained. It is undoubtedly the duty of a railroad company to provide suitable and safe means for entering and alighting from its trains, but having done this, and having stopped its train in proper position to enable the passengers to avail themselves of these means in entering and alighting, it is not bound to render them personal assistance. The contract of the carrier is that he will carry the passenger safely and in a proper carriage, and afford him convenient and safe means of entering and alighting from the vehicle in which he carries him, but he does not contract to render him personal service or attention beyond that."

In *Yarnell v. Kansas City, Fort Worth*

& M. R. R. Company, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599, the rule on the question under consideration is thus stated: "In the circumstances heretofore stated, it was no part of the duty of the defendant's employes to alight from the train and assist passengers thereon, and negligence cannot therefore be based on such alleged failure. When access to the cars of a railroad company is easy, as in the case at bar, such assistance cannot be claimed as a matter of right. It has been ruled that it is not the duty of a railroad company to assist a passenger in alighting from a train, and following the reasoning which denies the right of assistance to a passenger from a train would also deny it in getting on a train. The two cases cannot be distinguished in principle."

In *Hurt v. St. Louis, Iron Mountain & I. R. R. Co.* (Mo.) 7 S. W. 1, 4 Am. St. Rep. 374, it is said: "All the duty the law imposes upon a conductor acting as the agent of a corporation, in order to comply with the obligation of the carrier to the passenger, is to carry him safely to the point of destination, and announce the arrival of the train at the station, and give him reasonable opportunity to leave the car. When this is done, the duty of the conductor ceases."

In *Sevier v. Vicksburg Railroad Company*, 61 Miss. 11, 48 Am. Rep. 74, the duty of the common carrier to passengers was thus stated: "It was not the duty of the conductor to arouse the appellant on the arrival of the train at Jackson, by any special means applicable to his condition as being sick and drowsy. The business of the conductor was to manage the train, according to the established regulation, and not to vary them for an individual. Regulations are made for the traveling public, and should be reasonable, as adapted to the convenience of this public. If persons sick or under any disability which renders them unable to conform to the reasonable regulations for the community generally are inconvenienced by this inability, they have no legal cause of complaint against a carrier who undertakes to carry the public generally, according to a plan adopted to suit persons, generally, in a condition to travel, and not designed to meet the wants of those not in such condition. The obligation of the carrier was to carry the appellant safely to Jackson, and on arrival there to announce the fact, and afford an opportunity for him to leave the car. That he was asleep, and that his sleep was induced by sickness, did not entitle him to special attention. It was his misfortune to be sick, and yet called on to act as a well man, being on a train run for those able to travel on cars, and conform to the regulations for their operation. One too sick, or from any cause not able to do as travelers usually do in conforming to the usage in running trains for the traveling

public, should avoid them, or secure the assistance necessary to enable them to accomplish what is required of passengers generally."

In *Lafflin v. Buffalo & Southwestern R. Co.*, 106 N. Y. 141, 12 N. E. 602, 60 Am. Rep. 433, the court said: "On the evening when this accident happened the evidence tends to show it was dark, and the platform was not plainly visible. It was somewhat lighted by light, which came from the car windows, the depot windows and a lantern in the hands of the conductor, and it does not appear that it was ever lighted in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing until her foot touched the platform, and then she would have been safe. It was not the duty of defendant to furnish some one to aid her in alighting from the car."

In the case of the New Orleans, etc., R. R. Co. v. Statham, 97 Am. Dec. 478, the Supreme Court of Mississippi say: "Railroad cars are not traveling hospitals, nor their employes nurses. Sick persons have the right to enter the cars of a railroad company; as common carriers of passengers they cannot prevent their entering their cars. If they are incapable of taking care of themselves, they should have attendants along to care for them, or to render them such assistance as they may require in the cars, and to assist them from the cars at the point of their destination. It is not the duty of conductors to see to the debarkation of passengers. They should have the stations announced; they should stop the train sufficiently long for the passengers for each station to get off. When this is done, their duty to the passenger is performed. All assistance that a conductor may extend to ladies without escorts, or with children, or to persons who are sick and ask his assistance in getting on and off trains, is purely a matter of courtesy, and not at all incumbent upon him in the line of his public duty."

In 5 Am. & Eng. Encycl. of Law, tit. "Carriers of Passengers," p. 579, the author says: "It cannot be laid down as a rule of law that it is the duty of the carriers to assist its passengers in boarding or alighting from its vehicle or carriage; nor is it necessarily incumbent upon its servants to direct a passenger how he shall get on or off."

In 6 Cyc., tit. "Carriers," p. 611, the learned author says: "Nor in general is there any duty to assist a passenger in entering or alighting from the train or other conveyance, unless there is some unusual danger or difficulty arising from the place or means afforded for alighting, or the passenger is, to the knowledge of the servants of the carrier, infirm, or under some disability."

There is nothing in the opinion in the case of Cincinnati, New Orleans & Texas

Pacific Railroad Company v. Bell, 74 S. W. 700, 25 Ky. Law Rep. 10, in conflict with the rule sustained by the foregoing authorities. In that case the lowest step of the car was 23 inches from the platform, and the evidence of the plaintiff tended to show that she had ridden on the defendant's train many times, and alighted at that particular platform, and had been accustomed to find a box or stool to shorten the distance when she alighted from the train, and that it was so dark she did not notice the absence of the box on the occasion upon which she received her injury. The testimony of the defendant's brakeman showed that he had orders to assist the passengers in alighting, and he claimed to have done so. This was denied by the plaintiff, and the issue thus formed was decided adversely to the corporation by the jury.

We have no such question in the case at bar. Here neither the steps or the platform are complained of. The plaintiff fell because her hands were occupied in holding her sleeping child and the valise, so that she could not steady herself by catching hold of the iron railing, and thus preventing her fall as she descended the steps to the platform. Obviously, it is not incumbent on the employes of a carrier of passengers, on their own initiative, to render any special service to one or more passengers to the exclusion of others; their whole duty being to secure the safety and comfort of all. It certainly is not their duty to be on the lookout to discover that any particular passenger needs special assistance. We think, however, if a passenger is in need of special assistance, either from sickness or other misfortune, and this fact is known to the employes of the carrier, it is their duty to render it; but they are not required to anticipate such wants or needs. The trial court therefore erred by inserting into the instructions given to the jury the idea that it was incumbent upon the employes of the appellant to observe the condition of the passengers in order to see whether or not they needed assistance. This thought is embraced in the use of the expression "or was apparent" in the instructions after stating the duty of the employes of appellant if appellee's feebleness was known to them. As said before, if the employes of the railroad knew that the appellee was in feeble health, and needed assistance, it was their duty to render her such reasonable help as lay in their power in order that she might alight from the car in safety. But they owed her no duty of observation to ascertain her condition, and, therefore, the expression "or was apparent" should have been omitted. Nor was it the duty of the appellant to have its platform or station so lighted that the plaintiff might clearly see the steps and platform. All that was required of it was to have its steps and platform so reasonably lighted

that the ordinary traveler could see sufficiently to alight in safety. The eyes of appellee might have been dim or weak from age or infirmity, and, although the steps and platform were sufficiently lighted to enable the average passenger to alight in safety, they may not have been so lighted as to enable her so to do.

For these reasons, the judgment is reversed, and the cause remanded for a new trial, under instructions consistent with the principles herein expressed.

### KIRK v. GOVER et al.

(Court of Appeals of Kentucky. Oct. 18, 1906.)

#### 1. JUDGMENT—EQUITABLE RELIEF—FAILURE TO MAKE DEFENSE—EXCUSES—NEGLIGENCE OF PARTY.

Defendant, on being sued, employed an attorney to defend the case. Shortly thereafter the attorney was taken ill, but subsequently, when his condition had improved, he informed defendant that he would be able to take care of the case, and that, under the practice, it could not be tried at the next term. Relying on such statements, defendant did not attend court, and the attorney being absent owing to his illness, judgment was taken against defendant. *Held*, that he was not negligent, and enforcement of execution would be enjoined and defendant permitted to defend.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 823-827.]

#### 2. SAME—CONDITIONS PRECEDENT—PAYMENT OF AMOUNT DUE.

Defendant sought to restrain the enforcement of an execution based on a judgment against him, the ground of the relief prayed for being that he failed to present his defense owing to the illness of his attorney. Defendant showed a lack of any negligence, but admitted that a part of the claim for which the judgment was rendered was just. *Held*, that he should be required to pay the portion of the judgment, against which he admitted he had no defense, as a condition precedent to equitable relief against the remainder.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 853.]

Appeal from Circuit Court, Garrard County.  
"Not to be officially reported."

Suit by B. G. Gover against Wm. Redden Kirk and another to enjoin the levy of an execution based on a judgment against plaintiff and in favor of defendant Kirk, and from a judgment in favor of plaintiff, defendant Kirk appeals. Reversed and remanded.

J. M. Rothwell and Herndon & Sweinbrod, for appellant. M. C. Saufley, for appellees.

LASSING, J. At the March term, 1904, of the Garrard circuit court a judgment was rendered in favor of appellant against the appellee, Gover, for \$236.50 with interest from date and costs. On the 8th of April, 1904, an execution was issued by the clerk of said court on said judgment directed to appellee, Baughman, sheriff of Lincoln county, and placed in his hands commanding him to make said money with interest and costs. Appellee Gover brought his suit in equity seeking to enjoin the levy of said execution

upon his property, and the injunction was granted and the sheriff restrained by temporary orders. At the November term, 1904, the injunction was perpetuated by the judgment of the court, and from that order, this appeal is taken.

Appellee Gover alleges in his petition, and in an amendment thereto, that, immediately after the summons in the case of appellant Kirk against him, etc., was issued and served on him, he went to the office of W. G. Welsh, a resident attorney of Standford in Lincoln county who practiced regularly at the Garrard circuit court, and employed said Welsh to defend him in said suit; that said Welsh notified him that the case would not stand for trial at the March term of court, as the appellant was a nonresident of this state and had taken no proof in the case; that he relied upon said attorney to make defense for him, and employed no one else for that purpose; that shortly thereafter said Welsh was taken quite sick and remained so until the filing of this suit; that some 10 days or 2 weeks prior to the commencement of the Garrard circuit court said Welsh notified appellee Gover that he expected to be able physically to attend the March term of the Garrard circuit court and again assured him that he would look after the management of his case. He relied upon his promise to attend to said case, and his further assurance that his case would not stand for trial when the defense was interposed, as that would necessitate the taking of proof by appellant; that he did not attend the March term of the Garrard circuit court, and did not know that his attorney had not made defense for him and that judgment had gone against him until the execution had been placed in the hands of the sheriff; that he had a good and valid defense to said suit, except as to \$25 of the amount claimed; that the services charged for in said suit were for medical services rendered to his son, and that any service rendered his son in excess of the amount of \$25 was rendered contrary to appellee's consent and against his express order and direction. He asked that the enforcement of the execution be perpetually enjoined, and that the judgment be set aside, and that he be permitted to make defense to said suit.

The question arising on this appeal is, did the facts set up in appellee's petition entitle him to a new trial, justify and authorize the granting of the injunction?

In the case of McCall v. Hitchcock, 9 Bush, 71, the court says: "It is a general principle of practice that 'when a party or his counsel are taken by surprise, whether by fraud or accident, on a material point or circumstance which could not reasonably have been anticipated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial will be granted.'" When a party has been served with a summons notifying him that he has



been sued, it is his duty to exercise at least ordinary diligence to inform himself when the case is set for trial and to be present at such time to aid and assist his counsel in the preparation of his defense, or at least to see that his counsel is present to make his defense. And he cannot be said to have exercised ordinary diligence when he simply employs counsel and pays no further attention to his case. In the case of Payton v. McQuown's Adm'r, 97 Ky. 757, 31 S. W. 874, 31 L. R. A. 33, 53 Am. St. Rep. 437, the court held that where a litigant, upon being sued, stated his defense to an attorney and requested him to prepare an answer for him, and then went to his home in another county, that he could not rely upon the promise of his attorney to prepare his answer for him as a ground for a new trial, upon learning that his attorney had failed to prepare his answer or make defense for him and that judgment had gone against him by default. The court said that this is not such diligence upon the part of a litigant as would entitle him to a new trial, and quotes with approval from the case of Patterson v. Matthews, 3 Bibb. 80, in which the court said: "It is a settled rule that a new trial ought not be awarded on account of the neglect of the agent or attorney of the party applying for it; for such neglect is equivalent to the neglect of the party himself." In the case of Dixon v. Lyne, 10 S. W. 469, 10 Ky. Law Rep. 769, this court held that, where a wife sought to set aside a judgment on the ground that she was sick and unable to attend at her lawyer's office, but intrusted her defense to her husband and through his neglect it was not made, she was entitled to a new trial. In the case of Bone v. Blankenbaker, 17 S. W. 638, 24 Ky. Law Rep. 1438, it was held that, where one had employed an attorney to attend to a case for her and he had undertaken the defense and was compelled to leave the city, and, during his absence, a judgment went against his client, she was entitled to a new trial, as her attorney had been guilty of no lack of diligence in the preparation of her case, but that his failure to do so was due to his unexpected illness and his inability to find certain court papers where he had reason to expect them. From the foregoing opinions it will be seen that this court has, with a degree of uniformity, held that in order to entitle a litigant to a new trial, it must appear that he has used due diligence in the preparation of his case for trial; that he had a really meritorious defense to the suit; and that he was prevented from making said defense because of some "accident or surprise, which ordinary prudence could not have guarded against." And, if he seeks to enjoin the enforcement of a judgment, he must show that he is without fault.

In the case before us appellee, upon being sued, employed a regular practitioner at the bar of the Garrard circuit court and in-

trusted to him the preparation of his defense. Shortly thereafter his lawyer was taken sick and remained so for some time. About 10 days or 2 weeks before the commencement of the Garrard circuit court he again conferred with his lawyer, who was at that time improved in health, and his lawyer informed him that he would be able to attend to his court duties, and that he would prepare his defense for him, and, upon its being filed, the case would of necessity have to go over until the next term of court for trial, as plaintiff appellant was a nonresident and would have to take his proof by deposition. Relying upon this statement, appellee did not attend the term of court and did not know that judgment had gone against him until the execution had been placed in the hands of the sheriff. We are of opinion that on this showing appellee Gover is guilty of no negligence in the preparation of his suit for trial, but that his failure to present his defense was due solely to the illness of his lawyer and his lawyer's inability to attend the Garrard circuit court. Appellee admits, however, that he has no defense to \$25 of the claim sued on, and that, to this extent, therefore, the judgment is correct. Appellant being entitled to a judgment by default for \$25 with interest and costs, appellee cannot, in conscience, ask to have this part of the judgment enjoined. "Where complainant is seeking to restrain a judgment against himself and admits that he owes a balance to defendant on account of the same matter, equity may require such balance to be brought into court and paid accordingly. In no event should an injunction be allowed against more of the judgment than is shown to be unjust and unconscionable. Where circumstances of the case require it, the injunction will be dissolved as to a part and continued as to the residue." High on Injunctions, 138. We are of opinion that the equity of this case would require that appellee be required to pay the portion of the judgment against which he admits he had no valid defense, before a court of equity will give him the relief sought as to the remainder thereof.

For the reasons given, this case is reversed and remanded, with instructions to the trial court to dissolve so much of the injunction as enjoins the collection of \$25 of the judgment debt with interest from the date thereof and costs, and that, upon the payment of this sum by appellee into court, he be given a new trial and an opportunity to make defense to the remainder of said claim.

#### HUSBANDS v. POLIVICK et al.

(Court of Appeals of Kentucky. Oct. 9, 1906.)

1. TAXATION—TAX DEED — ACTION AGAINST CLAIMANT UNDER DEED—BURDEN OF PROOF. Though a tax collector is required to first sell the personal property of the taxpayer, and tender a receipt before selling, and to advertise the property for a designated period, yet there is no provision for a record of such

steps, and hence it is not incumbent on one claiming real estate under a tax deed to prove them; the burden being on the one assailing claimant's title to show the invalidity of the sale.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1565-1569, 1606.]

**2. SAME—SALE BY STATE—SALE OF EXCESSIVE AMOUNT OF LAND.**

Where the auditor's agent sells more land of the taxpayer than is necessary to repay to the state the delinquent tax, his act is void.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1352-1354.]

**3. SAME—ASSESSMENT—VALIDITY—ASSESSMENT IN NAME OF DECEDENT.**

Gen. St. c. 92, art. 16, § 2, required owners of land, nonresidents of the county where the land was situated, to file a list of the land for taxation, and Act May 6, 1880 (1 Pub. Acts 1879-80, p. 206, c. 1565), provided that a sale of lands for taxes should not be invalid on account of such lands having been charged in any other name than that of the rightful owner. *Held*, that where, after the death of a nonresident, his heirs did not cause the land to be assessed in their names, an assessment in the name of decedent was valid.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 704-706.]

**4. SAME—SUFFICIENCY OF DESCRIPTION.**

Gen. St. c. 92, art. 4, § 1, prescribing the form of tax books, having provided as to description, "Land, each tract in acres," a description of land as "three acres" on the assessor's books was sufficient.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 726.]

**5. SAME—TAX SALE—REPORT OF SALE—DESCRIPTION OF LAND—SUFFICIENCY.**

Gen. St. c. 92, art. 8, § 17, in relation to sales of land to the state for taxes, required the sheriff to return to the county clerk a description of the land sold "as fully as he is able to do so"; and article 4, prescribing the form of tax book, provided as to description, "Land, each tract in acres." *Held*, that a sheriff's return, describing the land as "three acres," which was the description in the assessor's book, was sufficient.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1371.]

**6. SAME—EFFECT OF SALE ON TITLE.**

Auditor's Agent Act (Pub. Acts 1879-80, p. 206, c. 1565) § 4, directs the auditor's agent to sell lands bought in by the state for delinquent taxes, and unredeemed, and requires him to sell so much of the land belonging to the person assessed "as will discharge the tax." *Held*, that a sale by the sheriff to the state for nonpayment of taxes does not divest the legal title.

**7. SAME—ACTION AGAINST CLAIMANT UNDER DEED—ISSUES AND PROOF—PLAINTIFF'S TITLE.**

Auditor's Agent Act (Act April 22, 1882; 1 Pub. Acts 1881-82, p. 108, c. 1304) § 8, provides that the purchaser at a sale by the auditor's agent of lands bought in by the state for delinquent taxes shall acquire all the title which the person assessed had. *Held*, that the Auditor conveys only the taxpayer's title, whatever it was; and hence, in ejectment by the heirs of a landowner against one claiming under an Auditor's deed conveying the land, defendant claimed through the decedent, and it was not necessary for plaintiff to show title further than him.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by F. J. Polivick and others against

W. M. Husbands. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

J. G. Husbands, for appellant. Oliver, Oliver & McGregor, for appellees.

O'REAR, J. There was listed for taxation, county and state purposes, a tract of 3 acres and 4 poles of land situated near Paducah, by G. A. Terry, for the year 1875. Terry having failed to pay the taxes due upon that assessment, the sheriff of McCracken county advertised the land for sale. No one offering to bid the amount of the tax due, and the costs of the levy and sale, amounting to \$1.45, the land was struck off to the state of Kentucky. On June 12, 1882, W. R. Howell, auditor's agent for McCracken county, sold the land, under an advertisement previously posted, for taxes due for the years 1876, 1877, 1878, 1879, 1880, 1881, and 1882, in addition to the taxes and penalties due for the year 1875. At this last-named sale S. B. Caldwell became the purchaser at the price of \$15.75. The auditor's agent gave Caldwell a certificate of his purchase, and the Auditor of State, on the 20th of November, 1882, conveyed the land to Caldwell by deed. The land was again assessed for taxes in 1884, in the name of G. A. Terry, and was sold in 1885, when, there being no other bidder, it was again stricken off to the state. Caldwell conveyed the land to appellant, W. M. Husbands, by deed dated May 7, 1902. Appellant took possession and made some slight improvements. G. A. Terry died in 1878. His widow, now F. J. Polivick, and five infant children, survived him. The youngest of these became 21 years old May 4, 1900. This action was begun October 10, 1902, by the widow and children of G. A. Terry (he having died intestate), to recover the land from appellant. The plaintiffs alleged that they were the owners and entitled to the possession of the land, which was wrongfully withheld by defendant, W. M. Husbands, and prayed judgment for its recovery. Defendant denied plaintiffs' ownership, and pleaded ownership in himself, setting out his title as being derived through the proceedings and conveyances above named. The plaintiffs, in avoidance of defendant's pleas, averred that the taxes for which the land was originally sold (1875 and subsequent years) were paid to the state by the widow of G. A. Terry before the sale by the auditor's agent in 1882. They also attacked the validity of the sheriff's sale in 1885, denying the steps of assessment, levy, advertisement, and sale, as charged in the answer. The case was tried by the court without a jury, and resulted in a judgment for the plaintiffs, adjudging them the land. From that judgment the defendant prosecutes this appeal.

The circuit court found, and the proof shows, that on June 10, 1882, Mrs. Polivick paid to Howell, auditor's agent, the tax due for the year 1875, and exhibits his receipt therefor. She also then delivered to the

auditor's agent sheriff's receipts for each of the other years' taxes prior to 1882. Notwithstanding, the auditor's agent sold the land on June 12, 1882, to Caldwell as stated. Appellees contend that it was incumbent on appellant, when justifying his possession and claim under a tax title, to prove affirmatively that each step in the matter of assessing the land, of advertising it for sale when the taxpayer became delinquent, and every other step required by statute to be taken by the revenue officers of the state up to the execution of the Auditor's deed, was taken in the exact manner required by the statutes, and that, as appellant did not do so, the deed from the Auditor of State to Caldwell was not receivable as evidence on appellant's behalf. In this contention we do not concur. Many of the acts required by the statutes to be done before the collector could sell the land are such as from their nature there could not be a record of them. For example, the collector was required to first levy upon and sell the personalty of the taxpayer in the county, and was required to tender the taxpayer a receipt before selling. The collector was also required to advertise the property levied on for a designated period by written or printed notices. As there was no provision for a record of such steps, even if it had been possible to make such a public record, which would of itself prove the acts to have been done as stated, it necessarily follows that proof of them, if required, must be had by the testimony of witnesses cognizant of the facts. The sheriff and the taxpayer were probably the only persons who could prove that the tax receipt had been tendered, and the taxpayer was the person most likely to know whether he then owned personal property in the county. The taxpayer in this case is dead. The sheriff has been out of office nearly 30 years. He may be dead, or removed to an unknown region, or have no recollection at this late day of such details, so common among thousands of similar ones, perhaps.

The rule contended for by appellee would make it well-nigh impossible, and after many years it would be impossible, to prove at all the antecedent facts requisite to the vesting of the title under a tax sale. The more ancient the transaction, the more infirm it would become, until in the course of time it would break in two by its inherent feebleness, and the whole transaction would become invalid from inability to prove it. Just the contrary is the general course of law. Time ripens most things, and makes perfect many acts hitherto doubtful. The courts require less evidence to establish an ancient fact than a recent one, because they appreciate the difficulty, and oftentimes the impossibility, of calling witnesses to prove the older facts. A notable instance is that an ancient writing proves its own execution, whilst it would be necessary to prove the execution of the same document, if recently made, by calling witnesses to the fact. Rea-

son and public policy are that such transactions as official sales of land, by which its title is changed, should be susceptible of proof at all times, so that the link thereby made in the chain of title affected should be as durable one time as another. This can be done, practically, in but one way; that is, to accord to the ultimate acts of the collector or making the sale the presumptions accorded to all other official acts. The collector, whether the sheriff or another, acts under an official oath. He performs a duty to the public, and is required by the statute to make a return in writing over his official signature of what he has done. This action is made a public record, and is required to be recorded, and safely kept as a public record. Why, if it proves nothing?

The statute in existence when these transactions occurred, and which is yet in force (section 3760, Ky. St. 1903), was section 17, c. 81, Gen. St., which reads: "Unless in a direct proceeding against himself, or his sureties, no fact officially stated by an officer in respect of a matter about which by law he is required to make a statement, in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer." This section but declares the common-law rule, which holds that every officer acting under the sanction of an oath, or in whom the government reposes a trust, shall be presumed to have done his duty until the contrary is proven. *Hickman v. Boffman*, *Hardin*, 358; *Scott v. Marshall*, 5 J. J. Marsh. 435; *Hickman v. Skinner*, 3 T. B. Mon. 211; *Case v. Colston*, 1 Metc. 145. In *Rudd v. Johnson*, 5 Litt. 19, it was held that where an officer has authority to act he will be presumed to have acted correctly; but, where the existence of some fact is necessary to give him authority to act, such fact will not be presumed from his having acted. Even if that be held to be a literal statement of the rule, it would not alter the presumption accorded to the officer's ultimate act in this case; for it is undeniable that, being the tax collector of the county, the tax not being paid, and the tax roll showing its assessment, he was authorized by law to sell the land for the delinquent tax. It is therefore presumed, in the absence of evidence, that he, in doing so, did all that he was required by law to do; that he found no personal property in the county belonging to the taxpayer; that he tendered the taxpayer the receipt before sale, and advertised the sale in the manner and for the time required by law. The effect of this rule is not to make the officer's certificate, or return, conclusive. It is a rule of evidence by which the burden of proof is shifted to the party who questions the veracity of the officer's certificate. This rule applies alike to the sheriff's sale and the auditor's agent's. Consequently, the burden was upon appellees to show that the sales were invalid for some

reason not appearing on the face of the returns.

As to the sale by the sheriff for the taxes of 1875, there is no proof to contradict his certificate, or to rebut the presumption accorded to it by law. But that is not true as to the certificate given by auditor's agent Howell to Caldwell in 1882. It was proved by appellees that Howell was paid the tax assessed for the year 1875, for which the land was struck off to the state at the sheriff's sale, and that the tax for the following years, prior to 1882, were also paid by or for appellees. If the land was sold for all, or for any of those years for which the tax had previously been paid, there was no authority in the auditor's agent to sell it. This is because he could sell only so much of the land as was necessary to repay to the state the delinquent tax. If he sold for more than was due, as he would if he sold for years in which the tax had already been paid, then he acted without authority, in that he acted without jurisdiction, and his act would be void. *Blight's Heirs v. Banks*, 6 T. B. Mon. 206, 17 Am. Dec. 136; *Fish v. Genett*, 58 S. W. 813, 22 Ky. Law Rep. 177; *Griffin v. Sparks*, 70 S. W. 30, 24 Ky. Law Rep. 850. We conclude that the sale by Howell, auditor's agent, to Caldwell, was ineffectual to pass the title of G. A. Terry, or of his heirs, in this land.

Appellant contends, however, that though that be conceded, still the taxes for the year 1884 were legally assessed against the land; that they were unpaid, and the land sold by the sheriff in 1885 to the state to pay same; that as the state did not have the title to convey in 1882, when it executed to Caldwell the deed by its auditor, its subsequently acquired title passed under the doctrine of estoppel to Caldwell; that, at any rate, it divested appellees of title, and is an insuperable obstacle to their suit in ejectment—they being without title. Whether the state is bound by the doctrine of estoppel is not free from doubt. But we waive that question. It must first be determined just what was the legal effect of the sheriff's sale of this land for taxes for the year 1884. If it was not such as to divest Terry's heirs of the title, then the question of whether the state is bound by the doctrine that after-acquired title will pass by its previous deed conveying no title will not arise in this case.

Appellees contend that the assessment of this property was invalid, and was void, because it was assessed in the name of G. A. Terry, who was then dead. In *Oldhams v. Jones*, 5 B. Mon. 458, it was held that land formerly owned by Robert Mosely, and listed by him for taxation as a nonresident in or prior to 1803, was legally assessed in his name for taxes for the year 1810, although he had died in 1804. The court said: "Although Robert Mosely was dead before the imposition of the tax, and the title had vested in his heirs, yet it vested in them subject to

the payment of accruing as well as existing taxes, and was equally liable upon the entry in the name of their ancestor, as upon a re-entry in their own name. \* \* \* Besides, it was the duty of the heirs to have paid the taxes, and to have entered the land in their own names. They had also the right to redeem."

Appellees question the applicability of the foregoing authority to this case, because they say it was rested upon a peculiar statute then in force, and not in force when the assessment in the case at bar was made, by which nonresidents' lands were required to be assessed in a peculiar manner. In the case at bar *G. A. Terry* is shown to have been a nonresident of McCracken county when the assessments of this land during his lifetime were made. Section 2 of article 16, c. 92, Gen. St., then in force in 1884-85, required owners of land, who were nonresidents of the county where the land was situated, should make out and file with the county court clerk of such county a list of their lands therein, which list was to be resorted to by the assessor in assessing such lands for taxation. This provision is essentially the same as that in force in 1803, under which *Oldhams v. Jones*, supra, arose; the only difference being in the officers with whom the list was to be filed and the assessment made, and the manner of collecting the tax. The case seems to us to be pertinent as authority.

By the act of May 6, 1880 (1 Pub. Acts 1879-80, p. 206, c. 1565), known as the "Auditor's Agent Act," it is provided in section 14 (page 208): "The sale of lands shall not be invalid on account of such lands having been listed or charged in any other name than that of the rightful owner." While this section would not and could not divest one of his title to his own land, which had been assessed to him, and the tax upon which he had paid, if it had also been assessed for the same period to another not the owner, and who had become delinquent therefor, still it seems to us to declare at least the same effect to an assessment allowed by the heirs at law to be made in the name of their deceased ancestor who had formerly owned it, and from whom they inherited; they not having had it assessed in their own names. The act of 1886—the Hewitt bill—went further in declaring the legislative purpose as to informalities in assessments. By section 12, art. 6, c. 92 (title "Revenue and Taxation"), it is provided: "But no error or informality in the assessment, or in the description or location of the property, or in the name of the owner or party assessed, shall invalidate the assessment if the property can, with reasonable certainty, be located from the description given." Carried into present revision as Carroll's St. 1903, § 4056. The legislative idea was to make the identical property bear its share of the public burden, and to pre-

: its escaping through misadventure of assessing officers in listing it. Mere inequalities were to be ignored. Such, as have seen, was the judicial idea, also, arly as 5 B. Monroe. The property owner ought to assess his property for taxation, s his legal and patriotic duty to do so, to pay the taxes on it. If he refuses neglects to assess it, and thereby error omitted by the assessing officials of a nical or trivial nature, such as misde- tion of the name of the owner, or the of land, or the like, it ought not to avail taxpayer to escape his duty to pay his s. Nor will it, if his property has been tified in the assessment so that there- t may be located.

he assessment made of this land in 1884 as follows, on the assessor's books pre- ded by the state:

Cracken Co.	Land, each tract in acres.	Name of nearest resident.	No. of election precinct in which situated.	Value of land.	
W. A.	3	Mrs. Diehl.	2	200	

is contended that this assessment is in- l because it is not a sufficient descrip- of the property to identify it. From nature of the case, description of lands he assessors' books in this state, where sectional system of surveys and descrip- s are not and have never been in use, ex- in a small portion of the state, cannot as full as is generally given in deeds. Is it necessary that it should be. It is ainly competent for the Legislature to rcribe the form of assessors' books. If oes, it is not for the court to say that ssments made in such form are not ad- ite. The statute then in force on this ect was section 1, art. 4, c. 92, tit. venue and Taxation," Gen. St., as fol- 3:

#### Form of Tax-Book.

ection 1. The tax-book shall be in the follow- form:

Full names of tax-payers of ——— county.
Land each tract in acres.
Nearest resident.
Number of election precinct in which situated.
Value of lands.

eterna.

The assessment in this case was in strict conformity to the statute, and was a suffi- cient description of the land. The ques- tion then arises whether the sheriff's sale, and the certificate he is required to give of the land, when sold for delinquent taxes, should give a more extended description of the property levied on and sold. It is to be remembered that in this case the land was not sold to a stranger by the sheriff, but was struck off to the state because there was no other bidder. The statute regulating the sheriff's duties in that respect is not very explicit. It was section 14, art. 8, c. 92, Gen. St. and reads, on this point: "And if no one will bid for and purchase such land at the price of the taxes due and the costs of the sale, it shall be the duty of the sheriff or collector to purchase same for the state, bidding therefor the taxes due and the costs of the sale." Section 17, same chapter and article, requires the sheriff to return and report in writing to the county clerk, showing when the sale was made, to whom, and at what price, "and giving a description of the land sold as fully as he is able to do." In this case the sheriff's report was filed as required; the description of the land being the same as is shown in the assessor's books. We are of the opinion that the description is suffi- cient.

The question now is, what effect upon the title of the delinquent taxpayer has such a sale? Section 14, art. 8, c. 92, above quoted in part, does not operate to transfer the title, or to divest the taxpayer of his title. It provides for a redemption of the land within certain periods, which in this case expired before the suit was brought, and without a redemption having been effect- ed or attempted. It might not unreasonably be supposed that the state got what any other purchaser would have got under the sheriff's sale. But the Legislature has not thought so. This is indicated by the au- ditor's agent act, enacted first in 1880. By the fourth section of that act the auditor's agent is directed to sell the lands bought in by the state for delinquent taxes and un- redeemed, and to sell so much of the land "assessed, or belonging to each person assess- ed or indebted," as will discharge the tax, interest, and charges thereon. In the amend- ment of April 22, 1882 (1 Pub. Acts 1881-82, p. 107, c. 1304; page 1111, 1887, Gen. St. 1887), the agent is directed to locate all lands in his county previously bought in by the state and remaining unsold. By section 5 it is provided: "Having so ascertained the location of said property and its present owner, said agent shall give public notice for 30 days that unless said taxes and costs are paid, so much of said property as may be necessary will be sold to pay the same." By the seventh section it is provided that, if the taxes and costs are not then

paid, the agent shall sell so much of the land as will be necessary to pay same. These provisions of the statute evidence a legislative construction that the title to the land remains in the taxpayer until the sale by the auditor's agent, when it is divested to so much only as may have been necessary to pay the delinquent tax and costs. This being true, the sale by the sheriff to the state for nonpayment of tax by the person assessed does not divest him of the legal title. It merely retains the state's lien, and provides for its summary enforcement.

It is not unreasonable to assume that the attitude of the Legislature on this subject was thoughtfully taken. In *Robinson v. Huff*, 3 Litt. 87, the question arose as to whether the title of the delinquent taxpayer was vested in the state by a proceeding almost identical with the one at bar. There, too, the question arose in the trial of ejectment, where the defendant showed the sale of plaintiff's title for taxes, and the purchase by the state, to defeat the plaintiff's action; the effort being to show that the plaintiff was not entitled to recover on the strength of his own title. The court said: "We are of opinion that the sale for taxes to the state did not pass the legal title. It is a well-known rule of the common law that no freehold might be given to the king, nor derived from him, but by matter of record. 2 Bl. Com. 344. In conformity to this principle the Supreme Court of the United States, in the case of *Fairfax's Devisees v. Hunter's Lessee*, 7 Cranch. 603, 3 L. Ed. 453, decided that statutes of Virginia, which showed a strong intention in the Legislature to take and pass the title of real estate without inquest of office, were insufficient for that purpose without express provision to that effect. No doubt this principle applies to our commonwealth, as it did to the crown, and it is doubtless a common-law rule subject to the control of the Legislature; but it is necessary that it should be clearly changed before we can disregard it." We conclude that the sheriff's sale of the land for the taxes of 1884, and its purchase by the state, did not divest Terry's heirs of their legal title, and are not a bar to their recovering the land from a stranger who is wrongfully in the possession of it.

On the trial plaintiffs did not show title derived from the commonwealth. Appellant contends that he was, on that account, entitled to a nonsuit. But it was denied him. The circuit court applied to this trial the principle that, where plaintiff and defendant each derive, or claim, their title from a common source, it is unnecessary for either to trace title further than the common grantor, as each is estopped to deny the validity of his title. Appellant contends, however, that that rule is inapplicable to the case at bar, because, when the title became

vested in the commonwealth by the sheriff's sale of 1878 for the taxes of 1875, all antecedent title was merged in the sovereign; that the Auditor's deed made on behalf of the state was effectual to convey, not only such title as the taxpayer may have had, but any title the state may have had from any other source; that as all title to land within the commonwealth was originally in the state, unless a prior grant from the state was shown by the plaintiffs, defendant's deed from the state, executed by the Auditor, was a grant by the state, showing superior title in the defendant. We think appellant misconceives the office and nature of the Auditor's deed. The Auditor acts no more in behalf of the state in the matter than does the sheriff in conveying by deed to an individual purchaser who buys at a tax sale made by the sheriff. Each, the Auditor of State and the sheriff, conveys only the title of the taxpayer, whatever that was. It does not purport to do more. If there was any doubt about it, section 8 of the auditor's agent act (act approved April 22, 1882) puts it at rest. That section provides: "The purchaser at such sale shall acquire all the title which the person to whom said property was assessed had therein, at the day of the assessment, and free from all liens or claims of any person claiming under or through him, except state taxes subsequently assessed against such property, and unpaid at the date of said sale." Defendant, then, claims title through G. A. Terry, as do the plaintiffs. It was not necessary in this action for plaintiffs to have traced their title to the commonwealth, as defendant was estopped to deny G. A. Terry's previous title.

It follows that the judgment should be affirmed, which is ordered.

#### DUPOYSTER v. FIRST NAT. BANK OF WICKLIFFE.

(Court of Appeals of Kentucky. Oct. 18, 1906.)

##### 1. CORPORATIONS—SUBSCRIPTION TO STOCK—CANCELLATION OF CERTIFICATES—EVIDENCE—SUFFICIENCY.

In an action to compel a corporation assuming the liabilities of a prior corporation to issue a certificate of stock to a holder of stock in the prior corporation, evidence examined, and held to warrant a finding that the certificate of stock in the prior corporation was canceled by the prior corporation with the consent of the holder thereof on his failure to pay for the stock.

##### 2. SAME—REORGANIZATION—RIGHT TO STOCK.

A national bank assumed the liabilities of a state bank. The state bank had issued a certificate of stock to a subscriber, and it was claimed that the stock had been fully paid for. Held, that the subscriber, though he had paid for the stock, could not, by a mandatory injunction, compel the national bank to issue shares to the amount of the certificate in exchange for the stock held in the state bank, but it was bound to the subscriber for anything that was due him as a stockholder.

[Ed. Note.—For cases in point, see vol. 12 Cent. Dig. Corporations, § 2305.]

Appeal from Circuit court, Ballard County.

"Not to be officially reported."

Action by Rebecca S. Dupoyster against the First National Bank of Wickliffe. From a judgment for defendant, plaintiff appeals. Affirmed.

John W. Ray, for appellant. J. M. Nichols & Son, for appellee.

**BARKER, J.** This is an action for a mandatory injunction requiring appellee to issue to appellant, as the assignee of her son, J. B. Dupoyster,  $2\frac{1}{2}$  shares of its capital stock. This claim arises out of the following statement of facts: The Western Bank of Kentucky was organized in August, 1899, and went into business at Wickliffe, Ky. J. B. Dupoyster was solicited to become a stockholder, and it is not disputed that he had some sort of agreement with the cashier, T. M. Dickey, looking towards a subscription by him for five shares of the capital stock. It is admitted that a certificate for  $2\frac{1}{2}$  shares, or \$250 par value of the stock, was issued and delivered to him, and it is claimed by the appellee that he executed and delivered to the bank his note for \$250, being the purchase price of the stock delivered to him. The Western Bank of Kentucky went out of existence in July, 1900; it being thought wise by its officers and stockholders to convert it into a national bank, which was done, and its successor was the appellee, the First National Bank of Wickliffe, which commenced business July, 1900. Judge T. M. Dickey was the cashier of the Western Bank of Kentucky during its existence, and became the cashier of its successor, the appellee, retaining that position until his death, January 20, 1904. J. B. Dupoyster died on the 20th day of May, 1904. In July, 1904, this action was instituted, as before stated, by the appellant, Rebecca S. Dupoyster, claiming to be the owner by assignment from her son of the  $2\frac{1}{2}$  shares in the Western Bank of Kentucky before mentioned, and, as such, entitled to receive  $2\frac{1}{2}$  shares in its successor, the First National Bank of Wickliffe.

The real defense in this case is that while the  $2\frac{1}{2}$  shares of stock in the Western Bank of Kentucky were subscribed for and delivered to J. B. Dupoyster, he did not pay for it, but executed to the bank his note for \$250, payable six months after date; that this note was kept by the bank until after it went out of existence, and appellee was organized as its successor; that, although all of the stockholders were notified of the proposed change from a state to a national bank, J. B. Dupoyster failed to pay for his stock, or demand an exchange for stock in the appellee bank; that thereupon the officers of the bank, with his acquiescence, entered an order on the stockbook canceling his stock, and destroyed his note for the purchase price. On the other hand, it is insisted

by appellant that her husband, J. C. Dupoyster, paid to the Western Bank of Kentucky, for his son, the sum of \$250, fully paying up the stock in controversy, and that if the bank held the note of J. B. Dupoyster for \$250, it was for other shares of stock, which were not delivered to him, and which are not in controversy here. Upon the trial of the case, the court dismissed the petition, and from this judgment Mrs. Dupoyster has appealed.

As we view the merits of this case, it is purely a question of fact. For appellant, her husband testified that he paid to the Western Bank of Kentucky the sum of \$250, the purchase price of the stock in question. On the other hand, the officers of the bank deny such payment, and say that J. B. Dupoyster failed and refused to pay his note for the purchase price of the stock, and that, after the lapse of the long time between 1899, when the Western Bank of Kentucky was organized, and 1904, when T. M. Dickey died, without any effort by J. B. Dupoyster, or of appellant or her husband, either to pay for the stock or to have it exchanged for shares in the appellee bank, they destroyed the note overlooking, or being ignorant of the fact, that the stock was outstanding. We do not think it necessary to discuss the facts of this case with any great particularity. The weight of the evidence clearly conduces to show that the claim of appellee as to the execution of the note by J. B. Dupoyster in payment of the stock in question, his failure to pay it, and the cancellation of the stock by his acquiescence, if not actual consent, is amply sustained, and, if we felt less sure of the soundness of this position, we would still feel indisposed to reverse the judgment; this being a case in which this court should lean with great confidence upon the judgment of the trial court as to the facts.

It will be observed that there is no complaint on the part of appellant that the canceled stock was worth more than the outstanding note with accrued interest. Her theory is that her stock was fully paid for, and that she was entitled to a mandatory injunction requiring the appellee to issue to her  $2\frac{1}{2}$  shares of its capital stock in exchange for that which she held. This could not be done in any event, as all of the shares of appellee are held by the shareholders, and the corporation has no power to issue to her any other shares. But, as appellee assumed all of the liabilities of the Western Bank of Kentucky when it took over the assets of that institution, it would, of course, be bound to appellant for anything that was due her as a stockholder, if her theory of the case was substantiated by the evidence. But, as said before, under the evidence, we think the chancellor correctly concluded that J. B. Dupoyster did not desire to pay for the stock for which he had subscribed, and that he, at least, acquiesced in its cancellation.

This, evidently, was the theory of the trial judge, and, as this conclusion meets our views, the judgment is affirmed.

**PORTER et al. v. HART COUNTY DEPOSIT BANK & TRUST CO.**

(Court of Appeals of Kentucky. Oct. 18, 1906.)

**1. HOMESTEAD — LIABILITIES EXISTING BEFORE ACQUISITION.**

A debtor is not entitled to a homestead exemption as against debt existing prior to the acquisition of the homestead.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 10, 136-140.]

**2. FRAUDULENT CONVEYANCES — FRAUDULENT TRANSACTIONS.**

An insolvent debtor made an assignment for the benefit of creditors. Out of the proceeds of the sale of his home the assignee paid to the debtor's wife \$1,000 as homestead exemption. The wife gave the purchaser at the assignee's sale \$1,000 for an option on the property at a price which was \$1,000 less than the purchaser had paid. The wife subsequently paid the price. *Held*, that the transaction placed the \$1,000 received as a homestead exemption beyond the reach of the insolvent debtor's creditors and was fraudulent as against the claim of a creditor arising prior to the debtor's acquisition of the homestead.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 118-122; vol. 25, Cent. Dig. Homestead, §§ 136-140.]

**3. SAME—SETTING ASIDE CONVEYANCE—RECOVERY OF CONSIDERATION.**

Where a conveyance is set aside for fraud as against a creditor, the grantee is not entitled, as against the creditor, to receive back the consideration which he paid; but, after the creditor has received payment, the grantee is entitled to the surplus.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 939.]

Appeal from Circuit Court, Warren County.  
"Not to be officially reported."

Action by the Hart County Deposit Bank & Trust Company against Lizzie G. Porter and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Sims & Grider, for appellants. Mitchell & Du Bose, for appellee.

**BARKER, J.** L. R. Porter, being insolvent, made a general assignment of his property to J. Whit Potter for the benefit of his creditors subject to legal exemptions. Out of the proceeds of the sale of his home, the assignee paid \$1,000 as homestead exemption to the appellant Mrs. Lizzie G. Porter, the wife of the assignor. The home place was sold by the assignee to T. C. Mitchell, for the sum of \$4,900. The appellant, being anxious to acquire the former home of herself and husband, entered into negotiations with Mitchell to purchase the place from him, with the result that they executed a written agreement by which she was to pay him the \$1,000 received as her husband's homestead exemption for an option on the place for one year, at the price of \$3,900. Subsequently she borrowed \$2,000 from E. Wagner, \$1,500 from Mrs. Lou Reardon, and \$400 from J. E.

Potter, with which she paid Mitchell the purchase price of \$3,900; whereupon he made her a deed to the property. The debts of E. Wagner and Mrs. Lou Reardon were secured by a mortgage on the purchased property, and, as there is no question about the validity of their claim to a first lien, they need not be further noticed. After all these conveyances were made, the appellee, the Hart County Deposit Bank & Trust Company, instituted this action to recover judgment of \$3,450 due them from L. R. Porter, evidenced by two notes it held, and also to set aside the conveyance to Mrs. Lizzie G. Porter on the ground that, its debt having been created prior to the acquisition of the home by the husband, he was not entitled to the homestead exemption as against it, and therefore the use of the money by the wife to purchase the property was fraudulent and void. Mrs. Porter defended this action by general denials of the allegations of the petition, and by pleading affirmatively that she did not use the \$1,000 received as her husband's homestead exemption in purchasing the property from Mitchell, but gave him that sum for an option on the place for one year, at the price of \$3,900.

There is no dispute of the fact that the claim of appellee antedates the acquisition of the homestead by the husband, L. R. Porter, and there can be no dispute that, in law, he was not entitled to the homestead exemption as against its claim. Mitchell, the vendor, purchased the property from the assignee for \$4,900. Appellant gave him, according to the terms of the agreement, \$1,000 for an option of one year on the property, at the price of \$3,900, which was subsequently paid in the manner already stated. It is clear that the real transaction which took place between appellant and her vendor, Mitchell, was that she merely took his purchase from the assignee off his hands, and that the object of the whole transaction was to make him whole, and at the same time place the \$1,000 received as a homestead beyond the reach of her husband's creditor. It seems to us a frivolous waste of time to demonstrate that which is so obviously apparent. The transaction speaks for itself. The chancellor set aside the conveyance, holding that the property, to the extent of \$1,000, was subject to appellee's claims after first satisfying the mortgage liens of Wagner and Reardon. This judgment, we think, is correct.

Appellant complains that she was not allowed by the judgment a pro rata share of the proceeds of the judicial sale to be had, for the \$400 which she borrowed to make up the purchase price of \$3,900 under the terms of the written contract. She is not entitled to receive anything until appellee has first received \$1,000. Having wrongfully taken the money belonging to her husband's creditor, and invested it in real estate, she has no right to ask that creditor to share with her



the hazard of the loss, if there be one. It would not be entitled to anything over and above \$1,000 which might accrue by reason of a rise in the value of the property, and, as said before, is not required to share with her any loss which may accrue from the venture. Moreover, as the conveyance was set aside for fraud, she is not entitled, as against the creditor, to receive back that which she actually paid. *Willett v. Froelich*, 90 S. W. 572, 28 Ky. Law Rep. 798, and the cases therein cited. After appellee receives the full sum of \$1,000, with interest and costs, if there be any overplus, it belongs to her, and this is the full extent of her rights, legal, or equitable, in the premises.

The judgment, being in accordance with these views, is affirmed.

#### THOMAS v. STRICKLER.

(Court of Appeals of Kentucky. Oct. 17, 1906.)  
APPEAL—QUESTIONS REVIEWABLE—FAILURE TO PRESENT QUESTION ON TRIAL—INSTRUCTIONS.

Appellant cannot complain of the giving or failure to give instructions, where no objection was made by him to the instructions given, or exceptions taken thereto.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1309-1314.]

"Not to be officially reported."

On rehearing. Petition overruled.

For original opinion, see 93 S. W. 648.

SETTLE, J. Complaint is made in the petition for rehearing that the opinion of this court overlooks the fact, as the court below undertook on its own motion to instruct the jury, it was its duty to instruct on every item of the account involved, for which reason, it is claimed, appellant is not estopped to complain in this court of his failure to ask an instruction on the omitted item. In reply to this contention it is sufficient to say that appellant is not in a position to make any complaint in this court of the lower court's action, either in giving, or failing to give instructions, as we find from a second examination of the record that no objection whatever was made by him in the court below to the instructions given, or exceptions taken thereto.

Petition overruled.

#### HAMILTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 18, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW—EVIDENCE—SUFFICIENCY.

Where there is any evidence to sustain a conviction it will not be disturbed on appeal, on the ground that it was contrary to the evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3074-3076.]

2. SAME—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Newly discovered evidence, which is merely cumulative, is no ground for a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2328-2330.]

96 S.W.—53

3. SAME—APPEAL—FAILURE TO PRESENT QUESTION ON MOTION FOR NEW TRIAL.

An affidavit showing prejudice of jurors against accused, filed with the motion for a new trial, was too late to avail accused on appeal from the conviction.

Appeal from Circuit Court, Rowan County.

"Not to be officially reported."

Alonzo Hamilton was convicted of voluntary manslaughter, and he appeals. Affirmed.

John E. Cooper, for appellant. N. B. Hays, C. H. Morris, and Alex. Connor, for the Commonwealth.

CARROLL, C. Under an indictment charging him with the murder of Robert Moody, appellant was convicted of voluntary manslaughter, and his punishment fixed at five years' confinement in the State Penitentiary. His defense was that he killed Moody in self-defense, and that error to his prejudice was committed in the instructions—that the verdict of the jury was contrary to the evidence, that since the verdict, he discovered new and important evidence in his behalf, and also learned that five of the jurors who tried him were members of a lodge of Odd Fellows that had employed an attorney to prosecute him. The evidence discloses that the deceased came to the house where appellant lived, and was cursing the appellant who was in the house, when two of his friends came and tried to get him to leave. Soon after their arrival, appellant came out of the house and told Moody to go away, that he didn't want to have any trouble with him. Moody then shook his fist in appellant's face, but did not strike or attempt to strike him, and appellant cut him several times with a knife that he had open in his hand when he came out of the house. Moody was not on the premises of appellant when he was cut, nor did he make an effort to go into appellant's house. The altercation occurred some 20 feet from the house, and appellant went from his house to the place where Moody was standing. The jury were the judges of the weight of the evidence, and believed the testimony of the witnesses introduced for the commonwealth in preference to the testimony of appellant, who testified that deceased struck him in the face with his left hand while holding a large club in his right hand, and that he believed at the time that he was in danger of great harm at the hands of deceased. This court has repeatedly ruled that where there is any evidence to sustain a verdict of conviction, it will not be disturbed on that ground; and there was sufficient evidence introduced on behalf of the commonwealth in this case to support the finding of the jury.

The affidavit filed in support of the ground that newly discovered evidence had been found, shows that the evidence was merely cumulative, tending to support the testimony

of appellant as to what occurred at the time he cut the deceased, and did not present any reason why a new trial should be granted. The jurors who were alleged to have been members of the Odd Fellow's Lodge that contributed means to employ attorneys to prosecute the appellant, each filed his affidavit, stating, in substance, that he did not know at any time during the progress of the trial that Moody was a member of the order, or contribute anything towards the prosecution of appellant; nor was there any evidence offered to support the affidavit of appellant in opposition to the affidavits of the jurors. Aside from this, the affidavit in respect to the jurors was only filed with the motion for a new trial, and consequently too late to avail appellant in this court. The instructions are not objectionable in any respect. They presented fairly to the jury the whole law of the case.

The judgment of the lower court is affirmed.

# GEORGE WIEDEMANN BREWING CO. et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

## INTOXICATING LIQUORS—SALES IN PROHIBITED TERRITORY—PLACE OF SALE.

Ky. St. 1903, § 2570, in relation to prohibition, provides that no trick, device, subterfuge, or pretense shall be allowed to evade or defeat the policy of the law. An agent of a brewing company resided in a county where the prohibition statute was in force, and there received an order for a case of beer, which order he sent to the company at its office in another county and the beer was shipped to the purchaser, who paid the price to the agent. The agent testified that the company had the right to reject any orders sent in, but that he in no case sent in an order from any irresponsible party, and it appeared that the company mailed to the agent a copy of the bill of lading, and that the agent gathered up the bottles after they were empty. *Held*, that the sale was made in the county of the agent's residence.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 162.]

Appeal from Circuit Court, Boyle County.

"To be officially reported."

The George Wiedemann Brewing Company and others were convicted of retailing liquor contrary to the prohibition statute, and they appeal. Affirmed.

Greene & Van Winkle and George Washington, for appellants. N. B. Hays, Atty. Gen., Chas. H. Morris, and Wm. J. Price, for the Commonwealth.

**BARKER, J.** The appellants were indicted in the Boyle circuit court charged with retailing liquor contrary to the prohibition statute prevailing in that county. A trial resulted in their being found guilty by the jury, and from the judgment of the court based upon the verdict they are here on appeal.

The facts show that the general prohibition statute is in force in Boyle county;

that Jerry Crowley is the agent of the George Wiedemann Brewing Company, a corporation residing in Newport, Ky.; that the agent applied to the mayor of Danville for a license to carry on the business of a wholesale liquor dealer in that city, which was refused, whereupon he rented an office, furnished it, put in a telephone, bought a horse and covered wagon, and opened up business. His mode of operation was to solicit orders for beer, transmit them to his principal in Newport, and the beer was then shipped to the customer. Wherever the agent heard of a man being thirsty, he solicited an order, and, if successful, sent it in to his principal. The rule of the corporation was to charge the customer up with the price of the case and the bottles, and upon return of these a part of the original purchase price was remitted. One of Crowley's duties was to go to the customer's house with his wagon and collect up the empty bottles and cases. The transaction involved in this case arose as follows: Forest Johnson ordered from Crowley a case of beer, for which he agreed to pay \$1.80. This order was sent to the home office in Newport. The beer was shipped to Johnson, who received it at the depot in Danville. The original bill of lading, or a copy thereof, was sent to Crowley, so that he knew the goods had arrived as soon as the purchaser. Johnson paid the purchase price of \$1.80 by delivering to Crowley his check for that sum, payable to the corporation. This was transmitted by Crowley to his principal.

The real question in this case is whether or not this transaction constituted a sale of liquor in Boyle county, or whether, as contended by defendant, the sale was in Newport, where the prohibition statute does not prevail. It may be conceded that the rule is general that where the goods are ordered from a distant point by an order which must be accepted at the home of the vendor, and the goods are shipped from there to the purchaser, the sale is considered as having taken place at the home office, and when the goods are delivered to the common carrier for transmission it is the agent of the purchaser. And where the transaction is free from fraud, evasion, or subterfuge this rule is generally enforced. The opportunity to retail liquor in prohibition districts presents great temptation to evade the law, and thus make a profit out of a prohibited business. The prohibition statute (section 2570. Ky. St. 1903) is as follows: "No trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous, vinous or malt liquors without license, or in violation or evasion of any local option laws prevailing in any county, city, town, precinct or municipality of this commonwealth." The statute modifies the general rule very substantially, and under it the jury, in such cases, are authorized to look beneath the surface

of the transaction and ascertain whether or not the dealer is undertaking to be "smarter than the law," and by a trick, evasion, or subterfuge to carry on a prohibited business in spite of it. The transaction in hand was a sale by retail; the amount involved being less than five gallons, and the total price \$1.80. It is true Crowley testified that the company had the right to reject any order he sent in, but it must be manifest that in such small transactions as that involved here the home office could not afford to look up the financial rating of the would-be purchaser, and Crowley himself admits that he in no case sent in an order from an irresponsible party. We think, therefore, it is clear that Crowley passed upon the credit of the purchaser, and that the contract was closed in Boyle county. This is also evidenced by the fact that the company mailed to the agent a copy of the bill of lading when a shipment was made, and also by the fact that the agent completed the transaction by receiving the check and gathering up the bottles after they were emptied.

This case does not fall within the principle of *James v. Commonwealth*, 102 Ky. 108, 42 S. W. 1107, relied on by the defendants. No order was given there in the county of the purchase. The purchaser himself forwarded the order to the vendor, and the goods were then shipped C. O. D. into the prohibition district, and it was held that the transaction took place in the county of the vendor. We think the case at bar falls within the reasoning of *Teal v. Commonwealth*, 57 S. W. 464, 22 Ky. Law Rep. 370, although the facts are not entirely coincident. There the vendor sent an agent into the county with samples of the whisky, took orders, and forwarded them to the vendor in another county, and these orders were filled by the vendor shipping the goods C. O. D. to the purchaser in the prohibition district. We held that this was a sale in the county where the purchaser resided, and the case was distinguished from *James v. Commonwealth*, supra, in the opinion. Evidently the object of the statute quoted above was to prevent any and all evasions of the prohibition law. It was intended to guaranty to the people of any given district a home government, and to place it within their power to exclude the sale of spirituous liquor in the given district, if they so desired, and especially to make it possible to prevent outsiders from violating the law and breaking down the moral barriers erected by the people for their protection by such practices as this record discloses. In this case we have a brewer in a distant county sending an agent into a prohibition district, soliciting and receiving orders for beer in retail quantities, forwarding these orders, receiving the money, and forwarding that, gathering up the empty bottles and cases and sending them back to the brewery, and remitting to the purchaser the stipulated sum for

the return of the bottles and cases. Every element of a complete sale is here, except the mere physical presence of the beer, and in these days of quick transportation, if a brewer in a nonprohibition district, by means of the railroad and express companies, can pour its product into prohibition districts in ways similar to those under discussion, it must be obvious that the utility of prohibition laws will soon be entirely broken down. It seems to us we have here a case that belongs to that class of liquor traffic as to which the statute was intended to "lay the ax at the very root of the tree."

We conclude, upon a survey of the whole record, that the defendants had a fair and impartial trial, and the judgment is therefore affirmed.

DUDLEY v. ILLINOIS CENT. R. CO. et al.  
(Court of Appeals of Kentucky. Oct. 16, 1906.)

1. REMOVAL OF CAUSES—CITIZENSHIP—JOINER OF PARTIES—PETITION.

Plaintiff, who was a brakeman on one of defendant railroad company's freight trains, sought to recover damages for injuries sustained by his being struck by a waterspout alleged to be too near the track. Plaintiff joined defendant M., whose citizenship was the same as plaintiff's, with defendant railroad company, whose citizenship was diverse, and alleged that M. had charge of defendant's waterspout, etc., and that the railroad company and M., as its agent and servant, had carelessly, etc., placed the post and pillars supporting the spout so near the track as to make its position dangerous, and that the spout was negligently permitted to hang in dangerous proximity to the top of the train; that by the negligence of defendant company and M. in placing the pillar, and in permitting the spout and connections to be in such condition, plaintiff was struck by the spout and injured. *Held*, that the petition stated a cause of action against both defendants, and that the court therefore properly denied the motion of the railroad company in the first instance to transfer the cause to the federal court.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 79.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANT'S LIABILITY.

A servant of a railroad company in charge of its water tanks, spout, pumping stations, and appliances under the direction of a superintendent, was not liable for injuries to a brakeman by striking a spout negligently placed too near the track, where such servant had nothing to do with the placing or adjusting of the pipe and fixtures, and was guilty at most of mere nonfeasance for failure to remedy the defect.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1236.]

3. REMOVAL OF CAUSES—RENEWAL OF MOTION.

Where, in an action for injuries to a servant, plaintiff joined a resident employé as a party defendant with the railroad company, which was a nonresident, and at the close of plaintiff's evidence no cause of action had been established against the resident defendant, and there was nothing to warrant the presumption that a stronger case could have been made out when the petition was filed, it was proper for the court to grant the railroad company's renewed motion for a removal of the cause to the federal court, on the ground that the citizen

defendant had been joined for the sole purpose of preventing such removal.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 79.]

Appeal from Circuit Court, Caldwell County.

"To be officially reported."

Action by William Dudley against the Illinois Central Railroad Company and others. From an order dismissing the suit as to defendant Calvin Mitchell, and sustaining the application of the defendant railroad company to remove the cause to the federal court, plaintiff appeals. Affirmed.

Hendrick, Miller & Marble, for appellant. Jno. C. Gates, Trabue, Doolan Cox, J. M. Dickinson, and P. H. Darby, for appellees.

CARROLL, C. The appellant, who was a brakeman on one of appellee's freight trains, brought this suit against the appellee company and Calvin Mitchell to recover damages resulting from injuries sustained by being struck by a waterspout attached to a tank operated by the defendant company near Cerulean Springs. The petition averred: "That the defendant Calvin Mitchell was in the employ of the company, and was acting as its pumper or superintendent or supervisor or manager of pumps, tanks, and all the appliances and water tanks, along its road; that he had charge and management of the pumps, tanks, cranes, chains, posts, and all appliances of the pumping stations which furnished water to the engines of the company, and was paid by the company to do this work under its orders; that he was especially and directly in charge and control of the tank and crane and spout and pumping station and all the appliances thereof at Cerulean Springs, and of the supplying of water to the engines, and was actually managing and controlling said tanks, pump, spout and appliances; that the company and Mitchell, as its agent and servant in charge of said tank, had carelessly, wrongfully and negligently placed the post, pillar and support supporting the spout and crane which was used in supplying the engine with water, dangerously and unnecessarily near to the track, making the position of same improper, defective and dangerous, because of its proximity to the track, and had negligently permitted the chains, spout and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the train, so as to endanger the lives of the employees engaged in discharging their duties; that by the negligence of the defendant company and Mitchell in placing the post, pillar and support so near the track, and by their negligence in suffering and permitting the support and connections of the tank to be in such condition as to put the spout in dangerous proximity to the train, the plaintiff was struck by the spout upon the head and injured." The petition also contained other allegations nec-

essary in cases of this character. In due time the railroad company, a foreign corporation, filed its petition and bond for removal of the cause to the United States Circuit Court. This motion the trial court overruled. Upon a trial of the case, at the conclusion of the evidence for plaintiff, now appellant, the defendant Mitchell entered a motion for a peremptory instruction, which was sustained by the court, and thereupon the jury returned a verdict for Mitchell. When the action against Mitchell was terminated in this way, the defendant company renewed its motion for removal, and it was sustained by the court. Appellant complains of the action of the trial court in giving the peremptory instruction and in removing the cause.

The petition stated a good cause of action against both the defendants, and the court properly refused to transfer the action when the motion was first made. *I. C. R. R. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370; *Pierce's Adm'r v. I. C. R. R.*, 86 S. W. 703, 27 Ky. Law Rep. 801. Whether the transfer was proper, upon the conclusion of the evidence for appellant, depends upon the question whether or not Mitchell was joined as defendant in good faith. The mere fact that the trial judge sustained a peremptory instruction on behalf of Mitchell is entitled to some weight, but is not in itself conclusive evidence that Mitchell was not joined in good faith, or that appellant failed to make out a case against Mitchell. To determine therefore whether or not the action of the trial court was proper, we will examine the evidence introduced by appellant, and determine from it whether or not the averments of the petition stating a good cause of action against Mitchell were sustained. The substance of the allegations against Mitchell are that he was directly in charge and control of and actually managed and controlled the tank, crane, spout, pumping station, and all appliances connected therewith, and that as agent and servant of the company he carelessly and negligently placed the pillars supporting the spout and crane, dangerously and unnecessarily near the track, making the same improper, defective, and dangerous because of its proximity to the track; and that the company and Mitchell negligently permitted the chains, spout, and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the cars. The evidence for plaintiff was to the effect that Mitchell was in charge of the tank and pump of the defendant on the Evansville & Hopkinsville Division, which included the tank at Cerulean Springs, and hired the pumpers, and that the tank at Cerulean Springs was some two feet nearer the track than the tank at Princeton on the same line; that Mitchell was working under one Noles, and had been seen repairing the tanks and machinery attached thereto; that the water pipe from the

tank was the instrument that struck the appellant and knocked him off the train; that it was Mitchell's duty to examine the tanks and pumps at each station, and keep them in running order; and that the pipe that struck appellant was improperly adjusted and hanging too far over the track. There was no evidence whatever tending to show that Mitchell had anything to do with erecting the tank or placing or adjusting any of the fixtures or appliances thereon; nor does the evidence disclose whether the pipe that struck appellant was so constructed that it hung too far over the track, or was negligently permitted to hang in that condition by some persons when using it; nor does the evidence show that Mitchell could have reconstructed the tank or placed it further from the track, or have supplied it with different pipes or appliances, or that he was furnished by the master with any other appliances than those in use, or that he had it in his power to do anything more than he had done. Mitchell was a subordinate employé of the railroad company, working under the superintendent or person who had charge of the tanks and pumping stations.

Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant such as Mitchell was is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed. This precise question was before this court in *Cincinnati, New Orleans & Texas Pacific R. Co. v. Robinson*, 74 S. W. 1061, 25 Ky. Law Rep. 265, and it was there held that the petition having failed to show any cause of action against Robinson, the employé joined with the company, that it was proper to remove the case to the United States Circuit Court. In the case at bar, the evidence wholly fails to make out a case against Mitchell, and therefore the action of the trial judge in giving the peremptory instruction was proper. The petition for removal set out that Mitchell was joined as a defendant for the sole purpose, and with the fraudulent design, of preventing the transfer of the case to the United States Circuit Court, and that the allegations of the petition in respect to Mitchell were untrue, and could not be sustained by evidence; and, when the evidence on behalf of appellant disclosed a total failure to show any liability on the part of Mitchell, the conclusion remained that the allegations of the petition for removal were true.

In *Illinois Central R. Co. v. Coley*, 80 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370, the engineer in charge of the train that injured plaintiff was joined as a defendant. A petition similar to the one in the case at bar was filed for removal,

and overruled. On a trial, a verdict was rendered against the defendants. In discussing the question of removal, this court said: "If the engineer negligently ran the engine against the wagon in which appellee was riding and injured her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as agent of the railroad company, and his act was its act, then it is also responsible to her upon the principle that he who does an act by another does it himself." In that case the evidence justified the finding that the engineer was guilty of an affirmative act of negligence, and, although a subordinate employé, was jointly liable with his principal for his negligent conduct. The court further said: "If the plaintiff trifled with the court, and joined a defendant who is a resident of the state simply for the purpose of defeating the right of the other defendant to remove the case to the federal court, the court should, as soon as this is made apparent on the trial, dismiss the action as to the defendant fraudulently joined, with costs, and remove the case to the federal court. The court should not at any stage of the proceeding allow a party to trifle with its process, or to defeat the courts by fraudulent joinder of a person as a defendant."

If the plaintiff can by stating in his petition a good cause of action against a resident defendant, and thereby prevent the nonresident defendant from transferring the case, although upon the trial the evidence wholly fails to show any cause of action against the resident defendant, the result would necessarily be that in every case where this was done a removal could be prevented, and the plaintiff, by the fraudulent or mistaken joinder of a person as a defendant, could defeat the jurisdiction of the federal court. *Powers v. O. & O. Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. It is true that it is for the state court to determine from the record, when the motion for a transfer is made, whether or not there is then presented a state of case authorizing a transfer. *Illinois Central R. Co. v. Jones' Adm'r*, 80 S. W. 484, 26 Ky. Law Rep. 31; *Rutherford v. Illinois Central R. Co.*, 85 S. W. 199, 27 Ky. Law Rep. 397. And it has been ruled in a number of cases that the motive or purpose of the plaintiff in joining the defendants will not be inquired into, provided a cause of action is stated against them jointly. *Winston's Adm'r v. Illinois Central R. Co.*, 23 Ky. Law Rep. 1283, 65 S. W. 13, 55 L. R. A. 603; *C. & O. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Rutherford v. Illinois Central R. Co.*, 85 S. W. 199, 27 Ky. Law Rep. 397. But when, during the progress of the trial—for instance, at the close of the

plaintiff's evidence—it becomes apparent that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the presumption or conclusion that a stronger case could have been made out when the petition was filed, the court will not sit idly by and permit a plaintiff, by making allegations that he must have known he could not establish, to deprive the defendant of a right guaranteed to it or him by the law. However reluctant state courts may be to surrender their jurisdiction, they cannot lend themselves to a scheme to defeat rights to which each one of the parties litigant is entitled, or permit a skillful pleader to determine the question of removal without reference to the merits of the case.

The case of *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, is not in conflict with these views. It is true that in that case, at the close of the testimony for plaintiff, the trial court sustained a peremptory instruction offered by the resident defendant, and thereupon the nonresident defendant again moved to transfer the case, and this motion was overruled. In sustaining this ruling, the Supreme Court said: "This was a ruling on the merits, and not a ruling on the jurisdiction. It was adverse to the plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby enable the other defendants to prevent plaintiff from taking a verdict against them. As we have said, the contention of that railway company that it was fraudulently joined as a defendant had been disposed of by the United States Circuit Court. But, assuming without deciding that that contention could not have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it." It will thus be seen that the decision of this question is rested upon the grounds: First, that it had been disposed of by the United States Circuit Court; and, second, that the record did not show a fraudulent joinder.

The judgment of the lower court is affirmed.

#### HOPPER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 19, 1906.)

##### 1. CRIMINAL LAW — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, on a trial for homicide, accused claimed that the shooting was in self-defense, that decedent threatened to shoot him and shot at him twice, but missed him, a requested instruction that accused, if assaulted, or if threatened by decedent, who came to accused's house armed, evidently intending to carry out his threats, had a right to shoot in self-defense without seeking any other place of safety, was properly refused because not applicable to the evidence.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 614-632.]

##### 2. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

Where, on a trial for homicide, accused claimed that the shooting was in self-defense, that decedent threatened to shoot him and shot at him twice, but missed him, an instruction that if decedent was about to inflict death or great bodily harm on accused, or if it appeared to accused, in the exercise of a reasonable judgment, that decedent was about to do so, and that it was necessary to shoot him, or reasonably appeared to accused to be necessary to do so to save himself, he had the right to kill decedent, was sufficiently favorable to accused.

##### 3. SAME—EVIDENCE—ADMISSIBILITY.

Where, on a trial for homicide, defended on the ground of self-defense, the evidence showed enmity between accused and decedent, and that on the night of the homicide some one fired into accused's house, that accused went to the home of decedent to investigate, that later in the night decedent came to the home of accused where the killing occurred, the refusal to permit accused to prove fully about the shooting that occurred at his home when a third person was shot, was not erroneous, for such evidence could not justify or excuse the killing.

##### 4. SAME—EVIDENCE—SUFFICIENCY.

Evidence on a trial for murder examined, and held to support a conviction.

Appeal from Circuit Court, Bell County.  
"Not to be officially reported."

Lewis (alias Luke) Hopper was convicted of murder, and he appeals. Affirmed.

John Reeder and W. L. Robertson, for appellant. N. B. Hays, Atty. Gen., C. H. Morris and N. L. South, for the Commonwealth.

O'REAR, J. Appellant Lewis, alias Luke, Hopper and Newt Shackelford were proprietors of rival blind tigers on Cumberland Mountain, near the Tennessee line, in Bell county. There was an enmity between them. On the particular night in question in this case some one had fired into Hopper's house. Hopper, believing the shot was fired from Shackelford's establishment, went over to investigate it. Everybody was armed, and all more or less under the influence of liquor. Hopper did not find out who it was that fired the shot. In a few hours, but after midnight, Shackelford, with some of his friends, returned Hopper's call. They ordered out the drinks, played at a game of cards for drinks, and swagged about with their weapons. Then, according to the witnesses for the commonwealth, appellant asked Shackelford to step outside, that he had something to say to him. Shackelford complied. No sooner were they out the door than appellant shot Shackelford to death, inflicting at least four mortal wounds. Appellant claims the shooting was in his defense, that Shackelford invited him out, and when he got him out in the dark threatened to shoot him and shot at him twice, but missed him. The witnesses for the commonwealth were two disreputable women who were hanging around the place; but their stories are apparently straightforward. The jury believed them, instead of believing appellant, although all the men present, including those who came with de-

ceased, testified for appellant, and attempted to sustain his view. The physical facts, such as the places of the wounds on the dead man's person, are the most damaging evidence in corroboration of the women's testimony. The wounds refute appellant's story. The court instructed the jury fairly and fully. There is no error pointed out in the instructions, and we are unable to see any in them.

It is complained that the court failed to instruct the jury as to defendant's right of self-defense, in that he did not tell them that defendant, if assaulted, or if threatened by the deceased and the latter came to his house armed, and evidently intending to carry out his threats, that defendant had the right to shoot deceased without seeking any other place of safety. Such an instruction, even if ever permissible, could have no place in this case. In the first place, defendant did not shoot, and does not claim to have shot deceased to prevent his executing such a threat. He says the deceased was then and there about to kill him, and was trying to, and he shot in the defense of his person. Nor did the court tell the jury that defendant had to seek safety elsewhere, or imply it in what he said. He told them that if the deceased was then and there about to inflict death or great bodily harm on defendant, or if it appeared to the defendant, in the exercise of a reasonable judgment, that he was, and that it was necessary to shoot the deceased, or reasonably appeared to the defendant to be necessary to shoot the deceased to save himself, he had the right to shoot and kill the deceased. This was all the defendant was entitled to from the facts shown by himself, his most favored witness.

It is complained that the court would not allow appellant to prove fully about the shooting that occurred earlier in the evening at appellant's place when a young man was shot, which, we understand, was the occasion that caused appellant to go over to Shackelford's to investigate. But that could not in any wise have justified or excused this killing. The verdict of the jury finding the appellant guilty and sentencing him to life servitude in the penitentiary was as little as they could do if they believed the proof made by the prosecution—which they evidently did.

Perceiving no error in the record, the judgment is affirmed.

#### PEYTON et al. v. WEBB et al.

(Court of Appeals of Kentucky. Oct. 18, 1906.)

#### FRAUDULENT CONVEYANCES — INTENT OF GRANTOR.

Ky. St. 1903, § 1906, provides that every conveyance made with intent to hinder or delay creditors shall be void as against them, provided that the section shall not affect the title of a purchaser for a valuable consideration, unless he had notice of the fraudulent intent, and section 1907 provides that every conveyance by a debtor without valuable consideration shall be void as to then existing liabilities, but

not on that account alone be void as to creditors whose debts or demands are thereafter contracted. A husband and wife having accumulated by their joint efforts money and land, the husband purchased an interest in a business with the money and deeded the land to the wife, the husband at that time not being indebted, and subsequently he purchased a further interest in the business. *Held*, that the seller of the latter interest was not entitled to set aside the conveyance as fraudulent as against creditors; there being no evidence tending to show that, at the time of the conveyance to the wife, the husband intended to purchase more than the interest originally bought by him.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 178-183.]

Appeal from Circuit Court, Ballard County.  
"Not to be officially reported."

Action by Frank L. Peyton and others against A. M. Webb and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

F. L. Turner, for appellants. John H. Kane and J. B. Wickliffe, for appellees.

CARROLL, C. The appellant brought this suit to set aside as fraudulent a conveyance of 100 acres of land made on September 9, 1903, by appellee J. W. Webb to his wife appellee A. M. Webb. The chancellor dismissed the petition. It is charged in the petition that on April 18, 1904, appellant sold his interest in a stock of merchandise to appellees, and, in part consideration therefor, they assumed the payment of all the indebtedness of the firm of Peyton, Webb & Co. This firm was composed of appellant and appellee J. W. Webb, who in September, 1903, had purchased a half interest in the business from Peyton. The sale made in April, 1904, was evidenced by a writing purporting to be signed by appellees A. M. Webb and J. W. Webb. The firm of Peyton, Webb & Co. owed debts amounting to several hundred dollars, upon which judgments had been obtained by creditors against appellant, and he sought to subject to the payment of these judgments the land conveyed by Webb to his wife, upon the ground that, under the contract of purchase, Webb assumed to pay these debts of the firm.

The record contains a large mass of testimony relative to the sale of the half interest in the business by Peyton to Webb in September, 1903; but this evidence is not pertinent to the question here involved, as it is only sought to set aside the conveyance on the ground that it is fraudulent as to the contract of purchase and sale made in April, 1904. The evidence shows beyond question that Mrs. A. M. Webb did not sign or authorize the signing of her name to the contract made on April 18, 1904. This contract was made by her husband, J. W. Webb, and her name was signed to it by him without her consent. This branch of the case, however, is not important as it is not material, so far as the rights of appellant are concerned, whether she signed this contract or not. The conveyance made by J. W.

Webb to his wife, A. M. Webb, recites that it is made in consideration of \$2,600, cash in hand paid, and was put to record in the proper office on the day of its execution. It appears from the testimony that Webb and his wife had been married some 25 years, and, by their joint efforts and industry, had accumulated some \$2,000 in money and property, and this tract of land referred to, worth probably \$3,000; that when J. W. Webb, in September, 1903, was considering the purchase of a half interest in the business of Peyton, his wife opposed his engaging in the venture, being apprehensive that it might not be successful, and it was agreed between them that he should deed her the farm as a home for herself and children, and he should take the money, and such of the personal property as was not needed to run the farm, and invest it in the business; and, in pursuance of this agreement, the deed was made, but no cash consideration was paid by her. In May, 1904, the store was burned, and the stock of goods destroyed; the insurance turned out to be worthless, and, as a consequence, Webb lost all that he had invested in the business. There is some conflict in the evidence as to whether or not appellant knew when he sold to Webb in April, 1904, that Webb had previously conveyed the land to his wife, but the preponderance of the evidence inclines to the conclusion that he did. Unless the fact that, without consideration, Webb in September, 1903, conveyed his little farm to his wife, and in April, 1904, entered into a contract with appellant by which he purchased appellant's interest in the business and assumed the payment of all the debts, is sufficient to show a fraudulent purpose on his part, there is no evidence of fraud in this record. At the time this conveyance was made, Webb did not owe any debts except, probably, a debt to appellant, contracted in the purchase of the half interest in the business. Whether, at the time of the conveyance, he owed this debt or not, the evidence is not clear, as it does not satisfactorily appear whether the conveyance was made shortly before, or immediately after, the purchase of the interest; but, whether it was made before or after, the indebtedness contracted by Webb in the purchase of this interest has been paid, and is not involved in this controversy, nor is there any evidence tending to show that when this conveyance was made Webb contemplated buying more than a half interest in the business, or that he had any intention of subsequently purchasing the entire interest of the appellant. At the time Webb made this conveyance to his wife, he was not in failing circumstances, but, on the contrary, after the conveyance, remained the owner of more property than was necessary to pay all of his debts; and there is nothing fraudulent or improper in a husband, situated as Webb was, conveying a portion of his estate to his wife.

There are two sections of the Kentucky Statutes of 1903 relating to fraudulent conveyances. Section 1906 concerns conveyances made without valuable consideration, providing that they shall be void as to all existing liability of the grantor or vendor, but shall not merely, because voluntary, be void as to creditors whose debts are thereafter contracted. Section 1906 provides that "every gift, or conveyance \* \* \* made with the intent to delay, hinder, or defraud creditors, purchasers or other persons \* \* \* shall be void as against such creditors, purchasers or other persons." The relief in this action is sought under section 1906, and it has been held that where a conveyance or transfer is actually fraudulent and made with the intent to hinder, or delay creditors, the conveyance shall be void as against debts created before the conveyance was made. There is a marked difference in the operation and effect when the conveyance is assailed under section 1907, if a party be in debt at the time the voluntary conveyance is made, it will be presumed fraudulent as to those debts; but, when the conveyance is assailed under section 1906, the creditor must show by facts or circumstances that the conveyance was made with a fraudulent intent before the property can be subjected. It is the intent and purpose with which the debtor acts that renders the conveyance fraudulent, and this must be determined by the facts of each particular case. *O'Kane v. Vinnedge*, 55 S. W. 711, 21 Ky. Law Rep. 1551; *Rose v. Campbell*, 76 S. W. 505, 25 Ky. Law Rep. 885; *Frazer v. Frisbie Furniture Co.* 86 S. W. 539, 27 Ky. Law Rep. 688.

Applying the rule announced in the authorities cited to the facts shown by this record, we fail to find any evidence that the contract was made with the intent to delay, hinder, or defraud creditors, and therefore the judgment is affirmed.

#### MAY et al. v. MAY et al.

(Court of Appeals of Kentucky. Oct. 17, 1906.)

##### 1. DEEDS—ESTATES CREATED—REMAINDERS.

Land was conveyed to a married woman for life, with remainder to her children. She died leaving her husband and children. Thereafter some of the children died unmarried, childless, and intestate, after attaining full age. Held that, at the death of the life tenant, the interest of the children became vested, each owning an undivided part, so that at the death of the children their interest descended under the statute to the surviving parent.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 368-371.]

##### 2. SAME—CANCELLATION—FRAUD.

Land was conveyed to a married woman for life, with remainder to her children. She died leaving her husband and children. Thereafter some of the children died unmarried and intestate, after reaching full age. A child induced the surviving parent to convey his interest in the land to the child's wife, by fraudulently representing that the parent had no interest in the land; that the whole thereof belonged to the children; that lawyers had ad-



vised the child to that effect; and that the parent ought as a matter of form to execute the deed to make the title appear clear. The parent, from old age and ignorance, confided in the child and executed the deed on the faith of the representations. *Held* to authorize the setting aside of the deed.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 174–182.]

### 3. CANCELLATION OF INSTRUMENTS—RELIEF TO DEFENDANT.

Where the only consideration for a deed sought to be set aside for the fraud of the grantee's husband was a writing from the grantee and her husband purporting to give the grantor the right to live for life on a tract of land belonging to the grantee, a judgment setting aside the deed sufficiently protected the grantee by directing that the grantor should surrender the writing.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, §§ 119–122.]

### 4. SAME—PETITION—FAILURE TO TENDER RETURN OF CONSIDERATION—WAIVER.

In a suit to set aside a deed on the ground of fraud, it appeared that the deed mentioned a money consideration, which was never paid, and the only consideration shown was a writing from the grantee and her husband purporting to give the grantor a home for life on a tract of land belonging to the wife. The petition did not tender the return of the alleged money consideration or a surrender of the land on which the grantor was permitted to reside, but the land in question was restored to the grantee. *Held*, that the grantee was estopped from complaining of the insufficiency of the petition to allege a tender.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 73.]

### 5. PLEADING—PETITION—DEFECT—WAIVER.

A defect in a petition in a suit to set aside a deed for the fraud of the grantee, arising from the failure to tender the return of the consideration, was waived by the filing of an answer and by the failure of the grantee to have the court act on the demurrer filed after the answer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1355–1358.]

Appeal from Circuit Court, Magoffin County.

"Not to be officially reported."

Action by James L. May and others against Julia F. May and another. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

D. D. Sublett, for appellants. B. G. Williams and R. H. Cooper, for appellees. T. H. Crockett, warning order attorney.

**SETTLE, J.** This is an appeal from the judgment of the lower court canceling as to appellee James L. May, and reforming as to appellees S. D. May and Samantha Rice, a deed jointly executed by them to the appellant Julia F. May. The judgment in question was rendered in an equitable action brought by appellees against appellants to obtain the relief thereby granted. The petition states these facts: That appellee J. L. May in his early manhood intermarried with Louisa A. Patrick, and that there were born of this marriage 11 children. The wife died some years ago. Later six of the chil-

dren died after reaching their twenty-first birthday, respectively. Previous to the death of J. L. May's wife her father, Jeremiah Patrick, by deed of general warranty, conveyed her for life, with remainder to her children, a considerable body of land situated on Burnt Fork of Licking River in Magoffin county. Soon after the execution and delivery of this deed Jeremiah Patrick, by proper deed, also conveyed to his grandson Leander J. May, son of James L. and Louisa A. May, a tract of land adjoining or contiguous to that conveyed his daughter, but by the terms of this deed Leander J. May was excluded from sharing with his brothers and sisters at the death of their mother the land conveyed her by her father. Leander J. May sold and conveyed to his brother German May the land received by him under the deed from the grandfather, and shortly thereafter both he and German died, unmarried, childless, and intestate. The other four deceased children of James L. and Louisa A. May died before Leander J. and German, and they, too, were unmarried, childless, and intestate. As all of the 11 children of James L. and Louisa May were living when their mother died, they, except Leander J. May, who was excluded by the deed made him by Jeremiah Patrick, as remaindermen under the deed to their mother from Jeremiah Patrick, became invested with the absolute title to the land of which she had been the tenant for life, each owning an undivided tenth thereof. Upon the death of five of the children, viz., Thomas L., William S., German, Emily, and U. S. Grant May, they being adults, their interest of one-tenth each in the land in question descended, under the statute, to their sole surviving parent, James L. May, who therefore became the owner in fee of an undivided half of the land. Upon the death of his son German May, vendee of Leander J. May, James L. May in like manner became the sole owner of the land conveyed to Leander J. May by Jeremiah Patrick.

It is in substance alleged in the petition that H. C. May, another son of James L. May, and an owner of an undivided one-tenth of the land formerly owned by his deceased mother, Louisa A. May, induced his father, James L. May, to convey by deed his undivided half thereof and the whole of the Leander J. May tract to H. C. May's wife, Julia F. May, by falsely and fraudulently representing to him that he had no interest in either tract of land, that the whole thereof belonged to his children by Louisa A. May, and that he, H. C. May, had been advised by several lawyers that James L. May owned no interest in the land, but that he ought as a matter of form to execute the deed to make the title appear clear. It is also alleged in the petition that the representations thus made by H. C. May were false, and known by him to be so, but they were at the time believed by James L. May to be true,

and by reason thereof, and of his implicit confidence in his son H. C. May, he executed the deed without knowing his rights or understanding its effect, and that James L. May was then 71 years of age, feeble in body and mind, and not possessed of sufficient mental capacity or will power to resist the importunity of H. C. May. It is further alleged in the petition that shortly before the execution of the deed in question S. D. May and Samantha Rice, who are also children of James L. and Louisa May, sold their brother H. C. May, for his wife, Julia F. May, their interest of one-tenth each in the land conveyed their mother, Louisa A. May, by her father, and then gave him title bonds therefor, and that they were made parties to the deed executed by their father to Julia F. May, and they signed and acknowledged the same without reading it and without knowledge of its contents, under the belief that, as to them, it only conveyed their interest in the land formerly owned by their mother, which belief was superinduced by the false and fraudulent representations of their brother H. C. May that such was the case, but that they shortly thereafter learned for the first time that the deed also purported to convey an interest of each stated to be owned by them in the Leander J. May land, which was not true, as they neither owned nor claimed any interest therein. The consideration expressed in the deed is \$80, stated therein to have been paid James L. May, \$70 to S. D. May, and \$50 to Samantha Rice. Though not mentioned in the deed, it appears that H. C. May at or about the time of its execution delivered to James L. May a writing giving him the right to reside until his death upon a small parcel of land owned by Julia F. May, and that he occupied this land as a place of residence until he brought suit to recover his own land.

S. D. May and Samantha Rice joined their father, James L. May, in bringing this action, though not seeking the same relief. They only ask a reformation of the deed mentioned, so as to make it a valid conveyance on their part of their interest in the land formerly owned by their mother, and that so much of it as purports to convey any interest of theirs in the Leander J. May land be canceled. On the other hand, a complete cancellation of the deed as to James L. May was asked by him. The judgment of the lower court granted the relief prayed by appellees, and our examination of the record convinces us that this was authorized by the evidence, the weight of which fairly supports the averments of the petition. If, as charged and proved, old man May was induced to sign the deed under a misapprehension of his rights, and in ignorance of his true interest in the lands thereby con-

veyed, and this state of mind was caused by the false representations of his son H. C. May, it would have been error not to have set aside the deed. From the old age and ignorance of the father, his confidence in the son, and the statement of the latter that he had taken legal advice in regard to the matter in hand, it is not difficult to understand with what ease the object of the latter was accomplished. If H. C. May was ready to practice such a fraud upon his father, it requires no great stretch of credulity to induce the conclusion that he was not reluctant to practice a similar wrong upon his brother and sister, nor is it a matter of surprise that he would boast, after the execution of the deed, of having entrapped them and the father, as at least two witnesses testified he did. We think the testimony appearing in the record amply sufficient to justify the court in reforming the deed as to S. D. May and Mrs. Rice, as was done.

Appellants cannot complain that the court did not compel restitution of the \$80 mentioned in the deed as the consideration paid James L. May for his interest in the lands conveyed, for the evidence conclusively shows that this sum was never received by him. The only consideration shown was the writing from H. C. May and wife purporting to give James L. May a home for life on another tract of land belonging to Mrs. May, and the right thus conferred the judgment directs the former to surrender, which he has done. We are also of opinion that appellants are estopped to complain of the alleged insufficiency of the petition in not tendering the return of the \$80, or surrender of the land upon which James L. May was permitted to reside. As already stated, the \$80 was never paid the grantor, and the land in question has been restored to Julia F. May. Besides, objection to all defects in the petition was waived by the filing of the answer and by the failure of appellants to have the court act upon the demurrer filed after they had answered.

Appellee James L. May is the only party who has not been made whole by the judgment, for it appears from the record that after his execution of the deed to appellant Julia F. May, she sold and conveyed a small parcel of the Leander J. May tract to one Arnett, who, being an innocent purchaser, could not be made to surrender or account for it. Indeed, the judgment appealed from recognizes Arnett's right, and quiets his title to the land, though he does not appear to have been made a party to the action. This is a loss to appellee James L. May, of which he does not, however, complain.

Being of opinion that the judgment complained of was altogether proper, it is affirmed.

**SWEAT v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Oct. 19, 1906.)

**1. PERJURY—INDICTMENT—REQUISITES.**

An indictment for false swearing, which alleges that accused testified in a certain county that he did not see persons engaged in a game at which money was bet, when he was in truth present and saw the game, is not defective because it does not allege that the place where the game occurred was in that county.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 76-79.]

**2. CRIMINAL LAW—IMPROPER REMARKS OF PROSECUTING ATTORNEY—OBJECTIONS—REVIEW.**

Where accused neither objected to the argument of the prosecuting attorney nor asked the court to exclude it, the error in permitting the argument was not reviewable on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2645.]

**3. PERJURY—EVIDENCE—NUMBER OF WITNESSES—CORROBORATION.**

A jury cannot find one guilty of false swearing, except on the evidence of two witnesses, or of one witness with strong corroborating circumstances.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 125-132.]

**4. CRIMINAL LAW—INSTRUCTIONS—EXCEPTIONS—REVIEW.**

Where one convicted of false swearing did not, in his motion for a new trial, complain of the failure of the court to instruct on the whole law of the case, the Court of Appeals will not reverse a conviction for the failure of the court to charge that the jury could not convict, except on the evidence of two witnesses, or of one witness with strong corroborating circumstances.

Appeal from Circuit Court, Graves County.  
"Not to be officially reported."

Jim Sweat was convicted of false swearing, and he appeals. Affirmed.

B. C. Seay, for appellant. N. B. Hays, C. H. Morris, and W. H. Hester, for the Commonwealth.

**NUNN, J.** The appellant was convicted of the offense of false swearing, and his punishment fixed at confinement in the penitentiary for the term of one year. There was some evidence introduced tending to show his guilt. The charge made against him was for swearing that, at a certain time and place, he did not see some parties engaged in a crap game at which money was bet and won or lost, when in truth and in fact he was present and saw the game at which money was bet and won or lost. The indictment was in the usual form in such cases. It was alleged that the false oath was made in the county of Graves, but it was not alleged that the place where the crap game occurred was in that county, and for this reason counsel for appellant contends that his demurrer to the indictment should have been sustained. To this we can not agree. The allegations of the indictment were sufficiently explicit to inform the appellant of the offense with which he stood charged, and fixed the place at which it was committed. Besides, it was shown on the

trial that the place where the crap game occurred was also in Graves county.

It is further contended that the court erred in permitting counsel for the commonwealth, in his closing argument, to improperly comment upon the testimony of one of the commonwealth's witnesses, which was prejudicial to the substantial rights of the appellant. We do not find in the bill of exceptions that the appellant objected to the comment in question at the time it was made, or that the court was asked to exclude the objectionable remarks from the jury. For this reason, under many decisions of this court, we are unable to consider the question. It does appear, however, that the court failed to give an instruction to the jury to which the appellant was entitled; that is, to the effect that the jury could not find him guilty of false swearing, except upon the evidence of two witnesses, or one with strong corroborating circumstances. *Goslin v. Commonwealth*, 90 S. W. 223, 28 Ky. Law Rep. 686; *Adams v. Commonwealth*, 94 S. W. 664, 29 Ky. Law Rep. 683. We are unable, however, to afford appellant any relief on this account, for the reason that, in his motion and grounds for a new trial, he did not complain of the court's instructions, or of its failure to instruct the jury on the whole law of the case. See *Thompson v. Commonwealth*, 91 S. W. 701, 28 Ky. Law Rep. 1135, where all the authorities upon this subject are collated and reviewed.

For these reasons the judgment of the lower court is affirmed.

**LE MOYNE v. ANDERSON et al.**

(Court of Appeals of Kentucky. Oct. 17, 1906.)

**1. PLEADING—ANSWER INURING TO BENEFIT OF CODEFENDANT.**

Where, in a suit for damages and to enjoin defendant from further trespassing on land alleged to belong to plaintiff, interveners alleged that they were the owners of the land, and that defendant was engaged in cutting timber under their authority, the answer was a complete defense to the action, and no judgment could be taken against defendant, unless plaintiff made out his case.

**2. TRESPASS—PARTIES—INTERVENTION.**

The Code of Practice provides that every action must be prosecuted by the real party in interest, and any person may be made defendant who claims an interest adverse to the plaintiff, or is a necessary party to the complete determination of the questions involved. Held that, in a suit for damages and to restrain defendant from removing timber from land alleged to belong to plaintiff, it was proper to permit interveners to file an answer and cross-petition alleging ownership in themselves and removal of the timber by defendant under their license.

**3. SAME—TITLE OF PLAINTIFF—BURDEN OF PROOF.**

In a suit for damages and to enjoin defendant from further removing timber from lands alleged to belong to plaintiff, the burden was on plaintiff to show title.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 112.]

## 4. SAME.

In a suit for damages and to restrain defendant from further removing timber from lands alleged to belong to plaintiff, plaintiff must recover on the strength of his own title.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, §§ 18-31.]

## 5. SAME—SUFFICIENCY OF EVIDENCE.

In a suit to restrain the removal of timber from lands alleged to belong to plaintiff, plaintiff relied on a patent for a large boundary of land, out of which all lands previously surveyed were excepted, and the deeds under which he claimed also excepted from their operation various tracts of land. A witness for plaintiff testified that the land in controversy was not embraced in any of the older surveys; but he did not show that he had ever surveyed the land, or seen it surveyed, and no proof was introduced as to the exclusions in the deeds referred to. *Held*, that plaintiff failed to show title to the land in controversy.

## 6. COSTS—PREVAILING PARTY.

In a suit for damages and to restrain defendant from further removing the timber on lands alleged to belong to plaintiff, plaintiff having failed to show title in himself, defendant was properly awarded costs under Ky. St. 1903, § 889, giving costs to the successful party.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 108-114.]

Appeal from Circuit Court, Whitley County.  
"To be officially reported."

Suit by John V. Le Moyne against J. R. Anderson, in which Calvin Trammell and another intervene. From a judgment in favor of interveners, plaintiff appeals. Affirmed.

Greene & Van Winkle, for appellant. Morrow & Stephens, for appellees.

HOBSON, C. J. Appellant, John V. Le Moyne, instituted this action on August 5, 1904, against J. R. Anderson. He alleged in his petition that he was the owner and entitled to the possession of a certain boundary of land; that Anderson in August, 1904, had entered on the land, forcibly cutting and carrying away the timber which represented nearly the entire value of the land; that he was then engaged in cutting and removing the timber from the land, and would continue to do so unless restrained; that he was insolvent, and a judgment against him for the value of the timber would be uncollectible. He prayed judgment for \$200 damages, and that the defendant be enjoined from further trespassing upon the land. An injunction was obtained as prayed in the petition. Anderson did not answer, but at the August term, 1904, Calvin Trammell and Sarah Roberts filed their petition to become parties to the action, and on their motion the petition was taken as their answer and made a cross-petition over against the plaintiff. They alleged that they were the owners of the tract of land described in the petition; that Anderson went upon it and cut the timber complained of by their license and authority. They set up the boundaries which they claimed, alleging that they had been

in actual adverse possession of it since February 16, 1888. They denied that plaintiff was the owner of any part of the land, and also pleaded that his purchase was champertous. They prayed that their title to the land be quieted. The plaintiff objected to their being made defendants, and moved to strike out their petition, upon the ground that such intervention was not allowed by the Code of Practice. The court overruled the motion. Issue was then made up, and on final hearing the court dismissed both the petition and the cross-petition and adjudged the defendants Trammell and Roberts their costs.

Though Anderson did not file an answer, the answer that Trammell and Roberts filed was a complete defense to the action, and no judgment could be taken against Anderson after that answer was filed, unless the plaintiff made out his case. The rule on the subject is thus stated in Newman on Pleading (page 555): "If any one of the defendants in an action relies upon a plea of infancy, coverture, limitation, non est factum, or any other defense merely personal, or which does not go to the whole action, the plaintiff may recover as to some of the defendants, while he fails as to others. But if either of the defendants should, in a joint or separate answer, rely upon a defense which goes to the entire merits of the action, such as payment, accord, and satisfaction, or other meritorious defense which shows that the plaintiff ought not to recover in the action against him, a judgment cannot be rendered in the action against any of the defendants until that plea is disposed of; and, if the defendant should succeed upon such a plea, the action must be dismissed as to all of the joint defendants."

The court did not err in allowing Trammell and Roberts to file their petition and defend the action. The title to the land was the thing in controversy. Anderson, who had cut the timber for Trammell and Roberts, had no real interest in the controversy. The Code of Practice provides that every action must be prosecuted by the real party in interest, and any person may be made defendant who claims an interest in the controversy adverse to the plaintiff, or is a necessary party to the complete determination of the question involved. There is the same reason that the defense should be made by the real party in interest as that the action should be prosecuted by the real party in interest. The court therefore did not err, when the real parties in interest appeared, in permitting them to file their answer and make defense to the action. *Murphy v. Cochran*, 80 Ky. 239; *Newman on Pleading*, p. 208.

On the merits of the case, the burden of proof was upon Le Moyne to show title to the land. It was timbered land, and he showed no adverse possession of it. He introduced a patent dated January 20, 1852,

and claimed title under the patent by virtue of a series of deeds. The patent was for 8,000 acres within a large boundary described in the patent out of which all the lands previously surveyed, estimated at 36,000 acres, were excepted. The deeds under which Le Moyne claimed also excepted out of their operation various tracts of land which had been sold and conveyed by those under whom he claimed, to others before the deeds under which he claimed were made.

The patentees only took under the patent title to such land as was embraced in the patent after platting out the exceptions. The vendors of Le Moyne only took under their deeds such land as was embraced in the boundary sold after taking out the exceptions. The land in controversy was 200 or 300 acres. Whether these 200 or 300 acres passed to the patentees under the patent could not be determined, unless it was shown that it was outside of the previous surveys and within the patent lines. To show that it was within the patent lines was not sufficient, for it might be within the patent boundary and still be no part of the land which the patentee obtained title to, for he only obtained title to the surplus after taking off the previous surveys, and in the same manner Le Moyne did not show that he had title to the small tract in controversy when he produced the deeds for the larger boundaries, unless he showed that this small tract was not within the boundaries which were excepted out of the operation of the deeds. *Hall v. Martin*, 89 Ky. 9, 11 S. W. 953; *Harris v. Lavin*, 6 Ky. Law Rep. 304. The plaintiff, in a case like this, must recover upon the strength of his own title. If neither party shows title to the land, the defendant cannot be disturbed. The plaintiff introduced a witness who testified that the land in controversy was not embraced in any of the older surveys; but the witness did not show that he had ever surveyed the land, or seen it surveyed, or state any facts showing that he was qualified to speak on this subject. And no proof was introduced as to the exclusions in the deeds referred to, and for all that appears the land in controversy may be within these exclusions, and not covered by the deed under which Le Moyne claims. He failed therefore to show title to the land in controversy, and the circuit court properly dismissed his petition. He also properly dismissed the cross-petition of Trammell and Roberts, as they did not show title to the land.

There was no error, however, in adjudging defendants their costs, for they had succeeded in defeating the plaintiff's action. It was in effect an action for trespass on land, although tried in equity, and, as the defendants defeated the action, they were entitled to their costs. *Moore v. Bonner*, 7 Bush, 26; Ky. St. 1903, § 889.

On the whole case we see no substantial error to the prejudice of appellant.

Judgment affirmed.

ECKLAR'S ADM'R v. ROBINSON et al.

(Court of Appeals of Kentucky. Oct. 17, 1906.)

DEEDS—CONSTRUCTION—TIME OF TAKING EFFECT—TESTAMENTARY DISPOSITION.

A deed to the grantor's wife and son recited that it was executed in order that the grantees might be provided for after the grantor's death "that is, at the time of the death of the first party" the wife "is to have and to hold for life the property and at her death the property is the property of" the son "to have and to hold to him and his heirs forever." *Held*, that there was a present grant with reservation of a life estate in the grantor, and not a testamentary disposition.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 294-303.]

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Action by the administrator of the estate of George W. Ecklar deceased against Phœnie Robinson and others for a sale of land to pay debts, and from a judgment dismissing the petition, petitioner appeals. Affirmed.

Wade H. Lall, for appellant. W. T. Laferty, for appellees.

HOBSON, C. J. The only question to be determined here is whether the grantees took anything under the following deed: "This indenture made and entered into this the 25th day of November, 1902, between George W. Ecklar of Berry, Harrison county, Ky., party of the first part, and Phœnie Ecklar, the wife of the first party, and Herman G. Ecklar, son of the first party, as parties of the second part, witnesseth: That the party of the first part, in consideration of the sum of one dollar cash in hand paid and the further consideration of love and affection that first party bears towards second parties, and in order that the said Phœnie Ecklar, the wife of the first party, and their infant son, Herman Ecklar, may be amply provided for after the death of the first party, has bargained and sold and by these presents does convey and confirm unto the said parties of the second part, their heirs and assigns forever, that is at the time of the death of first party, the said Phœnie Ecklar is to have and to hold for and during her natural life the property hereinafter described, and at the death of the said Phœnie Ecklar the property hereinafter described is the property of Herman Ecklar, to have and to hold to him, his heirs and assigns forever [here follows description of property conveyed]; and the first party also hereby sells and conveys to the second party to have and to hold in the same manner all the personal property of every description, to include household and kitchen furniture and all personal property of every species. To have and to hold said property with its improvements and appurtenances thereto belonging unto the said grantees, their heirs and assigns forever, in the manner hereinbefore set forth; and the said party of the first part does further covenant with the said

parties of the second part that he will warrant generally the title to the property hereby conveyed." It is insisted for appellant that the instrument is testamentary in character, and, not having been probated as a will, is of no effect. It is insisted for appellees that the instrument passed title to the property at the time of its delivery, and only the enjoyment or possession of the property was postponed until the death of the grantor. The grantor is dead, and the suit was filed by his administrator to sell the land for the payment of his debts. The circuit court dismissed the petition, and the plaintiff appeals.

The rule is that if a paper passes no interest in the lifetime of the maker, whatever may be its form, if it is operative only upon his death, it is a will, and, to be effective, must be probated. On the other hand, the object of all construction is to arrive at the intention of the parties and their intention, where it is apparent on the face of the papers, will be carried into effect if it can be fairly done under its terms. The law favors the vesting of estates, and it prefers a construction of an instrument that will give it some effect to one which will give it no effect. In *Hunt v. Hunt*, 82 S. W. 998, 26 Ky. Law Rep. 973, 68 L. R. A. 180, the court had before it a deed which provided that it was not to take effect until the death of the two grantors. It was held after an examination of the authorities that these words simply postponed the possession until the death of the grantors, and that the title to the land vested in the grantee upon the delivery of the deed. As shown in that case, there is considerable conflict in the authorities upon the subject, but the weight of the later cases seems to be in accord with the conclusion there reached. In the case at bar the husband and father conveys the land to his wife and infant son. He also conveys to them in the same manner the household and kitchen furniture, and concludes with a covenant of general warranty. The instrument was acknowledged at the time of its execution, and recorded in the county clerk's office. The deed is made that the wife and child "may be amply provided for after the death of the first party," and then following the words of conveyance are these words: "That is, at the time of the death of the first party, the said Phœnie Ecklar is to have and to hold for and during her natural life the property hereinafter described, and, at the death of said Phœnie Ecklar, the property hereinafter described is the property of Herman Ecklar, to have and to hold to him, his heirs and assigns forever." Reading the whole deed together, we think that these words should be construed to mean that Phœnie Ecklar, after the death of the first party, is to have a life estate in the property, and that, after her death, it is to go to the son absolutely; that the words, "That is" are used to introduce the whole following clause, and that this clause is inserted merely to show when the

grantees are to have possession and enjoyment of the property. The instrument is very inartificially drawn, but the real intention of the parties may be gathered from it. The grantor conveys and confirms the property to the parties of the second part, their heirs and assigns forever. Then there follows a parenthetical clause defining the time when the wife is to enjoy the property, and when it is to become absolutely the property of the son. Reading the words of present grant in the first clause of the deed with the covenant of warranty and the other clauses of the deed, we think that the parties contemplated a present grant; the grantor simply retaining a life estate in the property conveyed. If this is not the meaning of the deed, then it would have no operation as to the son until the death of Phœnie Ecklar; for it in terms provides that at her death the property "is the property of Herman Ecklar," but this language manifestly means that Herman Ecklar was not to come into the enjoyment of the property until his mother's death. We think the same meaning should fairly be given the previous words referring to the death of the grantor.

Judgment affirmed.

#### ILLINOIS CENT. R. CO. v. STANLEY.

(Court of Appeals of Kentucky. Oct. 18, 1906.)  
RAILROADS—KILLING OF STOCK—ACTION—QUESTION FOR JURY.

In an action against a railroad for the killing of stock, held a question for the jury whether the testimony of defendant's employees, in view of the physical facts, overcame the presumption of negligence arising by Ky. St. 1903, § 809, from the fact of the killing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1627-1640.]

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Action by T. A. Stanley against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. M. Dickinson, Trabue, Doolan & Cox, and Robbins & Thomas, for appellant. Wickliffe & Wiley, for appellee.

BARKER, J. On September 16, 1904, one of appellant's fast passenger trains going north, when near the line between the counties of Hickman and Carlisle, Ky., ran into a drove of stock consisting of 1 gray mare and about 35 mules, killing 6 of them outright, and badly injuring 5 others. The accident occurred at about 1:30 o'clock at night, and at or near where appellant's line of road crosses a public highway. Beginning with the north line of the highway, the appellant's right of way is fenced on both sides for about a half mile, to a trestle. On the north side of the highway, to prevent stock from entering its inclosed right of way, is a cattle guard, from the respective sides of

which short fences, or "wings," are built out and join the two inclosing fences, thus perfecting the inclosure between the north line of the highway and the trestle. The theory of the appellee is that some of the mules and a gray mare had strayed into the inclosure on the north side of the highway over the defective cattle guard, and were there killed. That of appellant is that all of the stock were struck by the engine and killed or crippled on the crossing. The engineer and fireman in charge of the train were the only eyewitnesses to the accident. They say the night was foggy, their train behind time, and they were running at the rate of between 50 and 60 miles an hour; that they gave all of the statutory signals for the public highway; that, just before they reached it, the appellee's stock undertook to cross immediately in front of the train, and, before they could stop, the engine ran into the drove of stock on the crossing, and whatever damage was done occurred there. For the appellee it is shown that the cattle guard is entirely useless for the purpose for which it was designed; that cattle and horses pass over it without difficulty, and that for some time, at least, appellant kept a man stationed there to prevent cattle from trespassing; and that no improvement had been made in it between the time it was considered necessary to have a special agent stationed there to prevent the trespassing of stock, and the time when the accident complained of occurred. It also appears, without dispute, that the six animals killed were scattered along at intervals from about 60 feet north of the road crossing to a quarter of a mile. It is therefore manifest, from the physical facts which are not disputed, that, if appellant's theory of the accident is correct, the engine must have carried on its cowcatcher five mules and a horse from the crossing 60 feet north, where the first body was found, and from that on to a quarter of a mile, dropping one at intervals along the line of the roadway.

It is insisted for appellant that, inasmuch as the engineer and fireman are uncontradicted in their testimony as to how the accident occurred, and it thereby appears that it happened on the crossing without negligence on their part, the *prima facie* evidence of negligence arising from the killing of the stock on the railroad right of way prescribed by section 809, Ky. St. 1903, is overcome, and therefore it was entitled to a peremptory instruction in its favor at the close of all the testimony, and in support of this position it cites: *Illinois Central R. R. Co. v. Gholson*, 66 S. W. 1018, 23 Ky. Law Rep. 2209; *Felton, Receiver, v. Anderson*, 66 S. W. 182, 23 Ky. Law Rep. 1809; *Mobile & Ohio R. R. Co. v. Wayne*, 64 S. W. 723, 23 Ky. Law Rep. 1070; *McGhee, Rec'r, v. Guyn*, 98 Ky. 209, 32 S. W. 615; *McGhee v. Gaines*, 98 Ky. 182, 32 S. W. 602; *Rogers v. Felton*, 98 Ky. 148, 32 S. W. 405; *Kentucky Central*

*R. R. Co. v. Talbot*, 78 Ky. 621; *Louisville & Nashville R. R. Co. v. Bowen*, 39 S. W. 31, 18 Ky. Law Rep. 1099; *N. N. & M. V. Co. v. Mitchell*, 33 S. W. 622, 17 Ky. Law Rep. 1066. This position would be incontrovertible, if the physical facts did not militate against the testimony of appellant's employés. In the first place, it is worthy of consideration that neither the engineer nor the fireman saw, or knew of, the injury of more than 3 of the 11 animals actually injured; and it is not inconsistent with its evidence to conclude that some of the animals were hurt on the crossing, and that the others had theretofore strayed over the defective cattle guard into the inclosure, and were there hurt. Five of the injured animals were found the next day outside of the inclosure. These must have been injured either on the crossing or south of it; but the 6 that were found on the north side of the highway, and within the inclosure, as said before, had either strayed over the defective cattle guard, or were carried over on the cowcatcher of appellant's engine. We think the question, as to whether or not it was possible for the cowcatcher of the engine to carry a horse and five mules for the long distances between the crossing and where their bodies were found, is one for the decision of a jury; and especially is this true when the evidence of the engineer and fireman only covers the injury of 3 of the 11 animals struck by the train—thus showing that a great deal happened there that night which they did not see.

Assuming it to be true that the cattle guard was defective, as the evidence of appellee tended to establish, the inclosure of the right of way on the north side of the highway was a veritable death-trap for stock, and there can be no doubt of the soundness of the legal proposition that if appellee's stock strayed from the highway into the inclosure by way of the defective cattle guard, and were injured therein, appellant is liable for the damage done. In none of the cases cited to show its right to a peremptory instruction, where the testimony of the employés of the road that the accident happened without fault on their part was not contradicted by other testimony, did the physical facts militate against the testimony, as in the case at bar. The jury were not bound, in the face of the facts which tended to show the negligence of appellant, to accept the testimony of its employés although no other living witness saw the accident. The jury had the right to apply the maxim "*res ipsa loquitur*."

Upon the whole case, appellant was not entitled to a peremptory instruction at the close of the evidence, and the trial judge properly submitted the question of negligence and the defectiveness of the cattle guard to the jury. There is no serious complaint of error in the instructions that were actually given, nor of any other, except the-

refusal to give a peremptory instruction for appellant.

On the trial below the jury rendered a verdict of \$900 in favor of appellee, and for the reasons herein given the judgment predicated upon this verdict is affirmed.

### KLEIN v. KLEIN.

(Court of Appeals of Kentucky. Oct. 18, 1906.)

#### 1. DIVORCE—GROUNDS—ABANDONMENT—EVIDENCE—SUFFICIENCY.

Where, in a suit by wife for alimony, the husband sought a divorce for abandonment, the fact that he, by an agreed order, had undertaken to pay alimony and the wife's transportation to her father's home, did not show him willing that the wife should leave him, where it appeared that he was obliged to make the agreement or let the chancellor fix the allowance.

#### 2. HUSBAND AND WIFE—PERSONAL DUTIES—WIFE'S ACCEPTANCE OF RESIDENCE.

It is the duty of the wife to accept such residence as the husband may select without unwarranted parsimony or stubbornness on his part.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 7.]

#### 3. DIVORCE—ABANDONMENT—JUSTIFICATION.

Where a husband took the wife to live with his parents, who occupied a comfortable home and where she was properly provided for, but she became unhappy because differing from her mother-in-law in temperament, disposition, and tastes, and while the husband and his father were making efforts to obtain a suitable separate home for the parties, the wife, at the instigation of her father, commenced an action for alimony, and departed to another state where she remained the statutory period, a divorce in favor of the husband on the ground of abandonment was proper.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 129.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Suit for divorce by Garnett Klein against Lettie M. Klein. From a judgment in favor of defendant, plaintiff appeals. Reversed with directions to enter judgment for plaintiff.

O'Neal & O'Neal, for appellant. Emile Steinfeld, W. W. Watts, and Watts & Gifford, for appellee.

CARROLL, C. The parties to this litigation married in June, 1903, separated in October, 1903, and the appellee brought this action for alimony. In 1904, after the expiration of a year from the separation, appellant filed an amended answer and counterclaim, in which he sought a divorce from appellee on the ground of abandonment. The chancellor dismissed his counterclaim, awarded appellee \$25 a month alimony, and he appeals.

At the time of the marriage these parties were about the same age, appellant probably being a few months the younger. Appellee was a resident of Wisconsin, and previous to her marriage lived with her parents and was employed as a stenographer. Appellant

resided with his parents in Louisville, Ky., and was engaged as a clerk, receiving an ordinary salary. He was the only living child of his parents, and had always made his home with them, and his mother especially was much opposed to his marriage with appellee or any one else. His parents were people in rather humble circumstances, his father made a living by labor and his mother did almost all the housework. They were industrious, frugal, plain people, and owned and occupied a comfortable home upon which they spent considerable time and money improving and beautifying for their intended daughter-in-law. Previous to the marriage, there was no acquaintance between the families of the contracting parties, and appellee was an entire stranger in the city to which her husband took her. After a short bridal trip they begun their residence at the home of appellant's parents—no person living in the house except appellant and his wife and the two old people. Appellant's duties required him to be at his business during the day, and his father was also engaged with his labors—leaving no persons at home except appellee and her mother-in-law. In temperament, disposition, and taste, these two people were radically different. There was nothing congenial or in common between them, and it is perfectly apparent that appellee soon became dissatisfied with her surroundings and discontented with her lot. The evidence leaves the impression that she had been accustomed to a good deal of company, her employment placing her with congenial associations, and to be situated in a large city in a house with an old lady whose mind was more occupied with her household duties than in an effort to amuse or entertain her daughter-in-law, was tedious, burdensome, and unpleasant to appellee. There is no testimony reflecting in the slightest degree upon the character of appellee, nor indeed is there anything to show that appellant was not kind and attentive to his wife, or that he did not give her all the comforts and pleasures that his circumstances would permit. In fact, the case for appellee is rested upon the ground that the fault of appellant consisted in taking his wife to live in the same house with his mother and continuing her there when he discovered that the associations and surroundings were distasteful. There is evidence that the mother of appellant was a blunt, plain-spoken woman, and sometimes indulged in expressions that might grate harshly upon the ear of a refined and highly cultivated person. She spoke occasionally of her daughter-in-law as that "gal," and intimated on one or two occasions that she didn't have much patience with a woman 23 years old who didn't know how to do housework, and it seems that when attending the wedding in Wisconsin was greatly distressed about the approaching marriage of her son and said to several people whom



she met that she didn't want her son to marry any person, and that she would rather attend his funeral than see him marry that "gal." She had no more objection to his marriage to appellee than she would have had to his marriage with any other person. It was the fact of his marriage that distressed her, not the fact that he was going to marry appellee. With the exception of these rather coarse or indelicate speeches, it does not appear that appellant's mother used any harsh or offensive language to or about her daughter-in-law. The record leaves the impression that the father of appellant was very kind, pleasant, and agreeable to appellee, and contributed all that he could towards making her lot comfortable and happy, but she received his friendly advances with cool indifference. Soon after her arrival at his house, he discovered that she was discontented with her home, and after fruitless efforts to induce her to become accustomed to the surroundings and better contented with her location, made several efforts to obtain a suitable house in which the young couple might take up house-keeping for themselves, and was engaged in efforts of this kind when the separation took place. On October 20th, the father of appellee came to Louisville for the first time, and, before seeing his daughter or any of appellant's family or visiting their home, employed a lawyer and in company with the lawyer went to the house and immediately took his daughter to the lawyer's office where a meeting was subsequently arranged between them and appellant and his father, and the following day the action for alimony was instituted. The conduct of appellee's father is not to be commended. To say the least of it, he was hasty and indiscreet, and had more to do with the separation than any other of the parties. Many accusations for disturbing the peace and happiness of young married people have been brought against mothers-in-law and a trial has usually resulted in a finding of guilty, but in this case the principal offender of the marital relation was the father-in-law. It seems entirely probable that, if appellee's father, on the occasion of his first visit to Louisville, had engaged in friendly conversation with appellant and his parents, an adjustment of the little differences then existing between these parties could have easily been made; but, instead of using any effort to bring about a better state of feeling between all of them, it is evident that his purpose was to cause a separation, and with this idea in mind his first visit was made in company with a lawyer, and his whole purpose seems to have been to precipitate the affair as speedily as possible into the courts, as, upon his arrival, the first meeting between himself and appellant and appellant's father was arranged to take place at a lawyer's office, and on the day following this action for alimony was instituted. The evidence disclosed in this

record as to the condition of events before his arrival did not warrant this inconsiderate and litigious haste on the part of appellee's father, and after his arrival appellant was afforded no suitable opportunity to see and converse with his wife, and arrange if possible, an amicable disposition of their matrimonial troubles, as in company with her father she left for his home in Wisconsin a few days after his arrival.

Undue importance is attached by counsel for appellee to the agreed order entered in the case on October 27th, by which appellant agreed to pay to his wife \$25 per month and to furnish her transportation to the home of her father, as this order was entered pursuant to an agreement between the parties as to the amount of alimony that would be exacted pendent lite, and the transportation was insisted upon as a part of the arrangement. Appellant was obliged to enter into an agreement of this character, or else let the chancellor fix the allowance, and under the circumstances the fact that the order was entered by agreement does not in the slightest degree prejudice the appellant's case or present him in the attitude of being willing to have his wife return to her father's home, as at this time the movements of his wife were controlled by her father and her lawyers, and appellant had little to do with her actions and conduct. If appellee, without fault on the part of appellant, abandoned him, he is entitled to a divorce on this ground, and this question we will proceed to examine, giving due consideration to the opinion of the chancellor declining to grant the appellant the relief sought. If appellant was in fault at all, his dereliction consisted in failing to provide a separate home for his wife when they first married, or in not removing her to another place after he discovered that she was dissatisfied at the home of his parents. It may be conceded that it is the duty of a husband to provide a comfortable home for his wife and to surround her with agreeable associations and to do everything within reasonable and proper limits that can be done to make her happy. The provision that the husband should make for his wife in respect to home, companions, and surroundings necessarily depends upon such a variety of circumstances involving the social standing, pecuniary condition, employment or business of the husband, and his place of residence, that no rule of general application can be laid down. Each case must be adjudged on the facts upon which it rests; what would be reasonable and proper in one might be wholly unsuitable and inadequate in another, and it is also true that, within reasonable bounds, he has the right to determine the place where he will live, and it is the duty of the wife to accept such residence and such place as the husband may, without unwarranted parsimony or stubbornness, *select. Clubb v. Clubb*, 63 S. W. 587, 23 Ky. Law Rep. 650.

The fact that appellant took his bride to the home of his parents is not to his discredit, nor should it militate against him. It was a comfortable home where she would be well provided for, and he had no cause to believe that the relation between his wife and his mother would not be agreeable, and it is in evidence that both he and his father were making reasonable efforts to procure another home when the untimely appearance of her father and his hasty action prevented the accomplishment of this purpose that would probably have resulted in the parties to this litigation continuing to live happily together as man and wife. The conduct and behavior of appellant's parents towards appellee was not of such a character that it could not have been borne by appellee, at least until her husband could procure for her another home, and under the circumstances it was her duty to have remained with her husband; and when she abandoned him to go with her father to his home in Wisconsin, and remained there for the statutory period, the appellant was entitled to a divorce on the ground it was sought.

Letters exchanged between these parties both before and after the marriage have been introduced as evidence, but they throw little light on the merits of the controversy. And a telegram sent to appellant informing him of the serious illness of his wife is relied on with some confidence as indicating indifference on his part towards her condition. This telegram however was signed by an attorney and not by any member of appellee's family, nor does it satisfactorily appear that its contents were made known to appellant, who, upon discovering that it had been sent by a lawyer, at once returned it.

We have given to this case a careful hearing, as it is an important and delicate matter to sever the marital relations, and the courts are reluctant to exercise this power; but the law, whether wisely or not, has provided that abandonment of one by the other for a period of one year without fault on the part of the one abandoned is grounds for divorce, and when the evidence supports the petition seeking a divorce for this reason, it is the duty of the court to grant it.

Therefore the judgment is reversed, with directions to enter a judgment in conformity to this opinion.

#### McEUEEN v. CARY.

(Court of Appeals of Kentucky. Oct. 12, 1906.)

##### 1. ELECTIONS—CORRECTING RETURNS.

Election officers, on discovering a mistake in their return, may perform their duty of correcting it, without obtaining consent to make the correction.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 230.]

##### 2. SAME—CONTEST—TAMPERING WITH BALLOTS—PRESUMPTION.

The fact that the county clerk, who was a candidate for re-election, had custody of elec-

tion returns, as was his duty, raises no presumption, in a contest by him of the election, that he had tampered with the ballots, which show more votes for him and less for his opponent than certified by the election officers.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 283, 287.]

##### 3. SAME—USE OF INTOXICANTS BY ELECTION OFFICERS.

The fact that election officers violated the law by drinking liquor during the election in the room where it was being held gives less weight than otherwise would be the case to their certificate of votes cast, where a different result is shown by the ballots.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 242, 243.]

Appeal from Circuit Court, McLean County.

"To be officially reported."

Action by R. G. Cary against Ellsworth McEuen to contest an election. Judgment for contestant. Contestee appeals. Affirmed.

Miller & Todd, Little & Taylor, J. H. Miller, and Greene & Van Winkle, for appellant. Sweeney, Ellis & Sweeney and J. W. Boston, for appellee.

BARKER, J. At the general election held November 7, 1905, in McLean county, Ky., the appellant, Ellsworth McEuen, was a candidate on the Republican ticket, and the appellee, R. G. Cary, was a candidate on the Democratic ticket, for the office of county clerk, and this case involves a contest as to which of the two was lawfully elected to that office. McLean county has eleven precincts, one of them being Rumsey. It is conceded that the election returns from all of the precincts except Rumsey were correct, and the merit of the contest, so far as the issues of fact are concerned, turns upon the proper count of the votes at this precinct. While the record is somewhat voluminous, the facts involved are comparatively few and simple. We have no doubt that, by the count of the officers in the contested precinct, the appellant received 212 votes, and appellee 153, and that these figures were placed on the official tally sheet. When the four certificates required by the statute came to be made out, two of them showed the vote between the parties hereto to be as before stated, but by a mistake of the copyist the vote between the rival candidates for the office of county attorney was copied on the other two certificates, thus showing that the vote stood 186 for appellee, and 176 for appellant. One of these erroneous certificates was returned with the stub book and ballots to be used in the official count by the election commissioners. On the day after the election (November 8th) the officers in some way discovered the error that had been made, and informed appellee of it, and on the 10th, with the consent of appellee, they changed the certificate by making it conform to the real fact—that by their count appellant received 212 votes, and appellee 153. While the change was made to correct the manifest

mistake in the certificate by the consent of appellee, we do not think his consent was necessary. It was the duty of the officers to return a true statement of the vote as shown on the tally sheet, and until this was done they had not performed their whole duty in the premises; and had they refused to make the correction, it is well settled in this state that they could have been compelled so to do by a writ of mandamus. *Batman v. Megowan*, 1 Metc. 540; *City of Louisville v. Board of Park Com'rs*, 65 S. W. 860, 24 Ky. Law Rep. 38; *Id.*, 77 S. W. 1133, 25 Ky. Law Rep. 1309; *Bennett v. Richards* (Ky.) 83 S. W. 154; *Anderson v. Likens*, 47 S. W. 867, 20 Ky. Law Rep. 1001. With the official returns thus corrected, it was shown that appellant was elected by a small majority, and in accordance with their duty in the premises the commissioners awarded him the certificate, and he was inducted into office thereunder.

Thereupon this action was instituted by the appellee to contest the election of appellant, claiming that, as a matter of law, the election officers had no right to make the correction in the official returns from Rumsey, and, as a matter of fact, by a correct count of the vote of that precinct he was elected, instead of appellant. This was denied, and, without further notice of the somewhat lengthy pleadings, it may be stated that the issues of fact were properly made upon which depend the question which of the contending parties was elected to the office for which they were candidates. Upon the trial the court, in the presence of the parties in interest and their attorneys, opened the ballot boxes and counted the ballots in the contested race, with the result that they showed appellee had received 176 votes, and appellant 196; and it is conceded that, if this count be correct (and it is correct if the ballots were not disgraced), the appellee was elected in the whole county by 20 votes. The question, then, comes to this: Whether the official returns, or the count of the ballots by the court, shall prevail. If the official returns prevail, then this case must be reversed, because appellant was elected; if the count by the court of the ballots be accepted, then the judgment must be affirmed, for the reason that appellee was elected—it being conceded that he received a majority of 40 in all of the precincts of McLean county, omitting Rumsey, and the count of the court showing that appellant received a majority of 20 votes in Rumsey precinct, thus reducing the majority of the former in the whole county to 20. But, if the count of the officers prevails, appellant had a majority of 58 in Rumsey precinct, thus overcoming appellee's majority of 40, and electing appellant by a majority of 18. For the purposes of this appeal, the corrected certificate will stand as if no mistake had originally been made, and we are thereby brought face to face with the proposition as to which

is to prevail in the final analysis of our legal problem—the return of the officers or the count of the ballots.

The rule in this state is firmly established that in a contested election the certificate of the precinct officers is *prima facie* evidence of the correctness of their count; but if the ballots themselves have been lawfully kept, and are shown not to have been tampered with, then they must prevail over the certificate. *Bailey v. Hurst*, 68 S. W. 867, 24 Ky. Law Rep. 508; *Edwards v. Logan*, 70 S. W. 852, 24 Ky. Law Rep. 1099; *Hamilton v. Young*, 81 S. W. 682, 26 Ky. Law Rep. 447. In the case at bar appellee and his son, who was his only deputy, both testify positively that no one tampered with the ballots while in their custody, and there is no evidence whatever that they had been changed, unless the bare fact that they disagree with the returns of the precinct officers can be so considered. The law makes it the duty of the county clerk to receive and keep the returns of the precinct officers until they have served their ultimate purpose. He cannot escape this duty if he would, and he has no right to shift the responsibility to another. Even when a party in interest, as here, it is none the less his duty to keep and preserve the official returns. He is not only a trustee in his own election, but also in that of the other candidates for the various offices involved, and in a higher sense he is the trustee for the people, whose interest overshadows that of the candidates. And while, so far as his own interests are concerned, a sensitively scrupulous officer might desire, as between himself and his opponent, to place the ballots in the custody of some disinterested party, yet we know of no principle which would authorize him thus to shift the duty which the law imposes upon him. This being true, it must follow that, legally, no adverse presumption, based upon self-interest, can be drawn against the county clerk, engaged in a contest for his office, because of his custody of the ballots. If this were otherwise, then a disastrous presumption would be drawn against an officer merely from the fact that he was faithfully discharging the duty imposed upon him by law. It may be admitted that, as a matter of fact, the temptation to manipulate the ballots in his own interest, where he has the opportunity, is as great in the case of a county clerk as that of any other candidate; and this consideration may induce the conclusion that the law itself is at fault, but it will not warrant the court in assuming that the ballots are disgraced because they were in the possession of their lawful custodian, even though a party in interest.

When the box containing the ballots was opened, they were found by the court and the attorneys, so far as the eye could detect, to be in perfect condition. They were properly sealed, with the officers' signature at the proper place, tied as the law requires,

and on their face apparently in the same condition as when they left the hands of the precinct officers. The trial court, before opening the package, submitted it to the careful inspection of the attorneys and parties in interest, and it is not contended here that the careful examination given by the court and counsel showed the slightest indication that the ballots had been unlawfully tampered with. So the question comes down to this: Whether we shall, as a solution of the dilemma, presume that the officer in whose custody the law placed the ballots was so lost to honor as to betray the high trust imposed upon him by his oath of office, or whether the officers of election made a mistake in the count. The difference between the count of the precinct officers and that of the court is made up of two items: First, there were 14 ballots stamped under the Republican emblem, and also stamped in the square opposite the name of appellee; and, second, 9 ballots which were voted under the Prohibition emblem were also stamped in the square of appellee. So that the officers of election, if the court's tally is correct, must have failed to count for appellee these individual votes which he received from the Republican and Prohibition voters; and whether they did or did not make this mistake is the real question in this case.

It is insisted for appellant that great confidence should be placed in the count of the officers, because, as a whole, they were composed both of Democrats and Republicans, and the challengers and inspectors of the respective parties were there and participated in the count, and it is hardly possible that these seven men could have been so egregiously mistaken in so many instances; and it must be confessed that there is great force in this claim. But, on the other hand, it must not be forgotten that in the count of the votes by the officers of election all do not participate in every part of the count. Usually, as the evidence shows was done in this case, one officer calls off the ballots, and another, or others, tabulate them. It requires but little familiarity with the conduct of elections to realize how easy it is for mistakes to creep into the official count at the end of the day. In the first place, the officers have been on duty for many hours, and are usually weary with the duties of the day when the count commences. The judges are generally elderly men, selected for the wisdom which ought to come with age, and the count of the votes, as in the case at bar, usually takes place after dark. Often the light is poor, and under these circumstances it can readily be seen how easy it is for an old man, with dim eyes and a poor light, to overlook sporadic votes. It is conceded that, in races other than the one involved here, several mistakes were made in the count of the officers, so that it is apparent that they were not infallible; and admit-

ting, as is done here, that they made a number of mistakes, we do not see why their county in the county clerk's race should be deemed beyond the possibility of error. In the first place, they made the original mistake of copying the totals in the county attorney's race for the votes in the county clerk's race, one of the candidates for another office received 100 votes which they omitted altogether to give him, and there were several other errors of minor importance which we do not feel it necessary to state with particularity.

We do not believe the officers were drunk, although there is evidence in the record tending to show that the clerk was intoxicated, and that others were under the influence of liquor. But it is admitted to be true that there was a quart bottle of wine in the room where the election was held, and it was, to some extent, drunk by the officers. Assuming, as we do, that they did not intoxicate themselves, yet this fact shows that they were guilty of a violation of the law (section 1575, Ky. St. 1903); and, being willful violators of their sworn duty in this regard, the weight which we would otherwise feel was due the result of their official labors is materially lessened. Upon the whole case, we agree to the conclusion of the trial judge upon this question—that the officers honestly failed to count all the votes that were cast for the appellant. Of course, we recognize that there is room for doubt, and for an honest difference of opinion in regard to the facts of this case; but we are fully persuaded that it is more consonant with justice to believe that the officers of election were mistaken in their count than that appellee was guilty of a crime, and after all it comes to this.

We have not discussed in detail all of the evidence upon the trial below, but it may not be inappropriate to say that every member of the court has taken a personal interest in investigating the facts of this case, that we have considered it maturely, and are unanimously of opinion that the judgment should be affirmed; and it is so ordered.

**CITY OF BOWLING GREEN v. GAINES.**  
(Court of Appeals of Kentucky. Oct. 16, 1906.)  
**MUNICIPAL CORPORATIONS — DELEGATION OF DISCRETIONARY POWER BY COUNCIL.**

A city council, to whom the fiscal affairs of the city are committed, has no power to delegate to the city attorney authority to employ an assistant in certain actions if he considers it necessary, he to determine who shall be employed and what shall be paid him, within the limit of 15 per cent. of the recovery in the actions.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 154, 584, 588.]

Appeal from Circuit Court, Warren County.

"To be officially reported."

Action by W. B. Gaines against the city of Bowling Green. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

J. G. Covington, for appellant. Thos. W. Thomas and Sims & Grider, for appellee.

HOBSON, C. J. The council of Bowling Green having received information that a large amount of property in the city, taxable for city purposes, for the last five years had escaped taxation, adopted on October 3, 1898, an ordinance for the assessment of such property, which, among other things, provided as follows: "The city attorney is directed, after said assessment is made, to take such steps by legal proceedings, or otherwise, as is necessary to collect and have paid into the city treasury taxes upon all property liable therefor, but upon which taxes have not heretofore been paid for any year within the last five, and he may employ such assistance as he may deem necessary in the collection of said taxes and preparation and conduct of any suits to be brought or proceedings instituted, and contract to pay therefor, not exceeding fifteen per cent. of the amount of taxes, penalties, and interest collected and paid into the city treasury, so that the commissions of the city attorney, together with the amount contracted for assistance, shall not exceed twenty-five per cent. of the amount of taxes, interest, and penalties collected and paid into the treasury. No compensation of any kind is to be paid to the city attorney, or the assistant employed by him, except twenty-five per cent. of such amounts as may be collected and paid into the treasury, and only after such amounts are so paid. And the city attorney may, in such cases as the council deems best for him to do so, after reporting to the council and procuring their consent thereto, compromise and settle with any taxpayer upon such just and equitable terms as the council may deem proper." Under the ordinance an assessment was made against the Warren Deposit Bank upon its intangible property, capital stock, and undivided surplus, for the years 1894, 1895, 1896, and 1897, in the sum of \$200,000 for each year. The assessments were approved by the council, and thereupon a suit was brought in the name of the city against the bank by the city attorney and W. B. Gaines, whom he had employed to assist him, to compel the bank to pay the taxes, interest, and penalties. While the action was pending the common council, on April 23, 1900, authorized a compromise of the suit for the sum of \$10,000 in cash to be paid by the bank into the city treasury. The compromise was made and the money paid.

The city attorney had made a contract with Gaines to pay him a fee of 12½ per cent. upon all sums collected and paid into the city treasury. The city declined to pay Gaines the \$1,250, and he brought this suit

against the city to recover therefor, alleging that he had been employed by it. The city denied the allegations of the petition, in so far as it was charged that the city had made any contract with Gaines. It pleaded that the city attorney was without authority to make any contract on its behalf, insisting that the settlement was made through the efforts of the city officials; that it had paid the city attorney \$1,000; and that this was as much as the work done by the attorneys was worth. In a reply the plaintiff alleged that the council had ratified the action of the city attorney in employing him, and had authorized the compromise and received the benefit of his services with full knowledge of the contract he had with the city attorney and the services which he had rendered under it. The allegations of the reply were controverted of record. The proof taken on the trial showed that the city attorney made the contract with Gaines as alleged in his petition, and that Gaines assisted him in the preparation and conduct of the suit, rendering efficient services; the evidence warranting the conclusion that the compromise was the result of the skill with which the claim against the bank was pressed by the city attorney and his associate, Gaines. But there is nothing in the record to show that the council ever ratified the contract which the city attorney made with Gaines, and Gaines' rights, as the record is now presented, must depend upon the validity of the contract. The circuit court, to whom the case was submitted without a jury, made a special finding of fact, to the effect that the contract above referred to was made with Gaines by the city attorney under the ordinance on behalf of the city. From this he deduced the conclusion of law that the contract was binding on the city, and it appeals.

It will be observed that by the ordinance, the city attorney was authorized to employ such assistance as he deemed necessary in the collection of the taxes, the preparation and conduct of any suits instituted by him, and to contract to pay therefor not exceeding 15 per cent. of the amount realized and paid into the city treasury. It is conceded that the council might have employed another attorney to aid the city attorney, and have contracted with him for his compensation, but the question is whether the city is bound on a contract made by the city attorney, he determining whether the assistance was necessary, what attorney he should employ, and what he should be paid. The council is the governing body of the municipality. Ky. St. §§ 3284-3290. The city attorney is the general law officer of the municipality, and it is his duty to attend to all legal business of the city, except prosecutions in the police court. He is paid a salary to be fixed by the council and 10 per cent. upon all sums recovered and collected by him for the city. Ky. St. §§ 3313, 3314.

He has no authority under the statute to make any contract on behalf of the city for other counsel, or to create any liability therefor. So, the only question to be determined is whether the council had the power to delegate to him the authority to make the contract in question.

In *Knight v. Eureka*, 123 Cal. 192, 55 Pac. 768, certain Chinamen brought suit in the Circuit Court of the United States at San Francisco against the city of Eureka to recover damages for the destruction of their property by a mob in the city. The city council, by an ordinance, employed S. M. Buck to take charge of the suits and authorized him "to associate with himself in defense of said action some able attorney and counselor in San Francisco, Cal., if, in his judgment, it becomes necessary. And said S. M. Buck is instructed to conduct said defense as economically as it can be done consistent with vigorous and successful defense thereof." Acting under this authority, Buck employed Knight to assist him in the defense of the actions, and agreed with him that the city of Eureka would pay him the sum of \$5,000 for his services. Buck and Knight successfully defended the actions, and Knight then sued the city to recover his agreed fee. It was held he could not recover. The court said: "Conceding the legality of Mr. Buck's appointment, we think it did not carry with it the authority to appoint an assistant attorney, nor could the council delegate its power to make such an appointment. Practically, the authority here delegated left with the agent of the council the discretion to determine the necessity for employing an assistant, and to fix his compensation. These were powers which, in our opinion, the council alone could exercise, and therefore, could not be delegated. \* \* \* This power to appoint an attorney is one of those incidental powers which of necessity reside in the council in order that its granted powers may be fully exercised, but is one of that class of powers devolved upon the council which in their very nature should be exercised by it, and could not, with safety to the public, whose servants the members of the council are, be conferred upon an agent to exercise. No exigency or emergency is likely to arise where full opportunity would not be given the council to act directly in selecting its own attorney, or his assistant; and there is every reason why the power to do so should be lodged in the governing body itself. We think the true doctrine is correctly stated by Mr. Dillon at section 96: 'The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.' See, also, *Cooley's Constitutional Limitations*, 248."

In *Huron v. Campbell*, 3 S. D. 309, 53 N. W. 182, the council authorized the city at-

torney to appoint as many assistant attorneys as the mayor of the city deemed necessary to protect and defend certain suits. The ordinance was held invalid, although the council had authority to employ a city attorney, or an assistant city attorney, and fix his compensation. Among other things, the court said: "In fixing this compensation (i. e., of the city attorney), the city council must exercise its judgment upon that particular question; and, in determining the necessity for an assistant or assistants, the city council must equally exercise its judgment as to the necessity for an assistant or assistants, and the compensation to be allowed him or them."

In *East St. Louis v. Thomas*, 11 Ill. App. 283, the mayor of the city had employed an attorney, agreeing to pay him a fee to attend to certain tax cases in behalf of the city. In holding that the city was not liable, the court said: "The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot be delegated, neither can they be bartered nor bargained away. *Dillon's Municipal Corporations*, §§ 96, 97. Another and very important limitation which rests upon municipal corporations is that they shall be executed by the municipality itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, they rest in the discretion and judgment of the municipal body entrusted to them, and that body cannot refer the exercise of the power to the judgment of its subordinates, or of any other person."

In *Tampa v. Solomonson*, 35 Fla. 446, 17 South. 581, the city council appointed four ministerial agents by ordinance, and authorized them to appoint a fifth. It was held that while the city itself could appoint these agents it could not appoint four and vest in them the power to select a fifth agent. To same effect see *Ridgeway v. Michellon*, 42 N. J. Law, 405. These cases are in accord with the principle everywhere upheld that while ministerial functions may be delegated, powers that involve discretion and judgment on the part of the city council cannot be delegated.

It is insisted that the case at bar does not come within the principle for the reason that the maximum the city attorney was to pay his assistant was fixed by the ordinance at 15 per cent. of the amount collected; but the rule is not that discretionary powers may be delegated with restrictions or partly delegated. The rule is that they cannot be delegated at all. The city attorney was left here to determine whether assistance was necessary and, if necessary, whom he should employ and what he should pay him, within the maximum fixed by the ordinance. If

the council had exercised its own discretion, it might have concluded that no assistance was necessary, or it might have preferred to employ another attorney at the same price for the better protection of the interests of the city, or it might have fixed a lower price than that fixed by the city attorney. The city attorney under the ordinance was left to discharge all the duties pertaining to the council in this matter, with the single exception that he could not go beyond a certain per cent. To illustrate: If the council had adopted an ordinance authorizing the mayor to buy land for a city hall, the price not to exceed \$10,000, would it be contended that the city would be bound upon the mayor's contract when the council exercised no discretion in determining what land should be bought, or how much or what should be paid for the piece of property that was bought? In committing the fiscal affairs of the city to the council, the Legislature had in mind that the common judgment of a number of men on a matter involving discretion is usually, one time after another, safer than the judgment of one man; that it is less likely to be influenced by prejudice, and will usually be more intelligent when the conclusion is reached after the different members have discussed the matter and brought to bear their different experiences and observations. This wise purpose of the law would be entirely frustrated if the governing body of the municipality might, by ordinance, abdicate its discretionary functions and delegate them to some agent of its own choosing. The council are elected by the people to have charge of the financial affairs of the city, and public policy does not permit the discretionary duties, which the law has placed upon them for the benefit of the public, to be delegated to others.

We therefore conclude that the circuit court's finding of facts is not sufficient to sustain a judgment against the city. As no evidence was offered on the question of ratification, that question is not now before us, and no opinion is expressed thereon.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

#### FLETCHER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

#### 1. CRIMINAL LAW—APPEAL—CHANGE OF VENUE—DENIAL—DISCRETION—REVIEW.

The denial of accused's motion for a change of venue for prejudice of the inhabitants will not be reviewed on appeal unless a clear showing of abuse of the trial court's discretion appears.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3044.]

#### 2. SAME—SUBSEQUENT APPLICATION.

The overruling of a motion for a change of venue is interlocutory only, and is subject to the control of the court at a subsequent term, so that, if events occurring after the hearing

of the motion warrant the granting of a change, the court may in its discretion set aside an order denying the motion and grant the application, notwithstanding Ky. St. 1903, § 1118, providing that no more than one change of venue or application therefor shall be allowed to any person or the commonwealth in the same case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 254.]

#### 3. SAME—APPEAL—INDICTMENT—MOTION TO QUASH—REVIEW.

Under the express provisions of Cr. Code Prac. § 281, the overruling of a motion to quash an indictment is not reviewable on appeal.

#### 4. GRAND JURY—WITNESSES—EXAMINATION—INTERPRETERS.

Where, in a prosecution for rape, both prosecutrix and her father were unable to speak English, and the jury did not understand their tongue, it was proper for the court to swear an interpreter and allow him to remain in the grand jury room while such witnesses were testifying and to give their testimony through such interpreter.

#### 5. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

In a prosecution for rape, books and papers belonging to one of the parties accused found on the ground after the commission of the offense were admissible as *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 793.]

Appeal from Circuit Court, Logan County.  
"To be officially reported."

W. R. Fletcher was convicted of rape, and he appeals. Affirmed.

Sims & Grider and S. R. Crewdson, for appellant. John S. Rhea, Browder & Browder, N. B. Hays, and C. H. Morris, for the Commonwealth.

HOBSON, C. J. In May, 1905, Vincent Gladder, with his daughter, Mary Gladder, left Mitchell, Tenn., with the intention of walking to Hopkinsville, and there taking the train to Milwaukee. Neither one of them could speak English. When they reached Russellville, they misunderstood the direction, not being able to speak English, and took the Greenville road. After going four or five miles from Russellville, they stopped and camped by the side of the road. Vincent Gladder and his daughter had come to this country from Austria in the month of September, 1904. He had been at Chicago, St. Louis, Little Rock, Chattanooga, and Mitchell, Tenn. He was a blacksmith by trade, but could not do much on account of being unable to speak or understand English. He was between 50 and 60 years of age, and had spent all the money he had when he reached this country, except something over \$50. After they had stopped on the side and camped John Sacra and Jim Lyon came along the road and stopped. Mary Gladder was a stout girl 23 years of age. They were drinking, and offered Gladder and his daughter whisky. After staying a while they went on to the house of Jim Lyon. After supper Sacra went for W. R. Fletcher; Guy Lyon already being at Jim Lyon's house. Sacra was heard to say to Fletcher, "I want you to go with me to see a woman to-night."

Fletcher said, "All right." Fletcher had been to Russellville that day, and had come home in the evening intoxicated. The four went from Jim Lyon's house to where Gladder and his daughter were camping. As they went along they passed Woodson Mayhew and Frank Head, who were watching a tobacco bed to prevent the plants being stolen. Both Fletcher and Sacra took a pistol with them from Fletcher's place. As they went along one of them shot off his pistol; and another halloed, "Let her go, Bill." One of them asked, "Where are they at?" Another of the party answered they were camped at the pond. Hearing this, Head and Mayhew followed them at a distance. When they reached the place where Gladder and his daughter were, they built up the fire. After they had done this, and drunk whisky around, one of them made a motion to somebody who was not in sight of Head and Mayhew, and then Vincent Gladder joined the circle at the fire, and the girl also. They offered Gladder and his daughter whisky, and also offered her money, which she refused. While they were standing there by the fire a man passed by in a buggy, but did not stop, paying no attention to what was going on, and only seeing the parties standing around the fire. Soon after this Sacra and Guy Lyon seized the girl and were dragging her off from the fire, when her father interposed. Fletcher and Jim Lyon thereupon presented a pistol at him, and forced him to stand still. They had been waving and shooting off their pistols around the fire. After Guy Lyon and Sacra had dragged the girl off into the bushes Head and Mayhew came up to the fire, and Head went on to where Sacra and Guy Lyon had the girl down. Guy Lyon was holding the girl, while Sacra was getting upon her person to ravish her, and she was struggling and crying. Head remonstrated with them, and one of them pointed a pistol at him. Finding that they could do nothing, Head and Mayhew left. After they left the girl was ravished in turn by each of the four. Head and Mayhew toward morning got some of their neighbors to come with them, and returned to the scene. All the parties had then left. They found at the fire some articles of woman's attire, also a valise near by, and at the place where the girl was ravished the ground was torn up, showing signs of a struggle. There they found a memorandum book and some papers belonging to Guy Lyon, also the top of a razor case. The girl and her father, wandering around in the dark, finally early in the morning made their way to Russellville, and warrants were issued for the arrest of the four. We have omitted the sickening details of the outrage, and have only given a brief statement of the occurrence.

The circuit court was in session. The defendants were indicted and arrested that day, and were sent for safekeeping by way of Franklin to Bowling Green. On May 25th

the cases were set for trial on the 31st. On the 31st the defendants entered a motion for a change of venue, which was overruled. They also entered a motion for a continuance. This motion was sustained, and the case was continued. At a special term held in July they entered a motion to quash the indictment. This motion was overruled. Sacra was tried at that term, but Fletcher was not tried until a special term held in August. He was then tried by a jury from Todd county, which failed to agree. At the September term he was tried again by a jury from Simpson county, which found him guilty as charged, and fixed his punishment at death. Fletcher on the trial testified that while they were standing around the fire Sacra was talking privately to the girl for awhile, and finally she and Sacra went off into the bushes together voluntarily, and that he soon after this went home. On the other hand, he stated to a number of persons when the thing happened and for some time afterwards that he was at Jim Lyon's all night, and was not up on the road at all. The girl's hands were bruised. There were bruises on her face and neck. She walked unnaturally, or with a shuffle. The ground also confirmed most pathetically the story told by her, her father, by Head, and by Mayhew.

It is insisted that the court erred in refusing to change the venue, in refusing to quash the indictment, in admitting evidence, and in instructing the jury. The rule is that this court will not disturb the conclusion of the circuit judge in refusing a change of venue unless he has abused his discretion under the evidence. The evidence heard by the circuit judge was very conflicting. It showed that there was considerable feeling in Russellville and in that part of the county against the crime, but there was no disposition to assume that the defendants were guilty. They were at home among their neighbors, friends, and acquaintances. Gladder and his daughters were but tramps passing through the county. They were without power or influence. The weight of the evidence heard by the circuit court tended to show that the people of the county, though at first considerably excited, had settled down to the conclusion that the law should take its course, and that there was a large per cent. of the county who had heard nothing of the facts of the case, and had no opinion about it. At the term at which he was tried the defendant filed a second motion for a change of venue, based upon the fact that in July a mob had broken into the jail and shot at Sacra as he fled from the jail, also upon the further fact that, when the jury failed to agree in August on his trial, the 11 who favored conviction were made much of by certain citizens of Russellville, while the one who had caused the jury to hang was treated slightly. Section 1118, Ky. St. 1903, pro-



vides that "not more than one change of venue or application therefor shall be allowed to any person or the commonwealth in the same case." But the order overruling a motion for a change of venue is only interlocutory, and is subject to the control of the court at a subsequent term. If events happening since the hearing of the motion in the judgment of the court are sufficient to show that a change of venue should be granted, he may in his discretion set aside the order overruling the motion and sustain the application. It is a matter addressed to the sound discretion of the court, and his discretion will not be reviewed in such a matter unless abused. In the case at bar the defendant was tried at the subsequent term by a jury from another county. The court, to secure the appellant in a fair trial, not only continued the case until the excitement had died down, but he summoned a jury first from Todd and then from Simpson county; the final trial not being had for something like five months after the crime was committed. We see no possible reason for concluding that a jury brought from a distant county, and not permitted to separate or speak to any one after they were sworn, would not give the defendant as fair a trial at Russellville, where he could conveniently produce all of his witnesses, as anywhere in the state.

Under the Criminal Code of Practice, § 281, we have no power to review the action of the circuit court in overruling the motion to quash the indictment, but we deem it proper to say that as neither Mary Gladder nor her father could speak English, and the grand jury did not understand German, the court did right in swearing an interpreter, and allowing him to remain in the grand jury room while they were testifying. There would be no other possible way of getting their testimony to the grand jury. The interpreter was a mere conduit by which the testimony of the witnesses was conveyed to the grand jury. Where the witness is dumb, or for any reason cannot communicate directly to the grand jury, another person may be used under oath to express to the grand jury what the witness testifies. 1 Greenleaf on Evidence, § 439d-e; Bishop's New Criminal Procedure, § 861; Criminal Code of Practice, § 158. There is no evidence in the record that the grand jury received any evidence except that which was sworn to before them.

The evidence as to the books and papers found on the ground was competent. Whatever the scene of the transaction showed might be proved as *res gestæ*. The court did not abuse a sound discretion in his rulings on the questions allowed to be asked Vincent and Mary Gladder. The instructions were very few and simple. They correctly set out the law of the case. Upon the whole case, we do not see that any substantial right of appellant was prejudiced.

Judgment affirmed.

## LYON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 17, 1906.)

### 1. CRIMINAL LAW—CHANGE OF VENUE—DENIAL—APPEAL—REVIEW.

The denial of a change of venue in a criminal case will not be reversed on appeal, unless it appears that the trial judge abused his discretion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3044.]

### 2. GRAND JURY—PROCEEDINGS—SECRECY—PRESENCE OF THIRD PERSON.

Cr. Code Prac. § 110, providing that no person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge, and no person whatever while they are deliberating or voting on a charge, does not prohibit the admission of an interpreter before the grand jury for the examination of witnesses, whose evidence could not be otherwise made intelligible to the grand jury.

### 3. CRIMINAL LAW—EVIDENCE—BOOKS AND PAPERS.

In a prosecution for rape, books and papers found at the scene of the crime, and admitted by defendant to belong to him, were properly admitted against him.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 793.]

### 4. SAME—STATEMENTS OF CODEFENDANTS.

Statements of other parties to the crime made in defendant's presence at a time and under such circumstances as would naturally call for a response from him were admissible against him.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 898, 899.]

Appeal from Circuit Court, Logan County.

"Not to be officially reported."

Guy Lyon was convicted of rape, and he appeals. Affirmed.

Geo. S. Hardy, for appellant. R. Y. Thomas, John S. Rhea, and J. C. Browder, for the Commonwealth.

NUNN, J. On the night of the 22d of May, 1905, Vincent Gladder and his daughter, Mary Gladder, were camping near the roadside in Logan county, Ky., some five miles from the town of Russellville. About the hour of 8 o'clock that night the appellant, Guy Lyon, together with John Sacra, Jim Lyon, and W. R. Fletcher (all of whom were drunk, and two, Fletcher and Sacra, armed with pistols), appeared at the camp, and there ravished the daughter, Mary Gladder. Many of the facts connected with the commission of this heinous offense, as disclosed by the record, are of so low and bestial a nature as to forbid reciting in this opinion. It is sufficient to say that a general statement of the events which led up to the indictment herein is to be found in the opinion delivered for the court by Chief Justice Hobson in the case of *W. R. Fletcher v. Commonwealth* (decided October 16, 1906) 96 S. W. 835. The appellant was tried on the 16th day of October, 1905, and found guilty; his punishment being fixed at death.

Upon appeal it is insisted that the court erred in refusing to change the venue, in refusing to quash the indictment, in the

admission of evidence, and in the instructions given to the jury. This court will not reverse a case unless it appears that the trial judge abused his discretion in overruling a motion for a change of venue. The appellant, together with the other defendants, at a called term in July made a motion for a change of venue, and filed the required affidavit. This the commonwealth resisted, and many witnesses were heard on the motion, which the court finally overruled. The evidence was about equally divided. It was shown that the appellant and the other defendant were residents of the county in which the trial was held. Their relatives and friends resided there. The woman ravished and her father were strangers in the community, and entirely unknown in that county. It is true the testimony discloses the fact that the people in and around Russellville were greatly wrought up, as was natural in the presence of such a crime. The appellant, however, was not tried at the special term held in the month of July, but at the regular term beginning in September following, at which time the passion and excitement aroused in the community as a result of the crime in question had subsided to some extent; and there is no evidence in the record tending to show that any unusual excitement prevailed during his trial. The jury which tried the accused was composed of citizens of the county of Warren. They were not permitted to separate or speak to any one after being sworn, and we are unwilling to say that appellant did not have a fair and impartial trial at their hands. At the regular term at which he was tried, appellant renewed his motion for a change of venue, setting forth additional facts which had occurred since his original motion was made. This the court also overruled. We concur in the court's action for the reason stated, and for the additional reasons given in the opinion in the case of *W. R. Fletcher v. Commonwealth*, referred to above.

The grounds upon which appellant sought to quash the indictment were that there was another person in the room when the grand jury heard the evidence upon which the indictment was found. Section 110 of the Criminal Code of Practice is as follows: "No person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge; and no person whatever while they are deliberating or voting on a charge." It appears that Mary Gladder and her father did not understand or speak English. They could only speak the German language. The grand jurors, on the other hand, could only speak the English language, and therefore were unable to understand the witnesses. The only means, then, of procuring their evidence for the grand jury was through an interpreter.

This method was adopted, and an interpreter obtained, who was sworn and admitted to the grand jury room when each of the witnesses, Mary Gladder and her father, were introduced. The questions that were asked and the answers given he translated for the enlightenment of the jurors. The witnesses were examined separately, and the interpreter was only in the room when they testified. He was not present when the grand jury acted upon the indictment. If a literal construction is to be given section 110, it would defeat the ends of justice. For instance, it would prevent the indictment of one who (as in this case) had committed a crime against a person who did not understand the English language, or the language understood by the jurors, or where the victim was deaf and dumb and unable to read or write, and others that might be mentioned. In such cases of necessity there must be an interpreter; and in our opinion it requires the interpreter and the person against whom the crime is committed to constitute a witness. Without both there can be no witness. But, if we are mistaken in this, we have no power to review the action of the court under discussion. By subsection 2 of section 158 of the Criminal Code of Practice, which defines the grounds for setting aside an indictment, it is provided "that some person, other than the grand jurors, was present before the grand jury when they acted upon the indictment." It was shown without contradiction in the case at bar that the interpreter was not present when the grand jury acted upon the indictment.

There was no error in the admission of evidence prejudicial to the rights of the accused. The books and papers found at the place where the crime was committed were admitted by appellant to belong to him. No statements of the other parties to the crime were admitted except those made in his presence, at a time and under such circumstances as would naturally call for a response from him.

A careful examination of the instructions shows that they contain all the law governing the case, and were as favorable to the appellant as he could reasonably have asked.

For these reasons, the judgment of the lower court is affirmed.

#### SACRA v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

##### 1. CRIMINAL LAW—CONTINUANCE—INABILITY OF ACCUSED TO PROCEED—MOB VIOLENCE.

Accused, with others, were indicted for rape on May 23d, the day after the crime was charged to have been committed, and on that day were taken to another place for safe-keeping. On May 31st the cases were called for trial, and accused moved for a change of venue for prejudice of the inhabitants, which was denied, but a continuance was granted until July.

A jury having been obtained, the court adjourned for Independence Day, when the jail where accused was incarcerated was entered by a mob. Accused fled in the darkness, but while in the jail yard he was shot in the face with a shotgun, inflicting slight injuries and later was shot by a squad of police with a pistol, the bullet passing through the trunk near the hip. Accused was brought into court on a stretcher on the 6th, when he asked for a continuance because of his inability to proceed, which was denied. *Held*, that the denial of such application was erroneous, and entitled accused to a new trial.

## 2. SAME—ACQUITTAL.

The granting of a motion on behalf of accused to discharge the jury and continue the case, because of his physical inability to proceed, does not operate as an acquittal.

Settle, J., dissenting.

Appeal from Circuit Court, Logan County.

"To be officially reported."

J. H. Sacra was convicted of rape, and he appeals. Reversed.

Geo. S. Hardy, Sims & Grider, and S. R. Crowdsou, for appellant. Browder & Browder, Jno. S. Rhea, N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

**HOBSON, C. J.** John H. Sacra, being indicted jointly with W. R. Fletcher, Gray Lyon, and Jim Lyon for the crime of rape upon the person of Mary Gladder, was found guilty as charged, and his punishment fixed at death. The facts out of which the prosecution grew are stated in the opinion this day delivered in the case of W. R. Fletcher v. Commonwealth, 96 S. W. 855. All the questions raised on the appeal of Sacra are the same as those raised in the Fletcher case, except one. The defendants were indicted on May 23d, which was the day after the crime was charged to have been committed. They were on that day taken to Bowling Green for safe-keeping, and were kept there from that time, except when brought to Russellville to answer the charge against them. On the 31st of May the cases were called for trial. The defendants' motion for a change of venue being overruled, a continuance on their motion was granted. A special term was held, beginning early in July. Sacra was placed on trial. A jury was obtained from Logan county and part of the evidence heard, when the court adjourned on July 4th for the day. The commonwealth had not completed its testimony, but a good deal of the commonwealth's testimony had been given. The court made an order that the defendants be taken back to Bowling Green that night for safe-keeping. They were to leave on the train which left Russellville at 9:15 p. m. Before that hour arrived a mob of men forcibly entered the jail. There were at that time no lights in the jail except a lantern carried by the leader of the mob. In hunting around the jail for the defendants, the leader of the mob fell through a trapdoor. The lantern was broken, and the light went out. In the darkness Sacra fled from the jail, but while in the

jail yard he was recognized by a member of the mob, who fired on him with a double barreled shotgun, loaded with large shot. One shot struck him in the right face, about an inch and a half below the eye, the ball passing about an inch and a half through the flesh, and making its exit near the nose. One entered near the angle of the jaw, and did not come out. A third grazed his ear, making a little abrasion on the tip of his ear. Sacra fled from the mob, and, as he fled, met a squad of police officers coming to the rescue of the jail. One of them, thinking that Sacra was fleeing from justice, fired on him with a pistol, which struck him near the hip bone and made its exit in front. He was then taken in charge by the officers, and taken to Bowling Green. There were no proceedings taken in the case the next day, but on the 6th Sacra was brought back from Bowling Green, and the trial was resumed. He filed an affidavit stating that he was physically unable to go on with the trial, and that by reason of the excitement produced by the act of the mob it would be impossible for him to have a fair trial at that term before the jury which had been impaneled. Proof was heard by the court on the question, and at the conclusion of the evidence offered on the motion the court overruled it. The defendant was then brought into court on a cot, he not being able to sit or stand, and the trial was resumed.

The ground upon which the circuit court overruled the motion to discharge the jury and continue the case upon the motion of the defendant was that he was not satisfied there was in fact any necessity for so doing, and that, if the jury were discharged when it was not necessary, the discharge of the jury would operate as an acquittal of the defendant. This is not sound. Where a jury is discharged after the trial is begun upon the motion of the defendant, he may be again placed on trial before another jury. The rule that the jury may not be discharged only applies where the defendant objects to the discharge of the jury. Where he asks that it be discharged, a different rule applies.

In 1 Bishop on Criminal Law, the rule is thus stated:

"Sec. 995. It is a doctrine to which there are few exceptions that a party in a cause may waive any right which the law has given him, even a constitutional one.

"Sec. 996. This right of waiver comes from the principle of natural justice that one should not complain of that to which he consented."

"Sec. 998. \* \* \* If, during a trial, the jury is discharged with the prisoner's concurrence, this consent thereto is his implied waiver of any objection to being tried anew, and he may be so tried. So his consent to the discharge may appear as well from implication as from express words."

The same rule is laid down in Cooley on Constitutional Limitations in these words

(page 468): "If, however, the court had no jurisdiction of the cause, or if the indictment was so far defective that no valid judgment could be rendered upon it, or if, by any overruling necessity, the jury are discharged without a verdict, which might happen from the sickness or death of the judge holding the court, or of a juror, or the inability of the jury to agree upon a verdict after reasonable time for deliberation and effort, or if the term of the court as fixed by law comes to an end before the trial is finished, or if the jury are discharged with the consent of the defendant, express or implied, or if, after verdict against the accused, it has been set aside on his motion for a new trial, or on a writ of error, or the judgment thereon been arrested—in any of these cases the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection." The entire current of modern authority sustains the above statement of the law.

While there is some conflict in the evidence as to the extent to which Sacra's wounds disabled him, there is no dispute that he had a gunshot wound through his thigh, the ball going in on one side of the thigh and coming out on the other, and that he was also wounded in two places in the face. It is also undisputed that he had required the careful attention of physicians while in Bowling Green and the physicians who had charge of him there and had best opportunity to know his condition testified that he was in no condition to go on with the trial. A man on trial for his life should not be compelled to try when there is doubt about his ability to properly conduct his defense, especially where this disability is produced by armed violence pending the trial. Not only so, but there had been considerable excitement at Russellville when the indictment was first found. The prisoners had been sent away for safe-keeping. To guard against a mob they had not been taken on the train in the usual way, but had been driven across the country to Franklin. And while this excitement had died down to some extent before the trial began in July, when the mob broke into the jail and attempted to kill the prisoner, it is manifest that a very unusual condition of things existed. It is said there is no proof that the jury knew anything about all this, but they were from that county. When the defendant was brought into court on a cot, they could not fail to see that something had happened. They could see the wounds about his face. They could see that he was not able to sit up; and it is incredible that the jury did not revolve in their own minds the cause of all this and understand the situation. It was only about six weeks after the crime was charged to have been committed, and in view of the proof in the record as to the excitement prevailing in the community at that time the

defendant had little show for a fair trial where a mob broke into the jail pending the trial, endeavoring to take his life.

It is said that the defendant is manifestly guilty, and that he was not prejudiced by all this. But he is entitled to a fair trial to determine whether he is guilty and what punishment he shall receive. If he may be properly punished under the mere form of a trial because he is guilty, then why go through the form which has no substance in it? The crime of rape is punishable by confinement in the penitentiary for not less than 10 nor more than 20 years, or by death, in the discretion of the jury. It is important to the defendant to have a fair jury left free to form its own conclusions in fixing the punishment, although he may not be guilty. When this mob was trying to take the defendant's life, almost in the presence of the court, he had small chance before the jury to have a fair and impartial trial. In view of the condition of the defendant, the action of the mob, and all the surroundings of the trial, we conclude that a new trial should be granted. It may be unfortunate that the administration of justice should be hindered by a mob under such circumstances. The mob is a relic of barbarism. Lynch law is simply the code of the savage. Civilized society rest upon the basis of law. It is the duty of every self-respecting man not only to obey the law, but to see that all others respect it. People who go into mobs are often inconsiderate, but they are oftener persons who have no respect for law. There is no safety for life or property unless the orderly processes of the law may be followed, and no court can safely undertake to administer justice where the law is not respected and a mob is undertaking to take the administration of justice out of the hands of the officers of the law.

Judgment reversed, and cause remanded for a new trial.

SETTLE, J., being of opinion that on the whole record the judgment should not be reversed, dissents.

#### CROCKETT'S GUARDIAN et al. v. WALLER et al.

(Court of Appeals of Kentucky. Oct. 18, 1906.)

#### 1. MORTGAGES—CONTRADICTION OF ABSOLUTE DEED—PAROL EVIDENCE—ADMISSIBILITY.

In the absence of an allegation of fraud or mistake, parol evidence is inadmissible to show that a deed conveying absolute title was to operate as a mortgage.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mortgages, §§ 98-101.]

#### 2. SAME.

A purchaser from a master commissioner executed bonds for the purchase money, with a third person as surety, and an assignment of his purchase to the third person, in consideration of the third person having become surety, and for the further consideration that he had agreed to pay the bonds. Held that, as the assignment

did not embrace the entire agreement between the purchaser and the third person, parol evidence was admissible to show that the instrument was not an absolute conveyance of the purchaser's right, but was made for the purpose of protecting the surety.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 98; vol. 20, Cent. Dig. Evidence, §§ 1874-1899.]

**8. SAME — JUDGMENT ADJUDGING ABSOLUTE CONVEYANCE A MORTGAGE—SUFFICIENCY.**

A judgment adjudging that an instrument was not an absolute conveyance, but was executed for the purpose of security only, and directing a conveyance on the payment being made, for which the instrument was executed as security, is not defective for failing to fix the time for the payment, the court having control of the case, and being in a position to enforce the payment and protect the rights of the parties.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1855, 1861.]

Appeal from Circuit Court, Woodford County.

"Not to be officially reported."

Action by Rice Waller and others against Lettie Crockett's guardian and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Will D. Jesse, for appellants. D. T. Edwards, for appellees.

CARROLL, C. In December, 1902, in obedience to an order of the Woodford circuit court, the master commissioner sold a tract of land for \$702.50, when Rice Waller became the purchaser and executed two bonds for equal amounts of the purchase money, due in 6 and 12 months, with James S. Hawkins as surety. In June, 1903, Waller executed the following assignment of his bid to Hawkins: "Whereas, in the above-styled cause the undersigned Rice Waller became the purchaser of the first tract of land sold under the order of court in said cause, a full description of which may be found in the commissioner's report of sale herein, and executed his two several bonds to the master commissioner L. A. Nuckles for \$351.25 each, due respectively June 22, 1903, and December 23, 1903, with interest thereon from December, 1902, until paid, at the rate of six per cent. per annum; and whereas, J. S. Hawkins became the surety on the said two bonds, and for the further consideration that the said Hawkins hereby assumes and agrees and does bind herself to pay the said two bonds of said Waller, with interest at maturity, the said Waller hereby assigns to the said J. S. Hawkins his said bid and purchase, and all rights acquired thereunder, and requests the court through its master commissioner to convey said lots of land sold under the order herein and purchased by him as aforesaid, and which is described by metes and bounds in the judgment and master commissioner's report to the said Hawkins upon the payment by him of said bonds with interest. [Signed] Rice Waller." This writing was filed by Hawkins in the case, and, when

the first bond fell due, Hawkins paid the same, and, he having died in 1903, his executrix paid the other bond. No deed was made conveying the land to Hawkins. This action was filed by Waller against the heirs of Hawkins, alleging that it was agreed by and between Waller and Hawkins that the contract should operate only as security to Hawkins for the repayment to him of whatever amount he might be required to pay as surety on the bond; and that, upon repayment to Hawkins by Waller of any sum so paid, the agreement was to be canceled and the land conveyed to Waller, and that Hawkins only had a lien on the land to secure the amounts paid by him. The widow and executrix of Hawkins filed an answer, in which she assented that the relief asked by Waller might be granted, but the appellants, infant heirs of Hawkins, by their guardian ad litem, resisted the petition, and denied that Waller was entitled to the relief sought. Upon hearing the case, the chancellor adjudged that Waller was entitled to a conveyance of the land by the master commissioner upon the payment to the estate of Hawkins of the sums paid by Hawkins with interest thereon, and the infants appeal.

The appellee took in his behalf the depositions of L. A. Nuckles, the master commissioner, and H. A. Shobert, the attorney who wrote the agreement. They testified in substance that, on the day the agreement was executed, Mr. Hawkins told them that he would have to pay the bonds, and he was going to have Waller assign the bid to him to protect himself, as surety, and that, if Waller paid back the money, he would reassign the bid or convey the land to Waller if a conveyance had been made to him; that the writing assigning the bid was only partial evidence of their arrangement and did not contain the agreement in its entirety; and that the assignment was made solely for protection, as it was not their intention to actually transfer the purchase from Waller to Hawkins. The guardian ad litem insists for appellants that, as there is no allegation of fraud or mistake in the agreement, its terms cannot be contradicted or affected by a contemporaneous parol agreement, and that parol testimony is not admissible in the absence of allegation of fraud or mistake to vary the terms of a written contract. In *Munford v. Green's Adm'r*, 103 Ky. 140, 44 S. W. 419, this court, after reviewing very fully the authorities, held that, in the absence of an allegation of fraud or mistake, parol evidence was inadmissible to show that a deed conveying absolute title was to operate as a mortgage, and we adhere to the doctrine laid down in that case; but, in our opinion, it is not applicable to the facts here presented. There is no effort to contradict the agreement made between the parties. The evidence of Nuck-

les and Shobert is not at all in conflict with the writing, but is simply explanatory of its meaning. The writing merely provides that Hawkins, the surety, is to pay the bonds, and Waller assigns to him his purchase; and the evidence introduced by Waller discloses the purpose for which the assignment was made. It was not necessary to allege, nor in fact under the evidence could it have been alleged, that there was any fraud or mistake in the writing, because there was neither. The writing, so far as it went, embraced the contract between the parties, but not the whole of it. In *Munford v. Green's Adm'r*, supra, the entire contract was reduced to writing, the deed was a complete instrument, and it conveyed the absolute title. The agreement in this case was merely a direction to the commissioner to convey the title, and did not place Hawkins, so far as security was concerned, in any better position than he would have been if the agreement had not been made, as, if the bonds had been paid by him, he would have been substituted to the lien given in the judgment directing a sale of the land, and could have subjected it to the payment of his debt. In *Blackerby v. Continental Ins. Co.*, 83 Ky. 574, this court said: "It is true parol testimony is inadmissible to vary or contradict the terms of a written contract, but this rule does not apply where the original contract was verbal and entire, and only a part of it has been reduced to writing. For instance, it may be shown by parol when a written promise without date was made." The written contract in this case not embracing the entire agreement between the parties, it was competent to show by parol evidence the entire contract, a part only of which had been reduced to writing, and this evidence leaves no doubt of the intention of the parties, and that appellee, upon the repayment to Hawkins of the money paid by him, was entitled to the land.

The judgment directed that the commissioner execute a deed to the land to the vendee of Waller—the deed not to be delivered until Hawkins was paid—and it is insisted for appellants, as there is no time fixed in the judgment for the payment of the money by Waller, that it was erroneous in this respect. The court, however, has control of the case, and the custody of the deed, and can enforce the payment of the money and fully protect the rights of Hawkin's heirs.

The judgment of the lower court is affirmed.

#### OTTER v. BARBER ASPHALT PAVING CO. (two cases).

(Court of Appeals of Kentucky. Oct. 18, 1906.)

##### 1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—CONTRACTS—PERFORMANCE.

Where an ordinance and contract for a street improvement called for a carriageway 50 feet in width and curbing 6 inches in width, the

driveway was properly made 50 feet excluding the curbing, especially where such construction appeared to have been the custom of the city engineer.

##### 2. SAME — ASSESSMENTS — APPORTIONMENT OF EXPENSES—BENEFIT TO PROPERTY.

The owner of a lot may be compelled to pay his share of the cost of a street improvement, though he receives no particular benefit, unless the cost is equal or greater than the value of the property.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1071.]

##### 3. SAME—ACTION TO ENFORCE ASSESSMENT—EVIDENCE — WEIGHT AND SUFFICIENCY — VALUE OF PROPERTY.

In an action to enforce an assessment for a street improvement, wherein defendant claimed that the cost exceeded the value of the property, the fact that the property brought on sale to enforce the assessment only the debt and costs did not conclusively show its value at that sum.

##### 4. SAME.

In an action to enforce an assessment for a street improvement, defended on the ground that the improvement was of no benefit and that the ordinance and contract were not complied with, the fact that defendant owned other property, behind the property involved, and had no other outlet for such property except over that involved, could not enter into the consideration of the questions raised.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by the Barber Asphalt Paving Company against R. H. Otter to enforce a lien for a street improvement. From an order confirming a report of sale, and from a judgment for plaintiff, defendant appeals. Affirmed.

Ernest Macpherson and Lane & Harrison, for appellant. Wm. Furlong, for appellee.

LASSING, J. This is an appeal from a judgment of the Jefferson chancery court enforcing a street improvement claim against the property of appellant, situated on West Broadway, in Louisville. Some years ago appellant became the owner of a tract of land containing 11¼ acres, lying between the city of Louisville and the Ohio river, and fronting on the old Dunkirk Road. After appellant had acquired this property the limits of the city were extended, and the property fronting on this road was taken into the city, or annexed. Later, by a proper ordinance, the city ordered the improvement of the old Dunkirk Road, and authorized the construction of an asphalt roadway from Thirty-Sixth street to the Ohio river, and appellant's ground, fronting 500 feet on said road and running back 200 feet from said road, was assessed its proportion of the cost of said improvement. Appellant refused to pay his assessment, and the contractor, the Barber Asphalt Paving Company, sued to enforce its lien. Appellant defended on several grounds, but two of which will be considered, as these only were urged during the trial: (1) That in making the assessment the charter provision as to curbing was disregarded; (2) that

the property was not benefited by the improvement, and that it was not worth as much after the improvement was made as the cost of the improvement, and amounted to confiscation. Proof was heard upon the question of value, and the court found the property sought to be subjected was of greater value than the cost of the improvement assessed against it, and that the cost of the curbing was by the ordinance made a part of the cost of the construction of the street or carriageway, and adjudged the assessment regular. The court found that the property could be divided to advantage, and ordered it divided into parcels, and sold to satisfy the debt and cost. At the sale there was no bid on the property, except that of the appellee company, and it became the purchaser thereof for the debt and cost. Appellant excepted to the report of sale, his exception was overruled, and the sale confirmed. Appellant appeals from the judgment, and also from the order confirming the report of sale.

We will consider the question of curbing first. The ordinance directed and the contract provided that the carriageway or roadway should be 50 feet in width and should be improved by grading, curbing, and paving with asphalt paving. An analysis of this ordinance shows that the carriageway or driveway must be 50 feet in width; that it must be graded and improved by curbing and then paved with asphalt pavement. If the curbing, which is 6 inches in width on each side of the driveway, is to be considered a part of the driveway, then the driveway proper would be but 49 feet in width. It will hardly be contended that the ordinance was intended to convey this idea, for, if it had, it should have read that the driveway, including the curbing, must be 50 feet in width. The curbing is not a part of the driveway, but its purpose is to support the driveway and hold the macadam or other material of which the driveway is constructed in place, and, where the ordinance provides that the driveway shall be 50 feet in width, it means 50 feet between the curbing, and not 50 feet including the curbing, as appellant would have it read. Prior to 1898, the cost of the curbing was taxed as part of the cost of the sidewalk, and not a part of the cost of the driveway, and this frequently worked a hardship on the owners of corner lots, as the cost of the sidewalk was charged against the front foot, and to relieve the owners of abutting property of this inequitable burden the Legislature of 1898 passed an act providing that "the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the cost of the sidewalk." Acts 1898, p. 121, c. 48. This act was intended to and did make provision for the payment of the cost of the curbing, by saying that it should be paid for in the same manner as the cost of the

carriageway is paid for; that is, that the cost of the curbing which supports the carriageway should be taxed against the same property for which the cost of the carriageway is taxed. Aside from the fact that a fair and reasonable construction of the wording of the ordinance and contract requires that the carriageway be made 50 feet between the curbing, it is shown to have been the custom of the city engineer to require all driveways to be constructed the full width called for in the specifications and ordinances, exclusive of the curbing; hence, in the absence of any other rule or guide to enable us to arrive at the fair and reasonable intent of the makers of the ordinance, the invariable construction that had heretofore been placed upon ordinances of this character by the city engineer, and others of its officers having in charge the construction of its driveways and streets, would be a most persuasive argument to induce us to adopt the same rule in construing the ordinance and contract in this case. We are of opinion that the ordinance has been fully, fairly, and strictly complied with, and that the contention of the appellant that the curbing should have been included in the carriageway, as a part thereof, is not supported by the ordinance itself, or by the custom and usage of the city authorities in the building of its streets.

On the second point upon which appellant relies—that is, that the improvement of this street is of no benefit to his property, and that the cost thereof exceeds the value of the property sought to be taxed therefor, and amounts to spoliation—it will be necessary for us to determine the manner in which the valuation of the property sought to be taxed is to be arrived at; and, when we have determined the value of the property as the law provides, we can then better consider appellant's objection on this ground. It is a well-settled rule that the owner of a lot may be compelled to pay his share of the cost of the street improvement, although he receives no particular benefit because of this improvement. In the case of *Preston v. Rudd*, 84 Ky. 156, the court said: "It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited. This rule, however, cannot be so extended as to entirely take from the citizen his property. This would work 'a manifest injustice.' It would be spoliation, and not taxation. Under the guise of benefit and taxation, he cannot be thus arbitrarily deprived of his property. It would be but an appropriation of it, by the exercise of arbitrary power, to public use, without compensation." Thus following the rule laid down in this case, there is no merit in appellant's contention that his property is not benefited by reason of this improvement, unless he can show

that the cost thereof is equal to or greater than the value of the property sought to be subjected.

We come, then, to a consideration of the question as to what was the value of this property in question; this plot of ground fronting 500 feet on the street improved, and running back a uniform depth of 200 feet. Appellant contends that, as the property in question brought only the debt and cost when offered at public sale, this is the best evidence as to its real value. This court, in the case of *Scott v. O'Neill's Adm'r*, 62 S. W. 1042, 23 Ky. Law Rep. 331, held that, where property has been duly advertised and exposed at public sale to the highest bidder without a suggestion of irregularity, the bidding would show what it was worth. The court, in the case of *Bristow v. Peters*, 6 Ky. Law Rep. 300, in an abstract opinion, held that the value of property sold at judicial sales is not only determined by those appraising the property, but by the actual and active competition upon the part of the bidders who were wanting the property and able to make their bids good. In each of these cases, however, it will be seen that the court did not hold that the price which property brought at decretal sales was its real value, but merely that this might be considered in connection with other evidence as to what its value was. It is a well-settled rule that, where property is sold with the right of redemption, the price realized at said sale cannot be accepted as a true test of the value of such property. Frequently there is no competitive bidding, and one desiring to purchase buys at his own terms. In the case before us, the trial court heard the proof that was offered as to value, and we take it that it is this proof, which was introduced during the trial, which must be considered now in testing and determining the value of this property. Giving to the testimony of each witness that consideration which his opportunities for knowing its value shows it is entitled to, we are of opinion that this property was proven to be worth from \$8 to \$10 per front foot. The improvement is shown to have cost about \$5.50 per front foot, so that placing this valuation upon the property, even though it has not been benefited by the improvement of this street, appellant cannot be heard to complain, for the tax against his property is only about two-thirds of the value of the property taxed. The question of spoliation has been recently and carefully reviewed by this court in the case of *City of Louisville v. Blitzer*, 115 Ky.

364, 78 S. W. 1116, 61 L. R. A. 434. In that case Chief Justice Hobson, speaking for the entire court, said: "Where the total value of the property taxed after the improvement is made is less or no more than the cost of the improvement, there is no room for difference of opinion that to enforce the lien is to take from the owner his property without compensation. In no case decided by this court has this been approved, and, while we are unwilling to extend the rule, it has been so often laid down that it cannot now be departed from. It may be objected that logically the rule should be to reject all assessments in excess of the benefits received by the property owners, and not to confine its operations to cases where the assessment equals the value of the property when improved. But in every system of taxation exact equality of benefits among those taxed is never attainable. The rule of assessment by the foot is no less arbitrary than the rule under consideration. In matters of this sort there must be some settled rule, and it is especially important that the rule should be well defined. The proper legislative authority, not the court, must judge of the propriety of the improvement, and the benefits to the abutting property owners. But no department of the government can take the property of the citizen for public purposes without just compensation, and, when the entire property is taken to pay for a public improvement, there is no room for presumption as to the benefits received, but a case of spoliation is shown." Thus we may say that if the cost of the improvement equals the value of the property sought to be taxed, the rule is well established in Kentucky that this amounts to spoliation, and will not be enforced in our courts. The converse of this proposition is likewise true: That, if the cost of the improvement does not equal the value of the property sought to be taxed, the courts will uphold the assessment and enforce its collection. The fact that appellant owns other property lying behind the property involved in this suit, and that he has no other outlet for said property, except over the property involved in this suit, cannot enter into the consideration of the questions raised in this case.

On the whole case, we are of opinion that the value of the property sought to be taxed is much greater than the amount of the tax levied against same; that the findings, rulings, and judgment of the trial court are authorized and upheld by the facts presented in this case; and the judgment is therefore affirmed.



**YATES, Court Clerk, v. McDONALD et al.**  
(Court of Appeals of Kentucky. Oct. 19, 1906.)

**1. JUDGES—ELECTION—POWER OF LEGISLATURE—CONSTITUTIONAL PROVISION.**

It was not competent for the Legislature to create a judicial district or to provide for a circuit judge in an existing district, without also providing for the election of a new circuit judge, as required by Const. § 129.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 2.]

**2. SAME—VACANCIES—ELECTION.**

Const. § 129, designating the term of office of circuit judges, provides that the General Assembly shall, at the same time the judicial districts are laid off, direct elections to be held in each district to elect a judge therein. Section 152 declares that, unless provided in the Constitution, vacancies in all elective offices shall be filled by election or appointment; that if the unexpired term will end at the next succeeding annual election at which city, town, district, or state officers are to be elected, the office shall be filled by appointment for the remainder of the term; if the unexpired term will not end at the next succeeding annual election at which city, town, county, or state officers are to be elected, and if three months intervene before such annual election at which either of such officers are to be elected, the office shall be filled by appointment until such election, and then the vacancy shall be filled for the remainder of the term. By Act March 2, 1906, an additional judge of the circuit court for the Sixteenth circuit was provided for, to be appointed by the Governor, and to hold office until January, 1907, and that at the November 1906, election, there should be a circuit judge elected for that office, who should hold his office after January, 1907, and until his successor was elected and qualified. Held that, on the creation of a new judgeship in such district, a "vacancy" occurred, within Const. § 152, and that the Legislature therefore had no power to provide for an election to fill the office of such judge in November, 1906, at which time there would be no election in such county to elect other state, district, or county officers.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 34.]

**Appeal from Circuit Court, Kenton County.**

"To be officially reported."

Action by Charles McDonald and others against John C. B. Yates, as clerk of the Kenton circuit court. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Byrne & Read, for appellant. R. C. Simmons and L. W. Arnett, for appellees.

**O'REAR, J.** By an act approved March 2, 1906, the General Assembly of this commonwealth authorized the election of an additional judge of the circuit court for the Sixteenth circuit court district, and provided for the appointment and election of such judge. The Sixteenth circuit court district is composed of the county of Kenton, containing the city of Covington. The Legislature deemed, and, for the purposes of this decision, it is assumed, that that city had such a population as entitled the circuit court of the county to be presided over by two circuit judges, under section 138 of the Constitution. Covington is

a city of more than 20,000, and the county of Kenton, presumably from the passage of the act, has a population of 40,000 or more. The act providing for an additional circuit judge in that district became effective after its passage, and provided that the Governor should appoint a circuit judge who should act until the 1st of January, 1907, and at the November election, 1906, there should be elected a circuit judge for that office, who should hold his office after the 1st of January, 1907, and until his successor was elected and qualified. The office of circuit judge is a constitutional office. The term of the office is six years. It is an elective office. The last general election for circuit judges in this state, all of whom are required to be elected for the regular terms at the same time, was held in November, 1903. The next general election for circuit judges will therefore be in November, 1909. Section 129 of the Constitution, designating the term of office of the circuit judges, contains this clause: "The General Assembly shall, at the same time the judicial districts are laid off, direct elections to be held in each district to elect a judge therein." Section 152 of the Constitution deals with the subject of filling vacancies in office. It provides that, unless otherwise provided in the Constitution, vacancies in all elective offices shall be filled by election or appointment as follows: If the unexpired term will end at the next succeeding annual election at which city, town, district, or state officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which city, town, county, or state officers are to be elected, and if three months intervene before said annual election at which either of such officers are to be elected, the office shall be filled by appointment until said election, and then the vacancy shall be filled by election for the remainder of the term. But if three months do not intervene between the happening of the vacancy and the next succeeding election at which state, district, or municipal officers are to be elected, the office shall be filled by appointment until the next election at which such officers are to be elected. The Honorable M. L. Harbeson was appointed by the Governor, and commissioned, as judge of the Kenton circuit court, to fill the office provided for by the act of 1906 alluded to above. He has been nominated for election. This suit involves the right of the county court clerk, whose statutory duty it is to provide ballots for the election to be held in November, 1906, to place the name of said Harbeson upon the official ballot at the November election, 1906, as a candidate to be voted for for circuit judge for the remainder of the term, until January, 1910. The circuit court held that an election must be held at the November election, 1906.

The correctness of this decision depends upon the construction we are to give the word "vacancy" as it occurs in section 152

of the Constitution. For appellees, it is contended that vacancy, as used in this section, applies only to the state of things where the office has once been filled by an election; that where a new elective office is created, and the act provides for filling the office by appointment until an election is held for that purpose, the first appointee does not fill a vacancy in the office; that there is not a vacancy in an office until after there has once been an election to fill it. If this contention is correct, it would follow that any elective office created by the Legislature could be filled, if the act so provided, by appointment for the whole of the first term, notwithstanding any number of elections might occur during the term at which such an officer might have been properly elected to fill a vacancy in that office. It would mean that if the Legislature had seen proper to so provide, the appointee to this office could have held until the regular election in November, 1909. There is no more prominent and persistent idea in the present Constitution than the purpose it evinces of having all constitutional offices filled by election by the people, and that as soon as it may be practicable to hold such election. The only postponement allowed is that shown by the purpose to keep from mingling state and national elections, and allowing for a reasonable opportunity for candidates and electors to prepare for the election. But where a state election is to be held, any vacancy in any state office, or any county or district office, may be filled at such election, if the vacancy has existed more than three months; and the term will not end at that election. Or if an election is to be held within a territory less than the whole state; as, for example, a district, a county, or a municipality, and a vacancy occurs in an elective office to be filled by an election held within the same or covered by the same territory, then the vacancy must be filled at that election, if the term does not expire at that election, and if the vacancy has existed for three months. In no event is a vacancy in an elective office to be filled by appointment longer than two years. An office is vacant when there is no legal incumbent to discharge its duties. When the Legislature created the office of an additional circuit judge for the Kenton district, it was necessary that there should be an incumbent to discharge its duties, and, until such incumbent was appointed or elected, the office was to every practical intent and in legal contemplation vacant. It was not competent for the Legislature to create a judicial district, or to provide for a circuit judge in an existing district, without also providing under section 129 of the Constitution for the election of the new circuit judge. The only constitutional warrant for his appointment at all is section 152 of the Constitution. As the Constitution makes the office elective, but for section 152 there would be no authority for

filling it by appointment at all. It is not competent for the Legislature, therefore, to provide an additional circuit judicial district, or to provide an additional circuit judge in an existing judicial district, and to provide for filling the office by appointment, upon any other theory than that, until an election can be held to fill it, the office is vacant. There will not be an election held in Kenton county in November, 1906, to elect other state, district, or county officers. Therefore, it was incompetent for the Legislature to provide contrary to section 152 of the Constitution that an election should be held to fill the vacancy in the office of circuit judge in that district in November, 1906. As the Constitution fixes not only when such election may be held, but also what part of the term may be filled by appointment, the Legislature could not change either; and it could not lessen the appointive period, or shorten or extend the elective period. It is true there exists a vacancy in the office of state senator from the district composed entirely of Kenton county, and that an election has been called to fill that vacancy at the November election, 1906; and it is true that a state senator is a district officer. But section 152 deals with the election of state, county, and district officers to vacancies at regular elections at which such or similar officers are to be elected. That an election to fill a vacancy in the office of circuit judge cannot be held when there is not an election for some state or district officer within the territory coextensive with the one in which the vacancy is to be filled, was decided by this court in *Eversole v. Brown*, 53 S. W. 527, 21 Ky. Law Rep. 925, and *Donelan v. Bird*, 118 Ky. 178, 80 S. W. 796. The same principle was applied in *Neely v. McCollum*, 53 S. W. 37, 21 Ky. Law Rep. 823.

We have been referred to cases in other states apparently holding the contrary to the views herein expressed. Such are *O'Leary v. Adler*, 51 Miss. 28; *State ex rel. v. Messmore*, 14 Wis. 127; and *People v. Opel*, 188 Ill. 194, 58 N. E. 996. On the other hand, the following decisions are cited to show that the construction herein given to our Constitution is in conformity to constructions given somewhat similar constitutional provisions in other states, namely: *Stocking v. Indiana*, 7 Ind. 327; *Collins v. Attorney General*, 8 Ind. 344; *Cline v. Greenwood*, 10 Or. 231; and *State v. Perry*, 18 R. I. 276, 27 Atl. 606. Little aid can be gathered from these conflicting opinions. We are left at last to mark out our own interpretation of the language employed by the convention which framed our Constitution. We cannot see it otherwise than that an office is vacant when it is not filled, as a house would be vacant when it is empty. A new house which has never been occupied is no less vacant than an old one which had been occupied, but whose tenant had removed from it. So a new office,

which has never been filled, is vacant when there is no incumbent, as much so as if it had had an incumbent, and he had resigned or died. Any doubt that we might have on the subject is put to rest by the other provisions of the Constitution, which point clearly to the controlling idea in the convention, that the people should, as soon as practicable, be left to fill these offices by their own selection, rather than by the appointment by some other power.

The judgment of the circuit court must be reversed, and cause remanded for a judgment in conformity herewith.

### LUCAS et ux. v. McGUIRE.

(Court of Appeals of Kentucky. Oct. 19, 1906.)

#### FRAUDS, STATUTE OF—PAROL CONTRACTS FOR THE SALE OF LAND—ENFORCEMENT—RIGHT OF PURCHASER.

Under Ky. St. 1903, § 470, providing that no action shall be brought to charge any person on a contract for the sale of real estate, unless the contract be in writing and signed by the party to be charged, a purchaser of real estate under a parol contract cannot enforce specific performance, though he has paid the purchase price, and is only entitled to a judgment adjudging a lien on the land for the money paid, with interest, minus a reasonable rental of the land during the time of his possession under the contract.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 311, 327, 332.]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by A. J. McGuire against James Lucas and wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Henry C. Hazelwood and J. A. Sullivan, for appellants. W. B. Smith and C. H. Breck, for appellee.

NUNN, J. The appellants, James Lucas and Mattie J. Lucas, are husband and wife. The latter was the owner in her own right of  $9\frac{1}{2}$  acres of land, which she rented to the appellee, A. J. McGuire, for the year 1895. He paid the stipulated rent for that year, and had remained in possession since that time, claiming to have purchased the land at the expiration of his lease at the price of \$40 per acre. The appellants refused to convey to him a title, whereupon he instituted this action for a conveyance, alleging that he had paid the whole of the purchase price, and that the purchase was effected by oral contract. Appellants answered, denying the sale of the land to him, or that he had paid to them any part of the purchase price. The evidence was heard, and upon trial the court found in favor of the appellee, and in the judgment used the following language: "That the plaintiff is entitled to hold and keep possession of the land set out in the pleadings. And it is further adjudged that the defendant James Lucas, and Mattie Lu-

as, his wife, or either of them, are perpetually enjoined and restrained from in any way whatever interfering with the plaintiff's possession or control of the tract of land above mentioned, or of interfering with or disturbing any one in the possession or control of this land to whom the plaintiff may rent, lease, sell, or convey the same."

It would seem that the court recognized the fact that it could not compel a conveyance of the land to appellee, and yet its judgment had that effect. By section 470, Ky. St. 1903, it is provided: "No action shall be brought to charge any person \* \* \* upon any contract for the sale of real estate, or any lease thereof, for a longer term than one year." This statute, as construed by this court, is an insuperable barrier to the maintenance of appellee's action for the enforcement of the alleged contract of purchase set forth in his petition, and the court erred in rendering a judgment enjoining and restraining the appellants from taking possession or control of the land. They are entitled to it. It appears, however, from a preponderance of the evidence, that appellee did pay the purchase price of this land to them, or to another party for their benefit, in the purchase of another tract of land, and the appellee should be adjudged a lien therefor on the  $9\frac{1}{2}$  acres, with interest from the time of payment, to be credited by a reasonable rental value of it from the time appellee has had possession under his parol purchase. See cases of *Usher's Ex'r v. Flood*, 83 Ky. 552; *Dean v. Cassiday*, 88 Ky. 572, 11 S. W. 601; *Glass v. Abbott*, 6 Bush, 622; *Fox's Heirs v. Longly*, 1 A. K. Marsh. 388; *McCracken v. Sanders*, 4 Blbb. 511; *Hunt v. Sanders*, 1 A. K. Marsh. 552; *Reed v. Lander*, 5 Bush, 21; and *Newburger v. Adams*, 92 Ky. 26, 17 S. W. 162.

For these reasons, the judgment is reversed, and remanded for further proceedings consistent with this opinion.

### OWENSBORO WATERWORKS CO. et al. v. CITY OF OWENSBORO et al.

(Court of Appeals of Kentucky. Oct. 19, 1906.)

#### 1. MUNICIPAL CORPORATIONS — TAXPAYERS' ACTION—RESTRAINING MISAPPROPRIATION OF FUNDS.

Where a private waterworks company in a city was a taxpayer, it was entitled in common with and for the benefit of the other taxpayers of the city to institute an action to restrain any diversion or misappropriation of funds raised by taxation for the specified purpose of erecting a waterworks system, regardless of its real purpose to prevent the erection thereof.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 2157-2163; vol. 1, Cent. Dig. Action, § 8.]

#### 2. SAME — WATERWORKS BONDS — SINKING FUND—DIVERSION.

Where a city voted a bond issue of \$200,000 for the erection of waterworks, and collected \$58,663.64 by general taxation to pay interest on the bonds and create a sinking fund for their ultimate redemption before any of the bonds

were in fact sold, and the amount so collected was used to pay general expenses of the city, such use constituted a misappropriation thereof, but did not authorize the setting apart of an equal amount from the proceeds of the bonds when sold to pay interest on the bonds and create a sinking fund for their redemption.

### 3. SAME.

Where a city issued bonds for the sole purpose of constructing a waterworks plant, money taken from the general fund of the city to pay for the services of brokers employed to sell the bonds could not be deducted from the proceeds of the bonds when sold.

### 4. SAME—INTEREST.

Where a city, on the sale of certain water bonds, received \$3,172.60 in excess of the face of the bonds for interest coupons which were left attached to the bonds, such sum should be deducted from the water bond fund and set apart to be applied to the payment of the coupons attached to the bonds when sold.

### 5. SAME—DEBT LIMIT—INCREASE—ANTEDATING BONDS.

Where a city was authorized to issue water bonds to the extent of \$200,000 at a rate of interest not to exceed 4 per cent., the city, while entitled to sell the bonds for as much as possible, had no power to antedate them and thereby realize more than they were worth on the day of sale, which would operate as a sale, not only of the bonds, but of the accrued interest, and thereby increase the city's debt limit in excess of the amount authorized.

### 6. INJUNCTION — MANDATORY INJUNCTION — SCOPE OF REMEDY.

Where a city had collected interest to the amount of \$3,172.60 on the sale of certain water bonds, and was bound to place such amount to the credit of a fund created to pay interest on the bonds, a mandatory injunction on behalf of a taxpayer was a proper remedy to compel such application.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 4.]

Appeal from Circuit Court, Daviess County.  
"Not to be officially reported."

Suit by the Owensboro Waterworks Company and others against the city of Owensboro and others. From a judgment sustaining a demurrer to certain paragraphs only of plaintiffs' petition, both parties appeal. Affirmed.

J. D. Atchison, W. T. Ellis, and Little & Slack, for plaintiffs. George W. Jolly, for defendants.

NUNN, J. This appeal is from a judgment of the Daviess circuit court sustaining a demurrer to certain paragraphs of the appellants' petition; the appellees also appeal because of the court's refusal to sustain their demurrer to one of the paragraphs of the petition. This necessitates a statement of the averments of appellants' petition. In substance it was alleged that an ordinance enacted by the city council was adopted in October, 1900, providing for the submission to the voters of the city of the question whether or not they were in favor of the city issuing \$200,000 of bonds for the purpose of borrowing money to be used in the construction of a system of waterworks for the purpose of supplying the city and the inhabitants thereof with water, and further providing that, if the requisite number of

voters favored the scheme, the council should cause to be issued the bonds of the city in the sum of \$200,000, bearing date January 1, 1901, payable in 30 years, with 4 per cent. interest, payable semiannually, reserving to the city the right to recall the bonds after the expiration of 10 years. The proposition was adopted by the voters at the election held in November, 1900, and in the same month the council enacted an ordinance authorizing the issuance of the bonds to the amount of \$200,000, to be sold at not less than par, the proceeds to be paid into the city treasury to the credit of the fund designated as the "Owensboro Water Bond Account." The council also enacted that: "The sum of \$14,666.66 is hereby appropriated and set apart out of the revenues and funds of the city to be raised by taxation and otherwise each year until said bonds are paid, for the purpose of paying the interest on the said bonds and creating a fund for the payment of the principal thereof. And for the purpose of providing a fund for said purpose, there is hereby levied upon all taxable property in the city a tax for the year 1901 sufficient to raise said sum of \$14,666.66 \* \* \* and continue from year to year until the ultimate payment of said bonds, and no part of said fund so raised shall ever be used for, or appropriated to, any other purpose or use whatever except the payment of the principal and interest of said bonds."

In the ordinances for the years 1901, 1902, 1903, and 1904, levying the municipal tax, there were provisions for the payment of the annual interest on said water bonds, and the creation of a sinking fund for the ultimate payment of the bonds, and in each of these years \$14,666.66 was collected. The city did not issue any of the bonds until 1903, in which year it sold seven of them for \$7,000, and in 1904 it paid as interest on these seven bonds \$280, and after deducting this sum from the amount collected during the four years mentioned—\$58,666.64—for the purpose of paying the interest on the bonds and for creating a sinking fund for the ultimate payment of the bonds there was left a balance of \$58,386.64. In November, 1904, the city sold the remaining 193 bonds for \$193,000, to Rudolph Kleybolte & Co., who acted as its agents in effecting the sale, and received in addition thereto the sum of \$3,172.50 interest which had accrued on the bonds from July 1, 1904 (the bonds bearing date as of July 1, 1904), to the date of sale. In November, 1904, an ordinance was enacted appropriating out of the general revenue fund of the city \$3,860 for the purpose of paying that sum to Rudolph Kleybolte & Co. for their services and expense in connection with the sale of the bonds, and this sum was paid them out of the general revenue funds of the city, although no tax had ever been levied to pay

the same. It also appears that the city had expended, previous to the sale of these bonds, the sum of \$22,949.25 out of the general revenue fund in a preliminary construction of the waterworks plant. In December, 1904, an ordinance was adopted directing that \$22,949.25 of the money realized from the sale of the bonds be placed to the credit of the general revenue fund of the city, which was done.

Appellant contends that the city should be required to take out of the money realized from the sale of these bonds the following sums: \$26,666.66 collected under the ordinance as a sinking fund; \$30,892.60, the amount collected under the ordinances for, but not used in, paying the interest on the bonds; \$3,860, the amount paid to Rudolph Kleybolte & Co. on account of the sale of the bonds; and the further sum of \$3,172.60 accrued interest on the bonds to the date of sale, and which amount was paid to the city by the purchaser of the bonds, making a total of \$64,591.86—and it asked a mandatory injunction to compel the appellee (the city council) to enact such ordinances as were necessary to take from the money realized from the sale of the bonds the sum of \$26,666.66, \$30,892.60 and \$3,172.60, and set them apart to pay the interest on the bonds and eventually redeem them, and that it be compelled to pay out of the fund so created into the general revenue fund of the city the sum of \$3,860, which had been paid to Rudolph Kleybolte & Co. It was also averred that, when there was taken from the \$200,000 realized from the sale of the bonds the above sums, it would only leave available to construct the waterworks the sum of \$108,457.68; and it was alleged that an adequate waterworks system could not be constructed with that amount of money. It was further averred that the city had made, or was about to make, a contract to construct a waterworks system that would cost not less than \$225,000; that the tax levy had reached the constitutional limit in the city, and that all the money raised by taxes from other sources was necessarily used in defraying the current expenses of the city, and would continue to be so used for many years; that it had no funds which could be used to construct the waterworks except the \$108,457.68. It therefore asked, in addition to the mandatory injunction, that the city be enjoined from entering into any contract for a waterworks plant that would involve the expenditure of more than \$108,457.68, and from making any contract that would not result in the erection of a waterworks of sufficient capacity to furnish the city and its inhabitants with water, and that it be further enjoined from using or borrowing for any purpose whatsoever any of the money collected to pay interest on, and redeem, the bonds issued. It is apparent that the real purpose of appellant was to

prevent the erection of any system of waterworks; but, whatever its intention may have been, it is a taxpayer, and in common with and for the benefit of the other taxpayers of the city had the right to institute an action to restrain any diversion or misappropriation of the funds raised by taxation for the specific purpose of erecting a waterworks system, and to seek such other relief as any taxpayer would be entitled to. See *Merchants' Police, etc., Telegraph Co. v. Citizens' Telephone Company*, 93 S. W. 642, 29 Ky. Law Rep. 512. Appellees interposed the following motions and demurrers: First, it required the appellant to elect whether it would prosecute the action upon relief sought by mandatory or perpetual injunction; second, they demurred generally to the petition because it did not state facts sufficient to constitute an action; third, they demurred to so much of the petition as sought a mandatory injunction; fourth, they demurred to so much of the petition as sought to enjoin them from making any contract for a waterworks system in excess of \$108,457.68; and, fifth, they demurred to so much of the petition as sought to prevent them from entering into any contract that would not erect a waterworks sufficient for the city and its inhabitants. These demurrers involve every submitted issue in the case.

There are four material propositions about which there can be no question: First, that the voters of the city, by a vote in 1900, authorized the council to pass an ordinance for the issue of the city's bonds to the extent of \$200,000 for the purpose of borrowing money to be used in the erection of a waterworks for supplying the city of Owensboro and its inhabitants with water; second, that the city, in 1900, adopted an ordinance providing that the proceeds of the bonds should be used in the erection of a system of waterworks, and for no other purpose; third, that another ordinance was adopted in 1900 providing that the proceeds of the sale of the bonds should be paid into the city treasury and placed to the credit of a fund to be designated "Owensboro Water Bond Account"; fourth, that the council levied and collected each year since, and including 1901, a tax of \$14,666.66 to pay the interest on the bonds and create a sinking fund for their ultimate redemption, and that the ordinance provided that no part of the funds so raised should ever be used for, or appropriated to, any other purpose or use whatever, except the payment of the principal and interest of the bonds. Nor is there any dispute about the fact that the city council did issue bonds to the amount of \$200,000, which amount it realized from their sale, and in addition thereto the sum of \$3,172.60 accrued interest. There is no question, so far as this record shows, about the city having on hand all the money realized from the sale of the bonds, except \$22,949.25 that it paid out of the bond money

**E—CONTRACTS FOR LIGHTING—RIGHTS  
LIGHT COMPANY.**

here a light company furnished to a city lighting in consideration of a void agreement of the city to pay the taxes levied against company, the company was entitled to receive a quantum meruit.

Note.—For cases in point, see vol. 36, Dig. Municipal Corporations, §§ 697, 698.]

deal from Circuit Court, Franklin Coun-

t to be officially reported."

on by the Capital Gas & Electric Light any against the board of councilmen of ty of Frankfort and others. From a granting insufficient relief to the plain-oth parties appeal. Affirmed on both is.

n W. Ray and Ira Julian, for plaintiffs. W. Rodman and Hazelrigg, Chenault & rigg, for defendant.

EAR, J. Prior to 1882 the city of fort owned and operated a gas plant, which it lighted its streets and public ngs and sold gas to its inhabitants for private consumption. By an act of the lature, also prior to 1882, the city was rized to sell its plant on such terms r such sums as the board of councilmen deem best for the interests of the

In pursuance thereof, the city sold the to the Southern Gas Company. In the act of sale was this provision: "It is r stipulated, and as a part of this con- that all the property, real or personal, sold and to be conveyed to the party of econd part, or its assigns, and all ad- s or extensions thereof, and all other al or property to be acquired and used e operation of said works, and the fur- ing and sale of gas, or other illuminating , whether in the hands of second party Southern Gas Company) or its assigns, he stock of the company owning and ting said works, shall, from and after xecution of this contract, be exempt the payment of all city taxes to the of Frankfort, and should it be deter- l that the party of the first part has he power to make such exemption from axes, then, any and all sums which the d party, or its assigns, shall have to for city taxes upon the said property n attempted to be exempted, shall be l to the sum herein stipulated for light- he streets of the first party." The con- of sale was for the value assigned to ap- e, who is now the owner of and operat- he plant. The city assented to the as- sent and executed the conveyance to ap- e direct, ratifying the foregoing provision s conveyance. September 18, 1893, this act was modified by the city and appel- by substituting a certain number of

ing electric lights for all the public gas lights, at a schedule of prices set forth in the amended agreements. Each of the agree- ments for extending and changing the light- ing contract containing this clause: "And the first party for said street lighting further obligates itself to pay to the second party such further sums each year as shall be equal to the city tax of every kind required to be paid such year by second party, or its assigns, including therein any assessments for city taxation on its capital stock in the hands of its stockholders." Appellee had, in the meantime, added an electric light plant to its system, from which it supplied, not only public lighting to the city, but lights for private consumers, which now constitutes nearly, or perhaps fully, one-half of its busi- ness.

The present Constitution of the state was adopted September 28, 1891. It requires all property, not exempted by the Constitution, to be taxed ad valorem, at its actual cash value, and allows in addition the imposition of taxes based on income, licenses, and franchises. Sections 170, 174, Const. And, as to municipalities, it allows them, if so em- powered by the Legislature, to impose and collect license fees on stock used for breed- ing purposes, on franchises, trades, occupa- tions, and professions. Section 181, Const. These provisions are the first authority con- ferred by law in this state for the imposi- tion of franchise taxes. In pursuance to these sections of the Constitution, the Legis- ature has provided for collecting taxes on franchises by the state and counties, and au- thorized the cities also to impose and collect taxes on the same. The franchise of appellee was assessed by the State Board of Valuation and Assessment for each of the years 1897, 1898, 1899, 1900, 1901, and 1902, and certified as required by law to the city of Frankfort. The city was attempting to collect the fran- chise tax, under tax levies made by the city for each of these years, when appellee brought this suit enjoining their collection up- on the ground that by the terms of the con- tract above set out all its property, includ- ing its franchise, was exempt from city taxes; or, if not exempt, that, by the said contract, the city had undertaken, for a valuable and legal consideration, to pay them, and that it ought not therefore be al- lowed to violate its contract by collecting them from appellee. Appellee also pleaded in bar a judgment of the Franklin circuit court, affirmed by this court, in which it had been adjudged and held that the contract was valid and enforceable, and the taxes not collectible. The circuit court in this case adjudged that the contract was binding upon the city, and enjoined the collection of the franchise tax imposed upon so much of ap-

pellee's property as was engaged in the manufacture and sale of gas, but refused to enjoin the collection of the tax imposed on the electric lighting franchise. Both parties have appealed.

We will take up first the plea of former adjudication, as we apprehend that whatever has been adjudged between these parties respecting the scope and interpretation of their contract, is, under principles of law too well known to need extended citation, the law of the case as between them. The former judgment of the circuit court, which, on appeal to this court, was affirmed, may be found set forth in the opinion delivered January 27, 1895, in *Board of Councilmen of the City of Frankfort v. Capital Gas & Electric Light Company*, 29 S. W. 855, 16 Ky. Law Rep. 780. It was urged upon that appeal by the appellant that the city was without power to contract an exemption from taxation, except in consideration of public service rendered by the grantee. But the court was not disposed to rest its opinion on that point. Nor was the point decided. The court said: "Exemptions from taxation are held invalid because it increases the tax on property not exempt; but here, if the city is required to reimburse the appellee, the burden remains the same, for, if taxes are collected from the appellee, the city must pay it back. The right of the city to make a disposition of its gas plant is conceded; and, if so, the city council were the sole judges of the consideration to be paid, and this exemption being an essential part of the consideration, its terms should be enforced. \* \* \* This is not the grant of a mere privilege, with an exemption from taxation in the exercise of corporate rights and the use of corporate property, but a sale by the city of its property to those parties upon a consideration of \$40,000, with other covenants contained, and the agreement on the part of the city to pay the taxes. This is in fact the agreement between the contracting parties, and that it must have been regarded as an essential feature of the contract is too plain for argument." At the time of that controversy the franchises of corporations were not assessed for taxation at all in this state. The question was, therefore, neither presented nor specifically decided whether the corporate franchise of appellee was, together with its tangible property, exempted by the contract from taxation.

Appellee insists that the contract was to exempt all the property of appellee from city taxation, or to pay the city taxes upon it, which is the same thing in effect; while appellant contends that the city undertook to exempt only that which it was selling. Appellee insists that the franchise of the corporation was then as it is now an integral part of all its property—was the value attaching to its property by virtue of its using it in the business of making and selling gas for illuminating purposes; that when the

agreement was to exempt its property so used, it necessarily meant to exempt the value of the use as well as the value of the lots and material. The city did not create the corporation to which it sold. It had no control over the amount of its capital, or the uses in which it might be employed. The franchise of appellee to be a corporation was granted by the state, not the city. If this were the franchise taxed under the present revenue laws, we would have less doubt concerning its being without the contract. But that is not the thing upon which the franchise tax is laid. The right to be a corporation is taxed when the state exacts the organization tax. But the ad valorem tax laid upon franchises of the public service corporations, is a property tax, their franchises being deemed property. This tax is laid not upon the tangible property as used, but upon the corporation, requiring it to account for its value measured by the value of all its intangible property. This is arrived at by deducting whatever value is placed upon its tangible property from the total worth of the corporation. Its earning capacity engaged in the business that it is, employing whatever tangible property it may, whether owned by it or not, that is reflected by its general prosperity, whether in dividends to stockholders, or value given to its shares of stock, or earning capacity as shown by interest paid upon its bonded or other indebtedness, this is the quality that is taxed. It is the quality of impersonation which a corporation has and exercises under the law, which has a value above the tangible assets of the corporation, that the Legislature has laid hold of for raising revenue. This is generally represented by the capital stock of the corporation, and certainly includes the capital stock.

If the contract had been to sell appellee the tangible property named and that is all that was sold, and to exempt it from taxation, we would have little hesitation in holding that the exemption did not embrace the franchise of the corporation. But the contract was not so limited. It exempted the capital stock of the corporation from city taxation. This was as much the consideration for the property sold by the city, as was the exemption of the tangible property. Maybe the appellant would not have bought the old plant at the agreed price of \$40,000, with 6 per cent. interest for 40 years, unless it had been excused from paying all city taxes on all its property, including tax on its capital. At least, the parties have so agreed, and it has previously been adjudged between them that what was exempted was a part of the consideration of the sale. As by its very terms it includes capital stock, and as the franchise now taxed by law is the enhanced value of its tangible assets (*Henderson Bridge Company v. Commonwealth*, 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73), we feel constrained to hold that this capital, however valued, or by whatever named valued, is included within the

contract. The former adjudication between the parties was that the attempted exemption was legal and binding upon the city. That leaves nothing for decision in this case, except to determine, and until it is determined, what was included in the attempted exemption. We think a fair construction of the former opinion necessarily includes the franchise of the corporation as now taxable under the laws of the state.

But as to the electric light plant a very different state of case is presented. The city did not sell an electric light plant, nor did it agree to exempt an electric light plant from taxation. In *People's Electric Light & Power Company v. Capital Gas & Electric Light Company*, 116 Ky. 76, 75 S. W. 280, this same contract was up for construction on the point whether it conferred any right upon appellee to operate an electric light plant in the city. It was held that it did not. That so much of the original contract between the city and the Southern Gas Company, of which appellee is the assignee, as pertained to "other illuminating light" was void, as the Southern Gas Company had neither the charter right nor means to furnish such light. Appellee's charter does authorize it to operate an electric light plant, it seems, but its rights to the exemption claimed in this suit are such as and no more than its assignor, the Southern Gas Company, acquired under the original contract. The latter company having no authority to operate an electric plant, a covenant to it, upon whatever consideration, to exempt it and its assigns from future taxation upon any electric plant they might thereafter own was void; because for a grant to be valid there must be a grantee then capable of taking the grant. In 1893 and 1895 when appellant and appellee came to rearrange their contract by which the latter undertook to furnish and the former to purchase so much of electric lighting in lieu of gas lighting, that was a new contract. Any attempt then to exempt the property of appellee from taxation in consideration of that new undertaking to furnish light must be measured by its own strength, and without reference to any borrowed force from the previous adjudication between the parties concerning an entirely different contract. This contract shows that in lieu of so many gas lights at \$24 per year, appellee was to furnish appellant a certain less number of electric lights at \$96.20 a year. Appellant also agreed then to exempt appellee from all city taxes, or to pay them itself, if the exemption could not be made. It is not necessary to carry the investigation of appellant's power to make such an exemption further than the Constitution of 1891, which itself fixes the exemption of property from taxes, excluding all other exemptions. It was not competent for appellant then to have created an exemption from taxes. No city can now barter its power of taxation, whereby special privileges or favors

may be obtained at such and such a price, by which the public burden is increased to the unfavored taxpayers. All taxes must now be uniform. Favoritism cannot be accomplished any more by purchase than by gift. But, we are persuaded there was not a purchase of the exemption in this case. It was a gratuitous grant. The provision that if appellee had to pay the taxes, appellant would pay it just that much for the lights was in the nature of a security from the city that it would observe its grant. If this arrangement were enforceable, then a city could, in spite of the constitutional prohibition, indirectly exempt any property within the city, and bind all future city governments to observe it. The attempted exemption was void. If appellee furnished light upon such consideration, it was entitled upon the failure of the consideration to recover upon quantum meruit. The case was referred to the commissioner on this point. But there was no proof to justify the belief that the price of \$96.20 per light was not of itself a fair, if not a liberal, price for the lights furnished.

Appellant finally contends that the court did not give a proper valuation to the electric light franchise which was adjudged liable to city taxation, and did not also adjudge that appellee pay the taxes on its tangible property also used in manufacturing and distributing its electric currents for lighting. We find nothing in this record upon which we could give a better estimate of appellee's corporate franchise employed in electric lighting than the trial court adopted. This suit involved franchise taxes only. Appellant has a plain remedy for collecting the taxes upon the tangible property of appellee that is liable.

Upon the whole case we find no error in the judgment; consequently it is affirmed upon both the appeal and the cross-appeal.

#### COMMONWEALTH v. HILLIS et al.

(Court of Appeals of Kentucky. Oct. 19, 1906.)

##### 1. PLEADING—DEMURRER—ADMISSIONS.

The introduction of evidence to support a pleading is rendered unnecessary by a demurrer thereto, which is overruled; the demurrant electing to stand thereon.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 525-534.]

##### 2. SAME—MATTERS TO BE PROVED—STIPULATIONS.

Where, after the entry of an order overruling a demurrer to a pleading, the parties agree that the allegations of the pleading shall be taken as true, the introduction of evidence to support the pleading is unnecessary.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1225.]

##### 3. BAIL—RELIEF FROM FORFEITURE—STATUTES.

Cr. Code Prac. § 96, providing that where, before final adjournment of the court, defendant appears and satisfactorily excuses his failure to appear at the time specified in his bond, the court may discharge the forfeiture of the bond, refers only to the power of the court to discharge the forfeiture during the term at which it is



obtained therein. Thereupon the court set aside the demurrers, thereby adjudging the matters of defense relied on were sufficient to justify the setting aside of the verdict and remission of the amount of the bond, and the judgment complained of was entered. The Commonwealth's appeal was overruled. The Commonwealth's appeal was reversed. At the instance of the Commonwealth, Beach's trial under the indictment was continued at the next term; but at the September term, 1906, he was tried and acquitted.

The appellant insisted that the facts set forth in the answer did not authorize the court to set aside the judgment, and, moreover, that no offer was made in support of them. As a complaint of lack of evidence, it will be sufficient to say that its introduction was considered unnecessary for two reasons: First. The averments of the answers were admitted by the demurrers. Second. The appellant appearing in the bill of exceptions complaining the order overruling the demurrers presents the facts as fully as if they had been testified to by witnesses. The answer was as follows: "And by agreement of parties hereto, the allegations of the answers being taken and accepted as true without additional proof, thereupon, the same being submitted to the court, it was adjudged," etc. In support of the claim that the facts alleged did not authorize the court to set aside the judgment there is but one authority cited by the appellant. *Weddington v. Com.*, 582. There was in that case an effort to set aside the forfeiture of a bail bond on grounds that the defendant had been arrested by the reign of mob law in the neighborhood of his residence, and by the attempts of so-called "regulators" to arrest him, to abscond. The circuit court refused to set aside the forfeiture upon those grounds. In affirming the judgment granting the forfeiture, this court held that the defendant, from which *Weddington* fled, was a public authority, and that the public authorities ought and have protected him against, and that he could not have applied to them for protection which he had not done, therefore he cannot rely upon his flight as a ground for setting aside the forfeiture of his bond. The record in that case fails to show that the defendant, *Weddington*, had surrendered when arrested at the time the motion to set aside the forfeiture was made, and, moreover, as we shall presently see, the circuit court from granting the forfeiture was asked. We think the judgment in that case was proper, and that it was properly affirmed.

There are two sections of the Criminal Code of Practice which bear upon the author-

ity of the court to set aside the judgment of the court, the defendant appearing and satisfactorily excuse the failure, the court may discharge the forfeiture." This section has reference only to the power of the court to discharge the forfeiture during the term at which it was taken, and upon the defendant's appearing and giving a satisfactory excuse for his failure to comply with the requirements of the bond. Section 98 provides for the remission of bail by the court before judgment. Its language is: "If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond." It will be observed that the power of the court to remit the whole or any part of the sum specified in the bail bond cannot be exercised after judgment is entered against the bail. The remission may be granted after the entering of the order forfeiting the bail bond, but it must be done before judgment is entered against the bail, and only then if the defendant is in custody, whether resulting from his having surrendered himself or his arrest. As held by this court in *Commonwealth v. Rowland*, 4 Metc. 225: "The power of the court to remit, in whole or in part, the penalty of a forfeited recognizance (or bail bond) is a judicial, not an arbitrary discretion, and the fact that the defendant has been either surrendered or arrested must be alleged and shown in the defense, and it is indispensable to the exercise of the discretion allowed to be exercised by the court." *Yarborough v. Commonwealth*, 89 Ky. 151, 12 S. W. 143, 25 Am. St. Rep. 524; *Commonwealth v. Thornton*, 1 Metc. 380; *Commonwealth v. Coleman*, 2 Metc. 382.

The judgment in the case at bar does, it is true, set aside the forfeiture, but, in meaning and effect, it also remits the whole of the sum specified in appellee's Beach's bail bond, as allowed by section 98, *supra* (formerly section 94 of the old Code); and, while we might not have felt authorized to reverse the judgment if, instead of remitting the sum specified in the bail bond, it had enforced the forfeiture, we are unable to find in the record any reason for holding that in granting the remission the court abused the discretion conferred by the Code. The case of *Commonwealth v. Davidson*, 1 Bush, 133, presents a state of fact very much like that of the case at bar. The appellee, *Davidson*, was indicted in the Webster circuit court for the crime of willful and malicious stabbing, and was admitted to bail in the sum of \$250, on which he gave Cobb and others as his sureties. "Afterwards, at the March term, 1865, *Davidson* failing to appear, an order was made forfeiting the recognizance, and awarding a summons thereon; and, at the September term, 1865, the summons having

been returned executed; the appellees appeared and moved the court to quash the summons, and also demurred to it, and, the motion and demurrer being overruled by the court, and the attorney for the commonwealth having moved the court for judgment upon the recognizance, Davidson surrendered himself in court, and his sureties moved the court to remit the penalty of the recognizance, and after examining Davidson upon oath, and hearing the testimony of another witness, the court adjudged a remission of the entire sum specified in the recognizance; and from this judgment the commonwealth prosecutes this appeal. The ninety-fourth [now ninety-eighth] section of the Criminal Code of Practice provides: 'If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond.' While we do not construe this provision as conferring on the court an arbitrary and unlimited discretion, we do regard it as vesting the court with a broad legal discretion over the subject of forfeited bail bonds, not to be restrained or controlled by this court, unless it shall appear to have been flagrantly and manifestly abused. There appears to have been no such abuse of the discretionary power of the court in this case, nor any such essential error in its rulings, as to authorize a reversal of the judgment. Regarded as a witness merely, Davidson was certainly competent to testify in behalf of himself or his sureties; but we think the court in its discretion had a right to receive his oral statement on oath in lieu of a written affidavit, as a foundation on which to base the application to remit the penalty of the bond. It appeared, moreover, *prima facie* at least, by the testimony of Crawford, that the nonappearance of Davidson was induced by a fear of violence to his life or person at the hands of soldiers. Upon the whole, as already intimated, we perceive no sufficient reason for reversing the judgment." Long ago, Chief Justice Marshall, in the case of *U. S. v. Feely, Brock*. (U. S.) 255, Fed. Cas. No. 15,082, in discussing the power of the court to remit forfeitures, forcefully said: "It is not an unreasonable power. The object of a recognizance is not to enrich the treasury, but to combine the administration of criminal justice with the convenience of the person accused, but not proved to be guilty. If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but repairs the default as much as it is in his power by appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done. If the accused prove innocent, it would be unreasonable and unjust in the government to exact from an innocent man a penalty, intended only to secure a trial, be-

cause the trial was suspended, in consequence of events which are deemed a reasonable excuse for not appearing on the day mentioned in the recognizance. If found guilty, he must suffer the punishment intended by the law for his offense, and it would be unreasonable to superadd the penalty of any obligation entered into only to secure a trial. The reasonableness, then, of the excuse for not appearing on the day mentioned in the recognizance ought to be examined somewhere, and no tribunal can be more competent than that which possesses all the circumstances of the original offense and of the default." *Am. & Eng. Ency. of Law* (2d Ed.) vol. 3, pp. 723-725.

It is apparent from the record in this case that the default of Beach was not willful, and that he repaired it voluntarily, and without expense to the state, at the next term of the court following the return of the indictment; that, when the lower court remitted the penalty of his bond, and discharged his sureties from their obligation, Beach was himself before the court, in its custody, and demanding a trial of the indictment against him. There was no time during his absence from the state when there could have been a trial of his case. Therefore, he did not in fact delay the trial, or obstruct the course of justice.

Being of opinion that there was no abuse of discretion upon the part of the circuit court, the judgment is affirmed.

#### COMMONWEALTH v. COAKLEY.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

PERJURY — INDICTMENT — SUFFICIENCY — AUTHORITY TO ADMINISTER OATH.

Ky. St. 1899, c. 41, § 1535, provides that no application to contest an election shall be heard, unless notice be given in writing, signed by contestant, and article 3 provides that immediately after the notice either party may proceed to take proof by deposition. An indictment for perjury charged that the deposition of defendant was taken as evidence in election contest proceedings then and there being conducted "under and in accordance with the laws of Kentucky." *Held*, that the indictment was not demurrable on the ground that it showed that the proof was being taken to be read as evidence in a contest brought before the Legislature over a seat in that body, and that, as the Legislature had not assembled and no contest board had been appointed or organized, the oath was not taken on a subject on which defendant could be legally sworn.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 72-75.]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"Not to be officially reported."

Walter Coakley was prosecuted for perjury, and from a judgment sustaining a demurrer to the indictment, the commonwealth appeals. Reversed, with instructions to overrule the demurrer to the indictment.

N. B. Hays, Louis B. Wehle, Chas. H. Morris, and J. M. Huffaker, for the Commonwealth. Edwards & Ogden, for appellee.

LASSING, J. This case is before us upon appeal from a ruling and judgment of the Jefferson criminal court sustaining a demurrer to the indictment. The indictment in this case is similar to the indictment in the case of the Commonwealth v. Henry Schwietters, 93 S. W. 592, 29 Ky. Law Rep. 417, and, but for the fact that counsel for appellee raises a point in this case not raised in that case, it would be reversed on the authority of that case.

Counsel for appellee insists that, as the indictment shows that the proof was being taken to be read as evidence in a contest which was to be brought before the Legislature over a seat in that body, and that, as the Legislature had not as yet assembled and consequently no contest board been appointed and organized, the oath administered was not taken on a subject in which appellee could be legally sworn, and, therefore, that the demurrer was properly sustained, and the indictment dismissed. Section 1535, c. 41, Ky. St. 1899, provides: "No application to contest the election of an officer shall be heard, unless notice thereof, in writing, signed by the party contesting is given." And article 3, § 1535, chapter 41, provides that "immediately after such notice either party may proceed to take proof by deposition, under the same rules and regulations that govern the taking of depositions in actions in equity, except that no commission shall be required for taking a deposition out of the state." It seems that, by oversight of the compiler, this provision of the Kentucky Statutes was omitted from the last edition of the Kentucky Statutes, but as there is nothing in the last edition of the Kentucky Statutes in any way modifying or even by implication repealing this provision regulating the taking of proof in contest cases, the same is still in full force and effect. And as the indictment provides that the deposition of said appellee was taken as evidence in the contest proceedings, which were then and there being conducted under, and in accordance with, the laws of Kentucky, we take it that this is a substantial averment that the notice had been given, and, therefore, the oath taken by appellee was on a subject about which he could be and was legally sworn.

The judgment is therefore reversed, with instructions to the trial court to overrule the demurrer.

ROBINSON, County Clerk, v. McCANDLESS.  
(Court of Appeals of Kentucky. Oct. 23, 1906.)

1. OFFICERS—FILLING VACANCIES—TIME FOR HOLDING ELECTION—COMMONWEALTH'S ATTORNEY.

Const. § 97, creates the office of commonwealth's attorney as a district elective office co-extensive with the circuit judicial district, and, beginning with 1897, an election to fill such office is required to be held every six years. Section 152 provides for the filling of vacancies in elective offices, and, if a vacancy occurs in

a district office more than three months before a regular election, in the district in which the vacancy exists, at which state or district officers are to be elected, the vacancy is filled by appointment until such election. In June, 1906, one was appointed to fill a vacancy in the office of commonwealth's attorney in the Tenth judicial district. Held, that the election of the successor of the appointee should be held at the election in November, 1906, for the office of judge of the Court of Appeals in the Third appellate district, which includes all the counties including the Tenth circuit judicial district.

2. MANDAMUS—GROUNDS—COUNTY OFFICERS—REFUSAL TO PLACE NAME ON BALLOT.

Mandamus will lie against a county court clerk of one of the counties of a judicial district who refuses to print on the official ballot the name of one entitled to have his name printed thereon as a candidate for the office of commonwealth's attorney.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 150-157.]

Appeal from Circuit Court, Larue County.  
"To be officially reported."

Mandamus by D. A. McCandless to compel W. A. Robinson, as county clerk, to place relator's name on the official ballot as candidate for office of commonwealth's attorney for the Tenth judicial district. From a judgment awarding the writ, respondent appeals. Affirmed.

O'Meara & James, for appellee.

O'REAR, J. By section 97 of the Constitution the office of commonwealth's attorney is created. It is a district office, coextensive with the circuit judicial district. It is an elective office. The term is six years. Beginning with the year 1897 an election to fill that office is required to be held every six years. Hence the last general election for that office was held November, 1903, for the term ending in January, 1910. At the election held in the Tenth judicial district, November, 1903, D. J. Wood was elected commonwealth's attorney for the ensuing term. He died June 11, 1906. The Governor appointed appellee to the vacancy till an election therefor. Appellee has been regularly and duly nominated for election to fill the vacancy. The question for decision on this appeal is, when is that election required to be held?

Section 152 of the Constitution provides for filling all vacancies in elective offices. If the vacancy occur in a district office more than three months before a regular election in the district in which the vacancy exists at which state or district officers are to be elected, or if the term does not expire at such election, then the vacancy is filled by appointment till such election, and thereafter by election by the voters of the district. A regular election is to be held in this state November, 1906, for representatives in Congress. But that is not a district office within the meaning of the section. Elections to fill vacancies in state, county, and district offices have reference to such offices as are filled under the state government. But there is also an election to be held November, 1906, for the office

of judge of the Court of Appeals in the Third appellate district. That is a state office elected by a district, and is one of the offices to be filled by regular election contemplated by section 152 providing at what elections vacancies in district and other offices may also be filled by election. The Third appellate district includes all the counties including the Tenth circuit judicial district. Therefore there is to be a regular election in November, 1906, to elect a state or district officer within the same territory in which there is a vacancy in the office of commonwealth's attorney, and, as that vacancy occurred more than three months before November, 1906, and the term of the office will not expire with that election, the vacancy must be filled after that date by the person elected to fill it at that election. *Eversole v. Brown*, 53 S. W. 527, 21 Ky. Law Rep. 925; *Donelan v. Bird*, 118 Ky. 178, 80 S. W. 796. As the vacancy must be filled at the election in November, 1906, and as appellee was entitled by virtue of his nomination to have his name printed on the official ballot as a candidate at that election, the writ of mandamus against a county court clerk of one of the counties of the district who refused to so print his name on the ballot was proper.

Judgment affirmed.

#### HOME INS. CO. OF NEW YORK v. BALLEW et al.

(Court of Appeals of Kentucky. Oct. 19, 1906.)

##### 1. PLEADING—AMENDMENT—DEPARTURE.

Plaintiff sued on a policy of fire insurance; the original petition alleging, as an excuse why a forfeiture for nonpayment of the premium should not be enforced, that it was agreed when the policy was taken that she should not be held strictly to the time of payment fixed in the premium note. She thereafter filed an amendment, alleging, as additional reasons why a forfeiture ought not to be enforced, that a tender of the premium had been made by plaintiff's representative prior to the maturity of the premium, but that the agent had directed the sending of the check at any time during the succeeding week, and that before that time expired the property burned. *Held*, that the amendment did not constitute a departure from the original petition.

##### 2. INSURANCE—FORFEITURES—WAIVER.

An insurer has power to waive forfeiture of a policy through its agent.

##### 3. SAME—EVIDENCE.

In an action on a fire policy, evidence held to warrant a finding that defendant had waived payment of premiums on the day specified.

##### 4. JUDGMENT—CONFORMITY TO PLEADINGS.

Where, in an action on a policy, insurer did not ask for a recovery of an unpaid premium, failure of the court to give credit for such premium in the judgment for plaintiff was not error.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 34-37.]

##### 5. SAME—RES JUDICATA—MATTERS NOT IN ISSUE.

Where, in an action on a policy, insurer did not seek to recover an unpaid premium, a judgment for plaintiff was not a bar to in-

surer's right to subsequently recover such premium.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1102-1106.]

Appeal from Circuit Court, Garrard County.

"Not to be officially reported."

Action by Jane Ballew and others against the Home Insurance Company of New York. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wm. O. Bradley, for appellant. W. I. Williams, for appellees.

NUNN, J. On the 10th day of February, 1902, the appellant issued to the appellee a policy of insurance on her dwelling house for five years for the sum of \$1,500, the total premium amounting to \$105, one-fifth of which was paid at that time, and for the balance the appellee, through her agent, Joe Burnside, executed a note for \$84, which was to be paid in four annual installments of \$21 each; the payments of the same to be made on the 1st day of each succeeding February until the full amount was paid. It was stipulated in the policy, and also in the note, that the appellant should not be liable for any loss or damage resulting to the property therein described while any installment due on the note given for the premium remained past due and unpaid, and it was further stipulated that the installments must be paid to the Home Life Insurance Company at its Western Farm Department office in Chicago, Ill., or to a person or persons especially authorized to collect the same for the company. Appellee paid the first installment on the note to appellant's agent at Lancaster about five days after it became due. The second payment was made to the same agent at the same place about 15 days after the 1st of February, 1904. The installment that fell due the 1st of February, 1905, was not paid, and the house was destroyed by fire on the 3d day of February, 1905. Appellant refused to pay the loss, for the reason that the installment due it on February 1st was past due and unpaid at the time of the fire. Appellee then instituted this action upon the policy, alleging that it was in full force and effect; that the insurance began on the 10th day of February, and that each payment continued it for one year thereafter; that, as the fire occurred on the 3d day of February, the last installment on the premium paid by her continued the insurance for seven days after the fire occurred. She did not allege, however, that the taking of the note and fixing the date of payment as of the 1st of February was made by fraud or mistake. Before an answer was filed, the appellee tendered an amended petition, in which she alleged that, at the time the contract for the policy was made, it was distinctly agreed and understood between her representative

and the agent of the appellant that she was not to be held strictly to the time of payment fixed in the note, but that a failure to pay the premium on the precise day mentioned therein would not be taken advantage of, and would not affect the insurance; that it would continue in force; that she had failed to pay the two preceding premiums, as stated, upon the date they were due, but, on payment being made to appellant's agent at Lancaster, he made no protest because of the delay; and this was in accordance with their agreement relative to the payments. Further, that, on the 23d day of January next preceding the fire, appellee's representative, Joe Burnside, met appellant's agent in the streets of Lancaster, and was told by him that the premium on appellee's dwelling house would soon be due; that Burnside had the money then, and offered to pay it for the appellee. Just at that moment, however, some one called the agent away, and as he started off he said to Burnside, "Send me a check for the premium any time next week, and that will be all right." Burnside answered that he would do it. The fire occurred before the next week expired. Appellee alleges that, by these actions and conduct on the part of appellant's agent, it waived the conditions of its policy heretofore recited. Appellant controverted all the allegations made by the appellee, and denied any lability on the policy by reason of the failure of appellee to pay the premium installment when due. The case was tried, and resulted in a verdict in favor of the appellee for the full amount of the policy.

Appellant contends that the court erred in permitting the amended petition to be filed, for the reason, as it claims, that there was a new cause of action set up by the same. To this proposition we cannot agree. Appellee's cause of action was based upon the policy. In the original petition she stated why the policy, from her standpoint, was valid and binding upon the appellant. Afterwards she filed an amendment, in which she set up additional reasons why appellant should pay the amount provided in the contract of insurance. This was not a departure from the original cause of action. See *Adams Oil Co. v. Christmas & Hughes*, 101 Ky. 564, 41 S. W. 545. The evidence of appellee tended to establish the truth of the allegations of the amended petition; that of appellant contradicted the same. Appellant admitted the payment of the two preceding premiums after the date when due, and its agent, in substance, made the following statement with reference to the alleged conversation of January 23, 1905: That he called Burnside's attention to the fact that the next installment on the premium would be due in a few days, and Burnside said that he did not have the money with which to pay it then, but would send him a check for it next week, which he answered would be all right.

The opinions of this court in the following cases sustain the proposition that insurance companies can, by their agents, waive the forfeiture of a policy: *Mudd v. German Insurance Co.*, 56 S. W. 977, 23 Ky. Law Rep. 308; *Johnson v. Southern Mutual Life Insurance Co.*, 79 Ky. 403; *Phoenix Insurance Co. v. Spiers & Thomas*, 87 Ky. 285, 8 S. W. 453; *Home Insurance Co. v. Mears*, 105 Ky. 323, 49 S. W. 31; *Wallis v. Home Insurance Co.*, 71 S. W. 650, 24 Ky. Law Rep. 1452; *Home Insurance Company of New York v. Holder*, 74 S. W. 267, 24 Ky. Law Rep. 2483. In the last case cited, upon the subject of waiver and forfeiture, the court said: "'While, however, the time of payment of a premium is of the essence of a contract of insurance, and while the conditions of a policy, which the court regards as valid, cannot be held to be meaningless, or be avoided, save for a sufficient cause, yet forfeitures are not regarded with favor. The belief long prevailed that the insurance business could not be carried on without the power to impose the most stringent conditions for delinquency, owing to the fact that prompt payments constitute its very life: and, while this is so, yet more liberal views have properly obtained of late, and the contract will be liberally construed as to the insured. We do not mean by this that the law will not uphold a condition in a policy which is not illegal and contrary to public policy, but that a court will seize hold of a reasonable excuse to avoid forfeiture. If, for instance, the insured can show some reasonable excuse for nonpayment of a premium, based upon the conduct of the insurer, the policy will not be regarded as forfeited.' It is further shown in the proof that one or two of the previous premiums were paid after their maturity without objection or complaint or forfeiture or lapse, and it is shown by the note of appellee to appellant's agent that it was his purpose to retain the premium until he ascertained the additional cost occasioned by the tenancy permit, and to remit it all at one time, and the statement by appellant's agent, Porter, to appellee's agent, Halteman, in effect that this would be all right, this, in our opinion, was sufficient to lull appellee into feeling that he was secure, and that his interests were protected." See, also, the case of *Continental Insurance Company of New York v. Browning*, 114 Ky. 183, 70 S. W. 660, the facts of which are in a great measure similar to those in the case at bar. In view of the alleged understanding and agreement at the time the policy was issued, and appellant's permitting appellee to pay the two previous premium installments some days after they were due, without complaint or objection, and appellee's version of the conversation which took place between her representative and the agent of appellant on the 23d day of January, 1905, we think appellee was led into the belief that her policy of insurance would not lapse

or be forfeited because of her failure to pay the premium installment on the precise day fixed in the policy and note.

Appellant also contends that the court erred in failing to give credit in the judgment for the unpaid premium installments. It is sufficient to say on this point that the appellant did not ask in its pleading for a recovery of the unpaid premium. It is entitled to recover the same, and it is not barred from so doing by this procedure.

For these reasons, the judgment of the lower court is affirmed.

#### WHITWORTH et al. v. POOL.

(Court of Appeals of Kentucky. Oct. 23, 1906.)

##### 1. APPEAL—HARMLESS ERROR—RULING ON DEMURRER.

Plaintiff sought damages for defendants' refusal to convey land as agreed. Defendants answered that the writing did not contain all the agreement, alleging other conditions, and sought specific performance of the agreement as stated by them. A demurrer to so much of the answer as asked for specific performance was sustained, but defendants were permitted to introduce evidence that the contract was as they alleged. *Held* that, if the court was correct in its conclusion that the writing contained the contract, the ruling on the demurrer, if error, was not prejudicial to defendants.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4089-4105.]

##### 2. SAME—QUESTIONS OF FACT—FINDINGS OF COURT.

Where, in an ordinary action, the court is required by the parties to pass on the facts, its judgment will be given the same weight as a verdict.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3955-3969.]

##### 3. VENDOR AND PURCHASER—FAILURE TO CONVEY—DAMAGES.

The measure of damages for failure to convey land as agreed was the difference between the contract price and what the land was worth on the market.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 1047-1048.]

##### 4. APPEAL—HARMLESS ERROR.

In an action for failure to convey land as agreed, an error of the court in computing damages in estimating the value of the land as of the date of the contract instead of the date the deed was to have been made was not prejudicial to defendant, where the evidence showed that there was no decrease in the value of the land after the date of the contract.

##### 5. FRAUDS, STATUTE OF—WRITING—DESCRIPTION OF LAND.

A contract as follows: "Waitman, Ky., December 23rd, 1901. We have this day sold to J. our farm on which we reside, on the Texas road, containing ninety acres, more or less, for the sum of \$2,000.00, \$50.00 received, balance \$1,950.00, to be paid when deed is made," sufficiently described the land; Waitman being a station in a certain county on a railroad commonly known as the "Texas" road.

##### 6. SAME—SIGNATURE—AUTHORITY OF AGENT.

Under the statute of frauds, requiring the writing to be signed by the party to be charged or his authorized agent, it is not necessary that the authority of the agent to make an executory contract for the sale of land should be in writing.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 254, 255.]

##### 7. SAME—SIGNATURE BY AGENT.

An agent having authority to sign his principal's name to a contract governed by the statute of frauds need not indicate that the signature is by the agent.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 251, 252.]

##### 8. SAME—SIGNATURE BY AGENT—EVIDENCE—SUFFICIENCY.

Where a wife signed her husband's name to a contract governed by the statute of frauds his subsequent offer to deliver a deed, even though it was defective, was a recognition, and evidence, of her authority.

##### 9. SAME.

Evidence held sufficient to show that a wife had authority to sign her husband's name to a contract governed by the statute of frauds.

##### 10. VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—INTEREST TO BE CONVEYED.

Where a contract was merely for the sale of land at a specified price "to be paid when deed is made" it would be presumed that the deed was to be one of general warranty.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 306, 307.]

Appeal from Circuit Court, Hancock County.

"Not to be officially reported."

Action by James Pool, by his next friend, against Mary Whitworth and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. Scott Morrison, for appellants. Miller & Todd, for appellee.

SETTLE, J. This action was instituted in the lower court by the appellee, James Pool, an infant, who sues by his next friend, J. H. Nelson, against the appellants, Mary Whitworth and R. J. Whitworth, to recover damages for an alleged breach of a contract contained in the following writing: "Waitman, Ky., December 23rd, 1901. We have this day sold to James Pool our farm on which we reside, on the Texas road, containing ninety acres, more or less, for the sum of \$2,000.00, \$50.00 received, balance \$1,950.00, to be paid when deed is made. Mary Whitworth. R. F. Whitworth. James Pool."

The joint answer of the appellants sets up the following grounds of defense: (1) That the writing evidencing the alleged contract does not sufficiently describe the land. (2) That the writing was not signed by R. F. Whitworth, but that his name appearing thereto was signed by his wife, Mary Whitworth, without authority from him. (3) That the writing does not contain all the contract made by the parties, being correct only in its statement of the consideration, amount paid and to be paid, and description of the land, but omitting, by fraud or mistake of the draftsman, to state the following additional features of the contract as actually made by the parties, viz.: That appellee would accept from appellants a deed to the land without covenant of general warranty; that appellants should be allowed to remove a certain pump then in use on the land by James Hoskins; and that appellee would fulfill appellants' contract with Will and

specific performance as corrected. The court below sustained a demurrer to the answer as sought the specific performance. The affirmative matter of the case was traversed by reply. It is unnecessary to decide whether the court erred in sustaining the demurrer, for it appears from the record that appellants were allowed to introduce evidence to show that the contract was claimed by them, and, if the court erred in the conclusion, that the writings contain the true contract between the parties. It follows that the error, if any there is in sustaining the demurrer, was not material to the appellants. There were no errors of the case. On the first trial, the jury returned a verdict in appellee's favor for \$2,300. On appellants' motion this verdict was set aside, and a new trial granted them. The case was again called for trial, but the parties waived a jury, and submitted the case to the court. The court found the law and the facts to the court's satisfaction, and accordingly, the court was of the opinion that the writing in question truly expressed the contract, and that, for the breach of the contract, appellee was entitled to recover of appellants \$300 in damages. And for this judgment was duly entered. It is the opinion of the court that the lower court was correct in refusing them a second new trial, and that the judgment should be reversed. On our examination of the evidence, and the court's separate conclusions of law and fact, we are satisfied that the writing filed in support of the petition substantially expresses the true contract made by the parties, and if in doubt there is, we would not be authorized to disturb the judgment, for, in an ordinary case, when the court is required by the parties to perform the work of a jury by passing on the facts, its judgment will be given the same weight and consideration that is given the verdict of a properly instructed jury. In fixing the damages, the court adopted the proper criterion. The measure of damages was the difference between what appellee was to pay for the land, and what it was worth on the market. The court found from the evidence that the land, at the time of its purchase by appellee, was worth \$2,300, which was \$300 in excess of what he was to pay for it. This finding is fully sustained by the proof, and the fact that the value was estimated as of the date of the contract, instead of as of the date when the deed was to be made, was not prejudicial to appellants. No time is fixed by the statute for the delivery of the deed; therefore, the deed was to be delivered within a reasonable time, and might have been delivered any time after the contract was made, and, according to the proof, there was no increase in the value of the land after the date of the contract, but all the time

was in proof that appellee, in anticipation of appellants' complying with their contract, had purchased of another person a right of way to the land in controversy, for which he paid \$150, which item the court excluded in estimating appellee's damages. We think the description of the land in the contract sued on is sufficient. The writing is dated at Waitman, which is in Hancock county, and a station on the Louisville, Henderson & St. Louis Railway, commonly known as the "Texas" road, and it is stated in the writing that the land contains 90 acres, more or less, situated on the Texas railroad. Tested by numerous decisions of this court, the description of the land is sufficient for its identification. *Winn v. Henry*, 84 Ky. 48; *Henderson v. Perkins*, 94 Ky. 207, 21 S. W. 1035.

We find no merit in appellants' complaint that the lower court was not authorized to find from the proof that appellant, R. F. Whitworth was bound on the writing by the act of his wife in signing his name thereto. It appears that each of the appellants held title to one-half of the 90 acres of land contracted to appellee, and, had it been owned by the wife alone, it would have been necessary for the husband to unite with the wife in the writing in order to make it binding on her. It is admitted that the name of R. F. Whitworth was signed to the writing by his wife; therefore its validity depends upon whether she had authority from her husband to sign it thereto. Under our statute of frauds the writing must be signed by the party to be charged, or his authorized agent, but it is not required that the authority of the agent to make an executory contract for the sale of realty must be in writing. Nor was it so at the common law. 1 Greenleaf (15th Ed.) § 269. Thus states the rule on this subject: "Though the agent to make a deed must be authorized by deed, yet the agent to enter into an agreement to convey is sufficiently authorized by parol only." The same rule has been announced by this court. In *Irwin v. Thompson*, 4 Bibb, 295, we find this language: "But it is contended as the letter of attorney was not signed by Elizabeth Irwin herself, that it is void under the statute against frauds and perjuries. The language of the statute most certainly does not embrace the case. The statute requires a contract for the sale of land to be signed by the party or his agent, but, as to the mode of appointing an agent, the statute has left it as it was at the common law. To construe the statute to require an authority to make a contract for the sale of land to be in writing and signed by the party giving such authority would, in effect, prevent every person who is unable to write from making a binding contract.

Such an effect cannot certainly be presumed to have been within the intention of the Legislature to produce by the statute." In *Talbot v. Brown*, 1 A. K. Marsh. 436, 10 Am. Dec. 747, it is also said: "But as the authority of Talbot's son is expressly denied, it is also contended that evidence of his authority should not only have been introduced, but it is moreover urged that the authority should be shown to have been in writing. That to make the sale obligatory upon Talbot his son must have been clothed with power to sell, is a proposition not to be controverted; but as respects the justice of the case, it cannot be material whether the authority was created either by writing or parol, and the statute against fraud and perjuries has never been held to require it to be in writing." *Columbia L. & M. Co. v. Tinsley*, 60 S. W. 10, 22 Ky. Rep. 1062. It was not necessary either that the agent should have indicated in writing that her husband's name had been signed by her as agent. If in fact she had authority to sign it as agent, simply the writing of his name to the paper by her was sufficient. *Patterson, etc., v. Henry*, 4 J. J. Marsh. 126; *Taul v. Winn, etc.*, 5 J. J. Marsh. 437; *Parmers v. Respass*, 5 T. B. Mon. 562.

The court found as a fact that appellant Mary Whitworth was authorized by the appellant R. F. Whitworth to sign his name to the contract in question. We are convinced that this finding is sustained by the evidence. Appellants admit they sold appellee the land for the consideration expressed in the writing, and that a deed was tendered appellee by the appellant R. F. Whitworth, after the execution of the writing. If, as appellants claim, the name of R. F. Whitworth was signed to the contract without authority, it is hard to understand why he was willing to ratify his wife's unauthorized act of signing his name to the contract, by tendering appellee the deed to carry it into effect, instead of promptly denying her right to do so, and repudiating the writing when informed of it. It is true the deed was imperfect in form, for which reason appellee, though then ready and willing to pay the balance of the purchase money due appellants on the land, would not accept it, but the offer of appellants to deliver even a defective deed, in pursuance of the contract of sale, was a recognition of the fact that appellant R. F. Whitworth's name was signed to it by his authority. Additional evidence of his having authorized the signing of his name to the writing is furnished by the testimony of J. H. Nelson and J. G. Nelson, found in the record, both of whom swore that he admitted to them he had given his wife such authority. It is also contended by appellants that the court erred in finding as a matter of fact or of law that the writing sued on required of them a tender to appellee of a deed to the land containing a covenant of general warranty. This contention is

wholly unsound, to demonstrate which we need no other proof than is furnished by the writing itself. As said in *Galther, etc., v. O'Doherty*, 12 S. W. 306, 11 Ky. Law Rep. 594, "If a party gives a bond for the conveyance of land without any stipulation as to the character of title he is to make to the grantee, he must convey with general warranty." *Davis v. Dycus*, 7 Bush, 6. The contract of sale in the case at bar being silent as to the character of title to be conveyed, it must be presumed, as the circuit court properly held, that the deed was to be one of general warranty.

Judgment affirmed.

#### MOUSER et al. v. SPAULDING et al., School Trustees.

(Court of Appeals of Kentucky. Oct. 23, 1906.)

##### 1. SCHOOL DISTRICTS—ESTABLISHMENT—DUTY OF SUPERINTENDENT.

In the matter of establishing or refusing to establish a new school district, the duties of the county superintendent of schools are statutory and purely administrative, and he cannot be made to observe the interests of any individual.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Schools and School Districts, § 59½.]

##### 2. SAME—ESTABLISHMENT OF NEW DISTRICT—RECORD.

The act of establishing school districts is not effected until so entered on the public official record, so as to notify the public that it is done, and it cannot be done privately by the administrative officer or by promises to individuals interested.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Schools and School Districts, § 67.]

##### 3. SAME—PROCEEDINGS FOR ESTABLISHMENT—FRAUD—EVIDENCE—SUFFICIENCY.

The superintendent of schools having refused defendants' request for the establishment of a new school district, their attorney filed a petition for mandamus, in which only his clients and others favoring the formation of the new district were made parties, some being made plaintiffs, and some defendants, the latter being styled "trustees of the new school district." Neither the county superintendent nor any of the trustees of the old school district were made parties or notified. In the petition it was pretended that the new district was already validly established, and it sought to compel the defendants therein to take up their alleged duties as trustees of said district. *Held*, in an action to have decreed void a judgment rendered according to the prayer of the petition, that said judgment was invalid, and without any effect regarding the establishment of a new district.

Appeal from Circuit Court, Marion County.  
"Not to be officially reported."

Proceedings by Joseph Spaulding and others, trustees of a school district, against W. B. Mouser and others to have declared void a decree in certain mandamus proceedings recognizing the existence of an alleged new school district. From a judgment for plaintiffs, defendants appeal. Affirmed.

Lafe S. Pence and S. A. Russell, for appellants. H. S. McElroy and H. W. Rives, for appellees.



SETTLE, J. The vital question presented for our consideration by this appeal is whether the county superintendent of schools for Marion county legally established in 1904 a new school district at Calvary Station in that county as claimed by appellants. It appears that appellants, Mouser, Patterson, Brown, Luckett, and others, residents of Calvary and the immediate surrounding territory, early in the year 1904, applied to the county superintendent, S. G. McElroy, to create a new school district to be composed, in the main, of territory already included within the boundary of a school district known as "Number 17." Upon receiving notice of the application for the proposed new district, the trustees of district No. 17 filed with the superintendent a remonstrance against the same. After considering the application for some time, during which he held numerous interviews with the parties concerned, the superintendent finally decided not to establish the new district. Appellants being greatly chagrined and angered over this decision, and insisting that in rendering it the superintendent violated a promise made them to establish the desired new district upon their complying with certain conditions, which they claimed to have done, consulting an attorney who advised them that they were entitled to the new district, because, if established, its boundaries would include the unincorporated village of Calvary. The attorney, was thereupon employed by appellants to secure the new district for them through the superintendent, or from the court.

The superintendent refusing to accede to the demands of appellants' attorney, he prepared and filed in the circuit court a petition for a mandamus in which only his clients and others, favoring the establishment of the new district, were made parties to the action, some of them being made plaintiffs, and three of them defendants. The latter were styled "trustees of the new school district No. 22." In other words, neither the county superintendent of schools, or any of the trustees of school district No. 17, were made parties to the action, or notified thereof by summons or otherwise. In this proceeding the court was never advised of there being any question of the legal existence of the alleged district No. 22. The ostensible object of the suit as set forth in the petition, was to obtain relief based upon an alleged default in duty on the part of the defendants in their assumed character of trustees, and against them the writ of mandamus was issued and directed. The pretended trustees signed and filed an answer prepared by the attorney bringing the suit, in which they confessed the allegations of the petition, and consented to the granting of the relief asked. A decree was entered in the case recognizing the district as claimed in the petition, which infringes upon the boundaries of three others, and directed

the appropriation by the superintendent to the alleged district No. 22, of a part of the school fund of the county. Later, the attorney threatened to enforce this judgment by process of contempt, if the superintendent and trustees of district No. 17 should fail to comply with its requirements. To prevent the threatened enforcement of the judgment in question, appellees, Henry Porter, Jos. Spaulding, and J. A. Spaulding, trustees of district No. 17, brought this action against appellants and the superintendent of schools, charging in the petition that the ex parte proceeding referred to and the judgment rendered therein, are fraudulent and void as to appellees and all others not parties thereto. That the proceeding was instituted for the fraudulent purpose of imposing upon the then judge of the court, under cover of a pretended controversy, and that he was deceived thereby, and induced to override the discretion of the county superintendent and to illegally establish a school district which that officer had refused to establish. Appellees prayed that the proceedings and judgment in question be declared void, and the prayer having been granted in the lower court by the judgment rendered, appellants now ask its reversal.

Appellants do not rely on the judgment in the proceeding for mandamus, nor do they contend that they are entitled, regardless of the refusal of the superintendent, to a school district because of section 70 of the school law relating to schools and villages, towns, and cities, but the defense set forth in their answer and now urged is that the county superintendent of schools, did, in fact, at a meeting held at Calvary in February, 1904, regularly declare the proposed district established after the giving of due notice in writing to the trustees of district No. 17. We think the weight of the evidence is against this contention of appellants; that of appellees being entirely and positively so. Among others, McElroy, the county superintendent, testified intelligently and convincingly that the new district was never established. He, of all others, ought to have known and did know what he did and what he refused to do, in regard to the proposed new district. From his own frank admissions, as well as the testimony of others, it is evident that he was greatly worried and annoyed by the persistency of the persons desiring the new district. He frequently met and talked with them about it and probably at one time conditionally promised that it would be established, but he did not in fact establish it, though his refusal to do so was not made final until it was advised by the State Superintendent of Schools.

A careful scrutiny of the cross-examination of the appellants and others favoring the new district, whose depositions appear in the record, will show that the county superintendent did not establish the pro-

posed district. That, at most, he only conditionally promised to do so, that is in case no valid objection was shown, but as such objection was made the district was never created.

Appellant's depositions all established the fact that the attorney by whom the mandamus proceeding was instituted was employed after the refusal of the county superintendent to establish the district had been announced, and that he was employed and the suit in question instituted to get the district established over and against the decision of the superintendent. The conduct of the attorney referred to establishes the same fact, for after instituting the mandamus proceeding he induced the superintendent to let him have for his clients a "teachers' register" and a "trustees record book" for which he gave that officer a receipt, stipulating that neither the superintendent, nor any one else should be prejudiced thereby, "in the contest and suit now (then) pending in the Marion circuit court \* \* \* in the attempt to establish a common school district in this county, with its No. 22, and if district is not established, then said books are to be promptly returned to said S. G. McElroy." The foregoing receipt given by the attorney of appellants completely disproves their claim that the superintendent had theretofore established the new district.

At most, the appellants' own testimony merely shows a conditional promise on the part of the superintendent to establish the proposed district. There has been no violation of the personal or property rights of the appellants by the failure of the superintendent to comply with such alleged promise, and if he had established the district as proposed it would not have been proper, for neither the new district or No. 17 would have contained the number of pupils necessary to compose a district as required by the school law. In the matter of establishing or refusing to establish the district, his duties were statutory and purely administrative. In performing them he cannot be made to observe the personal interests of any individual, or class, but must look alone to the public interest. No one can claim a personal right to have a public interest disregarded because some public administrative official may have promised to do so. The act of establishing school districts, being for the public good alone, is not effected until so entered upon the public official record as to notify the public that it is done. It cannot be done privately by the officer clothed with the administrative duty, and it would be against public policy to permit a private promise to one, or any number of individuals, to control the judgment or action of the officer in the performance of a public duty. The chancellor did not err in adjudging the judgment in the suit for the mandamus void, or in declaring

that the alleged new district No. 22 was not legally established thereby, or at all. Indeed, our conclusion is that the judgment appealed from is in all respects proper.

Wherefore it is affirmed.

THOMPSON'S EX'RS v. STILTZ et al.  
(Court of Appeals of Kentucky. Oct. 23, 1906.)

1. WILLS—RIGHTS OF CREDITORS OF DEVISEES  
—LIEN OF JUDGMENT—PROPERTY AFFECTED.

Judgment creditors of a devisee acquire no lien on the real estate of the decedent till the levy of an execution, and then, prior to sale and conveyance, they acquire only a lien, and not title.

2. FRAUDS, STATUTE OF—CONVEYANCE BY DEVISEE—DESCRIPTION OF PROPERTY.

Any conveyance or incumbrance of the share of a devisee in a decedent's real property, describing it as all his interest in the estate, is sufficient within the statute of frauds.

3. WILLS—ASSIGNMENT OF SHARE OF DEVISEE.

An agreement among devisees authorizing the executors to turn over to one of them more than his share of the personality on the understanding that he would account for the excess on the subsequent division of the real estate, constituted an equitable assignment of the recipient's share of the realty to the extent necessary to satisfy the agreement.

4. SAME—PRIORITY OF LIENS AGAINST SHARE OF DEVISEE.

The holder of an unrecorded equitable assignment of a devisee's share in realty is preferred to an antecedent creditor of the assignor if the creditor has notice of the assignment before his lien by execution is perfected by a sale and purchase by him.

5. LIS PENDENS—NATURE AND GROUNDS—ASSIGNMENT OF SHARE OF DEVISEE.

The statute regarding lis pendens has no application to the rights of holders of an equitable assignment of the share of a devisee in a decedent's realty as against prior judgment creditors of the assignor.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by Jacob F. Stiltz and others against Joseph Thompson's executors. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

W. W. Crawford, Wm. Furlong and Burnett & Burnett, for appellants. O. A. Wehle and L. B. Wehle, for appellees.

O'REAR, J. Godfrey Stiltz, now dead, devised all his estate equally to his seven children. Two of his sons, George G. and William, were made executors. His estate consisted of something over \$5,000 in bonds and stocks, and land of the value of about \$25,000. One of the executors, William Stiltz, having become embarrassed and in sore need of immediate funds, induced the devisees to allow him to appropriate the whole of the personal estate in anticipation of his distributive share of the entire estate of the testator. This was done. The devisees thereupon executed to the executors, authorizing them to turn over the personality to William Stiltz, a writing in which the market value of the securities appropriated

was agreed upon. In this writing it was provided "that at the division of the real and personal estate of Godfrey Stiltz's estate said William Stiltz be charged with the value of said effects, to wit, \$5,110.90." At the bottom of the paper William Stiltz endorsed and signed a statement that he had received the foregoing securities "on account of my share in the estate of my father, Godfrey Stiltz, deceased, at the agreed price of \$5,110.90, and that at the division of the real and personal estate of said Godfrey Stiltz, deceased, I be charged on account of said securities or effects with the sum of \$5,110.90." This paper was not acknowledged or recorded. Prior to the death of Godfrey Stiltz, William Stiltz had become bound on a note to Joseph Thompson for \$5,000. This was subsequently reduced to judgment against him. After the death of Godfrey Stiltz, and after the appropriation and the execution of the paper set forth above, Thompson's executors caused an execution issued on his judgment against William Stiltz to be levied upon the undivided share of William Stiltz in the real estate devised by Godfrey Stiltz's will.

Before any sale under the execution this action in equity was begun, whereupon Thompson's executors, as execution creditors on the one side, and Godfrey Stiltz's devisees, other than William Stiltz, on the other, are litigating the superiority of their respective equities. The latter contend that an equitable lien was created in their favor upon William Stiltz's share of the real estate devised by his father, by the execution of the paper and its consideration; Thompson's executors contend that the paper does not create a lien, because it does not sufficiently describe the land as to satisfy the statute of frauds; that the words of the paper are not sufficient to create a lien, though the land were described; and that the land descended to the devisee free from any debts due by him to either the executors of the testator, or to his heirs. Thompson's executors had no lien upon the land until they had caused their execution to be levied upon it. They then got only a lien, as it has not been carried into a title by sale and conveyance. Hence, if Stiltz's devisees got a lien by their paper, it is the elder, and will prevail in equity. It becomes necessary to decide first whether Stiltz's devisees have a lien. William Stiltz's share or interest in the real estate of Godfrey Stiltz was undivided. He had an undivided one-seventh of all of it. Any conveyance or incumbrance of it describing it as all of his interest in Godfrey Stiltz's estate is a sufficient description to satisfy the statute of frauds. This precise question was decided recently in the case of *Moayon v. Moayon*, 114 Ky. 855, 72 S. W. 33, 60 L. R. A. 415, 102 Am. St. Rep. 303. It is not deemed necessary to rediscuss the question.

We think the agreement among the de-

visees authorizing the executors to turn over to one of them more than his share of the personality upon the understanding that he would account for the excess in the subsequent division of the testator's real estate devised to them all, constituted an equitable assignment of the recipient's share of the real estate to the other devisees to the extent necessary to satisfy the agreement to equalize them. It was such an agreement as would be enforced in equity against the one who had received the overplus of personality. *Foltz v. Wert*, 103 Ind. 404, 2 N. E. 950; *Spain v. Anderson*, 115 Iowa, 121, 88 N. W. 200; *Harrison v. Baldwin*, 92 Ga. 329, 18 S. E. 402; *Brown's Adm'r v. Mattingly*, 91 Ky. 275, 15 S. W. 353; *Taylor v. Jones*, 97 Ky. 201, 30 S. W. 595. In this state the rule is recognized that the holder of such an unrecorded equitable assignment is preferred to an antecedent creditor of the assignor when the creditor is attempting to subject the assignor's legal title in the property, provided the creditor has notice of the equitable assignment before his lien by execution or attachment is perfected by a sale and purchase by him. *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146; *Clift v. Williams*, 105 Ky. 559, 49 S. W. 328, 51 S. W. 821; *Wicks Bros. v. McConnell*, 43 S. W. 206, 20 Ky. Law Rep. 84; *Three Forks Lumber Company v. Smith*, 32 S. W. 167, 17 Ky. Law Rep. 566. The facts of this case bring it within each of the principles stated above. The equitable assignment by William Stiltz to his co-devisees was in the nature of a charge upon his share in the realty devised to him by his father. It was for a sufficient consideration. The property was sufficiently described. The execution creditors of William Stiltz had notice of it before they had bought under their execution lien, and their execution lien is but an equity as it stood when this case was tried. The elder equity should, therefore, prevail.

The statute regarding *lis pendens* liens has no application to the relief granted in this case. That statute applies only in behalf of innocent purchasers for value. If the purchaser has notice of the pending suit, or of the lien being asserted in it, it is the same so far as he is concerned as if the *lis pendens* notice had been filed, for that is what that notice is for. It is to give notice to intending purchasers or subsequent creditors.

The judgment of the circuit court in favor of Stiltz's devisees is affirmed.

JONES et al. v. CARLIN et al.

(Court of Appeals of Kentucky. Oct. 23, 1906.)

DEEDS—CONSTRUCTION—INTEREST CONVEYED—LIFE ESTATES.

A deed by an elderly couple recited that they desired an equitable distribution of their estate among their children, and that they thereby conveyed with covenant of general warranty to two of the children jointly for life, with remainder to their bodily heirs, certain.

land, to have and to hold, together with all and singular the appurtenances thereunto belonging, unto said parties jointly for and during their natural lives, without power to alienate or convey, with remainder to their bodily heirs, forever. Ky. St. § 2343, provides that all estates which, in former times, would have been deemed estates entailed, shall be held to be estates in fee simple, and every limitation thereof held valid, if valid when limited on an estate in fee simple. Section 2345 provides that if any estate be given by deed or will to a person for his life, and after his death to his heirs or the heirs of his body, or his issue or descendants, it shall be construed as an estate for life only in such person, and remainder in fee simple. *Held*, that the deed was properly construed as falling directly under section 2345, and that the grantees took only a life estate in the property, as against their contention that they took an estate tail which was converted by section 2343 into a fee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 360-365, 416-435.]

Appeal from Circuit Court, Spencer County.  
"Not to be officially reported."

Action between Lew Jones and another and Sarah A. Carlin and another. From the judgment, said Lew Jones and another appeal. Affirmed.

Gilbert & Gilbert, for appellants. Reasor & Crume, for appellees.

HOBSON, C. J. George R. Jones and wife conveyed to two of their children, Llewellyn Jones and Sarah Agnes Jones Carlin, certain lands. The question to be determined here is what interest the grantees took under the deeds, which are substantially in the same words. One of the deeds reads as follows: "This deed of conveyance, made and entered into this 10th day of July, 1901, by and between George R. Jones and Emmerine C. Jones, his wife, parties of the first part, and Llewellyn Jones and Sarah Agnes Jones Carlin, parties of the second part, witnesseth: That, whereas, the first parties have arrived at an advanced age, and the tenure of life is uncertain, and they desire an equitable distribution of their estate among their children, now, in consideration of the premises, and of their natural love and affection for their children, the second parties, and the further consideration of one dollar cash in hand paid, the receipt of which is hereby acknowledged, we, the said first parties, have this day bargained and sold, and by this writing do sell, transfer, and convey, with covenant of general warranty, unto second parties jointly for life, with remainder to their bodily heirs, two certain tracts of land lying and being in Spencer county, Kentucky, and bounded and described as follows, to-wit: [Here follows description.] To have and to hold the said two tracts of land, together with all and singular the appurtenances thereunto belonging, unto the said Llewellyn Jones and Sarah Agnes Jones Carlin jointly for and during their natural lives, without power to alienate or convey, with remainder to their bodily heirs, forever." The circuit court held

that the grantees took only a life estate in the property, and they appeal.

Sections 2343 and 2345, Ky. St. 1903, are as follows:

"Sec. 2343. All estates heretofore or hereafter created, which, in former times, would have been deemed estates entailed, shall henceforth be held to be estates in fee simple; and every limitation on such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple."

"Sec. 2345. And if any estate shall be given by deed or will to any person for his life, and after his death to his heirs, or the heirs of his body, or his issue or descendants, the same shall be construed to be an estate for life only in such person, and a remainder in fee simple in his heirs, or the heirs of his body, or his issue or descendants."

It is insisted for appellants that they took under the deeds an estate tail, and that this, by section 2343 above quoted, is converted into a fee. It is also insisted for them that section 2345 has no application. It is said that here there is no conveyance to a person for his life and after his death to his heirs or the heirs of his body. An estate tail was created at common law by a grant to one and the heirs of his body. A grant to one for life, with remainder to the heirs of his body, did not at common law create an estate tail, but a fee simple, under the rule in *Shelly's Case*. This rule was declared not in force in Kentucky, and section 2345, Ky. St. 1903, is declaratory of the rule adopted in this state. By section 2348, Ky. St. 1903, when a joint tenant dies, his part of the joint estate descends to his heirs. Under the deeds in question the land was conveyed to the two children jointly for life, with remainder to their bodily heirs. The meaning of the deeds is not that, if one of them dies without children, the whole estate shall go to the children of the other. Under the deed, each of the children of the grantors takes a moiety of the land for life, with remainder to his or her bodily heirs. If either of them dies without bodily heirs, that moiety of the estate granted will revert to the grantors. The purpose of the grantors in making the deeds was to vest a life estate in the grantees, with the remainder in their children; the children of each grantee succeeding at his or her death to the moiety owned by their parent. The deeds are made in consideration of love and affection, and to secure an equitable distribution of the grantors' estate among their children. Taken as a whole, they do not indicate an intention to vest in the bodily heirs of one of the children any interest in the moiety of the property which was conveyed to the other. If such a construction were adopted, it would follow that, if Llewellyn Jones left one child and Mrs. Carlin six, the seven children would take the estate jointly, which would give her family six-sevenths of the land, and his only one-seventh. This

was not what the grantors intended. They intended an equal division of the land between their two children. The case, therefore, falls literally within section 2345, Ky. St. 1903, above quoted, and the circuit court properly so held.

Judgment affirmed.

#### RICE et al. v. MOUNTZ et al.

(Court of Appeals of Kentucky. Oct. 17, 1906.)

##### 1. ELECTIONS—MUNICIPAL ELECTIONS—MAN- NER OF HOLDING ELECTION—STATUTES.

Ky. St. 1903, § 1596a, subsec. 5, provides that the county board of election commissioners shall constitute a board for examining and canvassing the returns of elections, requires the board to give certificates of the number of votes cast in the city or town and to deliver a copy thereof to the municipality. Section 3658, in relation to towns of the fifth class, provides that the elections shall be held as provided in the general laws of the state. *Held*, that a city election in a city of the fifth class must be held under the general election laws and by the same officers, and at the same time and place for holding the general election for state and county officers, and such an election held at a place other than where the general election was held, and under the supervision of officers appointed by the mayor of the city, was invalid.

##### 2. SAME—BALLOTS.

Ky. St. 1903, § 3658, provides that all municipal elections in cities of the fifth class shall be held under, and as provided in, the general election laws. No registration of voters is required in cities of the fifth class, and section 3659 provides that in cities and towns where registration is not required the ballots shall be deposited in a separate box. Section 1453 prescribes the duty of the county clerk as to the printing of ballots, without stating whether there shall be separate ballots for candidates for municipal offices from that for candidates for county offices. *Held* that, if a voting precinct only includes the territory of the municipality, the ballot may contain the names of candidates for county and municipal offices; but, if the precinct includes persons outside of the municipal territory, there must be separate ballots.

Appeal from Circuit Court, Powell County.  
"To be officially reported."

Action by George W. Rice and others against William Mountz and others to require the judges of a city election held in Clay City, Powell county, to open the ballot boxes and issue certificates of election. From a judgment denying such relief, plaintiffs appeal. Affirmed.

John D. Atkinson, for appellants. C. F. Spencer, for appellees.

NUNN, J. It appears that, on the 7th day of November, 1903, an election, or an attempted election, was held in Clay City (a city of the fifth class), Powell county, Ky., at which the appellants claim they were elected mayor, police judge, and councilmen. The election was held under the supervision of officers appointed by the mayor of the city, and at a place other than that where the general election for county officers was held. When the polls were closed at the city election, the

officers counted the ballots and made out and signed certificates of the result. One of the certificates was placed in the back of the stub, or poll, book, and one in the ballot box. When the officers tore from the stub book the unused ballots, they, by mistake, tore out the certificate of the result, and destroyed it with the unused blank ballots. The certificates left in the hands of the election officers were lost or destroyed, which left the certificate placed in the ballot box the only one showing the result of the count of the ballots. When the county board of election commissioners met to perform their duties, they were unable to ascertain the result of the city election, and consequently did not issue certificates of election to any city officer. The appellants instituted this action to require the judges of the city election to produce the keys to the ballot box, and open it, and have the board of election commissioners reassemble, and, from the certificate in the box, issue certificates of election. They alleged in their petition that they had received the highest number of votes, and were elected. The lower court refused to grant appellants' request, and they have appealed.

The only question for determination is whether the election for city officers was valid. If so, appellants should not be deprived of the offices because of mere irregularities. See *Trustees of Common School v. B. E. Garvey*, 80 Ky. 159; *City of Cynthiana v. Board of Education*, 52 S. W. 969, 21 Ky. Law Rep. 733; and *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867. Many other cases might be cited to the same effect, but in all these cases there was an election authorized by law, and the effort was made to have them declared illegal because of mere irregularities. Subsection 2 of section 1596a, Ky. St. 1903, as amended by an act approved March, 1904 (see Acts 1904, p. 197, c. 93), and subsection 4, provide the only method for the appointment and selection of officers to hold elections. Subsection 3 explicitly prescribes their qualifications, and the manner of their appointment. Subsection 5 provides that the county board of election commissioners shall constitute a board for examining and canvassing the returns of elections, and the manner in which it shall be done. This section requires the board to give certificates of the number of votes cast in the city or town, and to deliver a copy thereof to the municipality. Section 3658, which applies to towns of the fifth class, provides: "In all municipal elections the qualification of voters \* \* \* shall be the same as in state elections; and all elections \* \* \* shall be held under and as provided in the general election \* \* \* laws of the state." We find that, "under and as provided by the general election laws of the state," the county board of election commissioners appoints persons with certain defined qualifications to serve as election officers in each county for the period of one year. In the event they

fail to attend, the voters present, under certain restrictions prescribed in subsection 4 of section 1590a, may select the officers to serve for that election. It is certain that it was the intention of the Legislature, in enacting sections 3618, 3658, 3659, 1445, and 1453, and the sections above referred to, to have the elections for cities, towns, and districts held under the general election laws, by the same officers, and at the time and place of holding the general election for state and county officers. These provisions were enacted to have a uniform system of election, to save as much expense as possible, and to prevent frauds.

In the case of *Cope v. Cardwell, Jr.*, 93 S. W. 3, 29 Ky. Law Rep. 263, the opinion in which construes sections 3669 and 3670, Ky. St. 1903, which relate to cities of the sixth class, and are identical with sections 3658 and 3659, governing cities of the fifth class, the appellant and appellee were opposing candidates for the office of police judge of the town of Jackson. At that election (November 7, 1905) a county ticket was elected, and also a state senator and representative. The clerk placed the names of all candidates upon one ballot; in other words, a separate ballot was not provided for the candidates for county, and those for municipal, offices. Because of the failure of the clerk to provide separate ballots, the appellant sought to have the court declare the election invalid. Upon the trial it appeared that the town of Jackson composed one voting precinct, in which persons living outside of the corporate limits were not permitted to vote. In the opinion rendered in the case, this court, in construing section 3670, said: "Our conclusion is that the inference to be drawn from section 3670 is that, in a case like this, when the precincts contain the same electors as the municipality, one official ballot was all that was necessary." The court then referred to the question as to how the ballots should be printed in towns where the voting precincts include both residents of the town and country, but did not expressly pass upon it. In view of the importance of this question, we have decided to pass upon it. As indicated in the *Cope-Cardwell Case*, supra, the statute does not make it mandatory upon the clerk to place the names of candidates for county and municipal offices upon the same ballot, but he may do it when the territory composing the voting precinct and the municipality are identical. It is obvious that, where the precinct includes the residents of a town and others residing without the corporate limits, it would be impossible to have a fair election, if the names of all candidates for county and municipal offices were placed upon the same ballot. Under the Constitution, elections by ballot are secret, and, if all the names were placed upon the same ballot, persons

residing without the town might elect the municipal officers.

Our conclusion is that, under the existing statutes, if a voting precinct only includes the territory of a municipality, the ballot may contain the names of candidates for county and municipal offices; but if the voting precinct includes persons outside of the municipal territory, then there must be separate ballots. We are also of opinion that the election under which appellants claim title to the offices was invalid. The officers who were appointed by the board of election commissioners, and who actually held the election for county offices and members of the General Assembly, were the only persons authorized to hold the election for municipal offices. We cannot uphold the action of the parties who held the election at which appellants were voted for, upon the ground that they were de facto officers. There can be no de facto officers when the de jure officers are in charge and discharging the duties incumbent upon them.

For these reasons the judgment of the lower court is affirmed.

#### ILLINOIS CENT. R. CO. v. STEVENS. (Court of Appeals of Kentucky. Oct. 24, 1906.)

##### 1. CARRIERS—INITIAL CARRIER—DAMAGES TO SHIPMENT—BURDEN OF PROOF.

An initial carrier limiting its liability to its own line, when sued for injuries to a shipment, has the burden of showing that it carried the shipment with proper care to the end of its line and there turned it over to the connecting carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 835-838.]

##### 2. SAME—EVIDENCE—SUFFICIENCY.

In an action against the initial carrier for negligence in the transportation of a shipment of stock it appeared that the carrier limited its liability to its own line. The train which carried the stock was delayed by a wreck on the initial carrier's line. The stock was placed on the receiving track of the connecting carrier. There was nothing to show when the stock left that point or how it was transported from there to the point of destination. *Held*, that the question of the liability of the initial carrier was for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 962.]

##### 3. SAME—CARRIAGE OF LIVE STOCK.

In an action against the initial carrier for injuries to a shipment of hogs, evidence *held* to warrant a finding that the hogs were not properly cared for while in the possession of the initial carrier.

##### 4. PLEADING—AMENDMENT—ANSWER.

Where, in an action against the initial carrier for injuries to a shipment of hogs, the proof showed that the hogs had been placed on the receiving track of the connecting carrier, but did not show any notice to the connecting carrier nor when the connecting carrier took charge of the shipment, the court did not abuse its discretion in refusing to allow an amended answer pleading that the hogs had been delivered to the connecting carrier.

Appeal from Circuit Court, Carlisle County.  
"Not to be officially reported."

Action by G. W. Stevens against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Robbins, Thomas & Bridgwater, J. M. Dickinson, and Trabue, Doolan & Cox, for appellant. J. M. Nichols & Son, for appellee.

HOBSON, C. J. Appellee Stevens shipped three carloads of hogs from Arlington, Ky., to Cincinnati, Ohio. The hogs were carried by the Illinois Central Railroad Company to Louisville, and were there delivered by it to the Baltimore & Ohio Railroad Company and were carried by it to Cincinnati. The hogs were loaded on the evening of the 15th of October, and, according to the usual course of business, should have been delivered in Cincinnati about 6 a. m. on the morning of the 17th, but they did not reach Cincinnati until the morning of the 18th. The purpose of the shipment was to get them to Cincinnati to be sold on the market on the 17th, which was Monday. The market the next day was 10 cents lower than on the day before. When the hogs reached Cincinnati they looked gaunt, as though they had not been watered or fed on the journey. Seven of the hogs were missing, three were dead in the cars, and one or two were crippled. All of them looked bad. Stevens brought this suit to recover damages for negligence in the shipment in the sum of \$369.21. The jury found for him \$280 against the Illinois Central Railroad Company, and it appeals.

The Baltimore & Ohio Railroad Company was made a defendant to the action in the circuit court, but was not brought before the court. So the only question here is as to the liability of the Illinois Central Railroad Company. The stock was shipped under the usual bill of lading by which the liability of the initial carrier was limited to its own line. The proof tended to show that there was a wreck on the line of the Illinois Central Railroad Company which delayed the train which took the hogs between four and five hours. In consequence of this delay the hogs did not leave Paducah when they should have left, and did not reach Louisville until after the time they should have been in Cincinnati in the ordinary course of business. They were placed on the receiving track of the Illinois Central Railroad Company about 8:40 a. m. on the 17th at Louisville. This track was the one from which the Baltimore & Ohio Railroad Company received freight. The proof for the defendant stopped here. It does not show when the stock left Louisville or how it was transported from there to Cincinnati. For all that appears in the proof, there may have been no negligence on the part of the Baltimore & Ohio Railroad Company. The burden was on the initial carrier to show that it carried the stock with proper care to the end of its line and there turned it over to the connecting carrier. On the facts shown the question was for the jury

as to the liability of the Illinois Central Railroad Company, and its motion for a peremptory instruction was properly overruled.

The verdict of the jury is not against the evidence. The facts shown warranted the jury in concluding that the stock were not properly cared for between Arlington and Louisville, the hogs having been in the care of the Illinois Central Railroad Company from the evening of the 15th until the morning of the 17th. The court did not abuse its discretion in refusing to allow the amended answer to be filed, which pleaded that the hogs were delivered to the Baltimore & Ohio Railroad Company at Louisville. This amended answer was tendered to conform to the proof on the trial, but the proof failed to show any notice to the Baltimore & Ohio Railroad Company that the hogs had been placed on the receiving track for it, and it did not show when the Baltimore & Ohio Railroad Company in fact took charge of the hogs. The burden was on the appellee to show these facts. *Railroad Co. v. Bourne*, 29 S. W. 975, 16 Ky. Law Rep. 825. The proof as to the condition of the hogs when they left Arlington and their condition when they reached Cincinnati, in connection with the proof as to the time that they had been on the journey, was sufficient to go to the jury on the question of loss of weight, as the jury would be warranted in concluding that the hogs would lose in weight if not fed and cared for in that length of time. The record does not show what the hogs weighed at Arlington, nor does it show what they weighed in Cincinnati. There is some talk in the record about a bill of sale, but that is not in the transcript and so we cannot say that there was any error in the circuit court in its rulings as to the admissibility of the bill of sale.

The instructions of the court excluded from the jury the item sued for on account of appellee being deprived of transportation for himself from Arlington to Cincinnati. There was sufficient proof as to the decline of the market to submit that matter to the jury. Appellant introduced no witness who knew the facts as to the cause of the wreck which delayed the train, or who could testify to facts showing that the wreck occurred without negligence on the part of the railroad company. On the whole case we do not see that there was any error to the prejudice of the substantial rights of appellant on the trial.

**Judgment affirmed.**

UNITED STATES LIFE INS. CO. IN THE CITY OF NEW YORK v. SPINKS.

(Court of Appeals of Kentucky. Oct. 19, 1906.)

1. INSURANCE — MUTUAL INSURANCE COMPANIES — SURPLUS — LAPSED POLICY.

The "surplus" of a mutual life insurance company belongs equitably to the policy holders who contributed to it in the proportion in which

they contributed to it. Under section 88, c. 690, p. 1809, Laws 1892, of New York, the share of a policy lapsed for nonpayment of premium (after having been in force three years) must be applied to the purchase of extended insurance unless the policy holder has elected to take paid-up insurance therefor.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 77, 935.]

## 2. SAME—EXTENDED INSURANCE.

The words "dividend additions" as used in the New York statute refer to that part of the premiums charged which was "loaded" onto the premium in excess of its share of expenses and losses sustained. Such additions, and the earnings thereon, which constitute the "surplus," must be valued and applied in buying extended insurance for lapsed policies in force three years or longer, in the same way that the "reserve" of the policy is required to be valued and applied in purchasing such extended insurance.

## 3. SAME—VALUING SURPLUS.

Insurance companies must keep accurate accounts with their policy holders as classes, failing which, no presumption will be indulged in the companies' favor when it comes to valuing and applying "surplus" or "dividend additions" to lapsing policies.

## 4. SAME—DIVIDENDS.

It is not optional with the directorate of life insurance companies not purely stock companies whether they will declare dividends, or to what extent, of the so-called surplus.

(Syllabus by the Court.)

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by Harry Spinks against the United States Life Insurance Company in the City of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Augustus E. Wilson and W. H. Mackoy, for appellant. L. J. Crawford and Hazelrigg, Chenault & Hazelrigg, for appellee.

O'REAR, J. February 21, 1894, appellant issued to Charles Spinks a policy of insurance upon his life, payable to his son, Harry Spinks, appellee. The policy was an agreement to pay the beneficiary the sum of \$25,000 if the assured died within 10 years from December 12, 1893. The consideration was the payment of \$1,128.25 annually by the assured on or before December 15th of each year, as premium, the first payment having been contemporaneous with the issue of the policy. Among the conditions contained in the policy was this clause: (2) After being in force three full years, an extended insurance shall be allowed, in accordance with the requirements of chapter 690, p. 1930, of the Laws of 1892, of New York." The insured paid appellant four annual premiums of \$1,128.25 each, aggregating \$4,513, which continued the policy in force regardless of chapter 690, p. 1969, § 88, Laws of New York, up until December 12, 1897. The insured did not pay the premium due on December 12, 1897.

Section 88, c. 690, p. 1969, Laws of New York 1892, is as follows: "Whenever any policy of life insurance issued after January 1st, 1880, by any domestic life insurance

corporation, after being in force three full years, shall by its terms lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy or security, or of any interest on such note or loan, the reserve on such policy computed according to the American Experience Table of Mortality at the rate of four and one-half per cent. per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount, so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance, payable at the same time and under the same conditions, except as to payment of premiums as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy. The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality with interest at the rate of four and one-half per cent. per annum, after deducting any indebtedness of the insured, on account of any annual or semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing. The net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve, computed according to the rule prescribed in this section after deducting the indebtedness as specified, but such insurance shall not participate in the profits of the corporation. If the reserve upon any endowment policy, applied according to the provisions of this section as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term, on the conditions on which the original policy was issued. This section will not apply in any case where the provisions of the section are specifically waived in the application, and notice of such waiver is written or printed in red ink on



the margin of the face of the policy when issued." As the provisions of this act were not specifically waived in the application or otherwise, or notice of such waiver indorsed in red ink on the policy, the last section of the act above quoted is not applied, and the act is to be treated as if that section had been omitted.

On January 27, 1898, the assured, Charles Spinks, and the beneficiary, Harry Spinks, appellee herein, requested the appellant in writing to apply the entire reserve on the policy, including dividend additions, if any, therein calculated as provided in the policy, to be taken as a single premium to continue the insurance of \$25,000 named in the policy in force at its full amount for such time as said single premium would purchase that amount as nonparticipating insurance at the company's rates therefor at the date of the policy, taken at the age of the assured at date of default, subject to the conditions and agreements of the contract contained and referred to in the policy. The written application was transmitted with the policy to appellant, who on February 14, 1898, issued and delivered to Charles Spinks its certificate of extended insurance, which was in these words: "The United States Life Insurance Company in the City of New York, doth hereby certify, that in pursuance of the application therefor, of which the above is a copy, the principal sum of insurance mentioned in the hereto annexed policy No. 79,714, on the life of Charles Spinks, and (if all the terms and conditions of said policy, in it contained and referred to, have been and shall be fully kept, and not violated), payable in the manner therein mentioned to the persons therein described as the payee thereof, viz., \$25,000.00, will be so payable as continued insurance, in the event of the death of the insured life on or before the 10th day of August, in the year eighteen hundred and ninety-eight; but after said date said policy, and the continued insurance thereunder, will in all respects be and become determined and null, void, and of no effect. The continuation of the insurance as aforesaid being in accordance with the conditions and agreements in said policy mentioned, and the application for said continued insurance, of which the above is a copy, as aforesaid, and which application is hereby made a part hereof. Dated New York City, February 14th, 1898." The assured, Charles Spinks, died September 13, 1898. No other action was taken before his death either by him or the insurer relative to any other extension of the policy.

Thereafter this suit was brought by appellee as the named beneficiary to recover from appellant the full amount of the insurance. In addition to the foregoing facts, it was alleged in the petition that there was a considerable sum in the hands of appellant (hereinafter sometimes referred to as

the "Company") known as surplus, belonging to, and contributed by, the policy holders, of whom Charles Spinks was one of a class, and which was subject to dividends on behalf of such policy holders; that of such surplus there was enough due to be applied to the policy in suit on February 14, 1898, and, on the date of the default in the payment of premium by the assured, which, if applied as a single premium at the company's published rates at the date of the policy, would have purchased for the assured extended insurance for the full amount of the policy for a period beyond September 13, 1898; that the company fraudulently, or by mistake, failed to include such dividend in the reserve of the policy when it extended the insurance, although assured had applied for it to do so, and never knew but what it had done so. It was also charged that appellant was wholly a mutual company. The company denied that there was any dividend addition which could have been applied to the extension of the policy; denied that it had ever declared any dividend to this policy; and denied that there was any fund out of which it could have legally declared such dividend. It also pleaded that the policy was a deferred dividend term policy of life insurance, containing among other things these express conditions: "(1) All premiums are payable in New York City at the company's office. \* \* \* Failure to make payment of any subsequent premium either to the company, or to a duly authorized agent, in exchange for receipt signed as above \* \* \* will render this contract null and void. Whenever this policy shall become null and void for any cause, all payments made hereunder shall become forfeited to the company, except that: (2) After being in force three full years, an extended insurance shall be allowed, in accordance with the requirements of chapter 690, of the Laws of 1892, New York. \* \* \* (7) The said company agrees, in case the life insured survive to the end of the specified period, if this policy be then in full force, to pay to the legal holder or holder of this policy the dividend apportioned to this policy from its profits by said company." Appellant pleaded that clause 7, just quoted, excluded the Spinks policy from participation in any division of profits or surplus, unless the assured survived the period for which he was insured, and unless the policy was then in full force; that, as he died, and was also in default of premiums, within the 10 years, the policy was not in full force at the expiration of the term, and was not therefore entitled to participate in any distribution of the surplus or profits among appellant's policy holders. It denied that it was a mutual company, and denied that it had, through fraud or mistake, failed to credit to, or include in, the reserve of said policy any dividends from the surplus and

profits, though it admitted that it had not done so, but claimed that it so failed because the policy was not then, and never was, entitled to share in such profits or surplus or any dividend thereof declared. On motion of appellant this action was transferred to equity, and was tried on its merits by the chancellor, who found that the policy sued on was entitled to share in the surplus, and that its share, computed according to the provisions of the policy and the laws of New York, was sufficient to have extended it beyond the date of the death of the assured. It was consequently decreed that the beneficiary recover the full sum insured from the company with interest from the filing of the suit. The company has appealed.

The questions for decision are two: First. What is the meaning of the term "dividend additions," as used in the New York statute which is quoted ante? Second. Was there due to be applied to this policy at the date of the default in premiums, a sum sufficient of such dividend additions, when added to the value of its reserve, to have paid for an extension of the insurance to and including September 18, 1898?

Appellant contends that the word "dividend" has a well-defined legal meaning, which is in accord with its popular use; that it signifies such portion of accumulated net earnings, or surplus, as the directorate of a corporation may deem expedient to be distributed, and in appropriate proceedings is by them ordered to be distributed among those entitled by law to receive it; that a dividend is *ex vi termini* the part of a thing which has been set apart for distribution. Counsel for appellant therefore argue that as there was not official action in declaring or setting apart a dividend, none could be added to the reserve of the policy; that the matter of declaring dividends from the company's surplus, or net profits, was one committed properly and necessarily to the sound business sense and discretion of the directors, to be exercised by them in behalf of the company and its patrons as their best interests appeared to the directors to justify. That this is the rule commonly applied to corporate dividends cannot be denied. And if the word dividend is used in the New York statute in the sense and to express the same idea as when used ordinarily regarding the distribution of the surplus earnings of other corporations, it seems to us that appellant's attitude is unassailable. Whether the word is so used involves a careful study and an understanding of certain terms commonly employed in the business of insurance, and which are found in the statute and policy before us, to the end that we may see whether, in expressing the mind of the legislator or contractor, the language employed has a peculiar, or only the common, significance, for it is well known that words of

common use, and having a generally accepted single meaning, when so used, may have an entirely different meaning by the usage of a particular trade, cult, or business. And, as the use of all words is to express the idea intended to be understood, the meaning which the user of the words had in mind is the one to be applied in interpreting his written or spoken language. To understand him, we will have to put ourselves in his place, to view the subject from his point of view, and to give to his words the same meaning which he understood and intended them to have. If, therefore, the words to be interpreted had a peculiar meaning when used in reference to life insurance, the Legislature and the contracting parties in this business evidently employed them in that sense. We must see whether they had such meaning.

Life insurance is not a modern business invention, although modernly many new features have been added to it, which may seem to be foreign to its original conception. But the main principle upon which it rests has not been changed. The plan is to collect from a class of selected persons, chosen with reference to their ages, health, occupations, and so forth, such a fixed sum as will, when kept safely invested at interest, pay to the estate of each of them when he dies, a certain sum of money, which was originally taken as the basis of the collections. It has been found, and it is a fact, that this can be done. The percentage of mortality of such persons is ascertainable in advance. From a long series of observations it is known to a reasonable certainty how many of the number will die within a given time. Thus the life tables, or tables of mortality, have been made up. The one in most common, if not universal, use in this country, is the American Experience. From these it is shown that of a given number of such persons of the same age and condition, each contributes a certain sum, either in one lump sum in advance, or in annual installments, that such contributions when loaned or invested at current interest compounded will so increase that as each one of the contributing class dies there will be enough in the common fund to pay to his estate a principal sum previously taken as the basis of the charges which he has contributed. The sum which he is required to pay is called the premium. If 1,000 men, aged 20, enter into an agreement to pay each one as he dies \$1, and to provide in advance a fund therefor, which will be sufficient, and no more than sufficient, to meet the undertaking, they find that from the tables of mortality so many will die the first year, so many the second year, and so on, so that enough will have to be paid in advance that out of it there can be paid the death claims of the per cent. who will die each year, and leave enough which, placed at compound interest, will ac-

the scheme is to determine that of money which will, when increased at a given rate per annum, compounded annually, become \$1 in a given number of years—the expectancy of the duration of the whole class. This amount will substitute the premium. The rate of interest must of course be not greater than the rates, and should be slightly less. Life insurance companies generally adopt 4 per cent. as the basis of such calculations. It will of course require more interest at 4 per cent. to produce a given future date than at 4½ per cent. Therefore the greater the rate adopted the smaller the premium required. Thus we find that \$0.95693+ at 4½ per cent. interest become \$1 in one year. For two years there would be a sum as would being put at interest at 4½ per cent. for two years produce a sum which would be a less sum than required to produce \$1 in one year, and for three years still less sum, viz., \$0.87029+. The principal sum could be at interest, unless it would have to be to start with, to produce \$1. So when we have a table of mortality showing the average expectancy of the class to be insured, we can be worked out to a mathematical calculation of just what sum is required to be each to be loaned at 4½ per cent. compounded annually in order to make all \$1 each as they died. Only a small per cent. of 1,000 insured will die in a year, hence the whole sum that is required to be put at interest to make all the full amount will not be so small. The life tables will show how long they will probably die. The fraction proper of the mortality number divided by the number of insured, when multiplied by the sum to be put at interest at 4½ per cent. for one year to produce \$1, will then tell us what each will have to pay in a year in order to have in the common fund enough to pay the death claims mature in that year. This effects the insurance for one year only. Only those dying get nothing. The survivors get nothing. They have been insured—have been protected against the chance of being included in the number who died. This would be called the cost of insuring \$1 for one year. The cost of insuring \$1 for a whole life is found by adding together the net cost of each year beginning with the age of the insured when the insurance is effected, and continuing to the end of his expectancy, would be the net single premium for life. But, as life insurance premiums are generally paid annually, or annually for a fixed number of years, instead of one sum for the whole life, the sum to be paid each year as an annual premium is ar-

life companies. This annual net premium is divided into two parts: one, to help pay death claims occurring that year, being the proportion that policy is required to contribute to pay death claims arising that year in its class, and the other is placed by the insurer at interest to the credit of a fund which shall at all times be kept equal to the net single premium that will at the age the policy holder has attained be sufficient to then effect his insurance. This fund is sometimes called by one name or another, but is now commonly known as the "reserve," and is regarded by every well-informed authority "the great sheet anchor of life insurance." It will thus be seen that the policy holders effect and pay their own insurance. They insure themselves and each other. It is essentially mutual. No company ever has to any great extent, and in the nature of the business cannot, do a life insurance business on any other basis than that of making the insured lives carry their own insurance. No stock company is rich enough to carry upon its capital alone the weight of liability represented by the policy liabilities of any of the great modern life insurance companies.

But we have traced the business only so far as to show the net cost of insurance, and how it is provided. There are of course expenses to be met in the conduct of the business. Managerial, rents, taxes, advertising, and agencies. These, too, must be borne by the benefited class, the policy holders. So enough must be added to the net premium charged to cover these expenses. There is also added something to cover such contingencies as that the death rate in any year from some abnormal cause, such as great epidemic, shall increase beyond the average expectancy, and for the loss in value of investments caused by financial panics, or by dishonesty of officials. The sum added to the net premium to meet these expenses and contingencies is called "loading" the premium. As such expenses and losses cannot certainly be known in advance, an approximation is made, and the total sum collected is called the gross premium. That is the premium actually charged and collected from the insured. It is applied, or ought to be, first, to pay that policy's proportion of that year's death claims; then to make good its own reserve; then to pay the expenses, including all official salaries; then to pay losses, if any. If there should be a balance after paying those items, it is called a "surplus," which is a pretty good name for it. The aggregate of all the excessive collections of premiums in that year constitute that year's accumulation of "surplus." This fund is sometimes called, or misnamed, "undivided profits," or "surplus earnings," or the like. But it represents only the aggregate of overcharges of premiums as-

sessed against the policy holders. The greater it is, the greater the unnecessary exaction that has been made by the insurance company from its policy holders in carrying on the business of collecting from them a sufficient sum to pay all of them the sums agreed at their deaths, and in the meantime to pay all the legitimate and necessary expenses of maintenance. If the insurance company doing the business were only a stock company, in the absence of statutory regulation, all "surplus" or "profits" would belong to the stockholders. It would represent that much more charged for doing the business than it cost, and would be properly profit. But where the company is a mutual, being conducted on the plan of giving the cheapest safe insurance to its members, all surplus ought to belong to the members, the policy holders. For in a purely mutual company there are no stockholders, and no one else therefore to whom the surplus could go than its policy holders. And it should in equity go to those who had contributed it. The officers of such a corporation being paid salaries for their services have no interest as such in the surplus. In mixed companies—that is, partly stock and partly mutual—the act creating them usually designates the maximum per cent. that shall be paid in dividends to the stock, the residue of "surplus" or "net earnings" going to the contributing policy holders.

We find from this record that appellant belongs to the latter class. The maximum dividends to its stockholders were all paid, and were deducted from the gross earnings. The "surplus" was what was left after paying the dividends to stockholders, all expenses and all losses, and after providing for all death claims and for maintaining the reserves. Hence this "surplus" should be treated as if the company were purely a mutual company. Not only ought the surplus to be divided among the policy holders contributing it, as a matter of equity, but an amendment to appellant's charter provides for limiting the amount of capital stock, and the rate of "interest" it shall receive, and excludes the capital from receiving any other rate of interest or any share in the "net profits, surplus or dividends of the company." The act continues: "But thereafter the entire net profits and divisible surplus shall be ascertained by the board of directors in accordance with the contracts between the said company and its policy holders respectively; and annually, or once in two or more years thereafter, the sums which may be set apart by the said board from such net profits or divisible surplus for such purposes shall, in the manner provided in said charter, as hereby amended, be apportioned among the policy holders entitled to participate therein according to their respective classes and the terms of their respective contracts." Act March 31, 1882, Laws N. Y. 1882, p. 36, c. 44. It is upon this amendment that the company rests its con-

tention that, under clause 7 of the policy, ante, it and Charles Spinks agreed that this policy was not to share in any distribution of profits until and unless he survived the term of 10 years; and that all the surplus of that class should be distributed to those of the class who did survive and persist in their membership. Appellant claims that this constituted the policy a tontine. The original tontine contemplated that the total fund should go to the survivors of a class, regardless of the cause of their dropping out. When applied to insurance it seems to have an opposite effect from the real matter of insurance, the latter being to pay you if you die, the former to pay you if you do not. Tontine insurance, therefore, was an agreement to divide the "surplus" which all of that class had contributed, among those who outlived the term agreed upon, and who persisted as paying members. It is a species of hazard, in which the strong and the rich have the greater chance of winning, although they pay no more for it. The poor, the weak, and the unfortunate are almost sure to lose. The system gathers together enormous sums, not always properly handled or invested, which are placed for a long term in the sole custody of agents for investment and speculation, and whatever remains after the term has expired goes to those in the main whom the circumstances have proven needed it the least. The plan has met with much criticism, and it is forbidden altogether by the laws of some states. This suggests one, and brings us to consider the other, abuses that led to the enactment of section 88 of chapter 690, page 869 of the Laws of 1892 of New York.

From what has been said, it will be noted that each policy holder of life insurance contributes his own policy's reserve. When, for any reason, he dropped his insurance, or failed to pay an annual or other installment when due, formerly the company forfeited his contract, and appropriated all he had paid. This was tolerated a long time upon the popular supposition that each year's premium paid for that year's insurance only. It was not generally known that a large part of it went to the creation of a reserve fund to carry that identical insurance to maturity. In this way enormous sums were confiscated by insurance companies, to which they had no equitable right, and in mutual companies to which they had no right at all. This led to wide-spread and wholesale corruption in the management of insurance companies. Exposure of the methods occurred first about 1860. Not a great while afterwards, and as the direct result of the exposures, Massachusetts adopted the now famous nonforfeiture law, which was aimed to prevent the forfeiture of a life policy after it had accumulated a reserve, but required the application of the reserve to the purchase of extended or paid-up insurance for the assured to the extent that the value of the reserve would buy such insurance at the single rate, that is,

one-payment rate of the insuring company. This statute, so eminently just and wise, is now very generally adopted in the states, and the same idea has been adopted by nearly all, if not all, insurance companies now by reason of the competition they would be otherwise unable to meet from companies where the statute is in force. Massachusetts, and perhaps other states, have adopted also an "annual dividend" statute, requiring the yearly distribution of the "surplus" among policy holders contributing it. This legislation is of a kind with the other. But it goes further. It prevents a species of extortion upon the policy holders becoming effective for great evil. Undoubtedly, the accumulation of vast sums of money in one center, improperly gotten together and unfairly held, is a sore temptation to men, if unscrupulous and adventurous, to embark it in purely speculative ventures, in which they would directly or indirectly derive great profit to the detriment of the owners of the fund. Its tendency would be to encourage dishonesty, and the unnatural disturbance of business and of market fluctuations thus illegitimately brought about. So it is a wise exercise of the police power of government that tends to prevent such abuses.

It is too well settled now to need citation of authority that life insurance is a business that the state may regulate under its police power, exercised for the public good. The statute being considered is of that species. Its first aim was to prevent a confiscation of the policy holder's property to the benefit of another. It was recognized that unforeseen casualty, unexpected and sudden poverty, sickness, sudden mental derangement, unavoidable absence, forgetfulness, or other cause, might intervene to cause a policy holder to fail to pay his premium the day it was due. Forfeitures are abhorrent to the law. The state intended by this statute to prevent just such forfeitures. It forbids them. But, as the insured had paid in his money for insurance, it was recognized that it would be unjust to make the company give him anything for his money but insurance. So the plan was evolved to convert his funds in the hands of the company into money, and then apply that money to buy extended or paid-up insurance of the kind shown in the original contract. The company is no more entitled to confiscate or forfeit the policy holder's "surplus" than his "reserve." Such forfeitures would have benefited the same persons precisely, and have injured the owner in the same way and from the same cause. Having determined to prevent forfeitures, the next step for the Legislature was to provide a plan by which the value of the defaulted policy might be justly and correctly ascertained. Obviously, the surest way was to follow the same line as the company had in calculating the premiums, which was, as the Legislature doubtless determined, on the

4½ per cent. interest basis, and the American Experience Table of Mortality. In that way, any actuary could easily compute the minimum value of the reserve with certainty. This value of the reserve was then, by the statute, required to be applied in the purchase for that policy of an extended insurance, unless the policy holder elected to take paid-up insurance. But the Legislature saw that it was saving to the policy holder only a part of his money; in so converting and saving his "reserve," that he would for the same unfortunate cause which had been deemed by the Legislature sufficient to enlist its exercise of the state's police power on his behalf, with respect to his reserve, lose still another part of his money, which was collected from him precisely as the reserve was, viz., his contributions to "surplus." To complete the equitable purpose the Legislature then declared "the reserve fund hereinbefore specified shall include dividend additions." If the section had ended there what was meant by the phrase "dividend additions" might have been more obscure than it now is. It is difficult to apply the word "additions" to a dividend which had been declared in the usual course of a corporation out of its net earnings or surplus. The word "additions" has a particular meaning as used. We have seen that there are additions to the net premium in life insurance for various purposes, the surplus of which is to be paid back to the contributors by the way of dividends. So "dividend additions" means the additions which the company made to the net premium in "loading" it, out of which dividends were to be distributed to the policy holders. The section does not end with the expression just quoted. It continues by directing how such "dividend additions" are to be valued, which is seen to be in the same way that the reserve is. This is certainly right and understandable. The sum of the "dividend additions," or distributable surplus, has been contributed by all the policy holders in the same proportion that they paid their premiums. For example, a man aged 40 pays a higher rate of premium than a man aged 20, both having the same kind of policies. It is also true that a man aged 40 pays a different rate of premium on an insurance for life than a man the same age would pay on a 10-year payment plan. Recognizing that the surplus belongs to those who contributed it, and in the same proportion that they contributed it, the statute points out that the value of each man's equitable share of it must be ascertained by reference to the plan upon which his whole premium was based. For it was known that, after the net premium was ascertained, based on the American Experience Table of Mortality, and interest at 4½ per cent., it was loaded in the same proportion; that is, 33⅓ per cent., or 30 per cent., or whatever may have been added, was added calculated upon the level of the net premium. So, if the loading was 33⅓ per cent., a man aged 20, whose net

premium was \$24 for \$1,000 of insurance, would be charged as premium \$32, while a man aged 40, whose net premium was \$30 on \$1,000 of insurance, would pay \$40 as premium. One would have contributed \$8, while the other contributed \$10, toward expenses, etc., on policies for the same amount and class. Yet each contributed on the same basis, the same general plan of calculation. So that whatever was left as surplus would have to be redistributed upon the same plan that it was originally collected to get at the equitable sum due to each. This construction satisfies and employs every word of the statute, and gives a meaning to each sentence and phrase.

As opposed to this construction, we quote appellant's contention: "What section 88 means is that, where a life insurance company has declared dividends prior to the lapsing of a policy, which dividends had been credited to the holder of the policy at the time of the lapsing of the policy but were not payable, the value of such dividends should be ascertained as provided in section 88, and then should be added to the reserve in determining the amount of the single premium to be applied to the purchase of extended insurance." This contention is unsound. It would allow the company to defeat all dividends by never declaring them, and particularly by not declaring any during the term of the policy. Thus would the construction defeat the statute. It does not attempt to account for the use of the phrase "calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality, with interest at the rate of  $4\frac{1}{2}$  per cent. per annum," etc. It eliminates that phrase by leaving it meaningless. If the dividend had already been declared, its value was then already ascertained and was worth just as many dollars as its face. It would be unnecessary then to calculate the value of dividends already declared in money as earned and actually apportioned. Nor do we see how such a calculation of value could be based upon an experience table of mortality and interest at  $4\frac{1}{2}$  per cent. Nor could the sentence quoted above from the statute have referred to the manner of applying the value of the dividend additions, for the manner of application is elsewhere specifically directed, viz., at the company's published single premium rate in existence when the policy was issued. Furthermore, the following clause in the statute shows that the surplus was intended to be disposed of by that proceeding without a dividend thereon having been declared by the directors. It provides that the insurance so purchased (by applying the value of the "reserve" and "dividend additions" belonging to the policy) "shall not participate in the profits of the corporation." Manifestly, if appellant's contention were the correct one, if the "reserve" of the Spinks policy had been enough to carry it to the end of the 10-

year period, and he had then survived, he would have been entitled to such share in the "profits" he had contributed to, because his share had not otherwise in that event been appropriated by him nor forfeited.

We construe the term "dividend additions," as contained in this statute, to mean that portion of the surplus in the hands of the company, accumulated from the premiums and profits paid upon and made upon the class to which the policy in question belonged; that a defaulting policy holder's share of "dividend additions" was to be ascertained as of the date of the failure to make any payment of premiums on the basis of the American Experience Table of Mortality with interest at  $4\frac{1}{2}$  per cent. per annum. In other words, on the same plan that his policy had contributed to the creation of said surplus. We have been left without precedent to guide us in this construction—for the statute does not seem to have been construed by the Court of Appeals, or even by the Supreme Court of New York. Nor are we cited to any construction of this or any similar statute by the court of any state. We have had recourse only to the history of life insurance, its nature, its abuses, and the legislation aimed at its abuses, shown by the contemporaneous history and legislation of the country. *Greiff v. Equitable Life Assurance Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659, is cited and relied on by appellant. That opinion holds merely that an action at law will not lie to recover a persisting member's share of alleged profits without showing that such profits existed, and that the board of directors had declared a dividend to the class to which the complainant belonged. It was intimated in the opinion that, if there had been a charge of fraud against the action of the directors in failing to make a declaration of dividends, equity would have afforded ample relief to the complainant. *Uhlman v. N. Y. Life Insurance Company*, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482, is to the same effect. These cases would have been in point if Spinks had survived the insured term and then had sued to recover dividends. Clause 7 of his policy provided for a distribution in case he survived, or in case he forfeited his right to share in the profits. The Legislature of New York, by section 88, supra, has provided against a forfeiture of his share of this surplus because of his mere failure to pay a premium, but applies his share of the profits then to buy additional insurance—a phase not contemplated by clause 7 of the contract. But though it had been otherwise stated in the contract, we apprehend the statute would have overcome it, and been available to the insured, anything in the contract to the contrary notwithstanding. The proof shows that there was a very considerable surplus belonging to the class of which Spinks' policy was one. Its size in figures is

not shown. But it appears that the company paid on an average a fraction over 8 per cent. of all premiums as dividends to the other members of that class who persisted. It is not an unreasonable inference from the proven facts that the Spinks policy upon the same basis, or upon the basis fixed by the statute, was then entitled to at least as much as 8 per cent. of all premiums he had paid. In other words, all premiums of this class were loaded 8 per cent. or more above what was actually required to pay the interest to stockholders, and all expenses of maintenance, extension, and losses.

Appellant complains of this method of ascertaining what the Spinks policy's share of the surplus was, as in the method actually employed by appellant in declaring the subsequent dividends all lapsed policies, such as Spinks' was treated to be, were ignored, whereas, if they had been included, the result would have been different, and the dividends less, it would seem. The record discloses a novel procedure by appellant in the matter of distributions of surplus. No account was kept with any policy. Nor were they classified. All collections were treated alike in the bookkeeping. Periodically the board of directors, in looking over the company's affairs, would decide that so many thousands of dollars could be spared judiciously in dividends to policy holders. Then that sum was apportioned among all policies maturing in that year, or whatever period of time may have been selected for the purpose. This seems to be justified in the opinion of the company upon the supposition that it had the right to declare dividends or not, and as much or little as its directors chose. We are not called upon in this case to pass on any feature of this method of doing business other than that of keeping the accounts so that it may be ascertained by those in interest what they are entitled to receive. The company, as a mutual company, is bound to treat the accounts of its policy holders as if they were *cestuis que trustent*. Every one who assumes for pay to handle the funds of another to a specific end ought to be supposed to keep accounts, and not to mingle them so as to balk every reasonable effort to get at just what is owing. The matter of keeping a fair, correct account in this matter does not appear so difficult as to be excused. If 1,000 persons were insured in 1884 for a term of 10 years, they naturally formed a class. An account of all premiums collected from that class is not difficult to be kept, nor is it unreasonable to require it. It should show the deaths in the class. The expenses and losses of the whole business could be apportioned among all the policies, the proportion of this class being charged to the class. In this way its share of "surplus" or overcharge of premiums would be easily ascertainable in any year. A failure to keep the books so that the inter-

ested parties could, with reasonable facility and certainty, see what their interests in their property was, is itself a fraud upon their rights. Although it is true that, in the matter of contracting for insurance between the insurer and insured, the result is to be regarded as a contract which is to be construed as such, and the liabilities of the parties enforced as such, still, their relations may be also more than that of simple contracting parties. We think it was incumbent on the insurer to keep intelligible and accurate accounts with its policy holders as classes, so that it could be seen from the books just what was due to be distributed to each, and, if it failed to do this, it will not be allowed to profit by the confusion occasioned by its failure.

But the failure to keep such books does not leave the policy holder without remedy, or the court without power to judge the matter. If a party charged with the duty of keeping true accounts neglects to do so, the law indulges no presumption in his favor because of the absence of such evidence. And, if a party, having accounts in his possession which presumably show the amount of dividends to which a claimant was entitled, shows that it has paid uniformly 8 per cent. to other claimants and denied the suing claimant any, because it was deemed he has forfeited his right to it, it will be presumed against such party from his failure to keep and produce accurate accounts of the transaction, and from his failure to produce the evidence in his control showing the true, or the approximate, state of the accounts, that such as he did keep and produce were no less favorable to him as applied to the case on trial than the facts warranted. We find evidence in this record that, if 8 per cent. of all his premiums paid had been ascertained as Charles Spinks' share of the undivided surplus as of the date of his default, it would have extended his policy much beyond the period of his death. Indeed, a much less rate would have done so. Equity regards that as done which should have been done. Appellant was applied to to extend the policy by applying, not only the reserve, but dividend additions to purchasing such insurance. The law required appellant to issue a certificate of insurance therefor. In the certificate which it issued appellant stated that the time extended was all that the convertible value would buy. We find this was not true; the value of Spinks' "dividend additions" was not applied by the company in extension of the policy. The effect of the application and the statute is that the policy was extended beyond the date of Charles Spinks' death, by applying the ascertainable value of the dividend additions of that policy to the purchase of such extension. This result coincides with the conclusion reached by the circuit court.

Wherefore the judgment is affirmed.

**LOUISVILLE & E. R. CO. v. VINCENT.**  
(Court of Appeals of Kentucky. Oct. 17, 1906.)

**1. CARRIERS—RAILROADS—INJURIES TO PASSENGERS—SEPARATE COACH ACT—LIABILITY.**

Ky. St. 1903, §§ 795-800, impose on railroads the duty of furnishing separate compartments for the accommodation of white and colored passengers, and upon the roads' agents the duty of assigning such passengers to their respective compartments. Section 799 requires conductors to refuse to carry any passenger declining to occupy a compartment to which he is assigned and authorizes conductors to put such passenger off the train. *Held*, that where defendant railroad's conductor permitted a negro to occupy a seat in the coach reserved for white passengers, and thereafter, on an altercation over the payment of fare, attempted to eject such negro, thereby creating a panic among the other passengers, defendant was liable for injuries received by plaintiff, a white passenger, through falling from the platform of a car while attempting to escape from the difficulty.

**2. SAME—CUSTOM.**

Defendant was not exempt from liability by reason of the fact that, by custom prevailing on its road, it had permitted colored passengers, when their own compartment was crowded, to ride in that set apart for white passengers.

**3. TRIAL — INSTRUCTIONS — DEFINITION OF LEGAL TERMS.**

Defendant's conductor permitted a negro passenger to occupy a seat in a coach reserved for white passengers, and thereafter, on a difficulty over the payment of fare, attempted to eject such negro from the train, during which difficulty plaintiff, a white passenger, was injured. *Held*, that an instruction in an action to recover damages for such injury, if the agents and servants of defendant in charge of their car, through their negligence, brought about or permitted or participated in a riot or rout, etc., without defining such terms, was not erroneous as misleading the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 489.]

**4. SAME—FAILURE TO REQUEST.**

A party cannot complain of a failure to define certain technical terms used in an instruction, where he does not offer or ask for an instruction on that point.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 630.]

**5. APPEAL — MISCONDUCT OF COUNSEL — OBJECTIONS.**

Alleged misconduct of counsel for a party will not be considered on appeal, where the bill of exceptions fails to show that any objection was made to the statements complained of when made.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1424, 1500.]

**6. TRIAL — STATEMENTS OF COURT — IRREGULARITY.**

Where it was agreed that an affidavit filed by defendant in support of a motion for continuance might be read as a deposition of an absent witness, for whose absence the continuance was asked, and the court told the jury, after the reading of the affidavit by the party introducing the same, that they must consider the affidavit as the deposition of such witness, its action in stating that defendant desired a continuance, and for that reason filed the affidavit, was at most a mere irregularity, and not prejudicial to defendant.

**7. CARRIERS — RAILROADS—NEGLIGENCE—INJURIES TO PASSENGERS—DAMAGES—EXCESSIVE VERDICT.**

Where plaintiff, a passenger, fell from a car, striking her head and neck severely enough to render her unconscious for a short while, and

was thereafter confined for several months to her home under the treatment of a physician, and suffered from severe pains in the back of her head and neck, and continued to do so for six months thereafter, during which time she lost 30 pounds in flesh, a verdict in her favor for \$2,250 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 357.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Anna D. Vincent against the Louisville & Eastern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

O'Neal & O'Neal, for appellant. Willis & Todd and Johnson & Hieatt, for appellee.

**NUNN, J.** This is an appeal from a verdict and judgment for \$2,250. The appellate corporation, the Louisville & Eastern Railroad Company, operates an electric line between Louisville and Beard Station, in Oldham county, Ky., and by section 842a of the Kentucky Statutes of 1903 is made subject to the same duties and responsibilities and given the same rights, powers, and privileges which other railroad corporations have under our law. The appellee, who is a white lady about 60 years of age, became a passenger on one of appellant's cars going from Louisville to Anchorage, Ky., on November 27, 1904. She was assigned to a seat in the compartment of the car set apart for white passengers. Some time after she boarded the car, three negroes were assigned to seats in the white compartment by the conductor, where they were permitted to remain until after the difficulty which terminated in appellee's injury. As the car passed Ormsby Station, one of the colored men, who was sitting in the white compartment, called the conductor's attention to the fact that his ticket called for Ormsby, and that he had taken him past that station. The conductor proposed that he get off at the next station, which is called "Ridgeway." The negro protested against this because there was no depot at Ridgeway, and insisted in being carried to Lakeland or Anchorage, where he could get a car coming back to Ormsby Station. The conductor told him he could not ride to Anchorage without paying another fare. This the negro did under protest. Something that he said in protesting against the payment of the additional fare seems to have caused the conductor to decide to put him off. Appellee's testimony is to the effect that the negro said to the conductor in an ordinary tone of voice, at the time he handed him the extra nickel, "There goes a nickel into my sinking fund." The conductor states, however, that when the negro handed him the nickel he became bolsterous and appeared to be drunk. The conductor then caused the car to be stopped on a fill between Ridgeway and Marritt's Station. At this time the negro was sitting, and the conductor took hold of the lapel of



his coat, and attempted to eject him from the car, but in so doing by some means he fell back between the seats on the opposite side of the aisle, still holding the negro by his coat, and the latter having a like hold upon him. According to appellee's testimony, the negro was bending over the body of the conductor, being held in that position by the latter. Appellant's evidence tends to show that the negro was down on the conductor; but the testimony of neither side shows that the conductor or the negro attempted to beat or bruise each other. At this point the motorman entered the car and struck the negro twice on the head with his controller, or brake handle. The commotion which ensued created a panic among the occupants of the car, the white passengers rushing therefrom. The appellee fled from the car to the rear platform, and in attempting to alight in some way missed her footing and fell down the embankment, striking her head and neck severely enough to render her unconscious for a short while. Upon regaining consciousness, she went to the front of the car, where she was finally helped aboard of the same. At Anchorage she was taken from the car and assisted by some strangers to the Louisville & Nashville Railroad Company's depot, and carried to her home at Simpsonville, where she was confined for several months, under the treatment of a physician, and suffering from severe pains in the back of her head and neck, and was still suffering therefrom at the time of the trial—six months after her injury. She had lost 80 pounds in flesh during this time. The testimony of the appellant does not vary greatly from that of appellee, except in the particulars mentioned. The conductor admitted that he assigned the negroes to seats in the white compartment, giving as a reason therefor that he had instructions from the company to do so when the colored compartment was crowded; but he further testifies that there were at least two vacant seats in the colored compartment at the time. It also appears from his testimony that, after the negro in question was put off the car, the other two colored passengers found seats in the compartment set apart for members of their race.

Appellant's counsel urge four reasons for a reversal of the judgment: First, error in the instructions; second, misconduct of appellee's counsel in his argument to the jury; third, the improper action of the court during the trial; and, fourth, excessive damages. Of these in their order.

It is insisted by counsel for appellant that the court erred in refusing to give the following instruction offered by it: "The court instructs the jury that it was the duty of the conductor in charge of the defendant's car, at the time and place complained of in the petition, to preserve good order among the passengers thereon; and if they believe from the evidence that the said conductor, while

discharging said duty in good faith, was suddenly and violently assaulted by one of the passengers, and was thereby placed, or apparently placed, in imminent peril of great bodily harm, or loss of life, and that in order to save him from such injury or harm, then or there threatened, or about to be done, the motorman of the defendant struck or took hold of said passenger so assaulting said conductor, believing same to be necessary for the protection of said conductor, and used no more force than was necessary, or apparently necessary, to free the said conductor from the danger then and there threatened, or apparently threatened to be done him, then the law is for the defendant, and the jury should so find." We are unable to perceive upon what theory of law such an instruction could have been given in this case. No decision or authority of any kind is cited in support thereof. Such an instruction might have been proper upon a trial of the motorman for assault and battery committed upon the negro, but had no application whatever to the issue being tried in this case.

It is admitted that appellant operates a railroad, and that sections 795 to 800 of the Kentucky Statutes of 1903 impose upon it the duty of furnishing separate compartments for the accommodation of its white and colored passengers, and upon its agents and servants the duty of assigning white and colored passengers to their respective compartments, and the statutes provide a penalty upon the railroad corporation, and also upon the servants in charge of the car for a violation thereof. Section 799, Ky. St. 1903, reads as follows: "The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach, or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off of the train. And for refusal and putting off the train, neither the manager, conductor nor railroad company shall be liable for damages in any court."

This court has outlined the duty of the railroad companies and their employes under the separate coach act in the case of Quinn, etc., v. Louisville & Nashville Railroad Company, 98 Ky. 231, 32 S. W. 742. That was a suit by a negro woman against the railroad company for damages sustained by her by reason of a drunken white man being permitted to remain in the coach set apart for colored passengers. The court, in that case, said: "If, as we shall assume was the case each one of the passengers had been assigned the coach required by the statute, and the white passenger had left his coach and gone into the coach with these colored people without the knowledge of the conductor, while he

was attending to his duties in the other cars, and had there abused and insulted the appellant, it is plain no action could be maintained against the company, but when the white passenger is assigned to the car set apart for those of another race the company will be held responsible for his bad conduct affecting the rights of other passengers, although the conductor may be ignorant of what is transpiring, and where the conductor, or those managing the train, know that one is in the wrong car, it is his duty to expel him, and by consenting to his remaining, the company becomes responsible for his conduct so long as he does remain. If a contrary rule is applied and no liability exists on the part of the corporation to the passenger, the separate coach law becomes a dead letter, and those who are entitled to its protection have no means of enforcing its provisions but by indictment, where a penalty may be adjudged in favor of the state. It is made the duty of conductors, under heavy penalties, to execute this law, and where there is a neglect of duty for which a penalty is imposed, and private injury results from this neglect, a cause of action arises in favor of the person injured. This is the universal rule applicable to such cases, and should be made to apply to the facts of this case. It may be contended that the white passenger having been assigned to his proper coach, and then leaving it without the knowledge of the conductor, exempts the company from liability unless the conductor knows of the wrongs being committed, or the purpose of the passenger, by reason of his conduct, to mistreat passengers. This would, perhaps, be a rational conclusion unless it further appeared the conductor, or those controlling the train, knew of the white passenger's presence in the colored compartment, and took no steps to require him to leave. Here the conductor assented to his remaining in the car until he dispatched his business with the old negro, and the company should be held responsible for his conduct so long as he remained, and any other construction of the duties of corporations and their agents, arising from the passage of this law, would nullify its provisions or amount to a disregard of the manifest purpose of the Legislature in enacting it. It would enable passengers and railroad officials to violate this law with impunity, and tend to increase the mischief the statute is intended to prevent. The court should have told the jury that the law required the corporation to provide separate coaches or compartments for its white and colored passengers, and if the agents of the corporation permitted the white passenger to enter into the coach set apart for colored passengers, or if the agents or servants, when seeing him in the car, permitted him to remain in the coach, the company is responsible for his subsequent conduct, and liable in damages for the maltreatment, if any, of the plaintiff, although the conductor may not have been present when the obscene

and profane language, if any, was used by the white passenger.' See, also, the case of *Wood v. Louisville & Nashville Railroad Company*, 101 Ky. 703, 42 S. W. 349."

It appears from the record that during the introduction of the testimony it was agreed that this difficulty in the white compartment caused the passengers therein to leave the car, and it may be reasonably inferred that as a result of permitting the colored passengers to remain in the compartment set apart for white passengers, the difficulty arose which was the proximate cause of appellee's injuries; but counsel for appellant contends that, by custom which prevailed on its road, it had permitted colored passengers to ride in the compartment set apart for white passengers, when their own was crowded, and that it could not, therefore, be held liable for injuries resulting therefrom. But we fail to see that such a custom, even if it existed, could annul the positive requirements of the law. If such a custom prevailed, it would reduce the separate coach law to a dead letter.

Appellant also complains of instruction No. 1 given to the jury, in which the court in substance uses the following language: That if the agents and servants of appellant in charge of the car through their negligence brought about or permitted or participated in a riot or rout, etc. It is complained that the court gave these technical legal terms without defining them, and the jury could not understand their meaning, and were misled thereby. We are of opinion that, under the facts and circumstances established in this case, the jury were not at a loss to understand the meaning of these words; but if we are mistaken in this, appellant is not in position to complain, for it did not offer or ask for an instruction upon this point.

The second reason assigned is the misconduct of counsel for appellee in his closing argument. The bill of exceptions does not contain the language complained of, nor does it show that appellant objected and excepted to the statements at the time they were made. In the case of *Illinois Central Railroad Company v. Radford*, 64 S. W. 511, 23 Ky. Law Rep. 886, it is said: "But we fail to find in the bill of exceptions that any objection was made to the statements complained of at the time they were made, hence we cannot consider that question." To the same effect is *Alexander v. Menefee*, 64 S. W. 855, 23 Ky. Law Rep. 1151, and *Stepp v. Hatcher*, etc., 67 S. W. 819, 23 Ky. Law Rep. 2441.

Appellant insists that the court was guilty of irregularity in explaining to the jury the nature of an affidavit which was filed in support of a motion made by appellant for a continuance, and which appellee consented might be read as the deposition of the absent witness. In the stenographer's report of the testimony the following appears: "Counsel for defendant thereupon read in evidence to the jury the affidavit for continu-

ance filed in the case. The court explained to the jury the nature of said paper, to which explanation the defendant by counsel excepted, the portion of said statement excepted to being the statement of the court to the jury that the defendant wanted a continuance, and for that reason had filed the affidavit." The stenographer does not pretend to quote the exact language of the court in explaining to the jury that the affidavit which was read to them was to be considered as the testimony and deposition of the absent witness, and there is nothing in the record which shows the exact language used by the court. But considering the stenographer's transcript, we fail to see how the defendant could have been prejudiced by the statement of the court. The court merely told the jury they must consider the affidavit read as the deposition of the absent witness, and if the jury learned from the statement of the court that appellant desired a continuance because of the absence of this witness, it was a trivial irregularity at most, and certainly could not have materially prejudiced the rights of appellant.

The fourth and last reason urged for reversal is that the verdict is excessive. To this we cannot agree. If appellee's evidence be true (and the jury had the right to believe her witnesses), she has experienced great suffering, and sustained probably permanent injury as a result of the difficulty herein set forth; and, in view of all the circumstances, it seems to us that the verdict of the jury is both reasonable and conservative.

For these reasons, the judgment is affirmed.

### LOUISVILLE RY. CO. v. EDELEN'S ADM'X.

(Court of Appeals of Kentucky. Oct. 26, 1906.)

#### 1. STREET RAILROADS—PERSONS NEAR TRACK—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

In an action for the death of a boy struck by a street car, plaintiff, as administratrix, can recover, if decedent got on the track or was approaching it far enough ahead of the car for the motorman, in the exercise of ordinary care, to have seen him in time either to stop the car or signal its approach and avoid the injury, and he failed to do so, though the boy was negligent.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 219.]

#### 2. SAME—SIGNALS.

A street railway company is not liable for death of a boy, where he was standing about eight feet from the track and suddenly ran across the track immediately in front of the car, too late for the motorman to avoid striking him, though he did not sound the bell when he saw the boy standing near the track.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 197, 199.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "To be officially reported."

Action by Leo Edelen's administratrix against the Louisville Railway Company.

From a judgment for plaintiff, the defendant appeals. Reversed.

Kohn, Baird & Spindle, Farleigh, Strauss & Farleigh, and Greene & Van Winkle, for appellant. O'Connor & O'Connor and J. W. S. Clements, for appellee.

CARROLL, C. In September, 1904, Leo Edelen, a boy between eight and nine years of age, was run over and killed by one of appellant's electric cars going west on Broadway between Twenty-Fifth and Twenty-Sixth streets, about 194 feet west of Twenty-Fifth street. Appellant asks a reversal of the judgment against it, first, because the trial judge refused to give peremptory instruction; and, second, for errors in the instructions.

We have reached the conclusion that the peremptory instruction asked should have been given, and will therefore state in some detail the evidence. Broadway, at the point where the accident occurred, is 50 feet from curb line to curb line, and is occupied by two street car tracks. Leo Edelen had been playing a game called "dainty" with two other boys, and these two companions and the motorman were the only eyewitnesses to the accident. The boys had quit playing, and were on the north side of the street when the accident occurred; Leo standing midway between the curb and the car track, and the other boys sitting down on or near the curb immediately opposite the point where Leo was killed. Paul Connelly, one of the little boys, testified as follows: "Q. Were you there when Leo was struck by the street car? A. Yes, sir. Q. Did you see him when he was struck by the street car? A. Yes, sir. Q. Did you see him immediately before he was struck by the street car—a short while before he was struck by the street car? A. No, sir. Q. Did you see him just before, a short time? A. Yes, sir; I seen him; he was standing up there a long time before he got struck. Q. Standing up where? A. In the middle of the street, about middleways between the curb and the car track. Q. What was he doing just before he was struck by the car? A. He was standing up there talking. Q. Talking to whom? A. To me; Ben and I were sitting on the curbing. Q. Was he saying anything? A. He says he was going home to breakfast, and he turned suddenly and started across the street in a sudden run, and he never seen the car and run into the car. Q. How was he looking—which way was he looking? A. He was looking towards us on the curb. Q. On which curb were you—on the south side or on the north side? A. On the north side." In the cross-examination he testified as follows: "Q. He started very suddenly and ran right in front of the car? A. Yes, sir. Q. How close was the car to him when he ran in front of it? A. About four feet. Q. Had Leo started home to breakfast when he started in front

of the car, or was he running with the sticks? A. He had started home for breakfast. Q. He lived east of where you were playing—eastward? A. Yes, sir. Q. Of course, his direction to go home would not be towards Twenty-Sixth street—it would be towards Twenty-Fifth street? A. Yes, sir. Q. He was standing out in front of you, between the car track and the curbing? A. Yes, sir; middleways. Q. About middleways between? A. Yes, sir. Q. What part of the car did he run against first? A. The front. He ran right straight across the track, and he hit on that life guard, and it threw him up." Ben Macklin, the other little boy who was present, testified: "Q. Were you on the street, West Broadway, between Twenty-Fifth and Twenty-Sixth street, on the morning when Leo Edelen was killed? A. I was on the curbing, sitting on the curbstone. He was between the curbing and the car track. Q. Who was? A. Leo. Q. Who was sitting with you? A. Nobody. I was sitting by myself. Paul Connelly was standing behind me on the grass. Q. Where was Leo? He was between the car track and the curbing. Q. Was he standing still? A. Yes, sir. Q. Which way was Leo looking? A. He was looking towards across the street. He said, 'I am going to eat my breakfast,' and he started to run, and the car struck him. Q. Did you see the car before it struck Leo? A. No, sir. Q. Do you know how long he was in the street between the curb and the street car track? A. About a minute. Q. How far out from the curbing was he—how near to the track? A. He was right in the middle of the street, between the car track and the curbing. Q. Do you know whether Leo saw the car before it struck him or not? A. I don't know." The car stopped at Twenty-Fifth street to let a passenger off, and was running at the usual rate of speed when the accident occurred. The motorman did not ring the bell or give any signal after leaving Twenty-Fifth street before his car struck the Edelen child. It is 17½ feet from the curbing on the north side to the first car track. It was a bright, clear morning, and there were no persons or objects on the street near where the little boys were.

The principal question in the case is, was the motorman guilty of negligence in failing to ring his bell after leaving Twenty-Fifth street, when he saw, or by the exercise of ordinary care could have seen, Leo Edelen standing some seven or eight feet from the track? If it was the duty of the motorman to ring his bell under these circumstances, then his failing to do so was negligence. If the failure to ring the bell was not negligence, appellee is not entitled to recover. In one of the instructions the trial judge said to the jury: "If you believe that the boy, Leo Edelen, got upon the track of the street car, or was in the act of approaching the track in such a

way as to indicate to the motorman or apprise the motorman in charge of the car that he was in the act of getting upon the track, far enough ahead of the car that the motorman in the exercise of ordinary care could have seen that fact in time, either by stopping the car or arresting its motion, or giving a signal of its approach, so as to notify the boy and to have avoided injuring him, and you believe from the evidence that the motorman failed to do this, then the law is for the plaintiff, although you may believe that the boy himself was negligent; that is, failed to use such care as I have said a boy of his age, experience, and intelligence usually exercises under such circumstances." We consider this a fair statement of the law applicable to this case; and, testing the facts stated by this rule of law, we are impelled to the conclusion that the motorman was not guilty of negligence. The eyewitnesses for plaintiff each testified that Leo was standing midway between the curbing and the car track, and that he suddenly left his position and ran straight across the track immediately in front of the approaching car. It must be conceded that the motorman could not have stopped his car after the boy started towards the track in time to prevent striking him; and we are of the opinion that the measure of care imposed by law upon the motorman did not require him to sound his bell merely because he saw a boy standing in the street seven or eight feet from the car track—there being nothing in the boy's conduct or his actions or in the surrounding circumstances to indicate that he was about to or would attempt to cross the track or get on the track in front of the car. If the boys at the time had been playing on the car track or on the street, or if Leo had made any movement indicating that he was going to leave his position of safety, or if there was any evidence sufficient to put the motorman in the exercise of ordinary care on his part upon notice that the boy might attempt to cross the track in front of the street car, a different question would be presented. It is the duty of motormen to keep a lookout at all times for persons using the streets; but the mere proximity of a boy nine years old to the track is not sufficient notice to charge the motorman with the duty of ringing his bell and taking other precautions in anticipation that the boy may get in front of the moving car.

Our attention has been called to the case of Louisville Railway Company v. Walker, 94 S. W. 635, 29 Ky. Law Rep. 663; but the facts are very different from those here presented. There the car was running at a high rate of speed, and the motorman testified that when about 20 feet from the child he saw her start across the street, going in the direction the car was running. Other witnesses testified that the child left the curbstone and started diagonally across the street when the car was more than 200 feet away, and that

the car could have been stopped before reaching the child, who fell on the track. Nor are the cases of *S. Cov. & Cin. Ry. Co. v. Herklotz*, 104 Ky. 400, 47 S. W. 285; *Pasamaneck v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620; *Owensboro City Ry. Co. v. Hill*, 56 S. W. 21, 21 Ky. Law Rep. 1638, in point, as they deal with facts very different from those here presented. Under the evidence exhibited in this record, upon the conclusion of the testimony for the plaintiff, the court should have given a peremptory instruction on behalf of the defendant.

The judgment is reversed, with directions for a new trial in conformity to this opinion.

#### WOLF v. PIERCE et al.

(Court of Appeals of Kentucky. Oct. 25, 1906.)

#### APPEAL—PARTIES—ENFORCEMENT OF LIEN FOR MUNICIPAL IMPROVEMENTS.

In an action by a contractor to enforce a lien for a local improvement, in which judgment is rendered against an abutting owner, but the petition is dismissed as against the defendant town, and an appeal is taken by the abutting owner, in which the plaintiff and the town are made appellees, the appeal will be dismissed as to the town.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1815, 1816.]

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by James L. Pierce against Harvey Wolf and another. From a judgment against defendant Wolf, he appeals. Dismissed as to defendant town of Central Covington.

C. H. Fisk, for appellant. Orlando B. Schmidt, for appellee town of Central Covington.

HOBSON, C. J. James L. Pierce built a sewer in the town of Central Covington under a contract made pursuant to an ordinance of the town. He brought this suit against Harvey Wolf, the owner of adjoining property, and the town, to enforce a lien upon his property for the amount of the assessment made against it. He made the town a defendant, praying judgment against it in case the property was held not liable. On final hearing a judgment was entered adjudging a lien against the property and dismissing the petition as against the town. The property owner appeals, making the contractor and the town appellees.

The town has entered a motion to dismiss the appeal as to it. The motion must be sustained. The property owner sought no relief against the town. The contractor might complain that his petition against the town was dismissed, but the property owner has no cause of complaint that the contractor did not recover against the town.

Appeal dismissed as to the town.

#### HEADLEY et al. v. RICE et al.

(Court of Appeals of Kentucky. Oct. 25, 1906.)

#### PARTNERSHIP—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY.

Evidence examined, and held to show that a partnership between the parties did not exist.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action between John W. Headley and others against L. M. Rice and others. From a judgment, said Headley and others appeal. Affirmed.

Alfred Seligman, Joseph Seligman, and E. E. Straus, for appellants. W. M. Smith, for appellees.

HOBSON, C. J. The learned chancellor to whom this controversy was submitted delivered the following written opinion:

"This action is submitted under the agreed order of April 9, 1904, upon the pleadings, exhibits, and depositions upon this single question: Were John W. Headley and J. D. Headley, Jr., or either of them, partners in the firms of Rice & Givens, and Rice & Turner, or in either of said firms? This particular tobacco warehouse business began in 1878, in Evansville, Ind., with the firm of Rice, Givens & Headley, which continued until 1883. The respective interests in that firm were L. M. Rice, one-third; J. W. Givens, one-third; Jno. W. Headley, one-fourth; and J. D. Headley, one-twelfth. Mr. Givens retired in 1883, and the firm of Rice & Headley continued in the business in Evansville; Rice owning one-half of the firm, Jno. W. Headley, three-eighths, and J. D. Headley, Jr., one-eighth thereof, respectively. In 1885, the Louisville business was organized under the firm name of Givens, Headley & Co., of which Rice owned one-third, Givens one-third, Jno. W. Headley one-fourth, and J. D. Headley one-twelfth interests, respectively. This last-named firm continued in the business of tobacco warehousemen in Louisville from 1885 to some time in 1892. It lost a good deal of money, and was succeeded, in 1892, by the 'Rice-Givens-Headley Company,' a corporation, the stock of which was held as follows: L. M. Rice, \$3,333.33½; J. W. Givens, \$3,333.33½; Jno. W. Headley, \$2,500; J. D. Headley, Jr., \$833.33½. The firm of Givens, Headley & Co. had ceased doing an active business upon the organization of the corporation in 1892, but the firm of Givens, Headley & Co. was not fully and finally closed until November 28, 1893, at which time the firm affairs were finally and fully settled by each partner assuming his share of the losses, which amounted to something like \$30,000. Those of the partners who were not able to pay their share of the loss gave their notes to the other partners, who had carried the losses. The min-

ute book of the Rice-Givens-Headley Company shows that said corporation was dissolved on December 9, 1893, by the consent of all the stockholders. The minute of that date contains this further recital: "The firm of Rice & Givens having agreed to succeed the said Rice-Givens-Headley Company in business, and to pay all the liabilities of said firm, in consideration of the entire assets of said company, it is ordered that the said Rice & Givens are authorized to collect all debts due or payable to the Rice-Givens-Headley Company and give absolute ownership thereof, together with the office fixtures and all other assets of every description whatsoever." The stock certificates were ordered to be canceled, and no claim was to be made by any stockholder against the assets. On the same day, L. M. Rice and J. W. Givens formed the partnership of Rice & Givens, under the following written memorandum of partnership: "L. M. Rice and J. W. Givens have formed a partnership under the firm style of Rice & Givens, to engage in the tobacco warehouse business, having bought out the business of the Rice-Givens-Headley Company. It is the agreement that Rice & Givens shall collect all debts due or payable to the Rice-Givens-Headley Company and shall pay all debts of the said company, this December 9, 1893. L. M. Rice. J. W. Givens." Jno. W. Headley had not been actively connected with the business after 1891, and J. D. Headley, Jr., had no active connection therewith after December, 1893. The firm of Rice & Givens was succeeded by Rice & Turner, on September 6, 1897, and in November, 1902, Rice & Turner sold the business to the Louisville Tobacco Warehouse Company.

"This suit is brought by Jno. W. Headley, claiming that he and J. D. Headley, Jr., have the same interest in the firms of Rice & Givens and Rice & Turner that they had in the old firm of Givens, Headley & Co., which was closed on November 28, 1893. Plaintiffs claim that a formal written agreement was signed on November 28, 1893, constituting L. M. Rice, J. W. Givens, Jno. W. Headley, and J. D. Headley, Jr., partners as Rice & Givens, and that the paper was left with Mr. Rice. Mr. Givens died in December, 1899, and Mr. Rice denies that any such paper was ever agreed to or executed. He says he did voluntarily agree, on or about December 9, 1893, when the firm of Rice & Givens was formed, to give the Headleys whatever profits might be realized out of the old business which Rice & Givens took over, but that there has been a loss, and not a profit, thereon. Mr. Rice denies most emphatically that it was ever agreed that the Headleys should be partners, silent or otherwise, in the firm of Rice & Givens, while the Headleys insist they were to be partners in consideration of the turning over of the business of the old firm to the new firm. There is no ground for the claim that plaintiff or J. D. Headley, Jr., is or

was a member of the firm of Rice & Turner. Mr. Turner bought a half interest in the business in September, 1897, for \$8,146, and never heard of plaintiff's claim until about the time this suit was brought in 1903. If plaintiff had any interest in the business, it would be quite unusual for the business to remain in the hands of a stranger for more than four years without the stranger finding it out. As to the plaintiff's claim of interest in the firm of Rice & Givens, which was in existence from 1893 to 1897—nearly four years—it appears that neither of the Headleys had any connection with, voice in, or management of, the firm. \* \* \* The question submitted is therefore decided in the negative, to wit: That neither Jno. W. Headley nor J. D. Headley, Jr., was a partner in the firm of Rice & Givens, or in the firm of Rice & Turner."

The appeal involves simply a question of fact, and on this question of fact we agree with the chancellor. When Rice & Givens took charge on December 9, 1893, the country was suffering from the panic of that year. There had been a great shrinkage of values, and the property which Rice & Givens took over had cost the old firm very much more than they took it at. The parties then evidently contemplated that in a short time there might be a reaction, and it was agreed that, if Rice & Givens made any profit out of the business of the old firm, they would share it with the Headleys. The evidence on this subject is not as clear as it might be, but taking the subsequent conduct of the parties, the documents in the case, and the circumstances under which this suit was brought, all into consideration, we do not see that any other conclusion can be reached, in view of the circumstances of the parties at the time. Prices did not react, no profit was realized by Rice & Givens, and the whole idea of a sharing of the profits was abandoned by the parties long before Givens sold out to Turner. It is needless to extend this opinion by copying into it the documents referred to, or by setting out more in detail the subsequent conduct referred to. Whether a partnership existed or not is a question of fact to be determined on all the proof. In view of the circumstances of the parties, their subsequent conduct, and the documents in the case, we see no escape from the conclusion that a partnership did not exist.

Judgment affirmed.

SHRADER et al. v. SEMONIN, Clerk of Court, et al.

KENTUCKY TITLE CO. v. SAME.

(Court of Appeals of Kentucky. Oct. 23, 1906.)

1. STATUTES—SUBJECT AND TITLE—VALIDITY.

Act March 15, 1906, entitled "An act relating to revenue and taxation," is not violative of Const. § 51, providing that no act shall relate to more than one subject, which shall be

expressed in the title, by reason of its provisions in article 2, § 10, that no mortgage or other instrument constituting a lien or other security for any evidence of indebtedness shall be received by any county clerk for record unless it contains the postoffice address of the person or corporation owning the evidence of indebtedness, nor by reason of the provision that, unless any assignment of security for indebtedness is of record, the original holder shall be liable for taxes.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Taxation, §§ 127, 173.]

## 2. EMINENT DOMAIN—CONSTITUTIONAL PROVISIONS—TAXATION—ASSIGNMENT OF CREDITS.

Act March 15, 1906, art. 2, § 10, providing that where an assignment of any instrument constituting a lien or security for a note or other evidence of indebtedness is not of record, the original holder shall be liable as though no assignment had been made, is not unconstitutional, as a taking of private property without just compensation.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Actions by C. R. Shrader and another and the Kentucky Title Company against W. J. Semonin, clerk of the Jefferson county court. From judgments in favor of defendant, plaintiffs appeal. Affirmed.

Thos. W. Bullitt and Wm. Marshall Bullitt, for appellants. R. W. Bingham, for appellees.

HOBSON, C. J. Section 10, art. 2, of an act entitled, "An act relating to revenue and taxation," approved March 15, 1906, reads as follows: "Each county clerk shall, on or before the first day of September of each year, make and certify to the various county assessors, as hereinafter provided, complete statements of all purchase money notes, mortgage notes, and other obligations for money due or to be paid, except purchase money notes, mortgage notes or other liens for money due or to be paid, owned by banks, or trust companies, as shown by the conveyances, mortgages and liens in his office. Said statements shall distinctly show the dates of execution and maturity of such notes or other evidences of indebtedness; the consideration therefor; the date of filing or recording same; the amount thereof, and the county of the residence of the owner, payee, beneficial holder thereof, or other person or corporation, liable for taxes thereon. Said statement shall be made to each county assessor of the state of such notes or other evidences of indebtedness as may be owned or held by persons or corporations residing or having their principal place of business in the county of such assessor. No mortgage, conveyance or other instrument or writing constituting a lien or other security for any note or other evidence of indebtedness shall be received for record by any county clerk of this commonwealth unless such mortgage, conveyance or other writing give the county and state of the residence and post office

address of the person or corporation owning or holding said note or other evidence of indebtedness, or liable for the payment of taxes thereon. Should there be an assignment of such note or other evidence of indebtedness of record in the clerk's office, the assignment shall state the county and state of the residence and post office address of the assignee; unless any assignment is made of record, the original holder or owner shall be liable for taxes as though no assignment had been made. Any person who shall knowingly and intentionally give a false or fictitious address or name in any such instrument or assignment as above mentioned shall be guilty of a misdemeanor, and shall upon conviction be fined not less than ten dollars nor more than one thousand dollars."

Section 11 of the same article provides: "The assessor upon receiving from the county clerk the statement of all purchase money notes, mortgages, notes, and liens, as provided in section 10 of this article, shall fix the value upon each and all of said notes and liens, estimated at the price each would bring at a fair voluntary sale, and enter the same in his tax book against the owner or beneficial holder thereof as it is provided in section 6 of article 1, that the property assessed shall be entered; and he shall return said statement to the county clerk for the use of the board of supervisors."

The first of these appeals arises in this way: On July 12, 1906, George E. Spurrier made a deed to C. R. Shrader for a tract of land in Louisville, Shrader executing to Spurrier as trustee his six promissory notes, with interest coupons attached, payable one and two years after date; three of the notes being for \$200 each, and three for \$500 each. A lien was retained in the deed to secure the payment of the notes, but the deed did not give the residence or post office address of George E. Spurrier, or of any person as the holder or owner of the notes. The deed was presented to W. J. Semonin, clerk of the Jefferson county court, duly executed and acknowledged, with the request that he should record it; the recording fees being tendered at the time. Semonin refused to receive the deed for record because it failed to comply with the statute above quoted in that it did not give the county and state of the residence or the post office address of the person owning or holding the notes referred to. Thereupon Shrader, as grantee, and Spurrier, trustee, as lien holder, brought this action for a mandamus to compel the clerk to record the deed. The clerk filed a general demurrer to the petition; the court sustained the demurrer, and the plaintiffs appeal.

The second appeal is based on these facts: On June 15, 1906, the Kentucky Title Company loaned to Mark A. and Katie Suter \$1,200, for which they executed six promissory notes, with interest coupons attached, payable in 6, 12, 18, 24, 30, and 36 months.

The notes were each for \$200, and were payable to the Kentucky Title Company or bearer. They were negotiable paper under the statute regulating negotiable instruments, and were transferable by delivery alone without indorsement or other assignment in writing. To secure the payment of the notes and coupons, Mark A. and Katie Suter executed to the title company a mortgage on real estate in Louisville. The mortgage was duly recorded, and, thereupon, the title company negotiated and transferred four of the notes to the Presbyterian Theological Seminary of Kentucky; one of them to Mrs. Mary Sullivan, and the other to Mrs. Mary W. Sloss. The notes were actually delivered to the transferees, but there was no assignment of record made. The Theological Seminary is an institution whose income is devoted solely to the cause of education, and the notes purchased by it are in its hands exempt from taxation. Mrs. Sullivan is a resident of Washington, D. C., and Mrs. Sloss of San Francisco, Cal. By the terms of the statute, it is made the duty of the county clerk to report the notes to the assessor of Jefferson county as the property of the Kentucky Title Company, and it is the duty of the assessor to assess them as its property for taxation; it is also the duty of the proper officers to collect from the title company the taxes upon the assessment. The title company brought suit to enjoin the clerk and assessor from discharging their duty, as required by the statute, on the ground that the threatened action on their part will inflict great and irreparable injury on the title company, and that the statute, in so far as it requires the notes and coupons to be assessed as the property of the title company, is in conflict with the Constitution. The court sustained a demurrer to the petition, and the title company appeals.

It will be perceived that in the first case the question is made as to the validity of so much of the statute as forbids the recording of a conveyance, mortgage, or other like instrument securing a lien for indebtedness, unless it give the county and state of the residence and the post office address of the person holding the notes or other evidence of such indebtedness. It will also be perceived that in the second case the validity of so much of the statute is assailed as makes the original holder liable for the taxes on such notes or evidence of indebtedness, unless the assignment is made a matter of record. It is earnestly insisted that these provisions are not germane to the title of the act, and that they are void under section 51 of the Constitution, which provides that no act shall relate to more than one subject, and that this shall be expressed in the title. We are unable to see the force of this objection. It is apparent on the face of the act that both the provisions referred to are inserted to secure the collection of the taxes due upon this class

of property. It is a matter of common knowledge that a large part of the money of the state escapes taxation, thus throwing a greater burden upon the visible property which the assessor can see and may not be easily concealed. If the record is required to show who owns the indebtedness which is secured by recorded instruments, and if the county clerk reports to the assessor all such indebtedness as shown by his record, manifestly a large part of the property of the state which has been escaping taxation will be brought upon the assessment rolls. The general purpose of the constitutional provision is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means proper for the accomplishment of its general object to be made the subject of a separate act, or to be set out in the title, would render legislation impracticable. So the courts have uniformly held that provisions which are fairly germane to the subject of the act may be inserted in an act having a general title like that before us. *Pennington v. Woolfolk*, 79 Ky. 14, rests upon the ground that the act was not restricted to matters germane to the title; but that, on the contrary, the title was calculated to conceal from the members of the General Assembly the real subject of the act. *Wulftange v. McCollom*, 83 Ky. 361, rests upon the same principle. In that case the title of the act related only to the charter of the city of Covington, and under this title provisions were inserted which had no reference to municipal affairs, but radically changed the general laws of the state. The other cases relied on for appellants are similar to those referred to, and need not be at length distinguished.

On the other hand, the following cases sustain the validity of the act: *Grundy v. Commonwealth*, 12 Bush, 350; *Commonwealth v. Godshaw*, 92 Ky. 435, 17 S. W. 737; *Nunn v. Citizens' Bank*, 107 Ky. 262, 53 S. W. 665; *Rumbley v. Hall*, 107 Ky. 349, 54 S. W. 4; *Weber v. Commonwealth*, 72 S. W. 30; *Hyser v. Commonwealth*, 116 Ky. 414, 76 S. W. 174; *Commonwealth v. Reinecke Coal Mining Company*, 117 Ky. 885, 79 S. W. 287; *Johnson v. Fulton*, 89 S. W. 672, 28 Ky. Law Rep. 569. In *Henderson Bridge Company v. Alves*, 90 S. W. 965, 28 Ky. Law Rep. 994, the court said: "In levying a tax on peddlers and providing for a license to be taken out by them, the Legislature may properly provide regulations as to how the business done under the license shall be conducted. This is germane to the general subject of the act. The case of *Rumbley v. Hall*, 107 Ky. 349, 54 S. W. 4, and *Jacobs' Adm'r v. L. & N. R. R. Co.* 10 Bush, 263, are based on the ground that there was a natural connection between all parts of the act." Here the provisions of the act in question are germane to the subject of revenue and taxation embraced in the



in be payable, the Legislature may, by a special act, provide safeguards to property escaping assessment and taxation. It is insisted that the statute is void as it requires the holder of record to pay taxes on the notes, when, in fact, they were assigned them before the time for payment. It is urged that this is taking property for public use without just compensation, especially where the property in the hands of its true owner is not subject to taxation. But the assignor may release himself of this liability by making a proper assignment. He is only made liable for the tax when he fails to put upon the record the name of the owner of the property, so that it may be assessed to him, and is liable. We do not see that there is any reason why the Legislature may not require property to be assessed in the name of the holder of record. Any one may avoid the tax under the statute by having the record show the real owner. It is immaterial whether the notes might have passed by delivery or by assignment. They only so passed as to be of the statute. The Legislature has the right to require the former owner to pay taxes unless he complied with the statute and made the record show the truth. This does not affect the title to the notes, and is therefore not in conflict with the title instrument act. It only imposes a duty for taxes. Similar provisions have been enacted in the state and elsewhere. To this it has long been provided by statute that the holder of the legal title, whether of the equitable title, and the holder or bailee in possession of property is liable for the taxes thereon; and the owner or proprietor of a bonded warehouse is liable for the distilled spirits therein, with interest, though they have been removed from the warehouse. If the owners are required to pay taxes on the shares in the hands of the holders. A number of like illustrations are given. It may be true that there is some hardship in the administration of the act, but this is a subject that should be addressed to the Legislature, and not to the courts. The Legislature, having the power to be remedied in mind, has the right to adapt the remedy to the evil, so long as it keeps within its constitutional powers, it cannot be controlled by the courts. The judgment is affirmed.

**F. COVINGTON v. WHITNEY et al.**  
(Court of Appeals of Kentucky. Oct. 25, 1906.)  
—PARTIES—DISMISSAL.

In an action against a city and another for injuries, there having been a judgment in favor of plaintiff against the city, but the other defendant having been dismissed, and the city on appeal having made the other defendant an appellee, though it

Appeal from Circuit Court, Kenton County.  
"Not to be officially reported."

Action by Catherine Whitney against the city of Covington and another. From a judgment in favor of plaintiff against defendant, city of Covington, it appeals, making the other defendant an appellee. Motion of the other defendant to dismiss the appeal as to him. Motion sustained.

F. J. Hanlon, for appellant. Orlando P. Schmidt, for appellee Thomas Evans.

**HOBSON, C. J.** Catherine Whitney sued Thomas Evans and the city of Covington, charging that she had been injured by their negligence. Each of the defendants filed an answer controverting the allegations of the petition. On final hearing there was a judgment in favor of the plaintiff against the city of Covington, but the action as to the defendant Evans was dismissed. The city of Covington has appealed, and has made Catherine Whitney and Thomas Evans appellees. Evans has entered a motion to dismiss the appeal as to him. The motion must be sustained. Catherine Whitney may complain that her petition against Evans was dismissed, but the city has no cause of complaint that no judgment was rendered against Evans, for it sought no remedy against him. Appeal dismissed as to Evans.

#### **SOPER v. CRUTCHER et al.**

(Court of Appeals of Kentucky. Oct. 24, 1906.)

#### **1. PLEADING—AMENDMENT—ADDING DIFFERENT CAUSE OF ACTION—ENTICING AWAY CHILD.**

In an action for enticing plaintiff's minor son from home, it was proper not to permit an amendment of the petition making another a defendant, on the ground that he harbored the son after he left home, as the amendment would have been a misjoinder of parties and of actions.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 686, 687.]

#### **2. JURY—COMPETENCY OF JURORS—RELATION WITH PARTY.**

The fact that many of the jurors were friends and acquaintances of defendant furnished no grounds for exception by plaintiff.

#### **3. NEW TRIAL—SURPRISE—EVIDENCE.**

In an action for enticing plaintiff's minor son from home, the petition charged that the son, after leaving home, stayed at the home of a certain person; but the proof showed that he stayed at the home of another. *Held*, that such fact did not furnish a ground for a new trial on the ground of surprise.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 177, 181.]

#### **4. SAME—PROCEEDINGS TO PROCURE—AFFIDAVITS.**

Under the express provisions of Code Civ. Prac. § 343, affidavits must be filed in support of a motion for a new trial on the ground of newly discovered evidence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 307.]

### 5. TRIAL—INSTRUCTIONS—EFFECT OF EVIDENCE.

In an action against several for acting in concert in enticing plaintiff's minor son from home, the court instructed that if defendants, or any one or more of them, induced the son to leave home, they should find for plaintiff. Another instruction was to find for defendants unless defendants, or some two or more of them, acting in concert, enticed the son from home, and another instruction was that, if the son left home of his own volition, without the inducement of defendants, or either of them, the jury should find for defendants, or such one or more of them as did not induce the son to leave home. *Held*, that the instructions were not erroneous, on the theory that the jury might not find as against one or more of the defendants without finding against them all.

### 6. PARENT AND CHILD—EVIDENCE—SUFFICIENCY.

In an action against several for enticing plaintiff's minor son from home, evidence considered, and *held* sufficient to sustain a verdict for defendants.

Appeal from Circuit Court, Madison County.  
"Not to be officially reported."

Action by Charles Soper against James S. Crutcher and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Grant E. Lilly, for appellant. J. Tevis Cobb, J. C. & D. M. Chenault, and B. A. Crutcher, for appellees.

LASSING, J. Appellant, Charles Soper, sued the appellees in the Madison circuit court, charging them with wrongfully inducing, persuading, and enticing his son, Thomas Daniel Soper, then under 18 years of age, to leave his home and go to New Mexico, and that they kept and harbored said boy away from the home of his father, and deprived him of the services and companionship of his said son, to his damage in the sum of \$5,000. The answer was a traverse and an affirmative plea that the boy ran away from and abandoned his father's home without their knowledge, connivance, or consent. Upon this issue proof was taken, and the following state of facts was developed: C. H. Chenault, son-in-law of W. L. Crutcher, moved from Kentucky to Portales, New Mexico. Shortly after locating there, he wrote to his father-in-law that he could secure a position for Thomas Daniel Soper and directed him to see Charles Soper and state to him that, if he would let his boy come on, he would endeavor to take good care of him. W. L. Crutcher communicated this fact to Charles Soper and was told by him that he did not want his boy to go so far from home. Some time thereafter, David Chenault, the father of C. H. Chenault, went on a visit to his son in New Mexico, and Thomas Daniel Soper disappeared from his home about the same time, met Mr. Chenault in the city of Louisville, and accompanied him to New Mexico, by the way of St. Louis. Shortly after Thomas Daniel Soper's arrival in New Mexico, Green Igo, who was then in New Mexico, returned to Kentucky, met Charles Soper on the street, who asked him

how his boy was getting along, and stated to Igo that he was at first very much angered because his son had gone to New Mexico, but that he had changed his mind, and was glad of it, and wanted Mr. Igo to keep his boy in New Mexico and take care of him and make him save his money. Upon his return to New Mexico the firm of which Mr. Igo was a member gave the boy a position, and he remained there in the employ of this firm. Appellee James S. Crutcher loaned Thomas Daniel Soper \$30 on the day before he left home, and with this money he purchased some clothing; but it does not appear that he knew the purpose for which the money was borrowed, or that the boy was contemplating leaving home, but the money was loaned upon the promise that George Evans would pay it back to him. Thomas Daniel Soper had been permitted by his father at various times before he left home to work for appellee W. L. Crutcher, and perhaps others, and draw his own wages. The boy, Thomas Daniel Soper, testified that he left home on his own free will and without the knowledge, advice, or assistance of any of appellees; that he wanted to see something of the world and make his own way, and for that reason ran away from home to New Mexico. The jury that tried this case, having heard the testimony, instructions, and argument of counsel, returned a verdict for defendants. Judgment was rendered thereon, and from that judgment plaintiff prays this appeal.

The grounds relied upon for reversal by appellant are numerous and will be considered separately. The first error complained of is that the court erred in refusing to permit appellant to file an amended petition making the firm of Igo, Walker & Co. party defendants. In his petition he had charged James S. Crutcher, W. L. Crutcher, David Chenault, and C. H. Chenault, acting in concert and by agreement, with having wrongfully induced and persuaded his son to leave home. Thereafter, by an amendment, he charged that George W. Evans, Jr., was also a party to the conspiracy to deprive him of the services and companionship of his son, and he asked that said Evans be made a party defendant, and the court permitted this to be done. Thereafter he offered to file his further amended petition setting out the fact that the firm of Igo, Walker & Co. had given his said son employment and had harbored and kept him upon their premises in New Mexico, and he asked to have them made party defendants to his said suit, and the court, upon objection by appellee, refused to permit this amendment to be filed, and we think properly so, for clearly the act of persuading and inducing his son to leave his father's home is a separate and distinct offense from that of harboring him after he had left home. To have permitted this amendment to have been filed would have made a misjoinder of parties and of actions.

Appellant complains that the trial jury

was not properly formed, but he fails to point out wherein the error lies. It was drawn from the wheel, and, so far as we are able to discover, the law was strictly followed in drawing, summoning, and qualifying the jurors who tried this case. The fact that many of them were friends and acquaintances of appellees furnishes no grounds for exception. The proof shows that the appellees were men of affairs, some of them holding positions of trust and public office in their county, and it would be difficult, no doubt, to secure a jury in their home county with whom they were not more or less acquainted. The fact that the jury wheel might have been tampered with is too flimsy an argument to be presented, in the absence of any evidence whatever that it was tampered with.

Appellant complains of misconduct upon the part of certain of appellees and their attorneys during the progress of the trial, but, upon a careful examination of the record before us, we are satisfied that the substantial rights of appellant were not prejudiced by the several acts complained of.

Appellant also complains that he was taken by surprise, in that appellees' proof showed that his son had not stayed at the home of C. H. Chenault in New Mexico, as charged, but that he had stayed at the home of one C. T. Chenault. This fact does not furnish him a ground for a new trial, and the trial court properly refused to consider same on appellant's motion for a new trial. Appellees were under no obligation, legal or otherwise, to inform appellant as to what they would be able to prove in the defense of their case. Had appellant desired to do so, he could have, by the exercise of even a slight degree of care or diligence, acquainted himself with the facts which he says came to him as quite a surprise during the trial. No affidavits were filed in support of appellant's motion for a new trial upon the ground of newly discovered testimony, showing what the discovered testimony would tend to prove, or by whom it would be proven. The court had no way of knowing whether such testimony would be merely cumulative or not, and, in the condition in which this motion was presented to the court, it should have been overruled. In the case of *Sloan v. Sloan*, 2 Metc. 339, this court held that, in order to have this ground considered, affidavits must be filed, as provided by section 372, now section 343, of the Civil Code of Practice, in support of same.

Appellant complains of the instructions given by the court, and especially of instruction No. 1, on the ground that it was confusing and so written that the jury might not find as against one or more of the defendants without finding against all. A careful examination of all the instructions given by the court shows that the instructions taken as a whole are not subject to the criticisms made by appellant. The instructions

must be taken as a whole and considered together, and must be based upon the pleadings and proof. Appellant charged the five appellees with having acted in concert to deprive him of the services and companionship of his said son, and his proof was directed towards proving this charge. Instruction No. 1 told the jury that if they believed from the evidence that the defendants, or any two of them, acting in concert or by agreement or understanding with each other, or that if any one or more of the defendants induced or persuaded or enticed or helped, etc., said Thomas Daniel Soper to leave home, bed, and board of his father against his will and without his consent, then the jury should find for the plaintiff. And in instruction No. 2 the jury were told to find for the defendants, unless they believed from the evidence that the defendants, or some two or more of them, acting in concert or by agreement or understanding with each other, or that some one or more of the defendants induced, enticed, etc., him to leave plaintiff's home without the knowledge and consent, etc., of plaintiff. And in instruction No. 3 the jury was told that if the infant son left the home of his father of his own free will and volition, and remained away without the inducement, persuasion, or enticement of the defendants or either of them so to do, or any one of them, then the jury should find for the defendants, or such one or more of them as they might believe did not induce, persuade, or aid him to leave his father's home, or harbor or keep him after he had so left. The whole theory of appellant's case is based upon the idea that these appellees, acting in concert and agreement and by collusion, induced his son to leave home and go to New Mexico and kept him there after they had persuaded him to go there. The instructions as given by the court are the whole law of this case and are as favorable to appellant as the facts warranted. Under instruction No. 2 the jury was told that they might find against any one of the defendants to the exclusion of the others, if the facts proven warranted it. Instruction No. 3 is based upon the pleadings, and there was proof to authorize the court to give this instruction. It is a well-settled principle that, if a son voluntarily and of his own accord leaves the service or control of his father, no action can be maintained for enticing him away. *Wood on Master and Servant* (2d Ed.) 24.

Appellant complains that the verdict of the jury is not supported by evidence and is flagrantly against the weight of the evidence, and for this reason the case should be reversed, and he be given a new trial before another jury. To support appellant's contention we have this character of proof: His son worked for W. L. Crutcher before C. H. Chenault went to New Mexico. He was well acquainted with the wife of C. H. Chenault. She wrote him a letter back to her father telling him to see the young man and his father

and inform them that, if Thomas Daniel Soper would come to New Mexico, they could secure for him employment; that Charles Soper notified W. L. Crutcher that he did not want his son to go; that George W. Evans, Jr., agreed to furnish the boy \$30; that the father of C. H. Chenault was going to New Mexico; that James S. Crutcher, the day before he started, let the boy have the \$30, under a promise that it would be repaid by George Evans; that the boy went on the same train with David Chenault to New Mexico, and remained there over the objection of his father. These are the salient points in the testimony upon which appellant depends. Opposed to this testimony is the positive testimony of each of the appellees that they did nothing whatever to encourage the young man to quit his father's service. And David Chenault testifies positively that he knew nothing of the boy's going to New Mexico, until he found him on the train upon his arrival at Louisville, or some point between Louisville and St. Louis; and the testimony of C. H. Chenault that he did not know that the boy was coming to New Mexico until he got there, and he then advised him to return to Kentucky; and the testimony of Green Igo that appellant told him that he was satisfied for the boy to remain in New Mexico. This testimony by the appellees would have, of itself alone, warranted the jury in returning a verdict in their favor, and, when taken in connection with the testimony of Thomas Daniel Soper himself, presents a defense which would have precluded any other than a verdict for appellees.

In a hotly contested case, such as the pleadings, proof, and briefs in this case show it to have been, it is but natural that some slight irregularities and errors will creep into the case during the progress of the trial; but, upon a review of the whole case, we are of opinion that appellant had a fair trial, and the judgment is therefore affirmed.

**CINCINNATI, N. O. & T. P. R. CO. v.  
LOGAN & HUNDLEY.**

**SAME v. HUNDLEY.**

(Court of Appeals of Kentucky. Oct. 26, 1906.)

**1. CARRIERS—CARRIAGE OF LIVE STOCK—INJURIES TO STOCK—DAMAGES—EVIDENCE.**

Where, in an action against a carrier for injury to colts while in transit, the shipper showed as his damages the difference in the value of the colts before and after the injury, by estimating their value at the point of shipment and what they brought at the point of destination at a sale, the carrier was entitled to show that the sale at the point of destination was a failure, and that the price offered for colts there was not a fair test of their value.

**2. SAME.**

In an action against a carrier for injuries to colts, the shipper showed that the colts were yearlings and finely bred, and showed the condition, temper, disposition, and character of the colts when received by the carrier, and the effect of these traits on the value of race horses, and that the injuries received would affect their

rating qualities and value. *Held*, that the evidence was admissible on the issue of damages.

**3. SAME—MEASURE OF DAMAGES.**

The measure of damages against the initial carrier, limiting its liability for injuries on its own line, for injury to colts while in transit on its line, is the difference between the fair market value of any colt in the condition when received by the carrier and its fair market value in the condition in which it was delivered at the end of its line.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 963, 964.]

**4. SAME—EVIDENCE—ADMISSIBILITY.**

A shipper of stock suing a carrier for injury to it while in transit is not limited to the amount of the damage apparent or discovered when delivered to him at the end of the carrier's line, but may show injury subsequently discovered and after the stock was received from the carrier.

Appeal from Circuit Court, Boyle County. "Not to be officially reported."

Actions by Logan & Hundley against the Cincinnati, New Orleans & Texas Pacific Railroad Company, and by A. E. Hundley against the same defendant. From judgments for plaintiffs in both actions, defendant appeals. Reversed and remanded.

Chas. H. Rodes and John Galvin, for appellant. Emmett Puryear and Robt. Harding, for appellees.

**CARROLL, C.** These two appeals involving the same questions of law and fact are by agreement of the parties heard together. The appellees delivered to appellant, at Danville, Ky., six race colts to be transported by it to Lexington, Ky. Four of the colts were owned by Logan & Hundley, and two by A. E. Hundley. To recover damages for injuries to these colts in transit, these actions were instituted, resulting in judgments against the appellant. The colts were all yearlings and finely bred, and were being shipped by the owners to a large and widely advertised sale of this class of stock that was to be held at St. Louis, Mo. The alleged injuries complained of occurred at Danville, Ky., shortly after the colts were loaded in the car, and at Burgin, Ky., a point between Danville and Lexington. The principle claim for damages is based on the injuries said to have occurred at Burgin; and witnesses for appellees testified that while the car was standing on the track at this place, two loaded coal cars were permitted to run against it with such force as to throw all the colts and the men in charge of them down, and break down the temporary stalls that had been put in the car at Danville. There was evidence tending to establish that the injuries received by the colts greatly impaired their value at the sale in St. Louis, at which all of them were put up for sale, but some of them were bought in by or for appellees, on account of the small prices bid for them. In view of the fact that there must be a retrial of the case, we will not further comment on the evidence, except to say that it was amply sufficient to authorize

a submission of the case to the jury, and to sustain a verdict in favor of appellees. On the trial, the evidence offered by appellees tended to fix the value of the colts at what they brought at the St. Louis sale; and the difference in the value of the colts before and after the injury was estimated in substance and effect, if not in express terms, by their value at Danville, and what they brought at the St. Louis sale. Appellant offered to prove that the sale at St. Louis was a failure; that horses sold at that sale did not bring one-half of what they were worth, or one-half of their value; and that a number of persons who had shipped horses there to sell, declined to sell them. This proffered evidence was excluded from the jury by the court over the objection of appellant. In view of the evidence introduced by appellees showing the depreciation in the value of the colts, and the fact that this difference was in a large measure fixed by the prices they brought at the St. Louis sale, it was clearly competent for the appellant to show that the St. Louis sale was a disappointment and failure, and that the prices offered for colts at that sale was not a fair test of their value, and the exclusion of this evidence was prejudicial to appellant.

On the trial appellees introduced evidence showing the condition, temper, disposition, and character of the colts at the time they were received by the carrier, and the effect of these traits on the value of race horses, and that the injuries received would and did make them nervous, restless, and excitable, and affect their racing qualities and value. Evidence of any loss in the value of the colts directly resulting from physical injuries received, caused by the negligence of the carrier, was admissible, and was competent to go to the jury as an element of the damages sustained by appellees. The contract of shipment being from Danville to Lexington, appellant was only liable for injuries happening between those two points, and the measure of damage was the difference in the fair market value of the colts at the time they were received at Danville and when they were delivered to appellees at Lexington. By instruction No. 2 the court told the jury that: "If you find for the plaintiff under instruction No. 1, the measure of damage will be the difference in the fair market value of any colt so injured, and if such injury or injuries had not been sustained by the colt; however, in no event to exceed the respective amounts claimed in instruction No. 1." This instruction was misleading and prejudicial. It did not fix the places at which the difference in the value of the colts was to be determined. Instead of this instruction, the court should have told the jury that: "If they found for the plaintiff, the measure of damage should be the difference between the fair market value of any colt in the condition when received by the company at Danville, and its

fair market value in the condition in which it was delivered to plaintiffs at Lexington, not exceeding the respective amounts mentioned in instruction No. 1." And in instruction No. 1, after the words "such an amount in damages," there should be inserted the words "as prescribed in instruction No. 2." The appellees, in showing the injury and damage, if any, sustained by the colts between Danville and Lexington, will not be limited to the amount of the injury and damage apparent or that they discovered when delivered to them at Lexington, but may introduce evidence up to the time of the trial showing the extent of the injury and damage to the colts received between Danville and Lexington, although it may not have been discovered by them until after they were received at Lexington. This evidence is competent as a means of ascertaining the extent and result of the injury inflicted, if the subsequent developments are traceable directly to the injury. *Sutherland on Damages*, § 917; *C. N. O. & T. P. Ry. Co. v. Pendleton & Hutchinson*, 96 S. W. 484, 29 Ky. Law Rep. 721.

For the errors indicated, the judgment in each case is reversed, with directions for new trials in conformity to this opinion.

#### WHITE'S ADM'R v. CHICAGO, ST. L. & N. O. R. CO. et al.

(Court of Appeals of Kentucky. Oct. 24, 1906.)

##### 1. REMOVAL OF CAUSES—JOINDER OF PARTIES—CITIZENSHIP.

In an action for death, plaintiff joined a resident corporation and two nonresident corporations, charging that defendants, together and jointly, were engaged in the building of a bridge over the Tennessee river, and that plaintiff's intestate was employed by the three defendants to work on the bridge, and while so engaged was killed by the fall of a mortar bucket, owing to the negligence of the three defendants and to the improper, defective, and unsafe condition of the machinery in use. *Held*, that the petition stated a cause of action against all the defendants, which precluded a removal of the cause to the federal court by the nonresident defendants, on a petition alleging that the resident corporation was joined for the fraudulent purpose of preventing a removal, etc.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 79.]

##### 2. SAME—FRAUDULENT JOINDER—PROOF.

Where, in an action for death, a joint cause of action is stated against several defendants, one of whom is a resident of the same state as plaintiff, the other defendants, on proving at the trial that the resident defendant was joined for the fraudulent purpose of preventing a removal of the cause to the federal court, may then avail themselves of the misjoinder, and remove the cause.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 79.]

Appeal from Circuit Court, Livingston County.

"Not to be officially reported."

Action by Richard White's administrator against the Chicago, St. Louis & New Orleans Railroad Company and others. From

Fairleigh, Straus & Fairleigh, Kohn, Baird & Spindle, and Greene & VanWinkle, for appellant. Tarvin & Huggins, for appellee.

**CARROLL, C.** The appellee was awarded \$5,100 damages for injuries sustained by her while a passenger on one of appellant's cars, and to reverse the judgment for this amount this appeal is prosecuted.

At the time of the accident appellee was a young unmarried lady about 20 years of age, and was returning home from an entertainment given at Fontaine Ferry Park. When the car started from the park on its way to the city it contained 67 passengers, and was so crowded that many of them, including appellee, were obliged to remain on the rear platform. In going down a grade at a rate of speed unusually high, according to the testimony of a number of passengers, the car left or was thrown from the track at a switch, and plunged forward some 20 feet, and when it stopped was located across the track. The jar threw appellee against the railing of the rear platform, resulting in serious injury to her, that will be more fully noticed in the course of the opinion. There is no explanation in the record of the cause of the accident, except the inference that the car was going at such an unusual rate of speed that some defect in the arrangement of the switch threw it from the track.

The errors assigned by appellant are—first, improper argument of counsel for appellee; second, that the verdict is excessive; and, third, error in instructing the jury.

The entire argument of counsel who concluded the case for appellee is contained in the bill of exceptions, and in the course of it he made use of the following language: "Then you have the depositions of Misses M. and N. Kerr. Wherever they may be, or whoever they may be, or where they live, I don't know; I never heard of them before. I don't know whether they are black or white, or yellow or blue, or green or brown. I don't know whether they are employed by the street railway company or not. I don't know what obligations they are under to the street railway company or its superintendent or adjuster. I don't know whether they are ten years old, or forty, or one hundred. I don't know where they live; have had no opportunity to cross-examine them. I don't know anything about them. They say they were passengers on the car." Counsel for appellant objected to this statement, and was overruled by the court. Counsel for appellant then said: "If he wanted to cross-examine them, he could have had them come here"; when the attorney for appellee replied: "Why didn't they come here yesterday? They had thirty-six hours to get them, and I say now to your honor they didn't get them because they didn't want them; that is why they are not here, and the only reason." To this statement objection was also made, but was not passed

on by the court. After further colloquy between counsel, the attorney for appellee said: "I want to say to the court that the record shows that the witnesses were subpoenaed, and that they live within the jurisdiction of this court, and they had from 2 o'clock yesterday morning until this afternoon to have those witnesses here, and they didn't do it, and there is no explanation why they didn't do it." To this statement objection was also made and overruled. It appears that appellant, in support of its motion for a continuance, filed the affidavit of its superintendent, stating what these absent witnesses would testify to, which was, in substance, that they were passengers on the car, and would say that the car was not running rapidly at the time of the accident, but was running at a moderately slow rate of speed, and that there was one lady inside of the car who was frightened, and quite a number of other ladies and gentlemen on the car, none of whom claimed to have been hurt. These statements of the witnesses were permitted to be read as their deposition, and to these witnesses appellee's counsel was alluding in the argument above set forth. The testimony of these witnesses was not material, except in so far as it stated that the car was running at a moderately slow rate of speed, and on this point several witnesses were introduced by appellant who gave testimony to the same effect. When it has appeared to this court that counsel in concluding the argument for plaintiff in cases of this character has gone outside of the record to make reckless and unwarranted statements calculated to inflame the passion of the jury or prejudice their mind against the defendant, it has been held in a number of cases to be reversible error; but the argument complained of is not of this character, and we are not prepared to say that it was either improper or prejudicial. Appellee at the time of the accident weighed about 130 pounds, was a vigorous, healthy girl, who earned her own living working in a bookbindery, in which employment she had been engaged for about two years. She also assisted in the general housework at her home. When the trial took place, some eight months after the accident, her weight had been reduced to 110 pounds, and she had not been able to do any work at her trade or about home on account of the intense pain labor of any kind produced, and has not been able to sleep soundly, and suffered continually. When she was thrown against the railing of the platform, her side was bruised, and a lump formed under the skin that was there when the trial occurred. Several physicians were introduced for both parties, and, as usual, they disagreed widely in their diagnosis of the case, and the effect of the injuries sustained by appellee. The physicians who testified in her behalf stated that the sexual organs of appellee were disordered by the accident; that her womb was thrown out of place, and one of her ovaries torn loose

from its normal position; that a cure could only be effected, if at all, by a dangerous operation that might result in death; and that if left in her present condition her health would be affected to such an extent as to make her an invalid, and her prospects of bearing children if she should marry would be greatly lessened, if not entirely destroyed. In view of this testimony, supported as it is by the evidence of experienced and reputable physicians, it cannot be said that the verdict is excessive.

The court instructed the jury that: "The defendant is not an insurer of the safety of its passengers, but that the law made it the duty of the defendant and of its agents and servants to exercise the highest degree of care for the safety of the passengers it undertook to carry, in the management and operation of its cars, in the care and inspection of its track and switches, and in the care and inspection of the running gear of its cars; and if the jury shall believe from the evidence that the plaintiff, Nettie Brownfield, sustained the injuries by her alleged by reason or because of the derailment of the car, then the law is for the plaintiff, and the jury should so find, unless the jury shall believe from the evidence that the derailment of the car was brought about by some cause which the highest degree of care upon the part of the defendant's agents and servants could not have prevented or guarded against, in which latter event the law is for the defendant, and the jury should so find. (2) By the term 'highest degree of care' as used in the foregoing instruction, is meant the degree of care which prudent persons engaged in business of carrying passengers in cars propelled by electric power usually exercise under similar circumstances. (3) If the jury shall find for plaintiff, they should award her such sum in damages as they shall believe from the evidence will fairly and reasonably compensate her in pain and suffering, mental or physical, directly resulting to her from her injury, for any loss of time or impairment of her power to earn money after she reached the age of twenty-one years caused thereby, and for any medical service, not exceeding the sum of \$100, made necessary by her injury; and if the jury shall believe from the evidence that the derailment of the car was brought about by the gross negligence of the defendant's agents in the management thereof, then the jury may, in addition to compensatory damages as above, award the plaintiff such exemplary damages as they may think proper under all the circumstances of the case. (4) By the term 'gross negligence' as used in the foregoing instruction is meant the absence of slight care."

It is insisted that instruction No. 1 is erroneous because it in effect told the jury that the law presumes negligence from the mere fact of the derailment, and that this presumption could not be overcome by evidence

that the derailment was brought about by some cause which the highest degree of care upon the part of the defendant could have prevented. The fact that the car was derailed being conceded, the law imposed upon appellant the burden of showing that it could not have been prevented by the highest degree of care on its part, as defined in instruction No. 2. The appellant did not explain in any satisfactory way, or, indeed, at all, the cause of the derailment, or attempt to show that it could not have been prevented by the degree of care imposed upon it in the transportation of passengers. We think the instruction submitted fairly to the jury the law of the case.

The instruction authorizing the jury to award exemplary damages is complained of because it is said there was no evidence of gross negligence. In the absence of evidence tending to show this degree of neglect, an instruction permitting other than compensatory damages is erroneous. The testimony for appellee tended to show that the car was running at a high and unusual rate of speed, and, there being no cause other than this to which its derailment could be attributed, it was proper to submit to the jury the question as to whether or not the servants of appellant in charge of the car were guilty of gross neglect as defined in the instructions, because if its derailment was due to the excessive speed at which the car was running, then the accident and consequent injury to appellee was caused by the gross negligence of the persons in charge of the car. To run a car loaded with passengers at such an excessive rate of speed as to cause it to leave the track is gross neglect on the part of the persons in charge of it.

Finding no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

#### COMMONWEALTH v. BALDWIN.

(Court of Appeals of Kentucky. Oct. 23, 1906.)

#### COMMERCE—INTERSTATE COMMERCE—REGULATION—LICENSE.

The sale of picture frames, etc., by an agent acting for a principal in another state, where the pictures were made and shipped to the purchaser, constituted interstate commerce, and hence the agent was not subject to a state law (Acts 1906, p. 202) imposing a license tax on picture solicitors.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 29, 30.]

Appeal from Circuit Court, Jessamine County.

"Not to be officially reported."

N. B. Baldwin was indicted for selling picture frames without a license, and from an order sustaining a demurrer to the indictment, the commonwealth appeals. Affirmed.

N. B. Hays, Atty. Gen., C. H. Morris, and Morris & South, for the Commonwealth. Jouett, Byrd & Jouett, for appellee.

HOBSON, C. J. Among the license taxes provided for by the revenue act of 1906 is the following: "On each solicitor or agent for the enlargement of pictures, or solicitors for picture frames or pictures, each county, five dollars." Acts 1906, p. 202. Any person who shall fail to procure the license shall on conviction be fined not less than \$25 nor more than \$100 for each offense. See Acts 1906, p. 202. Under this statute the following indictment was returned against appellee in the Jessamine circuit court: "The grand jury of Jessamine county, in the name and by the authority of the commonwealth of Kentucky, accuse N. B. Baldwin of the offense of acting as solicitor and agent for the enlargement of pictures and for the sale of picture frames and pictures without license, committed in manner and form as follows, viz.: The said N. B. Baldwin, in the county aforesaid, on the 11th day of June, 1906, and before the finding of this indictment, and without first having obtained a license so to do, and without paying the license tax required by law, did act as solicitor and agent for the enlargement of pictures and for the sale of pictures and frames in certain negotiations with one Richard Hager, and while acting in said capacity did unlawfully solicit from said Hager a contract or order for enlarging pictures, and did agree to sell to him an enlarged picture and a frame therefor; said Baldwin acting as and being at the time solicitor and agent for the Fidelity Portrait Company, a corporation duly organized and created under and pursuant to the laws of the state of Illinois, with its principal place of business in Chicago in said state, the terms of and the method of carrying out said contract being substantially this: Said Baldwin, in his capacity as said solicitor and agent, conducted said negotiations in person in the city of Nicholasville in said county, where said Hager furnished him a photograph, and selected a frame from samples shown him, whereupon said Baldwin for said company agreed with said Hager, for the consideration of \$4—being \$2 for the picture and \$2 for the frame—to be paid on the completion and delivery of said work, to sell him a picture to be enlarged from said photograph, together with the frame selected therefor, with the understanding that said photograph and the order for said picture and frame would be forwarded to the company's place of business in Chicago, where said company would make said enlarged picture and the frame therefor, and return both to said Baldwin, or some one of its agents at Nicholasville, who would fit the picture and frame together, deliver the same to the said Hager, and collect the price agreed therefor, against the peace and dignity of the commonwealth of Kentucky." The circuit court sustained a demurrer to the indictment on the ground that the statute, as applied to agents of non-residents of the state soliciting orders here to be filled elsewhere, was a regulation of

interstate commerce, as held by the Supreme Court of the United States in the case of *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. We have examined the opinion of the Supreme Court in that case with care, and find that it declares unequivocally, reversing the state court, that a license tax cannot be required under such circumstances. The case is on all fours with that before us. Among other things, the court said: "Transactions between manufacturing companies in one state through agents with citizens of another constitute a large part of interstate commerce, and for us to hold with the court below that the same articles if sent by rail delivery to the purchaser are free from state taxation, but if sent to an agent to deliver are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

Judgment affirmed.

#### AUXIER v. HERALD et al.

(Court of Appeals of Kentucky. Oct. 24, 1906.)

##### 1. ADVERSE POSSESSION — OCCUPANCY — EVIDENCE.

Where the land in controversy was never actually occupied by any person, though defendants claimed to have been the owners thereof since 1877, the fact that they occasionally cut timber therefrom was insufficient to show an adverse holding sufficient to invest them with title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 112, 113.]

##### 2. EVIDENCE — DECLARATIONS OF GRANTOR — CONTRADICTION OF DEED.

Statements by a grantor that his deed to C. embraced all the lands owned by him on a certain creek, which would have included the land in controversy, was insufficient to contradict the terms of the deed, which did not include such land.

Appeal from Circuit Court, Floyd County.  
"Not to be officially reported."

Action by E. B. Auxier against J. T. Herald and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

James Goble, for appellant. W. S. Harkins, for appellee.

CARROLL, C. Appellant, alleging that he was the owner of a tract of land on John's creek in Floyd county, brought this action for damages for trespass against appellees. Appellees, in an answer and counterclaim, after denying the affirmative matter in the petition, affirmatively alleged that they were the owners of the land in controversy, holding it by adverse possession for the time required by the statute, and that they also acquired ownership and possession of the land by conveyance from Armitage and W. H. Nesbitt. By consent of parties, the case was transferred to equity, and judgment rendered,



awarding the appellees the land in controversy.

It appears from the evidence that on the 18th day of November, 1877, appellant conveyed to Elizabeth Clark, a vendor of appellees, a tract of land described as follows: "Lying and being in the county of Floyd and state of Kentucky, on the waters of John's creek, and bounded and described as follows, it being the farm deeded by Thomas J. Burchett and wife to E. B. Auxier, bearing date of November 8, 1875. The said deed is of record in the Floyd county court clerk's office in Deed Book J, page 90, and is here surrendered and referred to and made part of this deed; and further reference is made to the deed made by Jesse Burchett and wife to Thomas J. Burchett, recorded in Deed Book H, page 377, including all the land conveyed by Thomas J. Burchett and wife to said E. B. Auxier." In November, 1875, Burchett, and wife conveyed to Auxier a tract of land on the waters of John's creek, "being the farm on which Thomas J. Burchett and family now resides, and being part of the land conveyed to said Thomas J. Burchett by Jesse P. Burchett and Louisa Burchett, his wife, by deed of date March 25, 1869. Said deed is of record in the clerk's office of the Floyd county court, and is surrendered and referred to and made a part of this deed." In 1876 Jesse P. Burchett conveyed to Auxier the land in controversy, and it is the contention of appellant that he only sold and conveyed the tracts mentioned in the deed—that is, the land conveyed to him by Thomas J. Burchett in 1875—and that he did not convey the land conveyed in 1876 by Jesse P. Burchett to him. The description in the deeds made by Thomas J. Burchett to Auxier and by Auxier to Clark are indefinite and ambiguous. It will be noticed that the deed from Thomas J. Burchett to Auxier conveys to him all the land conveyed to Thomas J. Burchett by Jesse P. Burchett on March 5, 1869, and appellees insist that as Jesse P. Burchett conveyed to Thomas J. Burchett his land, and subsequently Thomas J. Burchett conveyed this land to Auxier by the deed dated November 8, 1875, and Auxier by deed dated November 9, 1877, conveyed to Clark the land deeded to him by Thomas J. Burchett, that this line of conveyances vest Mrs. Clark, and consequently these appellees, with title to all the land owned by Jesse P. Burchett as well as Thomas J. Burchett. The deed made by Jesse P. Burchett to Thomas J. Burchett mentioned in the deed made in November, 1875, by Thomas J. Burchett to Auxier, is not in the record, and therefore we are unable to determine what land Jesse Burchett conveyed to Thomas J. Burchett, or whether or not the land conveyed by Jesse Burchett to Thomas Burchett includes the land in controversy. Nor does the record disclose whether or not the land conveyed by Jesse Burchett to Thomas J. Burchett is the same land surveyed to Jesse Burchett

August 22, 1868, for which a patent was issued to him on September 18, 1869. This land patented to Jesse Burchett. In 1869 is the same land conveyed by Jesse Burchett to appellant on the 25th of February, 1876, and is the land in controversy. The fact that in February, 1876, Jesse Burchett conveyed this land to appellant conflicts with the theory that in November, 1875, he had conveyed it to Thomas J. Burchett. If in fact this patented land was conveyed by Jesse Burchett to Thomas Burchett in 1875, then the appellees are the owners of it, because the appellant conveyed to them the land he obtained from Thomas J. Burchett, including the land conveyed by Jesse Burchett to Thomas Burchett; but, in the absence of the deed made by Jesse Burchett to Thomas Burchett, we cannot determine this question.

Appellees rest their case chiefly upon the ground that they and their vendors have been in the adverse possession of this Jesse P. Burchett land since 1877, and introduced evidence to establish the fact that Auxier in 1876, when he conveyed to Mrs. Clark, stated that the conveyance embraced all the land owned by him on John's creek, which would include the Jesse Burchett land. Appellees occupied the land conveyed to them by appellant, which was the Thomas J. Burchett land, but it does not appear that the land in controversy, which is the Jesse Burchett land, was ever actually occupied by any person, although appellees claim to have been the owners of it since 1877, and they occasionally cut timber from it. The evidence does not show an adverse holding sufficient to invest them with title, nor is the fact that appellant may have made statements that his deed to Clark embraced all the land owned by him on John's creek, which would have included the Jesse Burchett land, sufficient to contradict the terms of the deed conveying to Clark the land. We must look to the deed itself to ascertain what land appellant conveyed to Clark. Appellees and their vendors resided on the Thomas J. Burchett land, and, although they may have claimed the Jesse P. Burchett land, in the absence of evidence showing that they or their vendors resided on or had it inclosed, the fact that they claimed it in connection with the Thomas J. Burchett land is not sufficient. Under the evidence presented by this record, appellees must be limited to the Thomas J. Burchett land, as appellant shows title in himself to the Jesse Burchett land from the commonwealth, and it does not appear that he has been divested of his title.

In view of the conveyances to appellant, the burden of proof was on appellees to show that the Thomas J. Burchett land conveyed to them included the land patented to Jesse Burchett, and, failing to exhibit any deed from Jesse Burchett to Thomas J. Burchett, conveying to him this land, they must fail.

The judgment of the lower court is reversed, with directions to dismiss the petition.

Supreme Court will not reverse a judgment in a criminal case, where any evidence tending to prove the defendant's guilt.

Note.—For cases in point, see vol. 15, g. Criminal Law, §§ 3074-3076.]

—PRESENTATION OF QUESTIONS IN COURT—ARGUMENT OF COUNSEL. Objections to the argument of counsel in a case for homicide will not be reviewed unless where the argument was not objected to at the trial court, nor the court asked to renege attorney, or admonish the jury to disregard the statements.

Note.—For cases in point, see vol. 15, g. Criminal Law, § 2645.]

HOMICIDE—INSTRUCTIONS—JUSTIFICATION—USE OF ANOTHER.

In a prosecution for homicide, where there is evidence tending to show that the act was done in defense of the defendant's brother, the court should have instructed that, if defendant believed that his brother was in imminent danger of death or serious bodily harm at the hands of decedent, and it was necessary, reasonably appeared to defendant to be necessary, to kill the decedent to protect the defendant's brother, the killing was justified, and the jury should acquit the defendant.

Note.—For cases in point, see vol. 26, g. Homicide, §§ 177-181, 633.]

Reversed from Circuit Court, Estill County. to be officially reported."

McIntosh was convicted of voluntary manslaughter, and appeals. Reversed and remanded.

Riddell, for appellant. N. B. Hays and H. Morris, for the Commonwealth.

MR. JUSTICE. The appellant, W. D. McIntosh, was indicted in the lower court for the murder of Thomas Griffin. Upon the trial, by the verdict returned, found him guilty of voluntary manslaughter, and fixed punishment at confinement in the penitentiary for 15 years. Judgment was entered in conformity therewith.

Appellant insists that he should have been granted a new trial, and also that the judgment should be reversed upon the grounds: (1) that the verdict was flagrantly against the evidence; (2) that the Commonwealth's attorney was guilty of misconduct in argument to the jury; (3) that the court erred in instructing the jury and in giving an instruction asked by appellant.

On the first ground, it is sufficient to say there was some evidence to the effect that appellant was not justified in shooting the deceased, and it is well settled that this will not reverse a judgment in a criminal case when there is any evidence tending to prove the defendant's guilt.

As to the alleged improper statements of the Commonwealth's attorney made in argument to the jury were objected to by counsel for appellant, or that the court was asked to reprove the attorney, or admonish the jury to disregard such statements. It has been repeatedly held by this court that in order to authorize it to consider on appeal error of the trial court in permitting misconduct of counsel in argument to the jury it must appear of record that what was improperly said or done by the counsel was objected to at the time; that the trial judge was asked to rule upon it; that he refused to exclude it, or refused to rule upon it; and that such adverse ruling was excepted to by the party prejudiced. *Stinson v. Commonwealth*, 93 S. W. 463, 29 Ky. Law Rep. 733.

In considering the instructions complained of, we find that those given by the court were substantially correct. The one instruction asked by appellant was properly refused by the court for it was incorrectly worded, but as the ground of defense it attempted to express ought to have been presented to the jury, and it was the duty of the trial judge to give all the law of the case, he should have given, in lieu of the one offered, a correct instruction embodying that theory of defense; that is to say, an instruction should have been given in the following language: "Although the jury may believe from the evidence beyond a reasonable doubt that the defendant shot and killed Thomas Griffin, yet if they believe from the evidence that at the time he did so Griffin commenced or was commencing a difficulty with defendant's brother, Nim McIntosh, by assaulting him with a deadly weapon, and defendant believed, and had reasonable grounds to believe, that his brother was in imminent danger of death or serious bodily harm at the hands of Griffin, or it reasonably appeared to defendant that his brother was then in such danger, real or apparent, and that it was necessary, or it reasonably appeared to him to be necessary, to kill Griffin to protect the life or person of his brother from such danger or apparent danger, then the killing of Griffin was excusable, and the jury should acquit the defendant." If appellant killed Griffin in defense of his brother, he is excusable or not according as the brother would be innocent or guilty had he committed the homicide. *Utterback v. Commonwealth*, 105 Ky. 723, 49 S. W. 479, 88 Am. St. Rep. 328. Appellant testified that when he shot Griffin he believed himself and his brother both in danger; that when he interfered between his brother and Griffin it was to stop the difficulty; but upon reaching the parties he found Griffin and Fox a short distance away, flourishing their pistols, and threatening his brother and companion, and when presently Griffin raised or presented his pistol at his brother, he (appellant) fired upon him, in

good faith believing that it was necessary in the protection of himself and brother. Appellant was corroborated by other witnesses, and his and their testimony authorize such an instruction as we have indicated should have been given. This instruction should be given on the next trial.

For the error of the court in failing to instruct the jury as to the right of the appellant to act in defense of his brother, Nim McIntosh, the judgment is reversed, and cause remanded for a new trial.

### ZEHE'S ADM'R v. CITY OF LOUISVILLE. (Court of Appeals of Kentucky. Oct. 24, 1906.)

#### 1. EXCEPTIONS, BILL OF—REPORT OF EVIDENCE—BYSTANDER'S BILL.

Ky. St. 1903, § 1019a, provides for the appointment of an official court stenographer for courts of continuous session, and article 8 declares that the transcript made by the reporter and filed in the clerk's office, when certified to be correct by the court, may be used in the Court of Appeals as part of the record. *Held*, that where the record was taken and preserved by an official court reporter, it was proper for the court to refuse to sign a bystander's bill of exceptions which was incorrect.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 89.]

#### 2. SAME—TIME—EXTENSION.

Under Civ. Code Prac. § 334, providing that time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term fixed by the court, where 60 days were given for the preparation and signing of a bill of exceptions the court could not give any additional time, and the bill subsequently presented was properly disallowed.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 57-64.]

#### 3. MUNICIPAL CORPORATIONS—DEFECTIVE WATER COURSE—PLEADING—NOTICE.

Plaintiff's intestate was drowned in a deep hole in a creek at the mouth of a city sewer, while going through the creek in a wagon. *Held*, that a petition against the city alleging faulty construction of the sewer at the point where it entered into the creek, the permitting of a deep hole to form, etc., but failing to allege that the city had notice of the dangerous condition of the creek, or that it had existed for a sufficient length of time, to charge the city with notice, was fatally defective.

#### 4. SAME—DUTY OF MUNICIPALITY.

Where a city permitted a sewer to discharge into a creek, the city owed no duty to a person fording the creek in a wagon to see that the creek was safe for that purpose at the mouth of the sewer, and to fill up a deep hole that had been formed there.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by William E. Zehe's administrator against the city of Louisville. From a judgment for defendant, plaintiff appeals. Affirmed.

D. Moxley, for appellant. A. E. Richards and A. B. Bensinger, for appellee.

LASSING, J. This was an action by W. E. Zehe's administrator against the city of Louisville to recover damages for the death of

an infant 9 years of age who was drowned by the overturning of a wagon in a creek near the mouth of a sewer in said city. Plaintiff alleged that, by reason of the faulty construction of the sewer at the point where it emptied into the creek, a deep hole had been made in the creek and that the driver of the wagon in which the boy was riding, not knowing of the presence of said hole, drove his horse into same, and the wagon was overturned, and the boy was drowned. The city's plea was a traverse and a further plea of contributory negligence. The case was tried by a jury before a special judge, and, at the conclusion of the testimony, a peremptory instruction was given to find for the defendant, which was done. This was in May, 1900. Motion and grounds were filed for a new trial on May 10, 1900. On October 10, 1903, the motion for a new trial was overruled and plaintiff given 60 days to prepare and tender his bill of exceptions. On December 7, 1903, plaintiff, by counsel, tendered his bill of exceptions and moved the court for leave to file same, to which the defendant objected. The court thereupon gave plaintiff 30 days' additional time in which to complete the bill of exceptions. Upon January 7, 1904, upon motion of plaintiff, he was given 30 days' additional time in which to complete and file his bill of exceptions. On September 25, 1905, the following order was made: "The court declines to sign the bill of exceptions, because the stenographic transcript of the evidence was not tendered within the thirty days allowed to complete the bill, thereby showing the court the evidence on the trial. [Signed] John S. Jackson, Special Judge." The record shows that the evidence given on the trial of this case was taken by an official court stenographer, or reporter. The bill of evidence tendered on December 7, 1903, is not a stenographic report of the proceedings had on the trial, but purports to be a statement by two witnesses as to what took place during the trial, and we think the court properly refused to approve same, when the record had been taken and preserved by an official reporter for the court. Plaintiff should have had this stenographic report transcribed, and presented it as his bill. The court, on plaintiff's own motion, extended the time until January 7, 1904, in order that he might complete his bill. And on January 7, 1904, the court again extended the time for 30 days for plaintiff to complete his bill, and the plaintiff having failed and refused to complete his bill, the court, on September 25, 1905, refused to sign the bill tendered, and plaintiff appeals.

The first question for determination is: Is there any bill of evidence in this case to be considered by this court upon review, and, if not, did the pleadings support the judgment? Section 1019a, Ky. St. 1903, provides for the appointment of an official court stenographer for courts of continuous ———. And article 4 of said section provides for the

appointment of a special reporter when the regular reporter for any reason does not serve. And article 8 thereof provides that the transcript or duplicate made by the reporter, and filed in the clerk's office, when certified to be correct by the court, may be used in the Court of Appeals as part of the record in the action or prosecution in which the notes from which it has been transcribed were made.

It appears from the record that the time for preparing the bill of exceptions was extended by the court in order to give plaintiff an opportunity to secure and file a transcript of the evidence offered during the trial. He was first given 60 days, then 30 days additional, and then 30 days more, and having failed to produce same within the 120 days given him, the judge having waited more than 8 months after the 120 days had expired, refused to sign the bill which plaintiff had tendered as a bystander's bill. The reason assigned for refusing to sign the bill is that it is not correct. We are of opinion that under this state of facts the court was warranted in refusing to sign the bill tendered, and as plaintiff failed to present a proper bill within the time given by the court, or at all, he cannot complain of the action of the trial judge. For even had he tendered a bill correct in every particular after the expiration of 120 days from the time the judgment became final, the court would have had no right or power to sign same. Although plaintiff offered to file what he termed a bystander's bill, it was evidently but an imperfect statement of part of the testimony offered during the trial, and was so regarded, not only by the court, but by plaintiff's attorney, for the court, on plaintiff's motion, extended the time 60 days to enable him to complete his bill. The record does not show that the bill tendered was ever filed, and in fact it was not. Section 334 of the Civil Code of Practice provides: "The party objecting must except when the decision is made, and time may be given to prepare the bill of exceptions, but not beyond a day in the succeeding term fixed by the court."

In the case of *Cain v. Cain*, 12 Ky. Law Rep. 635, the court held that the time for filing a bill of exceptions in the Jefferson court of common pleas cannot be extended beyond 120 days after the order overruling the motion for a new trial. In that case the motion for a new trial was overruled October 3, 1885, and the bill of exceptions was not signed until February 13, 1886, which was 130 days after the motion for a new trial was overruled. The court held that, although the time was extended by the successive orders of the court, the bill could not be considered. No excuse appeared in the record for its not having been signed sooner. In the case of *Combs v. Combs*, 41 S. W. 7, 19 Ky. Law Rep. 439, the court held that a bill of exceptions which was filed pursuant to an order of the court granting further time to a date in the

term later than the succeeding term after the judgment became final, cannot be considered upon appeal. And if the pleadings are sufficient to sustain the judgment of the court below, the judgment must be affirmed. See *Johnson v. Stivers*, 95 Ky. 130, 23 S. W. 957, and *Bannon v. Moran*, 12 Ky. Law Rep. 989. In the case of *City of Covington v. Wilson*, 23 Ky. Law Rep. 1722, this court held, as stated in the syllabus: "In courts of continuous session a bill of exception must be filed within sixty days after the judgment becomes final, unless the court, on motion made within that time, gives further time within which to file same. A bill of exceptions tendered more than sixty days after the judgment became final, was properly refused by the court."

In the case before us the judgment became final October 10, 1903, and 60 days was given in which to prepare and tender the bill. On December 7, 1903, 30 days' additional time was given, which expired on January 6, 1904. On January 7, 1904, 30 days' additional time was given, which expired February 7, 1904. Under the Code, and under the ruling laid down in the above cited cases, no additional time could have been given by the court. The court had given him all the time which they could allow him, and appellant, within that time failed to have filed what he offered as for his bill filed. It cannot, therefore, be considered as a part of the record in this case. In the case of *Early v. Sutton*, 74 S. W. 238, 24 Ky. Law Rep. 2381, this court held that where the record fails to show that time was given to appellant at the term at which his motion for a new trial was overruled to prepare and tender his bill of evidence and exceptions at the succeeding term of the court, as provided by section 334 of the Civil Code of Practice that this court cannot legally consider upon appeal that part of the record which purports to be a bill of exceptions. The record shows that the trial court extended to the appellant plaintiff every opportunity within its power to file its bill of exceptions. The maximum time that can be given under the Code is 120 days from the time the motion for a new trial is overruled. This full time was given plaintiff, and he failed to complete his bill of exceptions within said time, and failed to have even his incomplete bill filed within said time. And after the expiration of the 120 days, the trial judge had no right to sign said bill, and properly refused to do so.

The only question remaining for consideration is: Do the pleadings support the verdict? Appellant practically admits in his brief that if the bill of evidence is not admitted as part of the record, and considered on this appeal, that his appeal is lost. The answer in the case is a traverse, and a plea of contributory negligence. The petition itself is defective, and the trial court should have sustained a demurrer thereto, for the reason that it fails to charge that the said defendant had notice of the dangerous condi-

tion of the creek at the mouth of the sewer, or, by the exercise of ordinary care, could have discovered its said dangerous condition, or that it had remained in said condition for a length of time sufficient to charge the city with notice of such condition. These are essential allegations, which would have to be alleged and proven in order to entitle the plaintiff to recover. Our courts have gone quite far in holding municipal corporations to a strict responsibility on account of accidents caused by their failure to keep their streets and sidewalks in a proper and safe condition, but we know of no case in which it has ever been held that a municipal corporation is required to keep a creek or waterway running through same in even a reasonably safe condition for public travel. A creek is not a highway, and the same rule of law which would apply in case of accidents occurring on streets or sidewalks of a city could not be applied to an accident occurring in a creek by reason of a latent defect therein, such as set up in this case. The city owed appellant no duty in reference to the creek. And appellant does not charge appellee with a breach of any duty in reference to the creek, but shows in his pleadings clearly that the accident which resulted in the death of his intestate was due solely to the negligence of the driver of the wagon, and in no wise to the fault or failure of the city to discharge any duty which it owed to the decedent.

The judgment is affirmed.

### DEATLEY v. TOLLE.

(Court of Appeals of Kentucky. Oct. 26, 1906.)

#### 1. APPEAL—FINDINGS BY COURT—EVIDENCE—REVIEW.

While the judgment of the chancellor on a question of fact will be given weight, and will not be disturbed in case of doubt as to the truth, it will not be followed on appeal where it is against a preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3990.]

#### 2. WORK AND LABOR—FINDINGS—EVIDENCE.

Evidence held to require a finding that plaintiff intended to pay for board furnished to her by her sister, and that the reasonable value thereof, after deducting an admitted credit, was sufficient to cancel a note sued on.

Appeal from Circuit Court, Lewis County.  
"Not to be officially reported."

Action by Linnie W. Tolle against Lucy M. Deatley. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Allan D. Cole, for appellant. Sallee & Slattery and Robt. D. Wilson, for appellee.

HOBSON, C. J. On October 6, 1883, Linnie W. Davis and her husband sold and conveyed to her sister, Lucy M. Deatley, a tract of 20 acres of land in Lewis county in consideration of \$600, \$450 of which was paid cash in hand, and for the remainder two notes were executed, one for \$50 and the other for \$100, due in 12 months. Mrs. Deatley

was a widow, with three small children. In March, 1885, Mrs. Davis' husband died, leaving her without children. After her husband's death she was invited by her husband's brother to make her home at his house, but she had her things taken to Mrs. Deatley's, and she lived there at Mrs. Deatley's, or at her brother-in-law's, until she married R. P. Tolle in November, 1887. About eight years after the death of her first husband, Mrs. Deatley let Mrs. Tolle have a colt at \$20, and on the same day Mrs. Tolle gave up to Mrs. Deatley the \$50-note, on which there were some credits. Subsequently this indorsement was made on the \$100-note by Mr. Tolle: "Credit by one colt, \$20.00. November 8, 1893." Whether this indorsement was made at the time of the transaction does not appear definitely. On December 16, 1904, Mrs. Tolle filed this suit against Mrs. Deatley on the \$100-note, seeking to enforce a lien on the land. Mrs. Deatley pleaded limitation; also, that the note had been settled in the board of Mrs. Tolle. She denied the credit of \$20 on the note. The affirmative allegations of the answer were controverted by reply, and on final hearing the circuit court entered a judgment in favor of the plaintiff for the balance of the note and a sale of the land to satisfy the debt.

The case involves only a question of fact. The rule is not that in an equity case the judgment of the chancellor has the force of the verdict of a jury. While the rule was so stated in some of the earlier cases, in the subsequent cases the court has uniformly maintained the rule that the judgment of the chancellor will be given weight, and will not be disturbed where the mind is left in doubt as to the truth, but it will not be followed where it is against the preponderance of the evidence. The difference in the cases is mainly in terms. The court has, in fact, always followed the rule that in an equity case the judgment on the appeal will be given according to the truth as it appears from the record. The weight of the evidence shows clearly that when Mrs. Tolle, then Mrs. Davis, went to her sister's she knew that her sister had no means of paying the debt that she owed unless she paid it in board. Mrs. Davis wished to be independent. She was not willing to be a charge on her husband's brother, and she was equally loath to be a charge upon her sister, who was struggling along to maintain her three little children. The clear weight of the evidence shows that it was agreed between the two that Mrs. Davis was to pay board, and that the board was to be credited on the notes which she held against Mrs. Deatley. This is shown, not only by what occurred at the time between them, but the proof on this subject is confirmed by the subsequent conduct of Mrs. Tolle after her second marriage. She not only took no steps to collect the debt for something like 20 years after the note was due, but some years before this suit was

brought Mrs. Deatley or her son had prepared a deed of release for Mrs. Tolle to sign, and when this deed was presented to Mrs. Tolle she said that she did not feel like her sister was able to keep her without paying board, and that she did not feel like signing the deed without something to show for it; in other words, she did not refuse to sign the deed on the ground that the debt had not been paid, but on the ground that if she signed the deed she would have nothing to show that her board had been settled. This conduct of hers at that time is in keeping with her long delay in bringing suit. The evidence is conflicting as to how much of her time Mrs. Tolle spent at her sister's, or how much she spent at her brother-in-law's, before her second marriage; but, under all the proof, we think it may reasonably be inferred, in view of the conduct of the parties, that she stayed at her sister's long enough for her board to satisfy the notes which she held against her sister, after deducting the \$20 for the colt and the other payments that had been made on the \$50-note. The circumstances leave no doubt that Mrs. Tolle did not expect her sister to keep her for nothing, and that both parties contemplated that the board was to go upon the notes.

On the whole case, we conclude that there should be no judgment on the note sued on.

Judgment reversed, and cause remanded for a judgment dismissing the petition.

#### HENDRIX'S ADM'X v. HENDRIX.

(Court of Appeals of Kentucky. Oct. 24, 1906.)

##### 1. LIMITATION OF ACTIONS — ACKNOWLEDGMENT—SUFFICIENCY.

Where two executors under a will appeared before the county court, and one of them admitted that he was indebted to the other in a certain sum, which admission was reduced to writing by the judge and placed on the records of the court, it was a sufficient acknowledgment to take the indebtedness out of the statute of limitations.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 593-596.]

##### 2. SAME—NECESSITY OF PRE-EXISTING INDEBTEDNESS.

In an action by one of the executors under a will against the estate of the other executor, it appeared that the two executors had appeared before the county judge, and that decedent had acknowledged an indebtedness of \$511 to plaintiff, which acknowledgment was taken down in writing by the judge and placed on the records of the court. *Held*, that the acknowledgment was not insufficient to warrant a judgment in favor of plaintiff on the theory that no pre-existing indebtedness was shown, where it appeared that the two executors at the time of the acknowledgment were the only heirs, and that decedent at the time was indebted to the estate in the sum of \$1,122.

Appeal from Circuit Court, Bath County.

"Not to be officially reported."

Action for the settlement of the estate of Sandford Hendrix, deceased, in which Thomas J. Hendrix presented a claim, and from the allowance thereof James N. Hendrix's administratrix appeals. *Affirmed*.

R. Gudgell & Son, for appellant. W. S. Gudgell, for appellee.

CARROLL, C. By the will of Sandford Hendrix, Thomas J. and James N. Hendrix were appointed executors of his estate. In June, 1881, they made a partial settlement of their accounts as executors, which showed that the estate at that time owed Thomas J. Hendrix \$124.58, and that James N. Hendrix owed the estate \$245.52. This settlement in due time was confirmed by the county court. In 1894 the executors made another settlement, which showed that there was due Thomas J. Hendrix \$1,122.41. Afterwards this settlement was approved. In 1903 the following agreed settlement was made by the executors before the county judge of Bath county: "This agreed settlement made this day by Thomas J. Hendrix and James N. Hendrix, as executors of Sandford Hendrix, as between themselves. As all dues and damages against the estate of Sandford Hendrix have been long since fully settled, and the matters herein embraced are a settlement of that estate between themselves, the said T. J. Hendrix has paid out on the estate of Sandford Hendrix more than the said J. N. Hendrix, and the sum as agreed upon, now, in order to make this a final and full settlement, the said James N. Hendrix agrees that he is indebted to the said T. J. Hendrix in the sum of \$511.00." Soon after this time, J. N. Hendrix died, and, in an action brought for the purpose of settling his estate, Thomas J. Hendrix presented a claim for the \$511 above mentioned, asserting it by an answer filed in the case. The administratrix of J. N. Hendrix denied that her intestate was indebted in the amount claimed, and averred that the settlement made in 1881 was the only settlement made by J. N. Hendrix, as executor of Sandford Hendrix, and that more than 20 years had elapsed between the date of the settlement in 1881 and the presentation of the claim against the estate of J. N. Hendrix; also denying that J. N. Hendrix in 1904, or at any other time, acknowledged an indebtedness to Thomas J. Hendrix, or that the agreed settlement made in 1903 had any validity. No evidence was taken in the case, except the deposition of John Ed. Daugherty, county judge of Bath county, before whom was made the agreed settlement in 1903. Judge Daugherty testified, in substance, that, in obedience to notice to make a final settlement as executors, J. N. and Thomas J. Hendrix came to his office and agreed upon a settlement, which was reduced to writing by him in their presence; this writing expressing the agreement made between them. The circuit court rendered a judgment for the amount claimed against the estate of J. N. Hendrix, and from that judgment this appeal is prosecuted.

It is insisted for appellant: First, that there is no evidence that at any time, previous to 1903, J. N. Hendrix was indebted to

Thomas J. Hendrix; and, second, that an acknowledgment of a debt, to take it out of the statute of limitations, presupposes the existence of an original debt, and that, no indebtedness being shown, the document purporting to be an agreed settlement is of no effect. The record shows that Sandford J. Hendrix devised his estate to his widow for life and remainder to his two children, J. N. and Thomas J. Hendrix, that the widow died in 1890, and that settlements were made in 1881 and 1894, as heretofore set out. The settlement made in 1894 showed that J. N. Hendrix was indebted to the estate in the sum of \$1,122, and, as J. N. and Thomas J. Hendrix were at that time the only heirs, it is fair to assume that one-half of this sum was due by J. N. to Thomas J. Hendrix, and therefore there was a pre-existing debt upon which to rest the acknowledgment made by J. N. Hendrix in 1903. The fact that the county judge, in whose presence J. N. Hendrix acknowledged his indebtedness to T. J. Hendrix, reduced this acknowledgment and agreement between them to writing and placed the same upon the records of his court, strengthens, instead of weakens, the effect of his testimony, and is corroborative of the fact that the agreement and acknowledgment was made. If J. N. Hendrix, in the presence of the county judge, had acknowledged to T. J. Hendrix his indebtedness to him in the sum of \$511, this acknowledgment, in view of the fact that there was a pre-existing debt, was sufficient to take the debt out of the statute of limitations, and an action might be maintained on this new promise. It is said, in *Head v. Manners*, 5 J. J. Marsh. 255, that: "In order to take a case out the statute of limitations, an express acknowledgment of the debt as a debt due at that time—coupled with the original consideration—or an express promise to pay, must be proved to have been made within the time prescribed by the statute."

This rule has been followed by this court in many cases, and the evidence in this record brings the claim sued on safely within it.

Therefore the judgment of the lower court is affirmed.

#### SNOWDEN v. SNOWDEN.

(Court of Appeals of Kentucky. Oct. 26, 1906.)

##### 1. PLEADING—EXHIBITS.

It is not essential to the sufficiency of a pleading that an open account filed as an exhibit should be set out in the body of the pleading, if it is made a part of and filed with it.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 944-947.]

##### 2. WORK AND LABOR—PROMISE TO PAY—PLEADING.

It is not necessary, in an action for work, labor, and services, to allege an express agreement or promise on defendant's part to pay for the labor, since, if the labor was rendered at defendant's instance and request, the law implies a promise to pay.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, § 41.]

##### 3. PLEADING—SPECIFICATIONS—REMEDY.

If an account, filed with a petition, is not sufficiently specific, the remedy is by motion to make the same more definite and certain, as authorized by Civ. Code Prac. § 134.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1185.]

##### 4. PLEADING—SET-OFF.

In an action on a note, defendant answered, that plaintiff was indebted to him in the sum of \$225 for labor and services rendered at plaintiff's request, an account of which defendant filed with the answer, "marked No. 1," showing the character of the services performed, the dates thereof and the prices charged; that all the prices were reasonable, and that there was due on the account the amount aforesaid. *Held*, that the answer stated a good cause of action against plaintiff, and was available as a set-off.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 293.]

##### 5. WORK AND LABOR—FOOD AND LODGING—STATUTES.

Under the express provisions of Ky. St. 1903, § 2178, if a person other than the keeper of a tavern or house of private entertainment shall furnish board to another, he cannot recover compensation in the absence of an express contract to pay therefor.

Appeal from Circuit Court, Clark County.

"Not to be officially reported."

Action by D. J. Snowden against J. H. Snowden. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. M. Stevenson, for appellant. Leland Hathaway, for appellee.

CARROLL, C. In an action against him by appellee on a promissory note, the appellant filed the following answer and set-off: "The defendant (now appellant), J. H. Snowden, says that the plaintiff (now appellee), is indebted to him in the sum of \$275, amount due for labor and services rendered plaintiff by defendant at his (plaintiff's) instance and request. Defendant files herewith as part hereof, marked No. 1, an account showing the character of the services performed, the dates thereof and the prices charged therefor, and says that all of said prices are reasonable and that there is due on said account the amount aforesaid. (2) The defendant further says that the plaintiff is further indebted to him in the sum of \$100, for boarding and caring for plaintiff and his family from the 1st of August, 1904, to November 4, 1904; that defendant boarded and cared for plaintiff and his family during said time, at the special instance and request of plaintiff, and that the charges made therefor is reasonable, and the same is due and unpaid." Exhibit No. 1, filed with the foregoing answer and set-off sets out in separate and distinct items the character of service rendered, the price charged for each particular item of service, and the year in which it was rendered. A demurrer was entered and sustained to each paragraph of this pleading, and the only question before us on this appeal, is the sufficiency of this set-off.

For convenience we will dispose of each

inst a plaintiff, and it must contain all necessary requisites of a petition. If averments in the set-off would not be sufficient to constitute a good cause of action in itself, they would not be sufficient in a pleading designated a set-off. Exhibit No. 1, the appropriate language made a part of paragraph 1, and must be considered as if set out in full in the body of the pleading. Section 120 of the Civil Code of 1903 provides that "If an action, counter-claim, or cross-petition be founded on a bond, bill, or other writing as evidence of indebtedness, it must be filed as a separate pleading if in the power of the plaintiff to produce it; and if not filed, the failure to file must be stated in the pleading; if upon an account, a copy thereof must be filed with the pleading." It is not sufficient to the sufficiency of a pleading that a bill, like an open account, shall be set out in the body of the pleading if it is made a part of it and filed with it as an exhibit. It must be observed that the Code makes a distinction between writings that are evidence of indebtedness, and accounts. It has been held that a petition founded on a writ which merely refers to it without setting out its terms is bad on demurrer. *Huffaker v. National Bank*, 12 Bush, 287; *Riggs v. Metc.* 2 Metc. 88; *Dodd v. King*, 1 Metc. 1. This rule does not apply to an open account; and if the averments of the pleading are sufficient to show defendant's indebtedness and his liability for the account, that is the basis of the action, it will be good if set out as a part of the pleading. It is not sufficient in an action on an account for goods furnished or labor performed, or services rendered, to allege an express agreement on the part of the defendant to furnish the goods or labor or services. If goods were furnished, or the labor or

man Pl. & Pr. pp. 400-403; *Drake's Adm'r v. Semonin*, 82 Ky. 291; *Skillman v. Mulr's Adm'r*, 4 Metc. 282. If the account filed with the petition is not sufficiently specific—a question we do not deem it necessary to pass upon—this defect, if it be one, can be corrected by motion made under section 134 of the Civil Code of Practice to make the pleading more definite and certain. *Posey v. Green*, 78 Ky. 162. The first paragraph of the answer stated a good cause of action, and the demurrer to it should have been overruled.

The second paragraph of the answer and set-off does not state a good cause of action, as it fails to aver an agreement or contract on the part of the plaintiff to pay defendant for boarding and caring for him and his family. Section 2178 of the Kentucky Statutes of 1903 provides that "Any person other than the keeper of a tavern or house of private entertainment, who shall entertain in his house another, or furnish him with diet or storage for his goods, not making any agreement for compensation therefor, shall not recover anything against the person so entertained or furnished with diet or storage, or against his estate, but the person so furnishing another shall be considered as doing the same for courtesy." Under this statute, if a person other than the keeper of a tavern or house of private entertainment shall furnish another board, he cannot recover compensation in the absence of an agreement to pay therefor. The law will not imply any promise to pay the board; on the contrary, the implication in the absence of a contract or agreement is that no compensation was to be charged. *Ramsey v. Keith's Adm'r*, 76 S. W. 142, 25 Ky. Law Rep. 582; *Hancock v. Hancock's Adm'r*, 69 S. W. 757, 24 Ky. Law Rep. 664.

The judgment is reversed for proceedings in conformity to this opinion.



**COCHRAN v. STATE.**

(Court of Criminal Appeals of Texas. Oct. 10, 1903.)

**CRIMINAL LAW—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW.**

Where, on appeal from a conviction for murder, there is no bill of exceptions, statement of facts, or assignment of error, the sufficiency of the evidence and the giving of a special charge requested by the state cannot be reviewed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2918, 2938, 2941.]

Appeal from District Court, Kaufman County; J. E. Dillard, Judge.

Albert Cochran was convicted of murder in the second degree, and appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** This conviction is for murder in the second degree; 50 years' confinement in the penitentiary being fixed as the punishment.

The record is before us without bill of exceptions or statement of facts. Two grounds were presented in the motion for new trial, and there are no assignments of error. The first relates to the sufficiency of the evidence, and the second to the giving by the court of a special charge requested by the state. This charge is not in the record. The evidence not being before us, neither question can be revised. As the case is presented there is nothing to review.

The judgment is affirmed.

**Ex parte JACKSON.**

(Court of Criminal Appeals of Texas. Oct. 10, 1900.)

**1. CRIMINAL LAW—COMPLAINT—SUFFICIENCY—FORM.**

Const. art. 5, § 12, requires all prosecutions to be carried on in the name and by the authority of "the state of Texas." *Held*, that while Code Cr. Proc. 1895, arts. 256, 257, and 938, in prescribing the requisites of a complaint does not require the complaint to commence with the words "in the name and by the authority of the state of Texas," where a criminal charge is brought before a justice of the peace, the prosecution being based solely on a complaint, it must so commence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 526.]

**2. HABEAS CORPUS—GROUNDS OF REMEDY—ACTUAL RESTRAINT.**

A motion to dismiss an application to the presiding judge of the Court of Criminal Appeals for habeas corpus, made after refusal of the writ by the county judge, was not dismissible on the ground that the applicant was not in jail when the application was presented to the county judge, where it appeared that he was in jail when the latter application was presented.

Application by Bud Jackson for habeas corpus to obtain his release from custody under a conviction of disturbing religious worship. Relator discharged.

Mounts & Jones, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

**HENDERSON, J.** This is an original application for the writ of habeas corpus.

The facts show that appellant was tried in the justice court of Wood county on an affidavit charging him with disturbing religious worship. He made a motion in arrest of judgment in that court on the ground that the complaint did not begin with the constitutional requirement—"In the name and by the authority of the state of Texas"—which was overruled, and appeal was prosecuted to the county court. Motion was made again in the county court to quash the complaint on the same ground, which was overruled, and he was tried and convicted. He then applied to the county judge for the writ of habeas corpus, which was refused, and then applied to the presiding judge of this court, who granted the writ. Motion has been made to dismiss by the Assistant Attorney General, on the ground that applicant was not in jail when the application was presented to the county judge, and affidavits are presented showing that fact. However, it does appear that he was in jail when the application was presented to the presiding judge of this court. The motion is accordingly overruled.

The ground of the application to discharge relator here made is, that the complaint upon which the prosecution was based is void, because it did not begin with the words, "In the name and by authority of the State of Texas"; the contention being that this is a "prosecution," and under our Constitution (article 5, § 12) "all prosecutions shall be carried on in the name and by authority of the state of Texas," etc. While this is a constitutional requirement, and in our view this is a "prosecution" (Ex parte Fagg, 33 Tex. Cr. R. 573, 44 S. W. 294, 40 L. R. A. 212), still it appears to have been held that this language is not an essential requirement in a prosecution of a misdemeanor. *Johnson v. State*, 31 Tex. Cr. R. 465, 20 S. W. 980; *Jefferson v. State*, 24 Tex. App. 535, 7 S. W. 244. The latter case affords a full discussion of the question; but there, as in the *Johnson Case*, the complaint was merely the basis for the information, and the information commenced with the language contained in the Constitution. It is said our statute requires this as to indictments and informations, but not as to complaints. And, so far as we are aware, the question here presented has not been before this court. Here the offense charged was only by complaint, and the prosecution was conducted solely on this complaint. In *Drummond v. Republic*, 2 Tex. 157, a similar provision in the then Constitution of the republic was construed by Justice Wheeler, and the court decided that "carried on" did not refer to the language to be used in the complaint; that it was sufficient that the prosecution was carried on by the proper law officer acting under the authority and con-

ducting the prosecution in the name of the government. In our present Constitution the requirement, as has been seen, is, that the prosecution shall be carried on in the name and by authority of the state of Texas, and that it conclude "against the peace and dignity of the state." It has been held in a number of cases that the conclusion to an indictment or information is an absolutely essential requirement. Our statute in prescribing the requisites of a complaint neither requires the constitutional beginning or conclusion. Articles 256, 257, 938, Code Cr. Proc. 1895.

The question is whether or not the Legislature could dispense with this constitutional requirement; and, if it could, would the complaint be merely irregular and voidable, or would it be absolutely void, so that the question could be reached on habeas corpus. In this particular case, as we have seen applicant attempted to avail himself of the defect in both the justice and county courts, but was overruled, and now he claims that, this being a prosecution, the constitutional requirement applies, and because of the failure to use the language required in the Constitution in the prosecution of all criminal cases that the same is absolutely null and void, and that he has no remedy except by the writ of habeas corpus to enforce this constitutional requirement. If this is a constitutional requirement and refers to the language to be used in the procedure by which a prosecution is inaugurated, under our authorities it appears to be an essential requisite in all prosecutions. Undoubtedly a trial on a criminal charge by complaint before a justice of the peace for an offense cognizable by him in a prosecution for an offense prescribed by statute. *Fagg v. State*, 38 Tex. Cr. R. 573, 44 S. W. 294, 40 L. R. A. 212, and authorities there cited. Accordingly we hold that where, as in this case, the prosecution is solely on complaint before a justice of the peace, the constitutional requirement that the same be carried on in the name and by authority of the state of Texas must be complied with. "Carried on" means and refers to the prosecution which is by a written complaint; and because this prosecution was not begun "in the name and by authority of the state of Texas" the same is absolutely null and void.

The relator is discharged.

### SIMPSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1906.)

#### 1. LARCENY—INSTRUCTIONS—DEFENSE.

Where, on a prosecution under Pen. Code, 1895, art. 877, making the fraudulent conversion of property under bailment theft, defendant was charged with the conversion of a gun left with him to be repaired, and his defense was that prosecutor failed to pay charges, and that when defendant removed from the county he took the gun with him to secure his charges,

it was error to refuse to instruct that if such was the case defendant could not be convicted. [Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 39-42.]

#### 2. SAME—EVIDENCE—ADMISSIBILITY.

It was error to permit the state to prove by prosecutor that he would have left the money to pay the repairs if defendant had told him to do so.

#### 3. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution under Pen. Code 1895, art. 877, making the fraudulent conversion of property under bailment theft, evidence considered, and held not to sustain a conviction, but to show that the property was kept openly under a claim of right.

Appeal from Polk County Court; A. B. Green, Judge.

J. S. Simpson was convicted of theft, and he appeals. Reversed and remanded.

F. Campbell and Cade Bethea, Jr., for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft, under article 877, Pen. Code 1895, which makes the fraudulent conversion of property under bailment theft, and his punishment fixed at a fine of \$25, and 20 days' confinement in the county jail; hence this appeal.

Appellant requested several charges which were refused by the court. To this action of the court, he reserved bills of exception. Said charges in various forms requested the court to instruct the jury, if the shotgun had been bailed to defendant to repair, and he repaired the same, and the owner failed to pay the charges thereon, and when he removed from the county he took the gun with him in order to secure his charges, and for no other purpose, to acquit him. This was appellant's ground of defense, and the proof amply justified the charge on this subject. We note that the court in his general charge did not instruct the jury on this defense in any manner. Accordingly we hold that the refusal to give said special charges, or some of them, was error, for which this case must be reversed.

We also believe that it was error for the court to permit the state to prove by prosecutor that he would have left the money in town to have paid the repairs on the gun if appellant had told him to do so.

Appellant strenuously insists that the evidence does not sustain the conviction; that the evidence for the state shows appellant had a lien on the gun for repairs made on it; and that said charges for repairs were not paid by prosecutor, and appellant, on removal from the county, carried the gun with him openly, and made no effort to conceal it. There is some testimony to the effect that, before appellant left Livingston, prosecutor made some effort to redeem the gun, but it does not seem to have been repaired at that time. There was some suggestion that there was an extra charge for repairing the gun

other than the \$1.50 which appellant had agreed to repair it for. Prosecutor also states that he was not certain about appellant telling him he was going to Camden soon; did not remember whether Edmund Washington told him appellant left word he was going to Camden and if he would send the charges for repairs on the gun he would prepay it back to prosecutor by express. Appellant testified: That he was a traveling jeweler, and received the gun to repair, and told prosecutor the repairs came to \$1.50. That he did not have time to examine it then, and, when he examined the gun, he found some more work than prosecutor had supposed. The gun needed repairs, as follows:

1 Main Spring.....	\$ 50
2 plungers, 50¢ each .....	1 00
2 plunger screws, 10¢ each.....	20
1 sear .....	50
1 sear screw.....	15

Total ..... \$2 35

That he repaired the gun for \$2.50. At the time he made the price with prosecutor he only had his statement of the work to be done, but that he told him to put it in good repair and he did so. That he refused to receive \$1.50 from prosecutor's messenger, and told him there was \$1.00 extra on it for the repairs; that he saw Hilton before leaving Livingston and told him that he had finished his work and would leave in a few days, and asked him to leave the money with some person in town and he would leave the gun. That he was going to Camden, Polk county, Tex., and unless he made the arrangements he would take the gun with him until the fees were paid. That he left word before leaving for Camden with Hardaway to tell Hilton that he would be at Camden for a while; that if he would send him the amount of charges on the gun he would prepay the gun to him by express. That he stayed in Camden three months, and during that time got no word from Hilton, and then moved to Lovelady, and while in Lovelady that portion of the town in which his shop was situated was burned, and the gun was burned in the shop. That he did not at any time claim to hold the gun except for the repairs, but kept possession of it in order to get his money for repairs. By another witness appellant proved the value of his repairs to be \$4.50. Edmund Washington testified that he delivered the message left with Jordan Hardaway by appellant, to prosecutor, to the effect that he was going to Camden and if Hilton would send the charges for the repair of the gun that defendant would return the gun to him by express prepaid. We do not believe that this state of case shows the charge of theft of bailed property. Appellant certainly had a right to the custody of the gun against the charges of \$1.50. As to the other dollar, extra charges, it may have been a matter of controversy. But appellant kept the gun openly under a claim of right, and, while he

may have been subject to a civil action to recover the gun without payment of the extra dollar, still he committed no offense in retaining it. We do not believe the evidence here presented is sufficient to sustain this conviction.

The judgment is reversed, and the cause remanded.

## GIDDINGS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1900.)

### 1. FENCES—INJURIES—OFFENSES—DEFENSES.

Where defendant in good faith believed that he had a right to use a boat to cross a stream, and that the boat belonged to the county and was for the use of the public, he was not guilty of injuring a fence to which the boat had been locked if it was necessary for defendant to break the fence in order to get and use the boat.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fences, §§ 62, 66.]

### 2. CRIMINAL LAW—INSTRUCTIONS—EVIDENCE.

Where, in a prosecution for fence breaking, committed while defendant was attempting to procure a boat with which to cross a river, there was no evidence that a storm was brewing at the time, it was improper to burden an instruction for defendant that, if he used the boat honestly, he was entitled to do so, by adding if he used it to get out of a storm.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1980–1984.]

Appeal from Chambers County Court; W. B. Gordon, Judge.

G. H. Giddings was convicted of injuring a fence, and he appeals. Reversed.

H. E. Marshall and E. B. Pickett, Jr., for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of injuring a fence, and his punishment fixed at a fine of \$10; hence this appeal. This case was reversed on former appeal because of the insufficiency of the evidence. See 83 S. W. 694, 11 Tex. Ct. Rep. 583. On this trial the state introduced two more witnesses, strengthening the case in some respects.

Appellant makes no contention that the fence was not under the protection of the law, and if he knowingly injured the same he is amenable. We understand his defense to be that he had been accustomed to use the boat in order to cross the Trinity river at that point, with the tacit consent of the owner, Mays. It appears to be conceded by the state that the boat had been formerly used as a general crossing by persons who had occasion to pass that way and cross the river at that point. But some month or so before the alleged transaction, Mays (the owner) had locked the boat by a chain to his fence, and no longer permitted the use of it by the general public. Whatever may be said of the changed condition as to the use of the boat, and notice given by locking

it to the fence, there is some evidence to the effect that appellant believed he had a right to use that boat; that the same belonged to the county, or was under the supervision of the county. There is testimony to the effect that the county judge had informed appellant the county had that boat in charge for the use of the public. Now, if appellant in good faith believed that he had a right to use said boat in crossing the stream, he was authorized to use it even though this might involve breaking the fence to get the use of the boat. The court charged the jury on this phase of the case, but burdened his charge with an instruction to the effect, if he used it honestly and in order to get out of an approaching storm, he had a right to do so, and, if he injured the fence in doing so, he would not be guilty. If he had a right to use this boat in crossing the river, he had a right to use it regardless of whether the storm was approaching. We fail to find from the evidence that any storm was threatening at the time appellant crossed the river in the boat. There is some testimony to the effect that he had been in the rain before he got to the river, but no testimony that a storm was then brewing. He says, himself, that he crossed the river because he wanted to get home. We do not believe the court was authorized to burden the charge in favor of appellant with any charge relating to a storm.

The judgment is reversed, and the cause remanded.

#### ALLEN v. STATE.

(Court of Criminal Appeals of Texas. June 6, 1906. Rehearing Denied Oct. 24, 1906.)

##### 1. CRIMINAL LAW — TRIAL — INSTRUCTIONS — REFUSAL.

It is not error to refuse an instruction requested by accused sufficiently covered by the instructions given.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

##### 2. ANIMALS—ABUSE—WILLFULNESS.

Where defendant beat his mule with evil intent and without reasonable grounds, the beating was willful and wanton.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 101, 102.]

Appeal from Williamson County Court; Chas. A. Wilcox, Judge.

Joe Allen was convicted of cruelly beating and abusing a mule, and he appeals. Affirmed.

D. S. Chessher and D. W. Wilcox, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of cruelly and unmercifully beating and abusing a mule, and his punishment assessed at a fine of \$5; hence this appeal.

Appellant contends that the court should have given his requested special instructions

defining "willfully" and "wantonly." It occurs to us that the court sufficiently defined these terms in the charge as given, and it was not incumbent on him to give the requested special instructions. We have examined the record carefully, and in our opinion, while there was evidence pro and con on the subject as to the willful and wanton beating of said mule, there is enough testimony in the record to show that the act was done with an evil intent, and without reasonable ground to believe that it was lawful; that is, that it was willfully and wantonly done.

The judgment is affirmed.

BROOKS, J., absent.

#### WALKER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1906.)

##### CRIMINAL LAW — APPEAL — STATEMENT OF FACTS—TIME OF FILING.

The term at which accused was convicted adjourned April 7th. On April 28th the judge wrote to the clerk, stating that the district attorney had agreed that the statement of facts could be filed as within the 20 days after adjournment. The file mark on the statement of facts recited a filing thereof April 30th as of April 26th by order of court. Held, that the statement of facts could not be considered, there being no showing that the delay was by the laches of the judge.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2876-2880.]

Appeal from District Court, Lavaca County; M. Kennon, Judge.

William Walker was convicted of robbery, and he appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of robbery, and his punishment fixed at confinement in the penitentiary for a term of 10 years. The term of court at which this trial occurred convened on March 12, 1906, and adjourned on April 7, 1906. We find in the record a letter from the trial judge to the district clerk, dated April 28, 1906, in which the judge states that Mr. Atkinson, the district attorney, had agreed that the statement of facts could be filed back as within the 20 days after the adjournment of the term. The file mark on the statement of facts reads as follows: "Filed as of the 26th day of April, 1906, by order of the court, this April 30, 1906." There is no rule or statute authorizing a statement of facts to be filed nunc pro tunc. If there has been some laches on the part of the district judge, depriving appellant of the right to have the statement of facts filed within the 20 days, where an order to that effect has been entered, then, under the decisions, the statement of facts can be considered upon proper showing of those facts. But this record is silent as to laches on the part of any one.

There is merely evidence of an agreement to file the statement of facts back within the 20 days after the adjournment of the term of court, without any legal basis for doing so. Under this condition, the statement of facts cannot be considered. *Lewis v. State*, 59 S. W. 888, 1 Tex. Ct. Rep. 170. In the absence of the facts, there is no complaint in the record that can be reviewed. The judgment is accordingly affirmed.

### GARRETT v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1903.)

#### CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—STATEMENT OF FACTS—TIME FOR PRESENTMENT.

Where the bill of exceptions and the statement of facts in a criminal case were presented to the judge after the expiration of the time allowed, and he refused to approve them on that ground, neither the bill nor the statement could be considered on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2847, 2876.]

Appeal from District Court, San Augustine County; Jas. I. Perkins, Judge.

Edward Garrett was convicted of selling mortgaged property, and he appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of selling mortgaged property, and his punishment assessed at confinement in the penitentiary for a term of two years. The questions presented on motion for new trial cannot be revised in the absence of a statement of facts. There is a bill of exceptions and statement of facts in the record, but the court refused to approve both because not filed within the 20 days allowed for that purpose. An inspection of the record shows that they were both presented to the judge after 20 days had elapsed. Therefore, neither the bill of exceptions nor statement of facts can be considered. With these out of the record, there is nothing requiring a revision.

The judgment is affirmed.

### BROOKMAN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1906.)

#### 1. INTOXICATING LIQUORS—ILLEGAL SALE—INSTRUCTIONS.

In a prosecution for violating the local option law, an instruction that if accused took an order for whisky from L., and it was a scheme to cover up a sale of whisky by accused to L., or that said L. gave the order and did not pay for the same, or authorize defendant to pay for the same, and defendant ordered the whisky from another town, and without the knowledge of L. paid for it, and delivered to L. two drinks, and received from L. 25 cents

in payment, in either case the order would afford no protection, was defective as predicated accused's conviction on the mere fact that, if the order was taken as a scheme to cover up a sale, accused would be guilty.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Intoxicating Liquors, §§ 331-347.]

#### 2. CRIMINAL LAW—TRIAL—VERDICT—LOTTERY.

A jury, after agreeing on defendant's guilt, but disagreeing on the amount of fine and imprisonment, decided to ballot by writing an amount for a fine and number of days for imprisonment on separate slips of paper as a ballot, and to divide the total by the number of jurymen. The result was \$72.50 fine and 45 days in jail. Held that, though the jury agreed to return an even number, and gave a verdict for \$75 even and 45 days in jail, it was invalid as based on a lottery.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2063.]

Appeal from Bell County Court; W. R. Butler, Judge.

Jim Brookman was convicted of violating the local option law, and appeals. Reversed.

McMahon & Curtis, Winbourn Pearce, and W. W. Hair, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$75 and 45 days' imprisonment in the county jail; hence this appeal.

Appellant criticises the following portion of the court's charge: "If you believe from the evidence beyond a reasonable doubt that the order for the gallon of whisky given by M. D. Light and taken by defendant, as shown by the evidence, was a scheme and subterfuge, and but a plan and devise to cover up a sale of whisky by defendant to said Light, or that said Light gave the order as shown by the evidence for one gallon of whisky to defendant, and did not pay for the same at the time or request or authorize defendant to pay for same for him, and the defendant ordered the gallon of whisky from Archinhold of Waco, Tex., and voluntarily and without the knowledge or consent of said Light paid therefor out of his own money without being requested to do so by said Light, and afterwards delivered to said Light two drinks of whisky out of the whisky so ordered and paid for, and at the time received from said Light the sum of 25 cents in payment of said two drinks of whisky, in either case the order would afford no protection to defendant, and he would be guilty of a sale, and if you so believe you will find the defendant guilty." It occurs to us that the first portion of said charge might be considered defective, in that it predicates appellant's conviction on the mere fact that, if the jury believe the order for the gallon of whisky for Light was taken by defendant as a scheme and subterfuge and a plan to cover up a sale of whisky by defendant to Light, he would be guilty. We presume that the learned judge intended to tell the jury that,

if they believed said statement was a subterfuge, and that appellant made a sale of the whisky to Light, he would be guilty. But he leaves this matter of sale off, and begins with his next proposition by using the conjunction "or." Of course, there must not only be a subterfuge, for both the Constitution and statute require, in addition to the subterfuge, there must be a sale in the local option territory, before a conviction can follow. As to the last portion of said charge it appears to be somewhat complicated, in referring to the facts. The jury should have been instructed as to what it takes to constitute a sale in a prohibited territory, and then told, if they believed appellant, on the occasion alleged, sold said whisky in said territory, then he would be guilty, etc.

Appellant also complains that the court refused and failed to give his special requested instruction. In view of the court's charge No. 6, we do not believe that it was necessary for the court to give the special requested instruction. We believe this adequately guarded whatever defense appellant's testimony raised.

Appellant insists that the evidence does not support the verdict. We are inclined to disagree with him as to this matter; but, inasmuch as the case is reversed, we will not discuss the evidence.

The case must be reversed because of the action of the jury in finding a verdict, which is reserved by bill of exceptions. After the jury retired, the following procedure occurred: They agreed on defendant's guilt, but could not agree on the penalty to be assessed. Some were for a low fine, and some were for the limit. After they had been out for several hours, an agreement was entered into with each other to write down on a slip of paper the opinion of each as to what punishment should be assessed, and each would put the numbers on separate slips of paper, and deposit the slips in a hat, and after drawing these slips out of the hat, they would write down these amounts, add them up, and divide the dollars by six and the days by six, and make the result the verdict. This was done, but a mistake occurred in the first attempt by getting seven slips of paper in the hat instead of six. It was then tried over, and the result found to be \$72.50 and 45 days. After this result was reached some one suggested to make it even money and even days, which was agreed to, and the verdict was then returned, \$75 and 45 days in jail. It seems to have been understood that the jury would be bound by the result of the adding and division, and the change was only made to make an even number of days and dollars. We do not understand that this statement of how the verdict was reached was controverted by the state. Under the decisions of this court, this was reaching a verdict by lottery. The mere fact that the exact number of days and dollars was not returned is immaterial under the circumstances shown

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by the testimony. The lottery was the real basis of the verdict, and the method adopted to reach the verdict. *Driver v. State*, 37 Tex. Cr. R. 160, 38 S. W. 1020; *Sanders v. State*, 45 Tex. Cr. R. 518, 78 S. W. 518.

The judgment is reversed, and the cause remanded.

#### MITCHELL v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1906.)

##### 1. HOMICIDE — SELF-DEFENSE — ASSAULT — EVIDENCE—INSTRUCTIONS.

On a trial for homicide, the evidence held to show an assault by deceased on defendant justifying an instruction that an assault and battery by deceased raising in defendant's mind a reasonable apprehension or fear of pain or bloodshed constituted adequate cause.

##### 2. SAME—MANSLAUGHTER.

Where, prior to the killing, defendant and deceased had been quarreling about a mule, which quarrel continued until the shooting occurred, prior to which deceased had seized defendant and was about to strike him with a bottle, such facts were sufficient to raise the issue of manslaughter.

Appeal from District Court, Hood County; W. J. Oxford, Judge.

Bradford Mitchell was convicted of manslaughter, and he appeals. Affirmed.

Estes & Douglass and Jno. J. Hiner, for appellant. Riddle & Keith and J. E. Yantis, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was given three years in the penitentiary on a conviction of manslaughter.

He insists that the court erred in charging upon the law of manslaughter, and complains of the following portion of the charge in defining manslaughter, to wit: "The following are deemed adequate causes: An assault and battery by the deceased raising in the mind of the defendant a reasonable apprehension or fear of pain or bloodshed," etc.—the criticism that there was no evidence warranting a charge upon that issue. Appellant in his own testimony states, "Deceased stated to me, 'What are you going to do about that mule?' I said, 'I've done all that is fair, and I am not going to do anything.' He reached down and got a bottle with his right hand, caught me around the neck with his left hand, raised the bottle up, and says, 'You will do something'; and at that time I had my pistol in my belt in front of me. I just pulled it out, and put the pistol to deceased's side. Then he said, 'I will cave your head in.' I then shot deceased. Deceased had a bottle in his right hand, had the bottle by the neck with the big end raised about as high as his head, and had left arm around my neck." Both parties were sitting in a buggy together and were drinking. This evidence clearly shows an assault. Furthermore, the evidence shows the parties had been quarreling about a mule and were quarreling just before the

shooting occurred. The circumstances clearly raise the issue of manslaughter.

The charge of the court upon self-defense is also criticised. A careful perusal of the same shows that it presents both actual and apparent danger, and the court charged the reasonable doubt, in connection with every possible phase in favor of the appellant. There is no error in this record. The verdict of the jury is warranted by the evidence.

The judgment is affirmed.

#### THOMAS v. STATE.

(Court of Criminal Appeals of Texas. May 16, 1906. Rehearing Denied Oct. 24, 1906.)

#### HOMICIDE—ADEQUATE CAUSE—EVIDENCE—INSTRUCTIONS.

Where, on a trial for homicide, there was nothing to show that decedent assaulted accused or caused him any pain, or the existence of any other statutory ground for adequate cause, an instruction authorizing the jury to consider all the antecedent circumstances in conjunction with those occurring at the time of the homicide in passing on whether accused's mind was rendered incapable of cool reflection was correct, and not open to the objection that it failed to define adequate cause.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, § 608.]

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Aaron Thomas was convicted of murder in the second degree, and he appeals. Affirmed.

See 85 S. W. 1154.

Rice & Bartlett and Nat Lewellyn, for appellant. Geo. H. Carter, Co. Atty., and J. E. Yantis, Asst. Atty. Gen., for the State.

**BROOKS, J.** This is the third appeal of this case. In each instance appellant was found guilty of murder in the second degree, and upon this trial his punishment was fixed at five years' confinement in the penitentiary.

Appellant insists that the court erred in his charge on manslaughter in not defining adequate cause, and in not telling the jury that, if his brothers had been assailed by deceased, and he was laboring under the passion or anger caused thereby, he would be guilty of no higher offense than manslaughter. There is no insistence in the evidence that deceased assaulted appellant or caused appellant any pain or bloodshed, nor are any of the other statutory grounds for adequate cause suggested. This being true, the charge of the court which leaves to the jury all the evidence in the case is sufficient, without stating the facts in evidence which would constitute adequate cause to excite passion sufficient to render the mind of defendant incapable of cool reflection. *Sargent v. State*, 35 Tex. Cr. R. 325, 33 S. W. 364; *Lawrence v. State* (Tex. Cr. App.) 33 S. W. 90; *Blanco v. State* (Tex. Cr. App.) 57 S. W. 828. The charge of the court was very full

on adequate cause, authorizing the jury to consider all of the antecedent facts and circumstances in conjunction with those that occurred at the time of the homicide in passing upon whether defendant's mind was rendered incapable of cool reflection. The charge given has been repeatedly approved by this court under facts as adduced on the trial of this cause.

There is no error in the record, and the judgment is affirmed.

#### JONES v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1906.)

#### 1. CRIMINAL LAW—ARGUMENT OF COUNSEL—FAILURE OF ACCUSED TO TESTIFY.

Where, on a trial for homicide, accused did not testify, the language of the county attorney, in referring to the circumstances surrounding the homicide, "What is the testimony on the part of the defense to meet this? Why . . . they are as silent as the grave," was not objectionable, as alluding to accused's failure to testify.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1672.]

#### 2. SAME—ADMISSION OF CONFESSION—REVIEW—BILL OF EXCEPTIONS.

The error in admitting the confession of accused on trial for crime, on the ground that the same was extorted by unfair means, will not be reviewed unless presented by a bill of exceptions.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2816.]

#### 3. SAME—CONFESSION—ADMISSIBILITY.

Under Code Cr. Proc. 1895, art. 790, providing that a confession shall not be used unless voluntary, or unless, in connection with the confession, accused made statements found to be true, a confession by accused charged with homicide committed for the purpose of robbery is admissible though procured by improper means, where, by means of his statement the property taken from decedent was found.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1223, 1224.]

#### 4. HOMICIDE—TRIAL—INSTRUCTIONS.

Where, on a trial for homicide, there was nothing to reduce it below murder in the first degree, an instruction stating that murder is distinguishable from every other species of homicide by the absence of circumstances reducing the offense to negligent homicide or manslaughter, or which excuse or justify it, was not erroneous for failing to state the excusable or mitigating circumstances, which relate only to the lower degrees of homicide.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 646.]

#### 5. SAME—MALICE AFORETHOUGHT.

On a trial for homicide committed for the purpose of robbery, an instruction that every person who shall unlawfully kill any human being with malice aforethought shall be guilty of murder, and requiring, to convict, a finding that the homicide was committed by a person with a mind showing a disregard of social duty and bent on mischief, the existence of which might be inferred from acts or words and in the perpetration of a robbery, is not objectionable as failing to define malice aforethought.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 587, 588.]

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

Jesse Jones was convicted of murder in the first degree, and he appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment fixed at death; hence this appeal.

The facts show that appellant at the time of the alleged homicide was in the employ of the deceased, who kept a butcher shop; that his duties were to wait about the market and drive the delivery wagon, and thus he became well acquainted with the habits of deceased. He lived or stayed with a woman about a block and a half from deceased's place of business. On the night in question appellant absented himself from the place where he lived from about 8 to 9:30 o'clock. During this time the circumstances show that deceased was killed by being knocked in the head with an ax, and his money, between \$200 and \$300, was taken from his person. The crime was not discovered until the next morning, somewhere between 4 and 5 o'clock, when certain parties went to deceased's place of business, and found his dead body. Shortly afterwards appellant was arrested, and, after being warned, made a confession implicating two others with himself in the homicide, and that it was done for the purpose of robbery. By means of his confession the money taken from deceased was discovered. There was other testimony in the case tending to corroborate the confession of the appellant. This is a sufficient statement of the case.

Outside of the motion for new trial there is one bill of exception, which is to the argument of the county attorney. The language used in the argument is as follows: "What is the testimony on the part of the defense to meet this? [referring to the circumstances surrounding the homicide.] Why, gentlemen, they are as silent as the grave, which trust he will soon fill [pointing at the defendant]." It is insisted that this was an allusion to appellant's failure to testify. It does not occur to us that the contention of appellant is correct. The expression here used was of a very general character, and it would be a strained conclusion to hold that it was a reference to appellant's failure to testify. Appellant in his motion for new trial states that the court erred in admitting the confession of defendant to witnesses Trice, Tilley, and Walton; that the same were extorted from defendant by unfair means, and by putting him in fear of mob violence, and by promises of favor, etc., and by putting him under the influence of whisky. It is a sufficient answer to this proposition to state that this matter is not presented by any bill of exceptions as is required under our system of procedure. However, it would appear

from an inspection of the statement of facts that, even if it be conceded that undue means were used to induce appellant to confess to the crime, by reason thereof the fruits of the same, to wit, the money of which deceased was robbed, was found, and under our statute this would make the statement or confession of appellant admissible. - Article 790, Code Cr. Proc. 1895, and section 1034 of White's Ann. Code Cr. Proc. and authorities there cited; Owens v. State, 16 Tex. App. 448; Spearman v. State, 34 Tex. Cr. R. 279, 30 S. W. 229; Parker v. State, 40 Tex. Cr. R. 119, 49 S. W. 80; Bargna v. State, 68 S. W. 997, 5 Tex. Ct. Rep. 367.

Appellant contends that the court erred in his definition of murder, to wit: "Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide." We fail to find any error in this definition. Nor was it necessary for the court to state the excusable or mitigating circumstances. There is nothing in this case to reduce it below murder in the first degree, and the extenuating or mitigating circumstances referred to only relate to lower degrees of felonious homicide. This portion of the court's charge is also objected to: "Every person with sound memory and discretion who shall unlawfully kill any reasonable creature in being in this state, with malice aforethought, either expressed or implied, shall be deemed guilty of murder. All murder committed in the perpetration of robbery is murder in the first degree. All murder not of the first degree is murder of the second degree." This charge is objected to because, in the remainder of the charge, murder in the first degree is nowhere completely defined, nor is malice or malice aforethought anywhere defined. In connection with the charge there is no stated definition of malice or malice aforethought. While ordinarily the court should define these terms, and in a case of this gravity the judge cannot be too careful, yet we believe in the court's charge, applying the law to the facts, there was a sufficient definition of malice aforethought, which cured this defect. The charge in question required the homicide to have been committed "unlawfully, and with a mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which may be inferred from acts committed or words spoken and in the perpetration of robbery, and with malice aforethought," etc. This embraces one of the definitions of malice aforethought, and under the facts and circumstances of this case, we believe was sufficient. Martinez v. State, 80 Tex. App. 129, 16 S. W. 767, 23 Am. St. Rep. 895; Hedrick v. State, 40 Tex. Cr. R. 532, 51 S. W. 252; Rupe v. State, 42 Tex. Cr. R. 477, 61 S. W. 929.

There being no error in the record requiring a reversal, and the facts showing a homi-



cide committed in the perpetration of robbery, evidently conceived some time before its execution, the judgment is affirmed.

### NAVARRO v. STATE.

(Court of Criminal Appeals of Texas. Oct. 10, 1903.)

#### 1. CRIMINAL LAW — TRIAL — CHARGE ON WEIGHT OF EVIDENCE.

In a prosecution for unlawfully carrying a pistol, an instruction charging the statute, defining in general terms a traveler, and informing the jury that defendant was only protected as a traveler as long as he was engaged in the pursuit of his journey, or some business connected therewith, was not a charge on the weight of evidence.

#### 2. WEAPONS—SUFFICIENCY OF EVIDENCE.

Under the statute prohibiting the carrying of a pistol, one who, while a traveler on coming to a ferry, ceased to be such, and was not protected by the exception in favor of travelers when, on finding that he could not cross, he went to a neighboring house, began drinking whisky, entered on a carousal, and raised a difficulty with some one in the house.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Weapons, § 11.]

Appeal from Red River County Court; J. R. Kennedy, Judge.

Albert Navarro was convicted of unlawfully carrying a pistol, and appeals. Affirmed.

W. W. Johnson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of unlawfully carrying a pistol, and his punishment fixed at a fine of \$25.

Appellant contends that the court committed a material error in instructing the jury as follows: After charging the statute, the court proceeds: "The foregoing statute does not apply to persons traveling, as long as they continue their journey, and are engaged in business connected with their journey. The word 'traveler' is used in its ordinary sense. But this exemption does not apply to travelers who stop in their journey, and engage in business or pleasure not connected with their journey. If you believe from the evidence, beyond a reasonable doubt, that the defendant had on his person a pistol, as charged; but you should further believe from the evidence, or have a reasonable doubt of same that, at the time he so had said pistol, he was a traveler, pursuing his journey, and engaged in business connected with the same, then you will acquit the defendant under first count. If you believe from the evidence, beyond a reasonable doubt, that the defendant had on his person a pistol, as charged, but that, at the time he so had said pistol, he was a traveler, but should you further believe beyond a reasonable doubt that at said time he was not in pursuit of his journey, or engaged in business connected with his jour-

ney, then you will find the defendant guilty, and assess his punishment, etc." It occurs to us that said charge taken as a whole is not a charge on the weight of evidence; but, in general terms, defines a traveler, and, in accordance with the decisions of this court, informed the jury that appellant was only protected as a traveler as long as he was engaged in the pursuit of his journey, or some business connected therewith. If he was not so engaged, he was amenable to the statute. We believe that the case, as shown by the facts, authorized the jury to believe that appellant was not a traveler at the time he was found carrying a pistol. Concede there is no question that he was a traveler when he came to the ferry, going to the territory; he ceased to be such when he found that he could not cross, and then went to a neighboring house and began drinking whisky, and entered on a carousal, and, according to the testimony of the state, raised a difficulty with some one at the house. As a traveler, he was protected while going to the ferry, and was protected in carrying the pistol on his return home; but, when he stopped, turned aside, and began drinking whisky with other people, and carousing, he not was in pursuit of his journey, and engaged in business connected therewith; and, consequently, was not protected by the exception in favor of travelers.

The judgment is affirmed.

### McKENZIE v. STATE.\*

(Court of Criminal Appeals of Texas. March 23, 1903.)

#### 1. CRIMINAL LAW—STATEMENT OF FACTS—TIME OF FILING.

The statement of facts in a criminal case was filed after the 20 days allowed. It had been presented in ample time for approval and filing before the expiration of that time. It was conceded to be correct, and the attorney for accused was not at fault. Held, that the statement of facts would be considered on appeal as if the same had been filed within the time.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2876-2880.]

#### 2. HOMICIDE—EVIDENCE—INSTRUCTIONS.

Where, on a trial for homicide, the state made out a case of a deliberate killing, and accused claimed that his pistol was accidentally discharged, an instruction in the language of Pen. Code 1895, art. 717, that the means by which a homicide is committed are to be considered in judging the intent, and if the instrument is not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used such intention appears, when followed by an instruction that no act done by accident is an offense, except where there has been a degree of negligence which the law regards as criminal, and where one person involuntarily kills another purely by accident it is not punishable, and if, while accused was cleaning his pistol, it was

\*Appeal dismissed October 10, 1903, on account of death of appellant during pendency. Motion for rehearing.

by accident involuntarily discharged, inflicting the fatal wound, he could not be convicted, was not objectionable as militating against the presumption of innocence and placing the case in the minds of the jury adversely to accused.

**3. SAME—GRADE OR DEGREE OF OFFENSE—EVIDENCE—INSTRUCTIONS.**

Where, on a trial for homicide, the issues were murder in the first degree and accidental homicide, the facts did not call for a charge either on murder in the second degree or manslaughter.

Henderson, J., dissenting.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Essex McKenzie was convicted of murder in the first degree, and he appeals. Affirmed.

J. E. Thomas, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The jury assessed the death penalty upon appellant for the murder of his wife.

Affidavit is presented to this court by appellant's counsel asking that the statement of facts be stricken from the record. The statement of facts was filed after the 20 days allowed. Counsel makes it apparent from the affidavit that he presented the statement of facts in ample time to have the same approved and filed before the expiration of the 20 days, that it is the stenographic report of the testimony, and on examining the same he found it correct, and so informed the trial judge. This occurred prior to the expiration of the time allowed for filing said statement of facts. We do not believe the motion to strike out this statement of facts is well taken. If appellant is deprived of his statement of facts, a reversal will follow, in order that he may have such facts before the appellate court when his case finally reaches this court. But the facts are conceded to be correct, and although filed after the expiration of the time allowed, and through no fault of the attorneys for appellant, it was not filed prior to the expiration of such time. The matters being presented in this form, the statement of facts will be considered and the case tried as if said statement of facts was filed within the time. The motion to strike out the statement of facts is therefore overruled.

There were two issues in the case: First, appellant killed his wife by deliberately shooting her with a pistol (the reasons given in the statement of facts are not necessary to repeat); and, second, issue was made by appellant's testimony to the effect that he was cleaning his pistol, and it was accidentally discharged, inflicting the fatal wound. The court gave the following charge, which is a copy of article 717, Pen. Code 1895: "The instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from

the manner in which it was used such intention evidently appears." Appellant urges that this charge operated prejudicially to him, and it should not have been given. His reasoning seems to be that the deadly character of the weapon used was not a question in the case; and therefore the instruction was prejudicial and militated against the presumption of innocence, and placed the case in the minds of the jury adversely to him.

Appellant's defensive matter was the accidental discharge of his pistol. If the pistol was accidentally discharged, then, under our statute and the peculiar facts of this case, we believe he would not be guilty of the homicide, at least not of murder. Now the question presents itself, does this charge impinge his theory of accidental killing? The state's case was clearly made out of an intentional and deliberate killing. From the standpoint of the state's case, this charge would not be injurious, because it instructed the jury that it was not to be presumed that death was designed, unless from the manner in which the instrument was used such intention evidently appears. If it evidently appeared, the charge would be correct. Furthermore, every man is presumed to intend the consequences of his deliberate act; and where a deadly weapon is used and in a manner calculated to effect the purpose, and that purpose results in the death of the party, the presumption arising from those facts is almost, if not entirely, presumed. *Hatton v. State*, 31 Tex. Cr. R. 586, 21 S. W. 679; *Wilson v. State*, 37 Tex. Cr. R. 156, 38 S. W. 1013; *Yzaguirre v. State*, 85 S. W. 14, 12 Tex. Ct. Rep. 266. So, viewed from the standpoint of the state's testimony, this charge was correct and could not have injured him. Viewed from the standpoint of appellant's testimony, that the killing was accidental, it occurs to us this charge was favorable, because the jury were instructed there could be no presumption against him arising from the use of the weapon in regard to the death of the party, unless from the manner in which it was used such intention evidently appears. This it occurs to us would throw the burden of proof upon the state to show the facts which made his intention evident from the facts introduced and protect him in regard to his accidental theory. In other words, it rather had the tendency of strengthening his accidental theory, and throwing the presumption of innocence and the reasonable doubt in his favor more strongly at that point. And viewed in the light of the subsequent portion of the charge we think this idea is strengthened, for the jury are charged that no act done by accident is an offense, except in certain cases specially provided for, where there has been a degree of carelessness or negligence which the law regards as criminal. And, further, where one person involuntarily kills another, without malice aforethought, without intent,

and purely by accident or misfortune, it is not murder and is not punishable by law. They are further charged: "If you believe from the evidence that while defendant was cleaning the gun in question that it was by accident involuntarily discharged and wounded Lula McKenzie, from which wound she subsequently died, you cannot convict defendant, as charged in the indictment, but you should acquit; or, should you have a reasonable doubt concerning the matter, you should acquit," etc. Taking these charges together, we think the defendant was not only not injured, but his case under the law was the more closely guarded. The court not only required the jury to believe that the intention of appellant to kill must have been made evident by the facts in regard to the use of the weapon, but further that, before they could convict, he was entitled to the presumption of innocence and the reasonable doubt on his theory of accidental discharge of the pistol. We are therefore of opinion that there was no error in regard to this matter.

The charge on murder in the second degree is criticised, because the court did not instruct the jury in regard to the terms, "mitigate," "excuse," or "justify," contained in the statute; in other words, failed to charge on manslaughter. We do not believe the evidence raised manslaughter. Nor was there any error in the court's refusal to charge on what would "excuse, mitigate or justify" the act. The court was fully liberal in the charge in giving murder in the second degree, because in our judgment the facts did not call for a charge on that phase of homicide. There were two issues only, and they were sharply presented by the facts—murder in the first degree and accidental homicide. Wherever there is a question as to whether manslaughter should be given in a case, or there are extenuations or excuses for the killing that might have a tendency to lower the homicide below murder in the first degree, then these terms should be explained, which is usually done by the court giving a charge to the jury submitting the inferior degrees of homicide. But under the facts of this case manslaughter was not an issue, nor was the charge on murder in the second degree, in our judgment, called for by the facts.

The remaining matters do not present matters of serious moment.

The judgment is affirmed.

HENDERSON, J. (dissenting). A majority of the court hold there was no error in the lower court giving the charge copied in the original opinion, which in my view makes appellant's intent to kill depend on the use of a deadly weapon. This article is frequently given by the courts in favor of a defendant when he has been attacked with a deadly weapon by his antagonist and relies on self-defense. But the authorities appear

to hold that this article 717 or article 51, Pen. Code 1895, should not be given against a defendant, inasmuch as the presumption of innocence outweighs that of guilt arising merely from the means used, and it is incumbent upon the state by legal evidence to overcome the presumption of innocence and establish the guilt of the accused beyond a reasonable doubt. *Black v. State*, 18 Tex. Cr. App. 124; *Bell v. State*, 17 Tex. Cr. App. 538; *Spivey v. State* (Tex. Cr. App.) 77 S. W. 448. In the latter case appellant used a deadly weapon in a deadly manner; that is, he shot and killed deceased with a gun. His defense was insanity. This court held that the charge authorized the jury to presume appellant's intent from the use of a deadly weapon was improper. In the case at bar, as stated in the opinion of the court, the issue was sharply drawn between the state's theory of killing intentionally by shooting deceased with a pistol, or, as claimed by defendant, that the killing occurred by the accidental discharge of the pistol, he not intending to kill deceased. In my opinion the effect of this charge was to instruct the jury that they could presume against the defendant that he intended to kill deceased because he used a deadly weapon; thus casting into the scale against him this presumption of law on the crucial issue in the case. There may be cases in which it would not be error to give such a charge as this, but I do not believe that this is such a case.

#### CROWDER v. STATE.

(Court of Criminal Appeals of Texas. May 16, 1906. Rehearing Denied Oct. 24, 1906.)

##### 1. CRIMINAL LAW—ENTRAPMENT—THEFT—WHAT CONSTITUTES.

Where the owner of mules, in order to detect a thief, employed another person as detective to encourage the thief's design and lead him on, and the act was consummated, it was theft, provided such owner or his agent did not induce the original intent on the part of the thief.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 42.]

##### 2. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for theft of mules, evidence examined, and held sufficient to sustain a conviction.

Appeal from District Court, Brown County; Jno. W. Goodwin, Judge.

Cliff Crowder was convicted for theft, and appeals. Affirmed.

Wilkinson & Lee, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction is for the theft of mules; two years' confinement in the penitentiary assessed against appellant as punishment.

The evidence discloses that appellant was found in possession of the mules alleged to have been stolen, in company with Andrew McMillan and Welch. The evidence further

shows that W. M. Hopper and G. W. Hutchison made a written contract with Andrew McMillan to act as a detective in order to catch appellant, whom they believed had been stealing their stock. By the terms of the contract with McMillan the latter was to go with John Welch and defendant and steal a bunch of stock and blow them into the officers' hands, with the understanding that McMillan should not be prosecuted, and should receive a fee of \$150 for his service as such detective. Seventeen mules and one horse were taken by the parties. However, appellant's insistence is that, under the evidence, the stock were taken with the consent of the owner, Hutchison; he having induced McMillan to go with appellant and Welch to commit the theft. Hutchison testified that it was not his understanding that the parties were to steal his stock. In addition to appellant's contention that the evidence fails to show a want of consent, he also submitted several special charges on this state of facts. These charges were given in the main charge of the court. The court charged the jury to the effect that if the said McMillan induced appellant to commit the theft, and that the intent and purpose to steal originated with and was suggested by said McMillan, it would be a taking with the consent of the owner, Hutchison, and they should in that event acquit appellant. If an owner of property, in order to detect a thief, directs another person to apparently encourage the thief's design and lead him on, and the act is consummated, it would be theft, provided the owner or his agent did not induce the original intent on the part of the thief. *Alexander v. State*, 12 Tex. 544; *Pigg v. State*, 43 Tex. 110; *Connor v. State*, 24 Tex. App. 250, 6 S. W. 138; *McGee v. State* (Tex. Cr. App.) 66 S. W. 562; *McAfee v. State* (Mo.) 50 S. W. 83; *U. S. v. Whittier*, 5 Dill. (U. S.) 535, 40 Fed. Cas. No. 16,688; *U. S. v. Wight* (D. C.) 38 Fed. 111. See, also, 81 Am. Dec. 366, note.

The evidence overwhelmingly shows appellant's guilt. There being no error in the mode and manner in which appellant was tried, the judgment is affirmed.

#### CITY OF TYLER v. BOYETTE.

(Court of Civil Appeals of Texas. Oct. 10, 1903.)

#### DEDICATION—PLATS—STREETS—ACCEPTANCE.

Where land is platted and the plat filed in the county clerk's office, and lots are sold according thereto, there is a dedication and acceptance of the streets, vesting title thereto in the city, without regard to the streets having been used.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. §§ 34-41, 46, 47.]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by the city of Tyler against W. F. Boyette. Judgment for defendant. Plaintiff appeals. Reversed and rendered.

R. P. Darough, for appellant. W. F. Boyette, for appellee.

NEILL, J. This suit was originally brought by appellant, a municipal corporation, against appellee for an injunction to restrain him from fencing that part of Twenty-First street, of the city of Tyler, between Glade and Holland streets, and from using and occupying said portion of the street for his private benefit. Upon filing his answer the temporary injunction, which had theretofore issued, was dissolved by an interlocutory order of the court. Whereupon appellant filed its first amended original petition in the nature of trespass to try title for said part of the street, to which the appellee answered by a general denial, and specially pleaded the three, five and ten year statutes of limitation. The case was tried before the court without a jury, and judgment rendered in favor of appellee, from which this appeal is prosecuted.

Even if the statute of limitations ran against a city in favor of an occupant of a portion of one of her public streets, there is not a scintilla of evidence tending to support any of appellee's pleas of limitation. The questions of fact, then, are whether the land in controversy is a part of Twenty-First street, of the city of Tyler, and whether appellee is a trespasser upon it. The evidence shows, beyond controversy that H. H. Rowland, formerly the owner of a certain tract of land upon which the premises in controversy are situated, made a plat of that portion of the city of Tyler where the land lies, laying the same out in blocks, streets, and alleys, numbering the blocks and designating the streets by name, and placed said plat on record in the county clerk's office of Smith county, intending to dedicate to the city of Tyler the streets and alleys shown by the plat. Among the streets so designated on the plat are Twenty-First, Glade, and Holland. After placing the plat on record he sold lots by it, and that portion of the land designated as streets, including Twenty-First street, was used as streets by the public. When this plat was made and recorded does not appear from the record; but it is apparent that it was made long before the appellee encroached, as hereinafter stated, upon the part of the land in controversy, for a witness who lives on block 51 of the land designated by the plat, whose lot fronts on Twenty-First street, testified that he had been living there 16 years, and that Twenty-First street, between Glade and Holland streets, had been used as a street all the time he lived there until the time Boyette closed it up.

The appellee owns block 25, designated on the plat made by Rowland. Twenty-First street runs east and west just north of said

block between Glade and Holland streets, which intersect it at right angles. A fence, marking the north boundary line of block 25, was on the south boundary line of Twenty-First street before Boyette bought the block. In 1904, after appellee had owned the block a little while, he moved the fence from where it was and placed it on the north boundary line of Twenty-First street, inclosing said street between Glade and Holland streets. Previous to that time Twenty-First street was opened, and had been ever since the Rowland addition of the city was platted and laid off and lots sold by it. Indeed, the appellee in his sworn answer, which was introduced in evidence, to appellant's petition for an injunction, admitted that during the year 1904 he closed up and fenced that part of Twenty-First street, of the city of Tyler, Tex., between Glade and Holland streets, a distance of about 300 feet, and at said time moved his fence from its north boundary line, so as to make the north boundary line of the street the north boundary line of his premises. It is true that the appellee testified that the portion of the street which he so inclosed was never used as a street by the public. But inasmuch as his testimony shows that he was away from Tyler from 1895 to 1903, such testimony is of little, if any, value. However, under the law as we understand it, it is a matter of no moment whether such part of the street was used by the public or not; for the proposition "that when an owner of land lays out and establishes an addition to a city, and makes, exhibits, and files in the county clerk's office a plat of said land, including in the plat streets and alleys, and sells the lots with clear reference to that plat, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plat represents as belonging to them, as part of the town, and title vests in the city in order that it may keep said streets in such a condition as that the traveling public may with safety pass over and along said streets," asserted by appellant's counsel under its first and only assignment of error, is too well settled in this state to admit of question. *City of Corsicana v. Zorn* (Tex. Sup.) 78 S. W. 924; *Heard v. Connor* (Tex. Civ. App.) 84 S. W. 606; *Sanborn v. City of Amarillo* (Tex. Civ. App.) 93 S. W. 473, and authorities there cited.

In view of the facts and law applicable thereto, as stated, the district court should have rendered judgment in favor of appellant. Wherefore its judgment is reversed, and judgment here rendered in favor of the city of Tyler for the land in controversy.

#### TEAGUE v. RYAN.

(Court of Civil Appeals of Texas. Oct. 6, 1906.)  
EXECUTION—CLAIM OF PROPERTY—TRIAL—VALUE OF USE.

Where a claimant of property levied on obtained the same from the sheriff, and in pro-

ceedings for the trial of the right of property claimant was defeated, it was error for the court to omit to adjudge the value of the use of the property necessary to be tendered in case claimant desired to return the property unimpaired, together with damages and costs in satisfaction of the judgment, as authorized by Rev. St. 1895, art. 4845.

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Proceedings for the trial of right of property between Xavier Ryan and T. S. Teague. From a judgment in favor of the former, the latter appeals. Reversed and remanded.

Robt. E. Breeding, for appellant. Xavier Ryan, in pro. per.

GILL, C. J. Xavier Ryan having had an execution levied upon certain personality as the property of one Zierath, the defendant in the judgment out of which the execution issued, T. S. Teague filed a claimant's oath and bond under the statute governing proceedings in trial of right of property. Others intervened in the proceeding setting up like claim in behalf of themselves, but as their interventions were dismissed, and they have not appealed, no further reference to their claim is necessary. The court tried the cause upon issues made up between Teague and Ryan, and rendered judgment in favor of Ryan for \$1,600, the adjudged value of the property; 6 per cent. interest on that amount from the date of the claim, and 10 per cent. on that amount as damages. The judgment further expressly provided that the officer should not accept the returned property in satisfaction of the judgment unless the tender was accompanied by the payment of costs, the damages adjudged, and a sum equal to the reasonable value of the rent and hire of the property during the time it had been in the hands of the claimant. The amount of this item was not adjudged.

The claimant has appealed, and offers several assignments of error for our determination. One of these is to the effect that the court erred in failing to adjudge the amount of the rent and hire necessary to be tendered in case appellant desired to return the property unimpaired together with damages and costs in satisfaction of the judgment, as the statute provided he might do.

We were first inclined to think the judgment might be affirmed notwithstanding this assignment, on the theory that, as the amount of the rent and hire had not been adjudged, that part of the judgment could be treated as a nullity to the appellee's loss. We were also impressed with the force of the suggestion that the judgment recited all that the statute required it to recite. That the statute did not require the determination by the judge of the value of the rent and hire, but passed that to the officer to be determined when the property should be tendered, just as he must determine for himself whether the property when tendered is in as good con-

North Pub. Co. v. Hiltson & Reed, 80  
 14 S. W. 843, wherein Chief Justice  
 said, speaking to the same point:  
 "The court should determine  
 the use of the property in controver-  
 \* \* \* The court should determine  
 e of the use of the property, \* \* \*  
 e the claimant, if he should wish to  
 the property in satisfaction of the  
 it, as provided by Rev. St. 1895, art.  
 know what amount he is required  
 or the use of such property up to the  
 the judgment."  
 oint is well taken, and requires that  
 ment be reversed and the cause re-  
 and it is so ordered. The other as-  
 ts are without merit.  
 sed and remanded.

**HOUSTON ICE & BREWING CO.\***  
 of Civil Appeals of Texas. Oct. 6,  
 Rehearing Denied Oct. 18, 1906.)

**JURISDICTION—AMOUNT IN CONTRO-**

district court has no jurisdiction of  
 shment proceeding in which only \$7.75  
 ed in a suit against a foreign corpora-  
 that amount as a debt and for unliqui-  
 damages for \$2,000, where the corpora-  
 not brought before the court so that per-  
 judgment may be rendered against it.  
 Note.—For cases in point, see vol. 18,  
 ig. Courts, § 423.]

al from District Court, Harris Coun-  
 E. Ashe, Judge.

n by A. B. Meek against the Meek  
 y, in which the Houston Ice & Brew-  
 npany was summoned as garnishee.  
 judgment dismissing the garnishment  
 ings, plaintiff appeals. Affirmed.

Meek and W. H. Haynes, for appel-  
 baker, Botts, Parker & Garwood, for

**SANTS, J.** Appellant filed suit in a  
 court of Harris county against the  
 company, a foreign corporation hav-  
 domicile in the state of Ohio, on a  
 or \$2,007.75. Of the amount claim-  
 was alleged to be due appellant on  
 act of employment, and the remain-  
 00 was claimed as unliquidated dam-  
 used by the breach by the defendant  
 contract. This petition alleges that  
 endant is a foreign corporation, and  
 no allegation that it has a repre-  
 e in this state upon whom service of  
 could be had, and the record falls  
 service of any kind upon the defend-  
 the time this suit was filed appel-  
 plied for and obtained a writ of  
 ment against the appellee. The ap-  
 n and affidavit in garnishment al-  
 at the original defendant was indebted  
 ellant in the sum of \$7.75, and con-  
 of error denied by Supreme Court Nov. 14, 1906.

accompanied by a bond executed in accord-  
 ance with the statute for the sum of \$15.50.  
 The writ of garnishment was issued and  
 served upon appellee on April 7, 1905. At  
 the succeeding June term of the court appel-  
 lee filed a motion to abate the writ of garn-  
 ishment on the ground that the proceeding  
 showed upon its face that the court was  
 without jurisdiction to hear and determine  
 the matters in controversy, and subject to  
 this motion filed an answer admitting that  
 it was indebted to the defendant in the  
 sum of \$561.90. The motion to abate was  
 sustained by the trial court, and from a  
 judgment dismissing the proceedings this  
 appeal is presented.

Under an appropriate assignment of er-  
 ror the appellant presents the following propo-  
 sition, upon which he contends the judg-  
 ment of the trial court should be reversed:  
 "In a suit on a liquidated demand joined  
 with an unliquidated demand against a non-  
 resident defendant, and garnishment against  
 resident garnishee, and garnishee answers  
 that it is indebted to defendant, the amount  
 of such indebtedness is, as it were, brought  
 into and is in the custody of the court, and  
 the court has the right to adjudicate the  
 entire cause of action, and apply the amount  
 that garnishee is indebted to defendant to  
 the payment of such judgment as plaintiff  
 is entitled to recover against defendant,  
 whether such judgment is on the liquidated  
 or unliquidated portion of plaintiff's claim.  
 Jurisdiction having once attached, the court  
 retains jurisdiction for all purposes."

It may be conceded as a general rule that  
 when a plaintiff brings a suit upon two or  
 more causes of action which are properly  
 joined, and the sum of the claims is an  
 amount within the jurisdiction of the court,  
 he may, if otherwise entitled thereto, ob-  
 tain a writ of garnishment upon any one of  
 his claims or causes of action notwithstanding  
 the fact that such claim is for an amount  
 below the jurisdiction of the court in which  
 the suit is brought. This rule, however, is  
 necessarily limited to cases in which the  
 court has potential jurisdiction of the suit,  
 and such jurisdiction can only be acquired  
 by proceedings in rem, which seek to bring  
 the subject-matter of the suit of value suffi-  
 cient to give jurisdiction into court, or by  
 service upon the defendant sufficient to give  
 the court jurisdiction of his person. This  
 record does not disclose such a case, but, on  
 the contrary, it appears from the face of  
 the proceedings that the only portion of the  
 claim against the defendant upon which an  
 attachment or garnishment could issue is  
 the \$7.75 claimed as debt, the remainder of  
 the claim being for unliquidated damages,  
 and that the defendant is beyond the jur-  
 isdiction of the court and no service can be  
 had which would bring it before the court  
 so that personal judgment could be rendered.

against it. The garnishment proceedings only attached a sufficient amount of the indebtedness due the defendant by the garnishee to satisfy the claim for \$7.75; and, that amount being below the jurisdiction of the court, the proceedings must fail.

We think the judgment of the court below should be affirmed, and it is so ordered.

**Affirmed.**

### HAM v. HAYWARD LUMBER CO.

(Court of Civil Appeals of Texas, Oct. 8, 1906. Rehearing Denied Oct. 25, 1906.)

#### 1. MASTER AND SERVANT—SAFE APPLIANCES—DUTY TO FURNISH.

A master must use ordinary care to furnish for his servants safe tools to work with, and is responsible for the proximate consequences of his failure to do so.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 178.]

#### 2. SAME—NEGLIGENCE—QUESTION FOR JURY.


In an action for injuries to an employee in consequence of a dolly bar used in the construction of a smokestack falling on him, evidence held to require the submission to the jury of the questions whether the accident was caused by the improper structure of the dolly bar or the insecure condition thereof while in use.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1016.]

Appeal from District Court, Nacogdoches County.

Action by J. H. Ham against the Hayward Lumber Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

T. B. Lewis and Mims & Strong, for appellant. Harry P. Lawther, for appellee.

REESE, J. J. H. Ham, employed by the Hayward Lumber Company as a common laborer, was engaged in assisting in the erection of a smokestack for his employer. His business was to send up from the foot of the smokestack sections of the stack, as they were needed, to the man at the top, to be used in building up the stack. One Mullins was engaged in the work at the top of the stack. His business was to assist in "bucking the rivets," that is, to put the bolts and rivets through the holes in the sections of the stack, and then to hold a piece of iron called a "dolly bar" against the rivets on the outside, while men on the inside riveted them with hammers. The dolly bar in use for the work was a piece of iron or steel about  $3\frac{1}{2}$  inches wide and about 18 inches long, and weighing 40 or 50 pounds. It had a V-shaped cut in it, about the middle, shaped like this  which extended about two-thirds of the way through the bar. A rope was tied around the bar by a slip knot at this cut, which passed through a hook higher up, and came down and was tied in the noose or knot around the dolly bar. This held the dolly bar in place opposite the rivets against

which it was pressed, and held by the workmen engaged in that work (in the present case, Mullins) while the rivets were fastened with hammers by the men on the inside of the stack. The dolly bar thus suspended would be above and over the place where Ham was required to work on the ground, at the foot of the stack. At the time of the accident hereinafter referred to the smokestack had been built up about 30 or 40 feet high. The iron used in "bucking the rivets" was not a regular dolly bar, and was simply a piece of iron or steel picked up and used for that purpose. There is such an instrument as a dolly bar specially made for that purpose, which has a ring in it about where the cut was in this bar, in which the rope is fastened that suspends the bar when in use. The entire apparatus used upon this occasion consisted of the bar of iron, the rope tied around it, and the overhead hook upon which the rope was hung. On the 15th day of October, 1904, while the men employed in erecting the smokestack were engaged in the work, J. H. Ham being on the ground at the foot of the stack, and Mullins at the top of and outside of the stack, in a "chair or buggy" placed there for him to sit in while holding the dolly bar against the rivets, the dolly bar in some way was loosened from the rope and fell, rebounding and striking Ham on the legs and injuring him. This suit is brought by said Ham (appellant) against the Hayward Lumber Company (appellee) to recover damages for such injuries. It is alleged that the dolly bar or piece of iron used as such was not a proper tool for the purpose, but was insecure and dangerous to the workmen situated as appellant was; that appellee was negligent in furnishing such a tool and apparatus to work with; and that the falling of the dolly bar and appellant's consequent injury were proximately caused by the improper and insecure character of the dolly bar. Appellee pleaded general denial, contributory negligence, and assumed risk, and also negligence of the fellow servants of appellant. Upon the evidence the court instructed a verdict for appellee, and from the judgment for appellee this appeal is presented. The action of the court in directing a verdict is assigned as error.

The principle of law that the master is required to use ordinary care to furnish for his servants a safe place in which to work and safe tools to work with, and is responsible for the proximate consequences of his failure to do so, is not controverted by appellee, but it is claimed that there was no evidence introduced to authorize the submission of the case to the jury upon the issue that the accident by which appellant was injured was caused by the improper structure of the iron used as a dolly bar, or the improper and insecure condition of the apparatus being used. There was evidence

tending to show that this dolly bar was not a safe tool or apparatus to use for the purpose, that it was insecure and dangerous, and that complaint had been made to the representative of the master of these facts without effect, other than a direction to continue to use it. There was also evidence which, if true, tended to show that the accident was caused by the improper and insecure construction of the dolly bar as a tool or implement for the purpose for which it was being used, and would not have occurred if a proper tool had been used. It is true that all of this evidence was strongly controverted by appellee, but we are of the opinion that the evidence introduced on the part of appellant was sufficient to require the submission of the issue to the jury upon proper instructions, and that the court committed error in instructing a verdict for appellee. It is not necessary in this opinion to further discuss the evidence. *Wood's Master and Servant*, § 405.

For the error indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

#### URQUHART et al. v. SANER.

(Court of Civil Appeals of Texas. Oct. 24, 1906.)

On Rehearing. Overruled.

For former opinion, see 94 S. W. 902.

KEY, J. As it was agreed in the statement of facts that the statement made out by appellant A. M. Urquhart was to be considered as if verified by him, the writer was mistaken in stating in the opinion that appellants' liability was shown by uncontroverted testimony. However, appellee submitted testimony which, if true, showed that appellants were liable for the amount recovered.

The motion for rehearing has received proper consideration, and is hereby overruled.

#### COMMERCIAL TELEPHONE CO. v. DAVIS.

(Court of Civil Appeals of Texas. June 28, 1906. Rehearing Denied Oct. 25, 1906.)

##### 1. TRIAL—INSTRUCTIONS—ASSUMED FACTS.

Where there was no issue raised by the evidence as to the fact that there had been an accident, and that plaintiff had sustained injuries therein, it was not error for the court to assume such facts in giving its instructions.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 432-434.]

##### 2. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff, a lawyer, was thrown from his horse by reason of defendant's negligence in stringing a telephone wire across a highway. Plaintiff sustained a "green stick" fracture of the jaw, and his lip was torn loose and lacerated

on the inside. His neck was also injured, and he, testifying more than a year after the injury, stated that at the time of the trial he could not turn his head without turning his entire body, or move it at all without pain, that he suffered pain at all times, and that his chin was partially paralyzed, and the muscles and ligaments injured. *Held*, that a verdict for \$5,000 was not so excessive as to indicate that it was the result of passion and prejudice.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 372, 374.]

Appeal from District Court, Chambers County; I. B. Hightower, Judge.

Action by J. R. Davis against the Commercial Telephone Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Stevens & Pickett, for appellant. Marshall & Marshall, for appellee.

REESE, J. J. R. Davis instituted this suit against the Commercial Telephone Company to recover \$30,000 damages for personal injuries. It is alleged that while plaintiff was riding along the public road from Liberty to Wallisville his horse became entangled in a telephone wire put up by defendant across said public road, and which it had negligently allowed to be down, resulting in plaintiff being thrown from his horse, and receiving the injuries of which he complains. There was a verdict for plaintiff for \$5,000, from the judgment upon which defendant appeals.

It is assigned as error that in its charge the court assumed the existence of certain material facts about which there was a controversy. The assignments presenting the question do not specify what particular facts were so improperly assumed, nor does the statement thereunder enlighten us upon this point. The only facts which can be said to have been assumed are the accident and injury to the appellee. There was no error in assuming that there had been an accident to appellee, and that he had sustained injuries thereby. There was no issue raised by the evidence as to these facts. Three witnesses testified for appellee with regard to such accident and injuries, all agreeing in their testimony, and the testimony is not controverted in any particular on this point. "Where there is no conflict in the testimony, and no room to doubt or to hesitate as to a matter of fact in issue, the judge in his charge ought not to assume that it is or may be doubtful. \* \* \* Where the evidence to a fact is positive, and not disputed or questioned, it is to be taken as an established fact, and the court should proceed upon that basis." *Wintz v. Morrison*, 17 Tex. 388, 67 Am. Dec. 658. The issue as to whether the accident was caused by the negligence of appellant was submitted to the jury by proper instructions, and especially by a charge given at the request of appellant.

Appellant also complains that the damages allowed by the verdict and judgment are



excessive. The amount appears to us to be very large, and we have had much difficulty in determining whether it is not so much so that the verdict should not be allowed to stand. There is, however, nothing in the record, except the amount of the damages awarded, to indicate that the jury were influenced by anything except their honest judgment as to the extent and seriousness of appellee's injuries, and the amount of physical and mental suffering undergone by him in consequence thereof. Appellee is a lawyer, and it appears that he has sustained a fracture of the jaw, which the medical witness calls a "green stick" break, by which is meant, as explained by him, a crack without any separation of the bone, and also that the lip had been torn loose and lacerated on the inside. There was considerable injury to the neck, from which appellee testified that he was still suffering at the time of the trial, more than a year after the injury was received, and that he could not turn his head without turning his entire body, or move it at all without pain. Appellee testified that from this injury he suffered pain all the time, and at times seriously; that his chin was partly paralyzed, and the muscles and ligaments injured. The testimony of the medical man is uncertain and indefinite, but appellee himself testifies quite positively about his injuries, and the pain he has suffered and is still suffering, and his testimony is not attempted to be controverted.

After a most careful examination of this testimony, our conclusion is that, while the verdict appears to us to be for a larger amount than should have been awarded, we are unable to say that it is so excessive as to indicate that it is the result of passion or prejudice on the part of the jury, or other improper influences, which we must find before we can properly substitute our judgment for that of the jury in the matter. *Railway Co. v. Smith*, 65 Tex. 173. This is especially true in view of the fact that the verdict has undergone the scrutiny of the learned and experienced trial judge by whom it is approved.

The record presents no error requiring a reversal of the judgment, and it is affirmed. Affirmed.

**MURPHY v. GALVESTON, H. & N. RY. CO.**  
(Court of Civil Appeals of Texas. June 25, 1906. On Rehearing, Oct. 12, 1906.)

**1. TRIAL—DIRECTION OF VERDICT.**

Where the evidence is such that, under the most favorable view of it that can be taken for plaintiff, there is no proof that would authorize a recovery by him, it is the duty of the trial court to instruct a verdict for defendant.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 383, 384.]

**2. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE—EXPLOSION OF TORPEDOES.**

A rule provided for the protection of a train by a flagman going back a distance of 13

telegraph poles, where he shall place one torpedo on the rail, and then continue at least 15 telegraph poles from the rear of the train and place two more torpedoes on the rail, when he may return to within 13 telegraph poles, and remain there until recalled; that when he comes in he will remove the torpedo nearest the train, but the two must be left on the rail as a caution to any following train. Held that, though such rule required the flagman to remain where he had placed the first torpedo until called in, the failure of the conductor of a freight train, who had put out torpedoes, to remain with them, did not constitute negligence, rendering the railroad company liable for injuries to a trackman by the explosion of a torpedo by a handcar on which he was riding; he having assumed, without reasonable grounds for so doing, when he saw the train standing, but did not see a flagman, that no torpedoes had been set.

**3. SAME—EVIDENCE—MATERIALITY.**

In an action for injuries to a trackman by the explosion of a torpedo alleged to have been negligently left unguarded by a flagman, a railroad rule providing that when the flagman comes back to protect the rear of his train the head brakeman or porter must in the case of passenger trains, and the next brakeman in the case of other trains, take his place on the train, was immaterial and irrelevant.

Pleasants, J., dissenting.

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by Maurice Murphy against the Galveston, Houston & Northern Railway Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Ewing & Ring, for plaintiff in error. Baker, Botts, Parker & Garwood, Andrews, Ball & Streetman, and C. L. Carter, for defendant in error.

**REESE, J.** This suit was instituted by Maurice Murphy against the Galveston, Houston & Northern Railway Company to recover damages for personal injuries alleged to have been received by him from the explosion of a torpedo placed on defendant's track by one of its employés. The material allegations of plaintiff's petition are substantially as follows: That plaintiff at the time of the casualty hereinafter mentioned, to wit, May 6, 1904, was in the employment of the defendant, serving it as a section foreman on a part of its road, including the part between the stations thereon of Harrisburg and Allen, which road, situated in the state of Texas, was being operated by it as aforesaid, and he was then and there engaged in the ordinary discharge of the duties of his service in the work of operating on said road one of defendant's cars, to wit, an attached push car and hand car near said Allen station, running southwardly at the usual speed, upon which he was then and there riding in the usual and customary position and manner, with his legs hanging over the side of said push car. That as he reached a point upon said railroad about 19 telegraph poles from said station, being about 3,500 feet therefrom, one or more torpedoes which had been supplied by defendant for the purpose of being placed upon such track, and which had been placed thereon by defendant's employés and servants,

station, suddenly exploded, unawares exploded, in consequence of such push car g thereover, whereby his right leg was inded, torn, and lacerated that it had and was afterwards, amputated about y above the knee, to his loss thereof eat permanent injury. That it became as the duty of defendant to plaintiff, result of the relation existing between to use ordinary care to avoid exposing ) unnecessary danger from the use of oes on said track, so as to maintain m a reasonably safe track for his but to do so defendant so negligently

That as a proximate result thereof tained aforesaid injury. That defend- its duly authorized employes in that , who were serving it on said train, egligent in placing and leaving said oes on said track, and in causing and tting the same to be left thereon, and : point where the explosion occurred, t the time and on the occasion and in anner as done, without warning or ation thereof to plaintiff, and the de- it, by its duly authorized employes in ehalf, who were serving it on said was also negligent after said torpedoes een placed on said track in failing e a flagman remain there until recall- the whistle of said train's engine when aln was ready to depart, contrary to n rules in such case made and provid- id contrary to such precaution as an rily prudent person would have taken aintiff's safety under the same or sim- ilar circumstances, in consequence whereof iff was thrown off his guard as to esence of said torpedoes on said track, ulled into a false security therefrom, by the risk to him from torpedoes on track was greatly and unnecessarily sed, so that, as a proximate result of and all of aforesaid negligent acts and ons so causing such abnormal or in- id risk, he was taken unawares and in- in manner as aforesaid, as he would therwise have been. That by reason e injury and loss of his leg aforesaid, laintiff, who was a sober, industrious, ealthy man, robust, strong, and about ars of age, was rendered a cripple for fe, and he was thereby caused to suffer physical pain and mental anguish, i in part will in reasonable probability ue for the rest of his life, and to lose me since said injury, which loss will ue until the trial, of the reasonable of \$100 per month, and to expend and liability for necessary medicine, nurs- and medical attention in attempting a of the reasonable value of, to wit, \$250, o lose his earning power for the future, eat value, in all to his damage in the of \$30,000.

ligence. Upon motion of defendant at the close of the evidence, the court instructed the jury to return a verdict for the defend- ant.

Plaintiff presented instructions embracing a complete charge to the jury, which he requested the court to give, which request was refused. The court was then requested separately to give each separate paragraph of the charge presented, which requests were also refused. From a verdict and judgment for defendant, plaintiff appeals, and assigns as error the giving of the peremptory charge and the refusal of the general charge presented by appellant and each separate paragraph thereof.

No opposition is made by appellee to the general propositions of law contended for by appellant under his first assignment of error, that if there was any evidence to support a recovery by appellant under the allegations of his petition, it was error on the part of the trial court to take the case from the jury by a peremptory instruction; nor indeed can this principle be questioned under the decisions upon the point in this state and elsewhere. *Choate v. Railway Co.*, 90 Tex. 85, 36 S. W. 247, 37 S. W. 319; *Crawford v. Railway Co.*, 89 Tex. 92, 33 S. W. 534. It is not necessary to multiply authorities upon a proposition so well settled, and which is undisputed in this case. The converse of the proposition, however, is equally well settled, that, where the evidence is such that under the most favorable view of it that can be taken for the plaintiff there is no proof that would authorize a recovery by him, it is the duty of the trial court to instruct a verdict for the defendant. Stated otherwise, the rule is that, in order to authorize the trial court to take any question of fact from the jury, the evidence must be such that there is not room for reasonable minds to differ as to its result. Whether the evidence is sufficient to support a finding upon any issue is a question of fact, which must always be submitted to the jury. Whether there is any evidence to support such finding is a question of law, which the court must decide. When the probative force of the evidence is not sufficient to do more than establish a mere surmise or suspicion of the existence of the fact sought to be established, it is deemed in law no evidence at all.

The rule is as simple as it is clearly established. The difficulty is in its application to the facts of any given case. The difficulty in the present case is to determine whether the evidence, taken in the most favorable light for appellant, and drawing therefrom every inference which could reasonably be drawn, is such that the jury could reasonably infer the fact of negligence on the part of appellee, or such that there is no room for ordinary minds to differ as to the conclu-

sions to be drawn therefrom negating such inference.

The case rests, in our opinion, upon the question of negligence vel non on the part of appellee. It may also be assumed to be settled law that, although rule 90, hereinafter referred to, was not intended for the protection of appellant and persons in like case using appellee's track with a hand car in the prosecution of its business, yet if the circumstances were such as to justify appellant in relying upon the observance of the rule, and, in consequence, to relax his vigilance and care in looking out for torpedoes on the track at the time and place of the accident, and if a person of ordinary prudence in the place of the agents and servants of appellee, using the torpedoes for the protection of the freight train at Allen's, would have reasonably anticipated that appellant would be led to relax his vigilance and care by the circumstances of no flagman having been left with the torpedoes, then the failure to have such flagman with the torpedoes would be a circumstance from which negligence towards appellant might be inferred, and the issue should have been submitted to the jury. *Railway Co. v. Gray*, 65 Tex. 32; *Railway Co. v. Woodward* (Tex. Civ. App.) 63 S. W. 1053; *Cahill v. Railway Co.*, 92 Ky. 345, 18 S. W. 2.

Only two witnesses were examined—the conductor of the train, who put out the torpedoes by the explosion of which appellant was injured, and appellant himself. There is very little, if any, conflict in the testimony of the two, except as to the practice and custom of employés of appellee under rule 90, hereinafter referred to, and the requirements of the rule as understood and acted upon by such employés. Taking the testimony of the plaintiff, and of the conductor in so far as it is not in conflict with that of plaintiff, and wherever there are conflicts or contradictions in the testimony of each witness, or between the testimony of one and that of the other, adopting that most favorable to appellant, the following facts may be deduced: The accident occurred on the 6th day of May, 1904, on the line of appellee's railway between Harrisburg and Allen's Switch, and at a point 17 telegraph poles from the latter point, and was occasioned by the explosion of a torpedo left on the track by the conductor of a freight train under circumstances hereinafter detailed. Appellant was a section foreman in the employ of appellee, and was at the time riding upon a push car being propelled in front of a hand car upon which he and several workmen under his direction were going from Harrisburg to a point beyond Allen's Switch for the purpose of repairing a bridge on the line of the railway. Appellant started from Harrisburg shortly after noon, and when he had gotten to a point within 17 telegraph poles of Allen's Switch, and while upon a bridge over Sims' bayou, the push car upon

which he was riding ran over a torpedo upon the track, which exploded. Appellant was sitting at the time on the right side of the push car, with his legs hanging down over the side of the car. By the explosion of the torpedo his leg was broken and had to be amputated. Some time during the morning of the day of the accident, and about an hour or an hour and a half before the accident, a train consisting of an engine and caboose passed Harrisburg going south to Allen's which is two and a half miles south of Harrisburg in the direction of Galveston. The business of this train and crew was to load a number of cars of cattle at Allen's and take them to Galveston, and it remained at Allen's the most of the day engaged in this work, in doing which the conductor was compelled to use sometimes a part of the main track for the placing of cars. When the engine and caboose passed over Sims' bayou, the conductor dropped off on the bridge, and placed two torpedoes on the track at a point 17 telegraph poles from Allen's for the protection of his train from other trains going south, while he was using the main track at Allen's in loading the cattle. Having placed the torpedoes on the track, he went onto his train at Allen's, and his train had been at Allen's about an hour or an hour and a half when the accident to appellant occurred. The rule of appellee company providing for and requiring the use of torpedoes in such cases is as follows: "(90) When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail when conditions require it. The front of a train must be protected in the same way when necessary by the front brakeman; if the front brakeman is not available, the fireman must act in his place. (a) A sufficient distance to insure full protection requires that the flagman shall go back to a point thirteen telegraph poles from the rear of his train, where he must place one torpedo on the rail. He must then continue to go back at least fifteen telegraph poles from the rear of his train, and place two torpedoes on the rail, not more than two hundred feet apart, when he may return to within thirteen telegraph poles from the rear of his train, and remain there until recalled by the whistle of his engine; but if a passenger train is due within five minutes he must remain there until it arrives. When he comes in he will remove the torpedo nearest to the train, but the two torpedoes must be left on the rail as a caution signal to any following train. The recall of the flagman is the most critical period, and when there is not a clear view of at least one-half mile, train should be moved forward a sufficient distance to insure safety before the flagman is recalled. (b) When

a train is detained more than three minutes at any of its usual stops, the train must be protected as above provided. (c) Should the speed of a train be reduced, and its rear thereby endangered, making it necessary to check a following train before a flagman can get off, a lighted fuse shall be thrown on the track at intervals, to insure the absolute safety of the leading train." This rule does not require that in all cases when torpedoes are placed on the track the flagman shall remain with them until called in. This is shown by the peremptory requirement that he shall so remain if a passenger train is due within five minutes, but appellant testified that it was the custom and practice whenever torpedoes are put out for the flagman to remain with the one nearest the train until he is called in, and that it is not usual or customary to call him in until the train is ready to leave. It was explained by appellant that the purpose of requiring the flagman to stay with the torpedoes was to see that they were not removed, and also to flag any approaching train in case the torpedoes failed to explode, and that this is the reason why the time that elapses between the calling in of the flagman and the departure of the train is spoken of as "the most critical time." Appellant knew that torpedoes might be expected to be found anywhere on the track, as it was the rule to put them out whenever a train was detained for over three minutes at any place, and that they were specially likely to be found within three-fourths of a mile of stations, water tanks and other stopping places, where he would always be on the lookout for them. A torpedo on the rail can be seen for 150 or 200 feet. When it explodes the particles scatter in every direction to a distance of seven feet. Appellant's duties on this particular occasion required him to specially look out and examine the embankments, bridges, culverts, and telegraph wires, and it was not practicable for him to keep a lookout all the time for torpedoes and discharge his other duties. He would be on the lookout for them at places where he had reason to think they might possibly be found. In regard to the immediate occurrence of the accident appellant testified: "I started out that afternoon with my men arranged as I have already stated, and they were arranged in that manner when I got hurt. There had been no change in the arrangement of them. I went by a water tank before I got injured. I saw no torpedoes there. Then we went on down towards Allen station. Before I approached this bridge, within the distance I spoke of from Allen's, I was on the lookout for torpedoes, and after I got on the bridge at Sims' bayou I saw this train at Allen's, and I saw no flagman, and I did not know, of course, how long the train had been there. I looked for the flagman when I saw the train; we always do that since the issuance of this rule. I saw

no flagman, and I came to the conclusion that I had a clear track to this train, that there were no torpedoes, and I diverted my attention to other duties—to the wires and the bridge. Sims' bayou being at that point, it diverted my attention specially, because the water was very high, and there was drift, and I had to watch the embankments, because they were soft there, and because we had trouble there, and I had to look at the banks themselves. When I saw the train standing there, I felt satisfied it was on the main track, but I could not say for certain. I looked for the flagman and saw none, then concluded I had a clear track; that there were no torpedoes. If there had been a flagman there, I would have known there were torpedoes there. If the flagman had been called in, I would have heard the whistle, or I would have seen him before he could get to the train. I would have heard him being called in by the blasts of the whistle. From my ordinary experience in railroading, he would have been called in when they were ready to go. It is not usual or customary for the flagman to be called in before his train is ready to start. I had not heard the blasts of the whistle, and I did not see the flagman at all. He was not on the track, nor going towards his train. Then I came to the conclusion there were no torpedoes, and nothing between me and it, and it was necessary for me then to give my attention to this bayou and the stream of water where the drift was coming down. If the flagman had been there, it would have prevented me from getting hurt, because I would have known there were torpedoes there, and I would have seen him a half a mile before I got to him. There would have been plenty of time to have stopped our car. The view approaching the bridge over Sims' bayou to Allen's siding is obstructed; that is, until you get onto the bridge. It was timbered on the left-hand side as you go down to the woods, which would obstruct your view of Allen's until you got about on the bridge; then you could see Allen's. When I got on the bridge I saw this train, which I believed to be on the main line. I did not notice that train when it passed us at Harrisburg going down there. We had not been out that forenoon. It had passed Harrisburg. I don't know what time it passed. When I got in sight of Allen's Switch that morning of the accident, if there had been no train at all in sight, I would have been looking for torpedoes until I got closer to the station. I would be looking out for them, because they might be left there by some train. When I saw the train and did not see the flagman, then I came to the conclusion I had a clear track, and that there were no torpedoes. I saw the train there and saw no flagman, and I did not know how long it was there. We had to think of these things very quick on those occasions. The fact that there was no flagman threw me off

my guard, because there should have been a flagman there when the train was standing there. I know there should have been a flagman there, because that is the rule, and the rule exacts it. The flagman always goes out and protects his train." Plaintiff knew that it was dangerous to run over torpedoes with a hand car.

It appears as a reasonable inference from the above and other testimony of appellant that when he got to the bridge over Sims' bayou he saw the train at Allen's Switch headed for Galveston. Seeing no flagman at the place where he would have been expected to be under the rule quoted, having heard no whistle to recall him, and not seeing him on the track going back to the train, he assumed that no torpedoes had been put out, and ceased to look out for them, and consequently did not see the one by the explosion of which he was injured. Appellant claims that he reasoned that, seeing the train on the track headed for Galveston, he assumed that if any torpedoes had been left on the track by previous trains at this point, they would have been exploded by this train, and that he need only look out for torpedoes left by this train, which he was led not to do by the circumstances detailed. It was undisputed that when torpedoes are put out the two furthest from the train are not taken up when the train leaves, but are left where placed.

We have stated the facts to be gathered from the evidence in the light most favorable for appellant, as is required to be done in considering the court's action in directing a verdict against him. Whether the inference of negligence towards appellant can be drawn from the evidence detailed, so as to require the issue to be submitted to the jury under the principle of law before referred to, depends upon whether a man of ordinary prudence and caution, in the position of the conductor of the train, in placing the torpedoes without leaving a flagman with them, as was customary under rule 99, would have reasonably anticipated the consequences which did in fact, according to appellant's testimony, result therefrom, or consequences similar in their nature to other persons lawfully on the track.

The conductor was required to act with ordinary prudence and caution himself, and he had a right to assume that appellant and other persons similarly circumstanced would do likewise. It is clear from appellant's testimony that he would have felt that he was required, in the exercise of ordinary prudence and caution, to look out for torpedoes at the very place where the accident occurred if he had not been lulled into a feeling of security and safety by seeing the train headed for Galveston and not seeing the flagman where he would have expected to find him if torpedoes had been put out, and that if he had done so he would have seen this torpedo, and saved himself from the consequences of the explosion. Were the circumstances such as to

justify him in relaxing his caution at this particular time and place? He says that he did not know how long this train had been at Allen's. If it had been there over three minutes, he knew that the rule required torpedoes to be put out to protect its rear. He assumed that the requirements of the rule would be complied with. His whole case rests upon his reliance that this would be done. This required not only that when torpedoes were put out a flagman would be left with them until he was recalled by a whistle just as the train was ready to leave, but also, and with equal, if not greater, positiveness, required that the torpedoes should be put out if the train had been at Allen's more than three minutes, and left on the track when the flagman was recalled. Not knowing, as he testified, how long the train had been at Allen's, he must have assumed that it had not been there longer than three minutes, for otherwise the rule, upon a strict observance of which he calculated, required the torpedoes to be out. The locomotive and caboose had come along the same track upon which appellant was traveling, and from the same direction, headed for Galveston. Now in common reason, when traveling on a hand car, appellant got to Sims' bayou and saw this train on the main track, not having seen it ahead of him at any time, he must have known that it had been at Allen's more than three minutes, or at least ordinary prudence would have prevented him from assuming that it had not, to his peril.

The presence of the flagman with the torpedoes was not for the purpose of warning appellant or other persons lawfully on the track of the presence of the torpedoes, but for the purpose of signaling approaching railroad trains. To do this did not require that he should at all times keep himself in a conspicuous place, but only that he should keep himself in a position to carry out the purpose of his being there. He need not be always erect upon the track, or upon the track at all. The rule required him to be at the thirteenth telegraph pole from his train. The torpedoes were at the seventeenth telegraph pole. Because appellant did not see him a distance of four telegraph poles away, he had no right to assume that he was not there, unless the situation was such that he must have been able to see him if he was at or near the place at all. Where his safety depended upon his looking out for torpedoes, which he would otherwise have specially looked out for in that immediate vicinity, it could not have been anticipated that he, as a man of ordinary prudence, would be led to relax his vigilance by this circumstance. How did appellant know, or upon what ground did he assume, that the flagman had not been called in, as provided for by rule 99? He testifies that he arrived at this conclusion from the fact that he had not heard the whistle blow for his recall and did not see him on his way to his train. There is noth-

ing in the rule, or the custom and practice under it, that requires that the train shall leave instantly when the flagman gets back to it. It seems unreasonable to expect that it would, and yet appellant assumed that this would be done, and because he had not heard the whistle and did not see the flagman going towards the train he assumed that no flagman, and therefore no torpedoes, had been put out. The facts did not authorize the conclusion drawn from them by appellant. The flagman might have been recalled, might have gotten to the train, and for many reasons the departure of the train might have been delayed for a few minutes. It further appears that appellant could not see the train until about the time he struck the torpedoes. He testified that when he got on the bridge he saw the train; that is just about the time he struck the torpedo which was on the bridge. It thus appears (and appellant's case rests upon this) that instantly recalling that he had not heard the whistle for the recall of the flagman, which under rule 99 might have been sounded when he was a mile or more away travelling on his hand car, and not seeing him on the track where he should have been, four telegraph poles away, nor returning to his train, he assumed that the train had not been at the station more than three minutes, that hence there had been no occasion to put out torpedoes, and that therefore none had been put out. Acting upon these assumptions, he relaxed his vigilance in looking out for torpedoes, which otherwise he would have been specially careful about at this point. All of these things had to concur to render the accident one reasonably probable to occur.

Appellee and its agents and servants were only required to exercise ordinary care to prevent such accidents as might be reasonably anticipated as likely to occur in the given case. In order for the omission of the conductor to carefully observe the requirements of rule 99, and the practice and custom thereunder to keep a flagman with the torpedoes, and not recall him until the train is ready to leave to be charged as negligence to appellant, in the circumstances, it must be found that a man of ordinary prudence in his place would have reasonably anticipated that appellant or some other person in like case, lawfully using the track, would have been injured on account of the presence of the torpedoes on the track, undetected by reason of the absence of the flagman. As the accident could not and would not have happened, and as it could not have been anticipated that it would happen, unless appellant or other person had been led to relax the vigilance which was required to look out for torpedoes, by reason of the conclusions drawn from the circumstances alleged by appellant to have caused him to do so, the conductor would not be required to have anticipated that appellant or some other person would reason as appellant did, and would, from the circumstances detailed by him, conclude that there

were no torpedoes on the track, and be led thereby to relax his vigilance in looking out for them. The conductor could not reasonably have so anticipated. A man of ordinary prudence and caution in his place would not have reasonably so anticipated. "Negligence cannot exist unless there is a duty to the person injured, and no duty to the plaintiff rested upon the railroad company unless the conditions were such that a prudent person would have anticipated and guarded against the occurrence which cause his injury." *Railway Co. v. Pope* (Tex. Sup.) 86 S. W. 7. "It ought not to be deemed negligence to do or to fail to do an act when it was not anticipated, and should not have been anticipated, that it would result in injury to any one. To require this is to demand of human nature a degree of care incompatible with the prosecution of the ordinary avocations of life. It would seem that there is neither legal nor moral obligation to guard against that which cannot be foreseen, and under such circumstances the duty of foresight should not be arbitrarily imposed." *Railway Co. v. Biggam*, 93 Tex. 226, 227, 38 S. W. 162; *Light & Power Co. v. Le Fevre*, 93 Tex. 607, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898.

The record does not present a case of the sufficiency or insufficiency of the evidence to establish negligence. There is no evidence of negligence upon which the jury could properly have been called on to pass. The trial court did not err in instructing a verdict for appellee.

There was no error in sustaining appellee's objection to the introduction in evidence of rule 100, which is as follows: "(100) When the flagman goes back to protect the rear of his train, the head brakeman or porter must in the case of passenger trains, and the next brakeman in the case of other trains, take his place on the train." The evidence appears to us immaterial and irrelevant to any of the issues in the case.

It becomes unnecessary to pass upon the charge with reference to the issues of contributory negligence or assumed risk, or the assignments which complain of the refusal of the court to give the charges requested by appellant.

We find no error in the judgment, and it is affirmed. Affirmed.

#### On Rehearing.

Counsel for appellant call our attention to what is an inaccuracy in the opinion of the court affirming the judgment of the trial court. In discussing rule 99 of appellee with regard to placing torpedoes on the track to protect a standing train from collision, it is stated in the opinion that "this rule does not require that in all cases when torpedoes are placed on the track the flagman shall remain with them until called in." Upon further consideration, we have concluded that this is an erroneous construc-

tion of the rule, and that it does in fact require the flagman to remain with the torpedoes until called in. It is, however, stated in the opinion that "appellant testified that it was the custom and practice whenever torpedoes are put out for the flagman to remain with the one nearest to the train until he is called in, and it is not usual or customary to call him in until the train is ready to leave," and the opinion proceeds upon the assumption that the rule as acted upon required the flagman to so remain. The erroneous statement as to the construction of the rule on this point has no bearing upon the decision of the case, as fully appears from the opinion.

The majority of the court are of opinion that the motion for rehearing should be overruled, from which conclusion Justice PLEASANTS dissents, and will present his reasons therefor in a separate opinion. Overruled.

PLEASANTS, J. (dissenting). When the judgment affirming this case was rendered, I had grave doubts of the correctness of our conclusion that the evidence adduced by the plaintiff did not require the trial court to submit to the jury the issue of the liability of the defendant for plaintiff's injuries, but, following the rule which requires this court to solve all doubtful questions of law in favor of the judgment of the trial court, I agreed with my associates that the judgment should be affirmed. A re-examination of the record and of the grounds upon which our former conclusion was based has convinced me that the judgment ought not to be affirmed, and I am therefore constrained to dissent from the order overruling plaintiff's motion for a rehearing.

The undisputed evidence, as found by this court, shows that the conductor of the train, for the protection of which primarily the torpedoes which injured plaintiff were placed on the track, violated an express rule of the company and the uniform practice in such cases in failing to station a flagman on the track near the torpedoes. The evidence of plaintiff, which in determining the question presented on this appeal must be considered true, establishes the fact that the failure of the conductor to comply with the rule and practice before mentioned was an efficient cause of plaintiff's injury. Under the principles of law announced in our former opinion, and which are well settled by our decisions, the defendant would be liable under this state of facts for plaintiff's injury unless the injury could not reasonably have been anticipated by the conductor as a probable result of his failure to comply with the rule, or the plaintiff in relying upon the performance by the conductor of his duty to place a flagman with the torpedoes, and concluding because of the absence of the flagman it was unnecessary

for him to look out for torpedoes at that place, is chargeable with contributory negligence. If the plaintiff might, under the circumstances testified to by him, in the exercise of that care required of an ordinarily prudent person have relaxed his vigilance in looking out for torpedoes at that place, it necessarily follows that reasonable care on the part of the conductor would require him to anticipate that plaintiff, or some one similarly situated, might be misled and probably injured by the failure to station a flagman with the torpedoes.

I cannot agree with my associates that the evidence set out in the opinion affirming this case is insufficient to raise the issue of whether the conductor might not in the exercise of ordinary care have anticipated injury to plaintiff as a probable result of the failure to comply with the rule above mentioned. The grounds upon which that opinion was based, which I then thought probably justified the judgment of affirmance, were: (1) That plaintiff knew, or in the exercise of ordinary prudence should have known, that the train had been standing on the track for more than three minutes, and therefore he ought to have anticipated that torpedoes had been placed on the track, and not have relaxed his vigilance in keeping a lookout for them. (2) That a flagman might have been placed with the torpedoes and not have been visible to plaintiff, and therefore plaintiff was not justified in relaxing his vigilance merely because he did not see the flagman. (3) That the flagman might have been recalled, as provided in the rule, and for some reason the immediate departure of the train have been delayed, and therefore the fact that no flagman was in sight did not authorize plaintiff to conclude that the train had not stopped longer than three minutes and no torpedoes had been put out by it.

A closer investigation has satisfied me that none of these propositions is sound. While the evidence would authorize, it does not compel, the finding that plaintiff knew that the train had been standing on the track for a longer time than three minutes. He testified that this train had passed Harrisburg going south an hour or more before he found it standing at the switch, but he does not say that when he saw the train at the switch he recognized it as the one which had previously passed him at Harrisburg, and his statement that he did not know how long the train had been there is not shown by any evidence in the record to be impossible or so unreasonable as not to be entitled to credit. The supposition that a flagman might have been placed near the torpedoes and not have been observed by plaintiff, or that after the recall of the flagman the departure of the train may have been delayed, are assumptions of fact not predicated upon any evidence in the case, and the possibility or even probability that

such facts might have existed does not, in my opinion, compel the conclusion that ordinary prudence on plaintiff's part forbade him to conclude because there was no flagman in sight that no torpedoes had been placed on the track.

I think the evidence as set out in the main opinion is sufficient to raise the issue of defendant's liability, and the judgment of this court holding otherwise should be set aside, and the judgment of the court below reversed, and the cause remanded.

**WESTERN BANK & TRUST CO. et al. v. GIBBS et al.**

(Court of Civil Appeals of Texas. Oct. 16, 1906.)

**1. HUSBAND AND WIFE—MARRIED WOMEN—RIGHT TO SUE—JOINDER OF HUSBAND.**

Where the property of a wife was about to be sold for the debt of her husband, which she claimed had been fully paid, and the husband refused to join in a suit to restrain such sale, and informed her that she would have to sue alone, she was entitled to maintain such suit for the protection of her separate property without joining her husband.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 774, 802.]

**2. EVIDENCE—SURETYSHIP—CONTRADICTION OF CONTRACT.**

As between the original parties to a transaction, parol evidence that some of the parties were sureties for others is not objectionable as a violation of the rule that parol evidence is not admissible to contradict or explain an unambiguous contract.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1864; vol. 40, Cent. Dig. Principal and Surety, § 22.]

**3. PRINCIPAL AND SURETY—PAYMENT OF DEBT—APPLICATION OF PAYMENTS—DISCHARGE OF SURETY.**

Certain land was conveyed in trust to secure a debt of another to a bank, the bank being directed to apply the proceeds of sales of the property to the payment of a secured debt. It failed to do this, and, if the application had been actually made, the debt would have been discharged. *Held*, that the mere nonmaturity of the obligation of the sureties did not authorize the bank to disregard their instructions to so apply the funds, and that the bank's failure so to do discharged the sureties' liability.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 240-243.]

Appeal from District Court, Limestone County; L. B. Cobb, Judge.

Action by W. H. Gibbs and another against the Western Bank & Trust Company and others. From a judgment in favor of plaintiffs, defendants appeal. *Affirmed*.

W. J. McKie and W. E. Doyle, for appellants. Harper, Jackson & Harper, for appellees.

**FISHER, C. J.** The plaintiffs below, W. H. Gibbs and Mrs. Jasper G. Smith, and also T. F. Smith (the latter vouched into this case by the bank), became indebted to

the Western Bank & Trust Company on or about the 10th day of March, 1903. All of the said named parties above executed and delivered their joint and several promissory note to the bank in the sum of \$3,000 with 10 per cent. interest per annum from date, and providing for 10 per cent. attorney's fees; the same maturing on the 10th day of March, 1904. This \$3,000 note was secured by a certain vendor's lien note for \$5,000 that was payable to the order of Mrs. Jasper Smith, signed by W. H. Gibbs, the same being the purchase-money note for the interest of Mrs. J. G. Smith in certain Louisiana lands, and said note was indorsed in blank by Mrs. Jasper G. Smith and husband, T. F. Smith, and delivered to the bank as part security to the \$3,000 note above referred to. W. H. Gibbs at the same time executed and delivered a deed of trust to one C. W. Hamner, as trustee, to secure the \$3,000 on all of his lands located in the state of Louisiana, which deed of trust covered the lands described in plaintiffs' petition. The note for \$3,000 due to the bank not having been paid at maturity, the same was in about the month of May placed in the hands of counsel for collection. Payment was demanded of all the signers, there remaining due on this \$3,000 note at this time, including interest and attorney's fees, the sum of \$2,600; a payment of \$1,000 and some interest having theretofore been made. Appellees made no response to the demand for payment, but in about the month of June, 1905, Mrs. Jasper G. Smith and her brother, W. H. Gibbs, both signers of the note, instituted this suit against the Western Bank & Trust Company, setting up that enough of the Louisiana lands had been sold to pay the debt. Mrs. Smith averred that her husband, T. F. Smith, had refused to join her in the suit and prayed the court to enjoin the sale of the Louisiana lands and for a cancellation of the deed and deeds of trust connected with the transaction, and also for a full cancellation of the \$3,000 note. Plaintiffs below, Mrs. Jasper G. Smith and W. H. Gibbs, filed their amended petition in this case on about July 20, 1905, and about the 27th of July, 1905, the defendant bank filed its motion to dissolve the injunction; but the court being in session, and the case about ready for trial, the motion to dissolve was not presented to the court, but the parties went into a trial on the merits on about the 28th of July, 1905. The bank, before the case came on to trial, vouched T. F. Smith into the case, setting up that he was a signer of the \$3,000 note and asking for a judgment over against both plaintiffs, W. H. Gibbs and Mrs. Jasper G. Smith, and against T. F. Smith, for the balance due on the note, to wit, for about the sum of \$2,600, asking that the injunction be dissolved, and that defendant have judgment and a foreclosure against all the Lou-



louisiana lands. Appellees made no denial of the execution and delivery of the papers to the bank as above stated. The husband, T. F. Smith, had an open and active account with the Western Bank & Trust Company all during this period of time; but neither the plaintiffs below, W. H. Gibbs, nor Mrs. Jasper G. Smith had any account with the bank or had any dealings with the bank, except to sign the papers hereinabove described. When said papers were delivered to the bank on about the 10th or 11th of March, 1903, the entire \$3,000 borrowed from the bank by the transaction above described was placed to the credit of T. F. Smith. He was in the brokerage or commission business at Mexia, and his account fluctuated from time to time, sometimes having a considerable amount to his credit, and sometimes his account was overdrawn. In May, 1903, the appellees succeeded in making a sale of part of the Louisiana lands. One third of the land sold, it appears, belonged to Mrs. Gibbs, the mother of W. H. Gibbs, who is a party to this suit, one third belonged to W. H. Gibbs, and the other third came from the sale of that part of the land that Mrs. Jasper G. Smith had deeded to W. H. Gibbs. The total amount realized therefrom was about \$2,700. When the deeds were executed for the purpose of collecting this purchase money, they were handed in to the Western Bank & Trust Company; a draft being drawn to its order for said purchase money, and the same was collected by the Western Bank & Trust Company on about the — day of May, 1903. A few days thereafter a representative of Mrs. Gibbs, the mother of W. H. Gibbs, made claim for her interest in this \$2,700, and \$900 of the same was paid to her, and the same was charged to T. F. Smith's account. A little later some other sales of the Louisiana property were made, and it took exactly the same course; that is, the proceeds went to the credit of T. F. Smith's account, and he used all of said money in his business. Thus matters drifted, it appears, until some time in the fall of 1904, at which time T. F. Smith paid the bank on this \$3,000 the sum of \$1,000, and also paid the interest from March 10 to November 10, 1904. Nothing else was ever actually paid on this \$3,000 note by any one, but the court held that, by reason of enough money coming into the hands of the bank from the sale of the Louisiana lands, the bank was bound to consider the note as fully paid. He therefore perpetuated the injunction, held the original \$3,000 note canceled and paid, directed by the judgment herein that the \$5,000 note deposited as collateral must be canceled or returned, or, if the bank neglected to return said note, plaintiffs could have judgment against the bank for \$6,500. The case was tried before

the court without a jury. No motion for new trial being necessary, the court was asked to file its conclusions of law and fact, and this appeal was perfected by the Western Bank & Trust Company.

The findings of fact and conclusions of law of the trial court, which we adopt, are as follows:

"Plaintiffs, W. H. Gibbs and Mrs. Jasper G. Smith, seek to enjoin defendant bank and trust company and the trustee from selling certain lands of plaintiffs to satisfy a balance claimed by defendant of a note for \$3,000 made by T. F. Smith with plaintiffs as sureties and secured by a trust deed on plaintiffs' land in Louisiana and Texas; plaintiffs alleging that the note had been fully paid by sales of lands in the trust deed, that the trust deed of the Louisiana lands were invalid, and that they have been released by extension of said note. The defendant by its cross-action made T. F. Smith a party and prayed judgment for the balance of the note and foreclosure of lien of the trust deed.

"(1) I find from the testimony that Mrs. J. G. Smith is and was on March 10, 1903, the wife of T. F. Smith and the sister of W. H. Gibbs, and that she and Gibbs owned by inheritance the lands described in the trust deed.

"(2) That T. F. Smith was then a customer of defendant, owed a balance on account of \$1,787.49, and obtained a loan of \$3,000 to cover the overdraft and for use in his business, making his note due March 10, 1904, with 10 per cent. interest, which plaintiffs executed as sureties and secured by trust deeds on their lands.

"(3) That, all parties believing that Mrs. Smith could not make a valid trust deed of her Louisiana lands, she and her husband made a feigned conveyance, in due form to W. H. Gibbs for the pretended consideration of his note of \$5,000, due in five years, and that thereupon he executed the trust deed in favor of defendant for her lands and his in Louisiana. She pledged the \$5,000 note, and, joined by her husband, made trust deed of her Texas lands, all to secure the said \$3,000 note; they all understanding that, upon payment of the loan, the \$5,000 would be canceled and her lands reconveyed to her by Gibbs.

"(4) The law of Louisiana does not permit a wife to secure her husband's debt upon her lands, except she be privately examined by a district judge, and he shall certify that the facts authorize the act. There was no such examination or certificate in this case.

"(5) By the law of Louisiana a mortgage or trust deed for future advances, or for an indefinite sum, is invalid.

"(6) All the transactions between defendant and Smith from March 10, 1903, to December 16, 1904, consisted in the ordinary

dealings of banker and merchant and the making of the \$3,000 note, and a note for \$100. During such period, and after the maturity of said \$3,000 note, the credit balance of Smith with defendant was frequently sufficient to pay the said note without allowing credit for any of the lands of plaintiffs sold as hereafter stated.

"(7) In the fall of 1904 defendant proposed to T. F. Smith that, if he would reduce the note to \$2,000 or \$2,500, pay another made by him with Gibbs as surety, and pay certain drafts for flour shipped to Smith and for which defendant had become liable by — of bills of lading, it would extend the balance of the note to the fall of 1905. Smith paid the \$1,100 note and the flour drafts during the fall of 1904 and paid \$242 interest and \$1,000 of principal on the \$3,000 on and before December 16, 1904, and thereby reduced the balance to \$2,280 at that date, not counting proceeds of plaintiffs' lands.

"(7a) But before the maturity of said note W. H. Gibbs had sold of his own and his sister's Louisiana lands to the extent of \$2,844, and she and Smith had sold her Texas lands for \$450; defendant releasing its lien on them all and receiving the entire sum of \$3,294, and placing it to the current credit of Smith, without the authority of plaintiffs. If these various items had been credited on the note as they were received by defendant, the same was overpaid by \$150 or more, without counting the sums credited thereon as paid by Smith.

"(8) When Gibbs made the deeds to the Louisiana lands, he delivered them to defendant with instruction to collect the sale price and apply it to the satisfaction of the \$3,000 note; but defendant, with the concurrence of T. F. Smith, diverted the funds and allowed Smith to use the same in the ordinary course of business.

"(9) Plaintiffs did not know of such misapplication of the proceeds of their lands until a few days before this suit, but could have ascertained the fact had they used ordinary diligence to do so. However, the defendant had no reasonable belief that plaintiffs assented to the misapplication.

#### "Conclusions of Law.

"A maker of a promissory note may show by parol his relation of surety whenever any equity in his behalf arises subsequent to the making of the note, whereby on account of dealings between the creditor and principal debtor the surety ought to be discharged. Such proof does not vary the terms of the writing, but only shows the relation of the party to the contract. If this were not so, yet, in this case, that plaintiffs were sureties appears from the transaction as a whole and the trust deeds made to secure the defendant. When a surety has secured the debt of his principal and sold the security

with the consent of the creditor and given to him the proceeds, the creditor cannot apply such funds to another debt of the principal without the consent of the surety, and such assent will not be presumed as against the surety, who is the wife of the principal debtor, from absence of proof that she objected, if indeed she is capable of assenting, and thereby extending by parol the scope and extent of her trust deed lien.

"When the surety paying to the creditor a sum of money directs its application to the debt for which he is liable, the creditor and principal debtor cannot divert the same to any other use.

"When the proceeds of the surety's property mortgaged to secure the debt came into the creditor's hands, they are, in the absence of contrary direction by the surety, applied by law to the debt secured, and if the principal debtor get possession of such funds by the act or consent of the creditor, and use them in any other wise than for the payment of the secured debt, the surety is discharged pro tanto.

"The plaintiffs were not bound to see that the proceeds of their lands were applied to the payment of the note—the rule of negligence cannot apply, as defendant is in no sense a purchaser for value, bona fide lien holder, or subsequent creditor having equities of equal standing with those of plaintiffs as sureties—and clearly had no right to disregard the positive instructions of Gibbs in the application of the money derived from the Louisiana lands, which exceeded in amount the balance claimed by defendant.

"The defendant, having knowingly obtained the money received for plaintiffs' land prior to the maturity of the debt, was bound to credit the payments as received, and not entitled to interest to the maturity of the note, and, so far as concerns plaintiffs, the note was overpaid before due, and they are therefore entitled to judgment as prayed.

"The agreement or proposal for extension of the \$3,000 note, and the acts of Smith in execution of the same, are too indefinite as to time and terms to bind the defendant to forbear collection of the note, and therefore would not release plaintiffs if the note had not been paid."

The first assignment of error questions the right of Mrs. Smith to institute this suit without joining her husband. The record shows that the property in question was the separate property of Mrs. Smith, and was about to be sold for the debt of her husband, which she avers was fully paid off and discharged. The husband refused to join in the suit, and in effect informed her that she would have to sue alone, and on account of his relations with the bank would have nothing to do with the suit. This was sufficient to authorize suit by her in order to protect her separate property. *Speer, Married Women*, §§ 298, 282.

The second assignment questions the action of the court in permitting evidence to the effect that Mrs. Smith and Gibbs were sureties on the note of T. F. Smith to the bank. As between the original parties to the transaction, parol evidence to the effect that some are sureties for others is held not to be a violation of the rule that parol evidence is not admissible to contradict or explain an unambiguous written contract. *First Nat. Bank v. Skidmore* (Tex. Civ. App.) 30 S. W. 565, and cases there cited.

In our opinion the remaining assignments of error are disposed of by the findings of fact. The bank was directed to apply the proceeds of the sale of the property to the payment of the secured debts, which it failed to do. If the application had been actually made, the findings established the fact that the secured debts would have been fully discharged, and it is not thought that the mere fact that those debts were not due would justify the bank in ignoring the instructions of the sureties. The bank, if it desired that the debt should continue until it fell due, should have held the money until that time. The mere nonmaturity of the obligation of the sureties would not be sufficient ground for disregarding their instructions to apply the funds that arose from the sale of their property to the payment of the secured debt.

We find no error in the record, and the judgment is affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. PARROTT.\*

(Court of Civil Appeals of Texas. Oct. 24, 1906.)

##### 1. EVIDENCE—SIMILAR FACTS—INJURIES TO SERVANT—VIOLATION OF RULES.

On an issue as to the contributory negligence of an injured servant in violating a rule of defendant railway company, evidence that plaintiff, on various other occasions, had been guilty of violating the railway company's rules, and that he had habitually violated such rules, and that accidents resulted therefrom, was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 414, 414½; vol. 34, Cent. Dig. Master and Servant, §§ 763, 764, 947.]

##### 2. EVIDENCE—RE MOTENESS.

The fact that the time to which certain testimony offered related was nine months prior to the date of the accident in question only affected the weight of the testimony and not its competency.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 434.]

##### 3. TRIAL—INSTRUCTIONS—REQUEST TO CHARGE—REFUSAL.

Where a matter has been submitted to the jury by the court in its general charge, if the party desires a fuller and more specific instruction, it is his duty to request the same.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Trial, §§ 628-634.]

\*Writ of error denied by Supreme Court.

##### 4. MASTER AND SERVANT—INJURIES TO SERVANT—RULES—VIOLATION.

In an action for injuries to a servant of a railway company, the fact that plaintiff violated one of the railway company's rules did not constitute negligence per se.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 759-764.]

On motion for rehearing. Overruled.

For former opinion, see 94 S. W. 1135.

BIDSON, J. As in the original opinion of this court in this case the appellant's assignments of errors insisted upon in its motion for rehearing of this cause as grounds for reversal of the judgment of the court below were overruled without discussion, and as counsel for appellant, in the motion for rehearing, request us to discuss and give our reasons for overruling said assignments, we will now proceed to do so.

The testimony, exclusion of which is complained of in the third assignment of error, was inadmissible. It was intended to show by the excluded testimony that appellee had, on various other occasions, been guilty of violating the rules of appellant, and, in effect, that he had habitually violated such rules, and that accidents had resulted therefrom. This character of testimony was held to be inadmissible in the case of *Railway v. Johnson*, 92 Tex. 382, 383, 48 S. W. 568, 569. Chief Justice Gaines, delivering the opinion in that case, uses this language: "We think the rule is well settled that when the question of whether or not a person has been negligent in doing or in failure to do a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion," citing among other cases that of *Tenney v. Tuttle*, 1 Allen (Mass.) 185, and quotes as follows from that case: "When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission and not by the character for care and caution that the defendant may sustain."

The testimony, admission of which is complained of in the fifth and seventh assignments of error of appellant, was properly admitted. The fact that the time to which the testimony related was nine months prior to the date of the accident, would only affect the weight of the testimony, and not its competency.

The matter to which the eighth assignment of error relates was practically submitted to the jury by the court in its general charge, in connection with special charge No. 11, requested by appellant, and given to the jury by the court; and if appellant desired a fuller or more specific instruction given to the jury on this subject, it was its duty to request same. And the

writer also thinks there is force in the view contended for by appellee that rule 104a applies to a train of cars, and not to an engine separated from a train on a siding to be cleaned.

We do not think there was any error in the fifth paragraph of the court's charge, complained of in appellant's tenth assignment of error. In our opinion the question, as to whether appellee was guilty of negligence in violating rule 104a, under the circumstances shown in this case, was one of fact for the determination of the jury. *Railway v. Adams*, 94 Tex. 106, 58 S. W. 831; *Railway v. Cornell*, 69 S. W. 981, 66 S. W. 247.

Appellant's seventeenth, eighteenth, nineteenth, twentieth, and twenty-fourth assignments of error complain of the refusal of the court to give certain special charges requested by it to the jury. Each of these

special charges makes the violation of the rule of appellant negligence per se, and for that reason was properly refused; and, besides, we think the court properly charged the jury as to the effect of the rule upon appellee's conduct in its main charge and the special charge given at the request of appellant.

The other assignments of error relied upon in appellant's motion for rehearing relate to the sufficiency of the evidence to support the verdict and judgment. While the testimony of appellee is, in some particulars, inconsistent and contradictory, he testified to facts, if believed by the jury, sufficient to justify their verdict; and the fact that they found such verdict shows that they believed his testimony as to such facts. In our opinion, the verdict and judgment are supported by the evidence.

The motion for rehearing is overruled.

**CADENHEAD et al. v. ROGERS & BRO.**  
(Court of Civil Appeals of Texas. Oct. 10, 1906.)

**1. LANDLORD AND TENANT—LIENS FOR ADVANCES—APPLICATION OF PROCEEDS OF PROPERTY.**

A landlord was not obliged to apply the proceeds of cotton received from a tenant to the payment of a claim for which he held a lien against property which had been levied on by a third person, but might apply the proceeds to a subsequent claim for supplies to the tenant.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 1018.]

**2. SAME—ACTION—PLEADING.**

In an action by a landlord to recover from a third person the value of cotton on which the landlord held a lien, an allegation that since the third person had levied on the cotton in question the landlord had received the proceeds of two bales of cotton, and that deducting from the value of the two bales moneys advanced to the tenant to buy supplies and to pick and gin the two bales left a balance which was credited on the account filed, was sufficient, without itemizing the subsequent claim to which the proceeds of the two bales were applied.

**3. PRINCIPAL AND AGENT—ESTOPPEL—STATEMENTS OF AGENT.**

Where the bookkeeper of a firm told one who inquired of him as to claims of the tenant of the firm that the tenant had left money to pay his store account, but that he knew nothing about the rents and had nothing to do with them, and he was the firm's representative as to matters appertaining to the store account but not as to the rents, the firm was estopped to claim a lien on property levied on by the third person for the store account, but was not estopped to claim a lien for the rent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 493.]

Appeal from Panola County Court; J. G. Woolworth, Judge.

Action by Rogers & Bro. against P. Cadenhead and others. From a judgment in favor of plaintiff, defendants appeal. Modified.

Mason Williams and H. N. Nelson, for appellants. W. R. Anderson, for appellee.

**JAMES, C. J.** This action was by Rogers & Bro. to recover the value of two bales of cotton and seed, upon which they had a landlord's lien to secure rents, supplies, and advances furnished Will Kizzline, their tenant, and which two bales of cotton and seed were alleged to have been converted by appellants. Judgment was rendered in the county court against appellants for the sum of \$102.50, the full amount of plaintiffs' claim.

Inasmuch as we have arrived at the conclusion that the account of Rogers & Bro. against Kizzline (except the items relating to rent) cannot, under the evidence, be recovered against appellants, for reasons hereinafter explained, the first assignment affects an immaterial matter. It would avail ap-

pellants nothing if we should sustain their contention that the item, "To bal. due on mule, \$18.00," was insufficiently alleged.

The second and third assignments are not well taken. Rogers & Bro., in our opinion, were not obliged to apply to the particular claim against Kizzline involved in the case the proceeds of other cotton received from Kizzline after appellants' levy on the two bales in question; the subsequent claim to which the other cotton was applied being, further, for supplies to Kizzline. The special exception in reference to this matter was properly overruled, because it was not necessary for plaintiffs in their pleading to itemize the subsequent claim. It was sufficient to allege, as plaintiffs did, as follows: "That since the recovery of said judgment plaintiffs have received the proceeds of two bales of cotton, deducting from the value of said two bales of cotton moneys advanced Kizzline to buy supplies and to pick and gin the two bales of cotton, left a balance of \$45.84, which amount was credited on the account filed herein."

The testimony shows that Cadenhead, before deciding to levy on the cotton in question, inquired at plaintiffs' store to ascertain the status of their claim against Kizzline; that Paul Rogers, Jr., kept the books at the store, sold goods, and made collections; that Paul Rogers, Jr., told him that Kizzline had left enough money there to pay his store account—that is, what he owed at the store; that he did not tell him anything about the rents, as he knew nothing about the rents, and had nothing to do with the rents, and upon this information Cadenhead proceeded to levy. That Paul Rogers, Jr., had nothing to do with the rents is undisputed, but that he was plaintiffs' representative as to matters appertaining to the store or store account is also undisputed. It is his own testimony that as to the store account he represented that it had been paid. To that extent plaintiffs were bound by his statements, and estopped to deny them as to Cadenhead, who thereupon made the levy. Ewart on Estoppel, p. 139. This being the state of the evidence, it is clear that, whether the charge on estoppel referred to in the fourth assignment was given or refused, plaintiffs were not entitled to set up or recover the store account pleaded by them. We think there was no estoppel as to the rents. It would be an injustice, manifest upon the record, to allow the judgment to stand for the store account.

We conclude that the judgment should be reformed by deducting therefrom the amount of the store account, and affirmed for the balance, to wit, \$24.16.

**RANSOM v. STATE.**

(Supreme Court of Tennessee. Oct. 25, 1906.)

**1. HOMICIDE—EVIDENCE—SUFFICIENCY.**

In a prosecution for homicide, evidence *acid* sufficient to sustain a verdict of conviction and insufficient to sustain the theory of self-defense.

**2. INDICTMENT AND INFORMATION—MODE OF OBJECTION—MOTION TO QUASH.**

An objection to an indictment on the ground that colored jurors were excluded from the grand jury on account of their race could not be presented at the trial by a motion to quash, but must be presented by a plea in abatement duly verified and sustained by competent evidence.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 480, 481.]

**3. GRAND JURY — CHALLENGES — TIME FOR MAKING.**

Where defendant has notice that his case is to be tried before a grand jury, but makes no objection to its formation till he has been indicted, and the case called for trial, his objection is too late.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Grand Jury, §§ 53, 54.]

**4. CRIMINAL LAW—APPEAL—RECORD—RULINGS RELATING TO JURY.**

Where, on appeal in a prosecution for homicide, the bill of exceptions fails to state, as required by the rules of the Supreme Court, that it contains all of the evidence heard by the trial judge on a motion to discharge the jury panel, the correctness of the court's ruling will not be reviewed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2928-2930.]

**5. JURY—MOTION TO DISCHARGE PANEL—EVIDENCE.**

Affidavits to the effect that the affiants had not seen or heard a colored man called to serve on the jury, were insufficient to sustain a motion to discharge the panel on the ground that colored men were excluded from the jury on account of their race.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 547.]

Appeal from Criminal Court, Davidson County; W. M. Hart, Judge.

Ernest Ransom was convicted of murder in the second degree, and appeals. Affirmed.

R. L. Mayfield, for appellant. Attorney General Cates, for the State.

**McALISTER, J.** The plaintiff in error was convicted in the criminal court of Davidson county of murder in the second degree for the unlawful killing of one Horace Dozier, and sentenced to the state prison for a term of 20 years. He has appealed in error. The only question made on the appeal is that the prisoner in his trial was denied the equal protection of the laws guaranteed to him by the fourteenth amendment to the federal Constitution. It is proper, however, before entering upon an examination of the legal question, to make a brief statement of the facts.

It is shown by the record that the killing occurred in a negro saloon near the corner of Cedar and Cherry streets in the city of Nashville. The plaintiff in error and other negroes were engaged in a game of cards at

a table in the rear of said saloon when one Yates, another negro, came into the room and began to guy the plaintiff in error, whereupon the latter arose, threatening to kill Yates if he did not let him alone. While these parties were engaged in an angry colloquy, a negro employé of the saloon interposed, and thereupon Yates retired. About this time, the deceased, Horace Dozier, a young negro, perhaps about 20 years old remarked to plaintiff in error: "Sit down, you are just checking"—meaning that the defendant was bluffing; whereupon the plaintiff in error said: "You think I am checking. I will show you whether I am or not;" and, suiting the action to the word, he immediately struck the deceased on the forehead, whereupon the deceased returned the blow with his fist. The two clinched, and wrestled with each other towards the wall of the house. The deceased at this point broke away from the prisoner, and, holding his hand to his left side, ran out through the barroom, and, when he was about to pass through a set of swinging doors, the plaintiff in error, who was in pursuit, caught hold of the deceased, and, turning him around, stabbed him twice in the breast. The deceased was taken to the city hospital where he shortly afterwards died. The prisoner, after stabbing the deceased, coolly wiped the blood from his knife upon his trousers, deposited it in his pocket and made his escape, but was arrested within about 24 hours and placed in jail. While the parties were about the same height, it appears that there was a disparity in their weight; the plaintiff in error weighing probably 20 or 25 pounds more than the deceased.

The theory of the defendant was that he had committed the act in self-defense. He claimed that while he and others were at the table, and after the controversy with Yates had subsided, the deceased, who was standing behind him, cursed him, and when the defendant looked around, the deceased struck him a severe blow in the mouth, and was in the act of following it up with another blow, but was prevented by doing so by his foot slipping; that the defendant then arose and began to defend himself from the assault made upon him by the deceased. He further insisted that the deceased was a man of equal strength with himself, and that he only used sufficient force to repel the threatened violence on the part of the deceased. The defendant also insisted the entire fight occurred in the poolroom, and that he did not pursue the deceased out to the front door of the barroom. The record, however, shows that he is not only contradicted in this statement by the witnesses for the state, but also by several of his own witnesses. The theory of self-defense is not made out upon the record, and the verdict of the jury was well warranted by the facts disclosed.

It is not insisted there is error in the charge of the court or in the admission or exclusion of evidence, nor is the guilt of the defendant seriously controverted on this appeal; but the whole contention made in this court is that the plaintiff in error was denied the equal protection of the laws on his trial in the court below. The questions now sought to be made are predicated upon the refusal of the trial judge to sustain a motion interposed on behalf of the plaintiff in error to quash the indictment and set aside the panel, for the alleged reason that negroes had been excluded from the jury box on account of their color. The facts necessary to be noticed to present the question are as follows:

The murder was committed on the 1st of August, 1905, and within 24 hours, the plaintiff in error was arrested and bound over to the next term of the circuit court which convened on September 4, 1905. On the first day of the court, to wit, September 4th, the court selected from the venire a grand jury to serve during the ensuing September term, 1905. On the 8th of September, 1905, the grand jury returned a true bill against the plaintiff in error, charging him with the crime of murder in the first degree. Thereafter the defendant demanded a special panel and on the 21st of October, 1905, the court ordered that the jury box be brought into open court and a panel drawn therefrom to be summoned by the sheriff to appear October 24, 1905, on which date the case had been set for trial. It is worthy of remark that up to this time no motion had been interposed on behalf of the prisoner to quash the indictment or to challenge the legality of either the grand jury that indicted him or the names drawn from the jury box from which the panel for his trial was to be selected. However, on October 24, 1905, the day set for the trial of the cause, the plaintiff in error through his counsel presented the following motion in writing to quash the indictment, viz.: "Now comes the defendant in his own proper person, and moves the court to set aside and quash the indictment against him because the jury commissioners appointed in accordance with the acts of 1901 of the state of Tennessee, that selected the grand jury which found and presented said indictment, selected no person or persons of color or African descent to serve on said grand jury, but, on the contrary did exclude from the list of persons, to serve as such grand jurors, all colored persons, or persons of African descent, known as 'negroes,' because of their race and color; and that said grand jury was composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent known as 'negroes,' although consisting and constituting one-third of the population of Davidson county, according to the federal statistics of 1900, and although otherwise qualified to serve on such

grand jury, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury for many years, which is a discrimination against the defendant, since he is a person of color and of African descent known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights as guaranteed by the fourteenth amendment to the federal Constitution. The act of the jury commissioners, in denying him the equal protection of the law, as guaranteed by the amendment above referred to, is the act of the state of Tennessee in denying to him the equal protection of the law; all of which he is ready to verify."

The trial judge overruled this motion, which motion is now made the basis of the first assignment of error. We are of the opinion that the ruling of the trial judge was correct for the following reasons:

(1) The indictment was in all respects regular on its face, and could not be invalidated on a mere motion to quash by objections presented to the Constitution of the grand jury. Under the practice in this state, such extraneous matters lying beyond the four corners of the indictment should have been presented by a plea in abatement duly verified and sustained by competent evidence.

(2) The objection to the formation of the grand jury was not seasonably interposed.

It was held by the Supreme Court of the United States in *Agnew v. United States*, 165 U. S. 42, 17 Sup. Ct. 235, 41 L. Ed. 624, that where the indictment was returned against the defendant December 12, 1895, and on December 17, 1895, he was permitted to file a plea in abatement, the court held that such plea was too late, for the reason that the defendant had not challenged the competency or legality of the grand jury at the earliest possible moment. Mr. Chief Justice Fuller, in the midst of his opinion, said: "Such a plea," referring to a plea in abatement, "must be pleaded with strict exactness. \* \* \* Dr. Wharton lays it down that the material irregularities in selecting and impaneling a grand jury which do not relate to the competency of individual jurors may usually be objected to by challenge to the array, or by motion to quash, or by plea in abatement; that the question of the mode in which such objections are to be taken, largely depends upon local statutes, but that certain rules may be regarded as generally applicable. One of these rules is that the defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be tried before the grand jury, he should proceed at once to take exception to its competency, for, if he lies by until a bill is found, the exception may be too late; but where he has had no opportunity of objecting before bill is found, then he may take advantage of the objection by mo-

tion to quash, or by plea in abatement. The latter in all cases of contested fact being the proper remedy. *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857.

"Another general rule is that for such irregularities as do not prejudice the defendant, he has no cause for complaint and can take no exception. *United States v. Richardson* (C. C.) 28 Fed. 65."

The court continued: "The original venire was issued November 18th. The second venire was issued December 2, 1895. The court opened December 3, 1895, and the indictment was returned December 12th, yet defendant did not file his plea in abatement until December 17th. The plea does not allege want of knowledge, nor want of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assigned any ground why exception was not taken or objection made before; and moreover, the plea is fatally defective in that, although it is stated that that the drawing 'tended to his injury and prejudice,' no grounds whatever are assigned for such conclusion, nor does the record exhibit any such. *Bishop's New Criminal Procedure*, § 877."

Applying the rule announced in that case to the facts herein, we find that the plaintiff in error was arrested on the 2d day of August, 1905, and bound over to the criminal court of Davidson county to await the action of the grand jury, yet with notice of the fact that his case would be investigated at the ensuing September term, he takes no step to object to the formation of the grand jury, for the reason that negroes were excluded therefrom, and no objection in fact was ever interposed until October 24th, the day set for his trial, which was six weeks after the finding of the indictment against him.

It further appears that during this intervening period between the finding of the indictment and the day set for the trial, the plaintiff in error asked that a special panel be summoned for his trial. For these reasons, we are of opinion that the motion to quash the indictment was properly overruled by the trial judge.

The trial court then proceeded to impanel a jury when one Benzine was qualified as a competent juror and accepted by the state. He was challenged by counsel for the plaintiff in error because the jury commissioners who placed the names in the jury box from which this juror was drawn, excluded from that box the names of colored men. The trial court, however, ruled that no such fact appeared, and the challenge was insufficient and the juror Benzine was directed to take a seat in the jury box. Counsel for plaintiff in error continued to challenge the remaining jurors as they were called and accepted by the state, but, for the reasons

already stated, his challenge was overruled by the trial court.

It appears, however, that after said jury had been selected, but before it was sworn, the plaintiff in error, by his counsel, interposed the following motion, viz.:

"Now comes the defendant in his own proper person and moves the court to set aside and quash the panel, array, or venire drawn from the jury box on the 21st day of October, 1905, from which a jury is to be drawn, to try this cause, because the box from which the panel, array, or venire was drawn contained no names of persons of color or African descent; but, on the contrary, the names of colored men, or men of African descent, known as 'negroes,' were not placed in the box by the jury commissioners because of their race or color, and that the panel, array, or venire is composed exclusively of white persons; while all persons of the colored race, or of African descent known as 'negroes,' although about one-third of the population of Davidson county, and otherwise qualified, were excluded therefrom on account of their race or color, which is a discrimination against the defendant, since he is a person of color and of African descent known as a 'negro,' and such discrimination is a denial to him of the equal protection of the law and of his civil rights guarantied by the fourteenth amendment to the federal Constitution. The act of the jury commission in denying him the equal protection of the law, as guarantied by the amendment referred to, is the act of the state of Tennessee in denying to him the equal protection of the law. All of which he is ready to verify. Ernest Ransom.

"Sworn to before me, October 24, 1905. R. Halley, D. C."

In support of this motion, counsel for the plaintiff in error submitted nine affidavits of colored citizens of Davidson county. The following affidavit of J. C. Napier is a fair specimen of the matter contained in the remaining affidavits: "Affiant J. C. Napier makes oath in due form of law that he is a colored citizen, householder, and freeholder of the county of Davidson, state of Tennessee; that for the past 30 years he has been a practicing lawyer at the Nashville bar in good standing; that in his practice he is frequently in the criminal courtroom at Nashville, and during a period covering the past 10 or 12 years he has not known, heard, or seen a colored man called as a juror, grand or petit, in said court; that he himself has never been summoned to serve on said juries; that to the best of his knowledge, information and belief, there are at least 6,000 colored citizens of Nashville, Davidson county, Tenn., who are competent to serve as jurors."

W. H. Hodgkins, colored, in his affidavit,



in addition to the facts stated by J. C. Napier, said that he "was present in the courtroom when the jury in this case was made up and no colored man was offered or called as a juror in this case."

There was no other or different character of testimony offered in support of the motion to discharge the panel. The trial judge overruled the motion.

We are of opinion that the action of the trial judge was correct for the following reasons: (1) That the bill of exceptions fails to state, as required by the rules of this court, that it contains all of the evidence heard by the trial judge on the motion to discharge the panel. The established rule of practice requires that it shall affirmatively appear from the bill of exceptions that it contains all the evidence heard by the trial judge on any plea or motion presenting disputed or contraverted facts. (2) It does not appear from the nine affidavits submitted in support of the motion that colored men were excluded from the jury box on account of their color, race, or previous condition of servitude. It only appears from said affidavits that the affiants during the period mentioned by them, had not seen or heard a colored man called to serve on the jury.

The judgment of the lower court must therefore be affirmed.

#### RIVERS v. STATE.

(Supreme Court of Tennessee. Oct. 6, 1906.)

##### 1. GRAND JURY — CHALLENGES — TIME FOR MAKING.

Under Acts 1901, p. 281, c. 154, § 17, providing that in the absence of fraud, no irregularity with respect to the provisions of the act, which relates to the duties of jury commissioners, shall affect the validity of any action of a grand jury, unless the irregularity has been specially pointed out and the exception taken before the jury is sworn, where a defendant had notice before he was indicted that he would be proceeded against by the grand jury, but made no objection to the jury on the ground that colored persons were excluded therefrom on account of their race till after he was indicted and his case called for trial, his objection came too late.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Grand Jury, §§ 53, 54.]

##### 2. JURY — MOTION TO QUASH VENIRE — EVIDENCE.

A motion to quash a venire on the ground that colored persons were excluded from the jury list because of their race, is not sustained by the affidavit of the defendant alone, verifying the motion to quash.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 547.]

Appeal from Criminal Court, Hamilton County; T. M. McConnell, Judge.

Will Rivers was convicted of voluntary manslaughter, and appeals. Affirmed.

John H. Early, for appellant. Attorney General Cates, for the State.

WILKES, J. Defendant is convicted of voluntary manslaughter for the killing of Prof. Caruthers, and sentenced to three years in the state penitentiary; and he has appealed. He assigned no errors upon the merits of the case; and there is no contention that he is not guilty of the offense of which he is convicted. There are two assignments of error, and only two, insisted upon, either in the assignment or in the argument at the bar.

The first is that the court erred in striking out the defendant's plea in abatement to the indictment; and the second is that the court erred in overruling the defendant's challenge to the array of jurors, and in refusing to quash the venire.

The plea in abatement to the indictment, as well as the motion to quash the venire and the challenge to the array of jurors, are based exclusively upon the fact that, because of their race or color, no negroes were placed upon the grand jury or upon the list of jurors from which the traverse jury was selected; and the contention is that, because of this fact, the defendant, who is a negro, has been denied the equal protection of the law, which has been guaranteed to him by the fourteenth amendment to the Constitution of the United States. The deceased was also a negro.

The plea in abatement sets out these facts, and that there is a large negro population in Hamilton county, and that many of them are householders and freeholders, upright and intelligent, and known for their integrity, fair character, and sound judgment, and possessing all the qualifications required by law for jury service; yet the jury commission appointed for the county of Hamilton, pursuant to the provisions of chapter 154, p. 273, of the acts of 1901, have all the time made up the jury lists for the county of white men only, and have persistently eliminated and excluded the names of all negroes therefrom, and that the grand jury, which indicted the defendant, was made up exclusively of white men, and the names of all negroes were eliminated and excluded, solely on the ground of their race and color; and by reason of these premises, the defendant has been denied the equal protection of the laws, guaranteed him by the fourteenth amendment to the Constitution of the United States.

The Attorney General moved to strike the plea from the files; and this motion was sustained by the court.

It is insisted on behalf of the state that this plea in abatement was properly stricken out, because it was not filed within the time prescribed by law, and was not sufficient in form and substance.

It appears from the record that the defendant was brought into open court on the 30th of September, 1904, to answer the state on a charge of murder, and entered into a recognizance with sureties to ap-

t the court without leave.

appears, however, that the indictment of actually returned by the grand jury, led in the office of the clerk, until the nber term of the court, 1904, and on ith day of November. It appears, there- that the defendant had notice that he l, probably, be proceeded against by ment for the commission of said of- as early as September 30, 1904, but he no plea and made no objection to the itution of the grand jury until the 16th of January, 1905, which was during a subsequent to that during which he ed his recognizance. The indictment already been found against him and ed into open court on the 18th of No- er, 1904; and the plea in abatement was led until the case was called for trial its merits.

is manifest, therefore, that before the ment was returned, the defendant had notice that the grand jury would con- the charge against him, and he had e after the 18th of November that the ment had been found by the grand

but he neglected to file his plea un- e 16th day of January, 1905.

is said by Wharton, in his work on inal Pleading & Practice, that where a dant is notified that his case is to be ht before a grand jury, he should at proceed to take exceptions to its com- cy. If he lies by until the indictment ind, then the exception may be too late, in all cases where, having prior op- nity and capacity to object, he made no tion. Wharton's Cr. Pl. & Pr. § 350a. is is, also, the requirement of Act 1901, 1, c. 154, § 17; and the reason under- the requirement is that the defendant ot stand by and speculate upon the ability of the grand jury finding, or not ag, an indictment against him; and if should find such indictment, he may upon attack the Constitution of the 1 jury.

the case of *Agnew v. United States*, U. S. 42, 17 Sup. Ct. 235, 41 L. Ed. 624, ndictment was returned against the de- ant December 12, 1895, and, on December 895, he was permitted in the lower court le a plea in abatement. The Supreme t held, however, that such plea was too for the reason that the defendant had challenged the competency or legality he grand jury at the earliest possible ment. Chief Justice Fuller said, in refer- to the plea in abatement, that it must pleaded with strict exactness; and he s Mr. Wharton as laying down a rule : the defendant must take the first op- nity in his power to make the objec- ; where he is notified that his case is to ried by the grand jury, he should pro-

In that case, the court further said: "The original venire was issued November 18th. The second venire was issued December 2, 1895. The court opened December 7, 1895, and the indictment was returned December 12th, yet the defendant did not file his plea in abatement until December 17th."

The court continues: "The plea does not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before; and, moreover, the plea is fatally defective in that, although it is stated that the drawing tending to his injury and prejudice, no grounds whatever are assigned for such conclusion, nor does the record exhibit any such. Bishop's New Cr. Procedure, § 877."

Applying the rule announced to the facts in this case, it appears that the defendant was brought into open court on the 30th of September, 1904, to answer the charge of murder; that the indictment was found against him on the 18th of November, but he made no objection until the case was called for trial on the 16th day of January, 1905, and then only by a plea which did not negative previous knowledge that a prosecution was intended against him, or that he knew of the incompetency of the grand jury.

We are of opinion, therefore, that the plea in abatement came too late, and that it was not sufficient in form and substance.

As to the challenge to the array of the traverse jury: This assignment does not appear to be pressed in this court by the defendant. It was called to the attention of the court below upon a motion to quash; but this appears to have been based alone upon the affidavit of the defendant himself.

It was held in the case of *Smith v. Mississippi*, 162 U. S. 596, 16 Sup. Ct. 900, 40 L. Ed. 1082, that this is not sufficient; and Mr. Justice Harlan said: "The facts stated in the written motion to quash, although that motion was verified by the affidavit of the accused, could not be used as evidence to establish those facts, except with the consent of the state prosecution, or by order of the trial court. No such consent was given and no such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced, or offered to be introduced, by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was, therefore, unsupported by any competent evidence. Consequently, it cannot be held to have been erroneously denied."

This case was approved by the Supreme Court of the United States in *Carter's Case*,

177 U. S. 447, 20 Sup. Ct. 687, 44 L. Ed. 839; but must be distinguished from that case by the fact that, in the Carter Case, the trial judge refused to hear proof, while in the Smith Case, as well as the case we are now considering, there was no effort to introduce proof.

We have, therefore, a case where it is now even suggested that the defendant has been injured by the mode of proceeding; and the record shows beyond a reasonable doubt that the defendant pursued, and recklessly stabbed to death, the deceased. There is no claim that he has been prejudiced on the merits of the cause; and it is a clear case for the enforcement of the statute (Shannon's Code, § 6351) which is as follows:

"No judgment, decision or decree of the inferior court shall be reversed in the Supreme Court, unless for errors which affect the merits of the judgment, decision or decree complained of." See, also, *Wilson v. State*, 109 Tenn. 167, 70 S. W. 57.

We are of opinion, therefore, that there is no error in the proceedings and judgment of the court below; and the judgment is affirmed, with costs.

This is in accord with the recent holding of this court in the case of *Ernest Ransom v. State* (December term, Nashville, 1905) 98 S. W. 953, opinion delivered by Mr. Justice McAlister, but not yet published.

**BROSNAN et al. v. LANCASTER et al.\***  
(Supreme Court of Tennessee. Oct. 27, 1906.)

**1. APPEAL—TIME TO APPEAL.**

Acts 1897, p. 812, c. 131, provides that no appeal shall be taken from a decree of the Court of Chancery after the expiration of 10 days from the decree. The Court of Chancery Appeals entered a final decree September 17th. A petition for additional findings of fact, filed September 22d, was disallowed on the same day. An appeal was granted on September 29th. *Held*, that the filing of the petition did not extend the period allowed for prosecuting an appeal, and it was taken too late.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1891-1894.]

**2. SAME.**

Acts 1903, p. 98, c. 58, authorizing clerks of the Supreme Court and of the Court of Chancery Appeals to issue execution on any final decree after the expiration of the 10 days allowed for the filing of petition to rehear, does not modify Acts 1897, p. 812, c. 131, providing that an appeal from a decree of the Court of Chancery Appeals must be taken within 10 days from the decree, the purpose of the act being to avoid the delay in obtaining relief incident to Shannon's Code, §§ 4732-4736, prescribing the time for the issuance of writs of execution by the clerks of courts, etc.

**3. SAME.**

Acts 1903, p. 98, c. 58, authorizing the clerks of the Supreme Court and of the Court of Chancery Appeals to issue execution on any final decree after the expiration of the 10 days allowed for the filing of petition to rehear, if construed as extending the period of appeal from the decree of Court of Chancery Appeals, as long as a petition for rehearing is undisposed

of, does not extend the period of appeal by reason of the filing of a petition for an additional finding of facts.

**4. SAME.**

The Court of Chancery Appeals has the power to withhold the entry of a decree so that during the consideration of a petition for rehearing or for an additional finding of facts, the statutory limitation of appeal may not run, or, if entered, to make an order (if within 10 days from the entry) withdrawing it and then suspend re-entry until such petition has been disposed of.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1895.]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit between Mrs. Bridget Brosnan and others and George D. Lancaster, executor, and others. From a decree for the latter, the former appeals. On motion to dismiss appeal. Granted.

Williams & Lancaster, Brown & Spurlock, and J. B. Mulligan, for appellants. Pritchard & Sizer and A. W. Gaines, for appellees.

**BEARD, C. J.** This is a motion made by appellee to dismiss the appeal in error in this cause, from the decree of the Court of Chancery Appeals, upon the ground that it was granted too late. The facts are that the final decree was pronounced and entered by that court on the 17th of September; that a petition for an additional finding of facts was filed on the 22d of September, which was disallowed by the entry of a proper order on the same day, and that the appeal was prayed and granted on the 29th of September, 1906.

In this petition there was no attack upon the decree already entered, nor was it, in a technical sense, a petition for rehearing, but it was simply an application to that court to find additional facts, which, it is assumed, were warranted by the record, evidently for the purpose of using the same, if found, upon the trial of the cause in this court.

The question then is: Did the filing of this petition extend the statutory period allowed for prosecuting an appeal in the nature of a writ of error, or writ of error from the final decree already pronounced? This question, we think, is clearly answered by the statute itself. Chapter 131, p. 312, of the Acts of 1897, amendatory of the original act creating the Court of Chancery Appeals, provides in language which we regard as clear and, at the same time, conclusive on this question, that "hereafter no writ of error, or appeal in the nature of a writ of error, shall be taken to the Supreme Court from any decree of the Court of Chancery Appeals after the expiration of 10 days from the decree" of that court. In that court there is a rule giving 10 days from the filing of an opinion within which a petition for rehearing or for an additional

\*Rehearing denied December 10, 1906.

finding of facts may be presented, but it is not within either the letter or the spirit of this act, that the mere presentation in either form, of a petition, would interfere with, or stop the running of, the statutory period of appeal, that period beginning with the entry of the court's decree.

While there is a dissimilarity of facts between the present case and that of *Patterson v. Bank*, 101 Tenn. 511, 48 S. W. 225, yet the question made in that case rendered it necessary for the court to construe this act, and that construction is in accord with what has just been said. There the opinion of the court was handed down on April 11th, and the petition to rehear was filed on April 28th. This was dismissed on May 11th. In the meantime, however, that is, on April 21st, a final decree was entered from which no appeal was then taken. But when the decree dismissing the petition to rehear was entered for the first time, the defendants prayed and were granted an appeal from the decree of dismissal, as well as from the final decree, which had gone down 20 days prior thereto. Upon motion the appeal was dismissed upon the ground that it came too late. This is made clear by the language of the opinion, which is, on this point, in these words: "A motion is now made here by the appellee from the final decree to dismiss the appeal to this court because prayed and granted in the Court of Chancery Appeals more than 10 days after such final decree. This motion is well taken." It was insisted in that case, as in the one at bar, by the appellants, that the right of appeal was preserved by the pendency of their petition to rehear. It is true that, in answer to this insistence, the court said: "This could not be so because \* \* \* they had no petition filed within 10 days from the delivery of the opinion." To this, however, it is significantly added "that if it had been, it would have been immaterial," because a petition to rehear not only does not vacate a decree complained of, but does not even suspend it. Subsequently, the case of *Bank v. Johnson*, 105 Tenn. 521, 59 S. W. 131, called the attention of this court once more to this act, and it was there held that the statutory term for an appeal began not with the delivery of the opinion of the Court of Chancery Appeals, but with the entry of the decree. Again, it was recognized by the court that the time for appealing from a decree of that court was settled by chapter 131, p. 312, of the Acts of 1897.

But it is now insisted, however, that chapter 58, p. 98, the Acts of 1903, has necessarily modified the act last referred to, and that a different construction leading to an extension of the time for appeal must now be adopted. We do not think so. Section 11 of chapter 76, p. 116, of the Acts of 1895 (the chapter embracing the act creating the Court of Chancery Appeals) in part

provides that "unless remanded to the Supreme Court \* \* \* final process may issue from that court returnable as in case of like process issued upon the judgments or decrees of the Supreme Court," but no time was fixed in the statute itself for the issuance of this process. This was left to be controlled by section 4732 et seq. of Shannon's Code. Section 4732 is in these words: "The clerks of the several courts shall issue executions in favor of the successful party on all judgments rendered at any term as soon as practicable, and within the time prescribed by this Code, without any demand of the party." Sections 4733, 4734, and 4735 prescribe the periods for the issuance of executions by the clerks of the Supreme Court, clerks of the circuit court, clerks and masters of the chancery courts, and clerks of the county court, each period beginning with the adjournment of the particular court and extending for from 10 days, in the case of clerks of the county courts, to 60 days, in the case of clerks of the Supreme Court. The clerks of these respective courts are the only ones who are specifically provided for in the Code. But the sections above referred to are followed by section 4736, which is in these words: "The clerks of all other courts" shall issue executions "within the time prescribed for the clerks of the circuit courts." By reference to section 4734 we find that the clerks of these latter courts are required to issue writs of execution, when the court continues in session less than 2 weeks, within 30 days, and when more than 2 weeks, within 40 days, of the adjournment. The only way by which a party, who was successful in either one of these courts, in obtaining a final decree of judgment, could avoid the delay incident to these provisions and obtain at an earlier day the fruit of his litigation, was by filing an affidavit showing sufficient cause therefor, either during the term at which his judgment or decree had been rendered, or after the adjournment and before the expiration of the time prescribed in the general statute. We are satisfied that the only purpose of chapter 58, p. 98, of the Acts of 1903 was to relieve from this condition. By its terms it applies both to the Supreme Court and Court of Chancery Appeals, and provides that the clerks of these two courts "are authorized to issue execution upon any final judgment or decree of said Supreme Court, or Court of Chancery Appeals, at any time after the expiration of the 10 days allowed for the filing of petition to rehear after said final judgment or decree is rendered by either of said courts." While this act does recognize the existence of a 10-day rule in both of these courts for the filing of petitions to rehear, we are satisfied it was not contemplated by the act that it should in any way interfere with or modify the statute, heretofore referred to, absolutely fix-

ing the period within which the appeal could be taken.

But even if the insistence made here by the appellants, that the intention of the Legislature in the act of 1903 was to extend the period of appeal from a decree of the Court of Chancery Appeals, as long as a petition for rehearing was undisposed of, it having been filed in time, yet it could not avail them in resisting the present motion. For the statute in question recognizes alone the existence of the rule as to the right to petition for a rehearing, and does not embrace the rule of that court which allows time for the filing of a petition for an additional finding of facts. To paraphrase the language in *Sholty v. McIntyre*, 136 Ill. 83, 26 N. E. 655, an authority relied upon by appellants, it should be remembered the right to apply for an additional finding of facts to the Court of Chancery Appeals is not a right given by statute, nor by any rule of common law, but is a mere matter of grace or favor. The practice of entertaining such petitions is based largely, if not wholly, upon the willingness and desire of the court in case it has made inadvertent omissions, to have these brought to its attention in order that the record may be corrected while still under the control of that court. Such right must yield to the imperative terms of chapter 58, p. 98, of the Acts of 1897.

Nor is there any necessary hardship in the construction of this statute, announced heretofore and in this opinion. For it is within the power of the Court of Chancery Appeals, and no doubt this power would at any time be exercised upon application of an unsuccessful litigant to withhold the entry of a decree so that, during the consideration of a petition for rehearing or for an additional finding of facts, the statutory limitation of appeal might not run, or if entered, to make an order (if within 10 days from such entry) withdrawing it and then suspend re-entry until a petition in one or the other of these forms could be disposed of. Pursuing either of these courses, the litigant is placed beyond the peril which he would otherwise incur.

The result is that the motion to dismiss this appeal is granted.

**McCLUNG, BUFFAT & BUCKWELL v.  
QUINCY CARRIAGE & WAGON  
CO. et al.**

(Supreme Court of Tennessee. Oct. 20, 1906.)

**MORTGAGES — AFTER-ACQUIRED PROPERTY —  
CONSTRUCTION.**

A corporation, after leasing certain premises, but before its buildings had been completed, executed a deed of trust embracing the leasehold "and all buildings and improvements" on the lot, "which will be put thereon" by the mortgagor during the term of the lease, together with all other tools not specifically named, used

in his factory, and also all the factory buildings and machinery. Held, that the mortgage covered after-acquired heavy machinery and a boiler firmly set in the ground and used as a part of the manufacturing plant.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 255-257.]

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Action by McClung, Buffat & Buckwell against the Quincy Carriage & Wagon Company and others. The City National Bank filed a petition claiming certain property. From a judgment in favor of the bank, plaintiffs appeal. Affirmed.

John W. Green, for appellants. Shields, Cates & Mountcastle, for appellees.

**McALISTER, J.** The only question presented on this appeal is whether certain after-acquired property is embraced within the description and intentment of a certain mortgage or deed of trust. The original bill in this case was filed as general creditors' bill for the purpose of winding up the Quincy Carriage & Wagon Company as an insolvent corporation.

The question of law propounded on the record arises on the petition of the City National Bank, filed in said cause, wherein it avers that said bank is the owner and holder of a note for \$1,500, executed by the Quincy Carriage & Wagon Company to Mrs. Sarah E. Kirby, and by her transferred to said bank; that the note in question was secured by deed of trust, wherein it conveyed:

(1) "A leasehold for the term of five years, with a privilege of ten years, on lot No. 11, in John L. Hardee's subdivision of Sneed, King & Co.'s addition to Knoxville, situated at the northwest corner of Vine and State streets, and all the buildings and improvements on said lot of ground which will be put thereon by said first party during the term of said lease. And in case of foreclosure of this mortgage, all the rights, privileges and conditions contained in said lease shall inure to the benefit of said second party."

(2) "Also all the personal property, fixtures, and machinery belonging to said first party, and which is used by it in the repairing and construction of hacks, wagons, and other vehicles, some of which are specifically described, \* \* \* and all other tools not specifically named, owned by said first party and used in its manufactory. Also the old frame building now on lot No. 10 in Hardee's addition. Also all its rights, franchises, lots, ground, factory buildings and machinery."

This trust deed was executed by the Quincy Carriage & Wagon Company to Mrs. Kirby on the 20th day of December, 1897. The Court of Chancery Appeals finds that when the trust deed was executed, December

building was in process of completion had not been completed.

It appears that under the execution of trust the Quincy Carriage & Wagon Company purchased certain machinery in its business and erected it on the leasehold as follows:

A cold tire shrinker which was set in a brick foundation, which the Court of Chancery Appeals finds was intended to remain as a part of the fixtures on said leasehold until the termination of the lease of the Quincy Carriage & Wagon Company. It was purchased in June, 1901, by the Court of Chancery Appeals. It was a cold tire shrinker, a piece of machinery weighing from 5,000 to 6,000 pounds, used for the use of said company in the running and construction of hacks, cabs and other vehicles. It was erected on the leasehold by burying heavy timbers around and bolting said machine to the ground with the intention and purpose of making it to the leasehold and permitting it to remain there and be used in the company's business during the continuance of said lease upon said property, as found by the Court of Chancery Appeals.

A cold tire shrinker was purchased by the company in May, 1900.

In October, 1902, the company purchased a cold tire bolt threader and nut tapper which was permanently fastened to said leasehold by burying heavy timbers in the ground and bolting said machine to said leasehold.

It was purchased to be used in the business of the Quincy Carriage & Wagon Company, and was placed as a fixture on said leasehold during the continuance of the lease, as found by the Court of Chancery Appeals.

In December, 1900, the said Quincy Carriage & Wagon Company purchased one cold tire shrinker for use in its business and was permanently fixed to the building for use in the company's business, as found by the Court of Chancery Appeals.

The contention made on behalf of the National Bank is that all of this after-acquired machinery became a part of the improvements and fixtures, and that under the mortgage or deed of trust executed to Mrs. Sarah E. Kirby on the 20th of December, 1897, and which has inured to the benefit of said bank by reason of its assignment of the note for the security of the deed of trust in question was excluded.

The Court of Chancery Appeals further finds that at the time the lease was executed and was leased and understood to be for the purpose of erecting and maintaining thereon a carriage and wagon factory in which it would be necessary to erect and operate heavy machinery of the character above described.

The Court further finds that at the time the deed of trust was executed it was also the understanding of the parties that the building was to be conducted as a carriage and wagon factory. The machinery in question, about which the dispute arises, was purchased and placed on this lot with the understanding and purpose that it should become integral parts of and necessary adjuncts to the manufacturing plant. That court was of opinion, in view of the facts found, that said machinery, although acquired after the execution of the deed of trust, nevertheless passed under it as security to the transferee of the note the deed of trust was designed to secure.

The receiver appealed from the decree of the Court of Chancery Appeals, and insists that court erred in decreeing that the City National Bank is entitled to the boiler, cold tire shrinker, nut threader, and dash machine, and in holding that said articles were covered by the deed of trust and passed to the holder of the note secured by said deed of trust.

We are of opinion that the decrees of the chancellor and Court of Chancery Appeals were both correct. As found by the Court of Chancery Appeals, when said trust deed was executed, the Quincy Carriage & Wagon Company had not completed its buildings on said leasehold or erected its machinery thereon, but the manufacturing plant was in process of construction. Now, when we look to the description of the property intended to be covered and conveyed by the deed of trust, we find that it embraces the leasehold, "and all buildings and improvements on said lot of ground which will be put thereon by said first party during the term of said lease." It is insisted on behalf of the appellants that the term "improvements" refers to buildings and not to machinery. It is said that the clause just quoted was intended to cover the shops, sheds, buildings, and other like improvements, but it will be observed that both terms are used in this description, viz., buildings and improvements.

The Court of Chancery Appeals has found that this heavy machinery was annexed to the leasehold to remain during the continuance of the lease, and such fixtures might well be termed improvements in the sense of this deed of trust; but the instrument further embraces "all personal property, fixtures, and machinery belonging to said first party, and which is used by it," etc., in its business. It is insisted on behalf of appellants that this language confines the machinery conveyed to that in use at the date of the execution of the mortgage. We are of opinion, however, that this is too restricted a construction, and that the language is broad enough to cover any machinery used by said company on the leasehold during its continuance. This is evident from subsequent clauses: "And all other tools not specifically named owned by said first party and used in its manufactory," and

"also all its rights, franchises, lots, ground, factory buildings and machinery."

Viewing the entire instrument, and giving effect to all of its terms, it is our opinion that the Quincy Carriage & Wagon Company intended to embrace in said instrument all machinery purchased by it and used in its business during the continuance of the lease. We fully concur in the construction placed on this instrument by the Court of Chancery Appeals, and the result is the decree is affirmed.

### HICKS v. NORTHWESTERN AID ASS'N et al.

(Supreme Court of Tennessee, Oct. 6, 1906.  
Rehearing Denied Oct. 19, 1906.)

#### 1. INSURANCE—LIFE INSURANCE—INCREASED RATES.

A life policy provided that, while the rates specified therein were not fixed, it was believed that such rates would never be exceeded, and that, if any unexpected emergency should arise whereby the mortuary and reserve funds should become exhausted, then, and in such case only, it was agreed that the policy holder should be liable for such further assessment as would be necessary to meet the emergency and maintain the solvency of the company. *Held*, that the company had no power under the contract nor under the law to increase the rate of existing insurance, except in case of an emergency so specified.

#### 2. SAME—INCREASED RATES—NONPAYMENT—EFFECT.

Where rates on existing life insurance contracts were illegally increased, the insured were not bound to pay them to prevent a forfeiture, and, on the falling in of the policies by death, the beneficiaries were entitled to recover their full face value, less the amount of premiums unpaid at the lawful or contract rate.

#### 3. SAME—BURDEN OF PROOF.

Where an insurance policy provided that the rates should not be increased except on the happening of the unexpected emergency, that the mortuary and reserve funds should become exhausted, and the company sought to justify an increase in the rates, the burden was on it to show the happening of the unexpected emergency.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 2001.]

#### 4. SAME—TENDER.

Where a life insurance association, after illegally raising its rates, wholly changed its plan of business, basing it on the new schedule, and the association insisted on payment of the new rates by an old member, who was willing to pay his contract rate, a tender of such rate was waived.

#### 5. SAME—CONTRACT—ALTERATION—REORGANIZATION OF INSURANCE COMPANY.

Where the insurer issued a contract at a specified rate, which provided that the rate should not be raised except on a specified contingency, the insurer had no right to change its contract with the insured without his consent merely to facilitate the reorganization of its business on a more satisfactory basis.

#### 6. SAME—AMOUNT OF RECOVERY.

Where, under a policy of life insurance, the beneficiary was entitled to one assessment levied on the members, not exceeding a specified sum, and in an action thereon there was no evidence showing what an assessment would pro-

duce, plaintiff was entitled to recover the full amount of his policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 2013.]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Action by Nannie A. Hicks, as administratrix of Milton B. Hicks, deceased, against the Northwestern Aid Association and others. From a judgment of the Court of Chancery Appeals reversing a judgment for plaintiff, she appeals. Reversed.

Burkett, Miller & Mansfield, for appellant.  
Cooke, Swaney & Cooke, for appellees.

NEIL, J. This was an action brought to recover upon a policy of insurance for \$1,000, payable originally to Mrs. Nannie A. Hicks, but subsequently changed in accordance with its terms, so as to be made payable to the estate of the insured, Milton B. Hicks. There was a recovery in favor of the estate in the chancery court, but on appeal this judgment was reversed by the Court of Chancery Appeals.

The facts, so far as necessary to be stated, are that the policy was issued on the 18th day of July, 1892, and premiums were continuously paid by the insured up to January 18, 1903, in quarterly payments of \$3.47 each, the last payment being made in October, 1902, which carried the policy forward for the next quarter, which expired on January 18, 1903; but during this time, that is, about the time the last payment was made, the insurance company raised the rate from \$3.47 a quarter to \$4.86, that is, from the total amount for the year of \$13.88 to \$19.44. This increase was made without the consent of the insured, and he thereafter made no other payments, and died on the 21st of October, 1903.

The insured died suddenly, and his papers were left in considerable confusion; but from these and from other sources the following additional facts were gleaned:

When the fact that the rate had been increased was brought to the attention of the insured and of other policy holders in Dayton, Tenn., where all of them resided, all of them expressed dissatisfaction with the change, and all said they would not pay this increased rate, except Hicks. He expressed dissatisfaction with it, but said in the conference referred to that he did not wish to lose his insurance, and expected to pay it. However, he did not pay it, and the association claimed that the policy was forfeited by reason of such failure to pay. The policy contained the following provision:

"Notice of the amount of each quarterly payment and the time it is due will be sent to the insured thirty days before such payment is due, unless the insured has deposited for the year or half year in advance on account. Printed or written notice mailed to

the address of the policy holder as it appears on the books of the association at that date shall be deemed due and sufficient notice. The policy holder must notify the association at once of any change in residence, post office address, occupation, or name."

It does not appear that the association, after the new rate had once been called to the attention of the insured, ever notified him again of any assessment upon either the old or new rate, pursuant to the foregoing provision or otherwise, save in the following manner: Prior to October 9, 1903, how long prior does not appear, the association mailed to Mr. Hicks, who had been defendant's agent at Dayton, Tenn., a number of blank receipts applicable to the policies of the various policy holders in Dayton, including Hicks, with a view to having the premiums paid on the new rate. The receipts exhibited the amount of premium covered by each policy according to both the old and the new rate, and stated that the premium called for in each was due October 18, 1903. The policy contained a provision that payment was to be made "in advance, for a quarter, half year, or year, at the option of the insured." The receipt contained no reference to the period between October 18, 1902, and October 18, 1903 (during which Hicks had made only the payment of one quarter, \$3.47, at the old rate, and which, as already stated, carried the policy to January 18, 1903), except such as may be inferred from the following clause therein appearing, viz.: "The acceptance of the foregoing premium shall not be held to waive any forfeiture caused by nonpayment of this or any previous sum when due, or otherwise."

Hicks, being confused by the appearance of both the old rate and the new in this receipt, addressed a letter to the association on October 9, 1903, making sundry inquiries concerning the status of his own and other policies. The letter was:

"I am in receipt of several receipts for policy holders at this place and beg leave to inquire as to the present status of these policy holders. For example, take my own case. My receipt called for \$13.88, which is four quarterly premiums under the old rate. Now, if I pay this \$13.88, am I fully reinstated in the company, and failure to pay quarterly premiums when due waived? If it puts me in good standing and a policy holder, what is the value of my policy as an asset in my estate in case I should die? What would be the result of continuing to pay the old rate in accordance with the terms of the contract as originally issued to me? What would be the result if I pay the \$13.88 on the 18th inst., the time due, and after that pay the new rate of \$19.44, and what would be the quarterly rate of that date? If the payment of this \$13.88 on the 18th inst. reinstates me, it is my intention to pay it, but I should like full in-

formation as to the above for guidance as to course I shall follow in the future, whether to continue at the old rate or pay the new one, which I understand we have the option of doing. I cannot say as to the other policy holders, but your letter to me will probably determine them as to what course they will pursue."

Mr. Hicks died before the reply to his letter was mailed; but, in ignorance of his death, the association addressed to him a letter on October 23d, which exhibited their own view of the meaning of the demand made in the receipt; that is, that the increased rate must be paid.

The clause of the policy under which it is claimed the change was made from the lower to the higher rate was as follows:

"This association qualified under the so-called 'assessment laws' under which it is not obliged to tax its policy holders to maintain the legal reserve of level premium or old line companies. The maximum quarterly, semi-annual or annual payments to be made on account of this policy are set opposite the age of insured in the table of rates indorsed hereon. The amount named in such table of rates, and spoken of as the maximum payment, is not in any sense a fixed or artificial premium. The past experience of this company and the American Tables of Mortality indicate, as we believe, with absolute certainty, that the rate spoken of as the maximum will never be exceeded. If, however, any unexpected emergency should arise whereby the mortuary and reserve funds should become exhausted, then, and in such case only, it is agreed that the policy holder shall be liable for such further assessment as may be necessary to meet such emergency and maintain the solvency of the company."

There was no evidence introduced, and the Court of Chancery Appeals did not find as a fact that any unexpected emergency had arisen whereby the mortuary and reserve funds had become exhausted, and that any further assessments were necessary to meet such emergency and maintain the solvency of the company. The substance of the finding of the Court of Chancery Appeals upon this subject is that there was no evidence that such emergency had not arisen.

After the policy was issued, the company changed its name from that under which the policy was issued to the Northwestern National Life Association; but it is admitted in the pleadings that the corporation is in effect the same. As originally constituted, the company that issued the policy was an assessment concern; but under its new name it became a level rate premium company and formulated several plans whereby its policy holders might take advantage of the new plan, one of which was the increase of premiums.

The defense of the company is, in effect, that the policy sued on had been forfeited



by failure to pay the premiums that accrued subsequent to the payment which was made in October, 1902.

The face of the policy shows that the insured was, at the time it was issued, 27 years of age, and a table upon the back of the policy shows that the maximum rate at this age was \$3.47 per quarter, and the facts found show that he had been paying this maximum all the time up to and including the last payment made by him in October, 1902. There are numerous other facts found by the Court of Chancery Appeals bearing upon various phases of the case, that is, as applicable to various grounds of relief claimed in the original and amended bill; but the foregoing statement contains all that is material in respect of the crucial point in the case, the one upon which we think the true liability rests.

We think it perfectly clear that the defendant company had no power under the contract, or under the law, to increase the rate of Mr. Hicks' insurance, except in accordance with the terms of the contract; that, in case the premiums or quarterly payments were illegally increased, the insured was not bound to pay them; and that, upon the falling in of the policy by his death, while he was in arrears under such a state of facts, the policy did not stand forfeited, but was matured into a claim against the company for its full face value, less the amount of the premiums unpaid at the lawful or contract rate. *Covenant Mut. L. Ass'n of Illinois v. Kentner*, 188 Ill. 431, 58 N. E. 906.

The contract contained the provision that the rate should not be increased, except upon the happening of the unexpected emergency referred to in the foregoing quotation from the policy. The burden of proof was upon the defendant to show that such emergency had arisen. This is a sound view, not only by clear implication from the terms of the passage quoted, which made the right to call for increased assessments dependent upon the existence of an exceptional status that might thereafter arise, but also because the facts were peculiarly within the knowledge of the company, and the policy holder could not be supposed to know anything of them. *United States v. Denver & R. G. R. Co.*, 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106. The rule laid down in the contract was payment at the rate not exceeding the maximum named in the table indorsed. If the company claimed a right dependent upon the existence of an exceptional status, one outside the rule, it was no more than just that it should show that such status had become a reality. This it could prove with the greatest ease, if the fact existed, being peculiarly within its own knowledge. The negative could be proven by the complainant only with the greatest difficulty, if at all. *United States v. Denver, etc., R. Co., supra.*

The Court of Chancery Appeals seems to

have been of the opinion that the court should presume that the assessment was lawfully made, but manifestly such a presumption would deprive complainant of his rights under the contract, since it would wholly emasculate the term which he had provided for his protection, substituting an inference drawn from the performance of the forbidden act as a support for the act itself, in lieu of proof of a state of facts which would justify the performance of the act; such act being unlawful but for the existence of some exceptional state of facts. For example, we may suppose a given act unlawful under all circumstances but one. The doing of such an act would be *prima facie* unlawful. One claiming under such an act and asserting its lawfulness would have imposed upon him the duty of showing that the special fact was in existence which made it lawful. To infer lawfulness from the mere doing of the act would negative the existence of the rule, and destroy it.

In the brief of defendant's counsel, we are referred to *Supreme Lodge Knights of Pythias v. Knights (Ind.)* 20 N. E. 479, 3 L. R. A. 409, as a case in point. This case does not apply. The matter there complained of by the party suing was, in substance, this: The insurance department of this organization had a division, called the "second class," composed of about 16,000 people. From time to time an assessment was made to pay death losses on the whole of this membership, at the rate of \$1 each, and out of the fund so realized the amount of the certificate, \$2,000, was paid to the beneficiary, and the rest of the fund, it is presumed, kept to meet future death losses. Subsequently, a new class, called the "fourth class," was organized, into which all of the insured members of the organization were allowed to enter upon complying with the prerequisites for the constitution of the class. In this class the system of insurance was changed from the plan of arbitrary assessments of the same amount for each member to an assessment graduated according to the age of the member. It was contended by the plaintiff in the case referred to that the organization of the "fourth class" within the body of the general insurance organization had the effect of depleting the second class to such an extent as to almost annihilate it, since nearly all of the insured members went into the new "fourth class," and this was true. It was further contended that this change was a violation of the contract rights of the few persons who remained in the "second class," since an assessment upon the members of that class at the old rate would not produce anything like the sum of \$2,000 which was called for by their certificates. But it appeared that the "constitution" and by-laws of the order contained a reservation of the right and power to change or amend the "constitution" and by-laws, and that the change re-

ferred to was regularly made by the duly constituted authorities of the organization.

Responding to the contentions above referred to, the court said: "It was not the destruction of a vested right, because the power to amend was, as reserved, a part of the contract from which the right of the beneficiary emanated." Another reason was also given, to the effect that the right to enter the new class was open to all members on equal terms. However, the first answer was in itself a sufficient one. In the case now before the court it does not appear that there was any such reservation. There was, indeed, a reservation in the face of the policy to make new by-laws and regulations; but these were to be of such a character as that they should not be "in conflict with the contract rights of the insured." The exact language of the clause, appearing upon the face of the policy, is: "In accepting this contract, the insured and the beneficiary herein agree to be bound by the by-laws and regulations of this association now in force or which may hereafter be adopted, not in conflict with the contract rights of the insured herein."

In *Covenant Mut. Life Ass'n v. Kentner*, supra, it was held that, where a certificate issued to plaintiff's husband under which his life was insured in the defendant, an assessment life insurance company, contained no agreement that future changes in defendant's by-laws should affect his contract, the fact that the insured was chargeable with knowledge of the by-laws existing when his certificate was issued, and that they contained a provision that they might be altered, did not authorize defendant, under a change of by-laws, to increase the cost of carrying the insurance beyond the original terms of the contract.

In that case it appeared that a certificate was issued to the plaintiff's husband by which it was agreed to pay to the plaintiff on her husband's death the amount, not over \$5,000, of an assessment which it would make on all its members, on condition that the insured would pay on the death of each member a mortuary assessment not to exceed \$1, and expenses not to exceed 30 cents a month. The insured paid all of the assessments up to No. 149, levied March 1, 1899, which he refused to pay, and died April 23, 1899. Assessment No. 149 was levied on a new basis and was largely in excess of what assured agreed to pay. Upon these facts it was held that the fact that the rate agreed on with insured would not meet the cost of insuring him did not authorize defendant to increase its assessment beyond the contract rate in order to meet such cost, and hence that the refusal by insured to pay assessment No. 149 was justified, and did not authorize defendant to forfeit his rights under the certificate.

We have considered the question whether it was incumbent upon the insured, in order

to preserve his rights under this policy, to tender the premium due at the contract rate, from quarter to quarter.

In *Guetzkow v. Insurance Co.*, 105 Wis. 448, 81 N. W. 652, it is said: "The rule of law is maintained with great unanimity that one party cannot predicate a forfeiture, upon an omission by the other which his own conduct has helped to bring about; that the declaration that a policy of insurance is clearly forfeited will constitute a sufficient justification for the omission to tender subsequently accruing premiums or installments, upon the ground that the assured is justified in believing that no tender would be accepted, and the formality is therefore unnecessary; that the law will not require the doing of a vain thing. 2 *Joyce on Insurance*, § 1123; *Shaw v. Republic L. Ins. Co.*, 69 N. Y. 286; *Girard L. Ins. Co. v. Mutual L. Ins. Co.*, 86 Pa. 236; *National Mut. Ins. Co. v. Home Benefit Soc.*, 181 Pa. 448, 37 Atl. 519, 59 Am. St. Rep. 666."

In *Benjamin v. Mutual Res. Fund Ass'n* (Cal.) 79 Pac. 517, a very recent case decided in 1905, it was held that a certificate holder in an assessment insurance association, of whom an illegal assessment was demanded, need not pay such assessment, nor tender a sum equivalent to a legal assessment, in order to preserve his rights under his contract; nor need he, on demand by the association, furnish it with his reasons for not paying the assessment. To same effect, in substance, as to the absence of a necessity for tender, is the case of *Heinlein v. Ins. Co.* (Mich.) 59 N. W. 615, 25 L. R. A. 627, 632, 45 Am. St. Rep. 409, and *Hayner v. Am. Pop. L. Ins. Co.*, 69 N. Y. 435.

In *Supreme Council American Legion of Honor v. Orcutt*, 119 Fed. 682, 56 C. C. A. 294, the facts, so far as they bear upon the question before us, were these: "

Upon the trial it appeared that the assessment for the month of July 1897, was, by the rules of the association, required to be paid before the end of the month; that the assured paid it to one Daoust, the cashier of a bank at Defiance, Ohio, on or about the 20th of July, 1897, but that Daoust did not forward it to the collector of Alpha Council No. 1 to whom he should have forwarded it, until the 5th of August following; that the collector was required to make his returns to the supreme treasurer for the month of July on August 12th; that he reported the July assessment of Orcutt as not having been paid until August; that Orcutt was thereupon suspended, and the check was returned to Daoust; that he made application for reinstatement on August 23, 1897; that his case was referred to the medical examiner, who reported his physical condition not acceptable, and thereupon the petition for reinstatement was disallowed; that Orcutt was, at the time of his suspension, in falling health; and that he died in September of the following year. There was testi-

mony from which the court concluded that Daoust was the agent of the association.

For the association it was urged:

"(1) That Orcutt was not a member in good standing at the time of his death. But if the facts be" said the court, "as the jury found, that he was suspended without cause, it was not competent for the defendant to put its own wrongful action forward as a defense. \* \* \*"

"(2) \* \* \* That the insured did not tender subsequent dues and assessments, or claim the privileges of a member, is of no moment. He had no notice of any such levies, and it would have been a vain thing for him to make such tender or claim his privileges. Nor did his claim to be reinstated constitute a waiver of his rights. That was an obvious and proper way to have the wrong undone. The defendant's refusal was a repetition of the wrong. The association was in no wise prejudiced by these proceedings, and is in no position to claim that the plaintiff surrendered a valuable right."

To the same effect is *Wagoner v. Supreme Lodge Knights & Ladies of Honor* (Mich.) 87 N. W. 903. In that case, it appeared that a previous assessment had been refused, on the ground that Mrs. Wagoner was not a member of the association. Upon the point whether Mrs. Wagoner should have continued to make tender of subsequent assessments in order to keep her policy good, the court said: "The law does not require useless things to be done. It was useless to tender a second assessment when the previous one had been refused on the ground that Mrs. Wagoner was not a member." So, in *Dennison v. Masons' Fraternal Acc. Ass'n of America*, 69 N. Y. S. 291, 59 App. Div. 204, it was held that, where timely tender of premium on an accident policy was made and rejected, and a wrongful declaration of forfeiture of the policy made, the insured need not thereafter keep the tender good to entitle him to sue on the policy.

There is a recent case, *Lavin v. Grand Lodge A. O. U. W.* (Mo. App.) 86 S. W. 600, which fully recognizes the rule supported by the preceding cases, but takes a distinction to the effect that subsequent tender should be made when there is a probability that the refusal of a previous premium may have been the result of mistake, and when ample means are afforded by the society for the ascertainment and rectification of the wrong and the reinstatement of the member. In such case it is said that a tender is not a vain and useless thing.

But, in the case now before the court, it is clear that no subsequent tender of the old rate would have availed. The association had wholly changed its plan of business, and the new rates were based upon that new plan. The last communication from it upon the subject in response to an appeal

for an explanation, and a suggestion that the member was willing to pay the old rate was an insistence upon the payment of the new. Moreover, as above shown by a quotation from the policy, it was the duty of the association to give 30 days' notice in advance of such assessment, and it does not appear that any such notice was given or any assessment at the old rate; but, from the sending of the blank receipt above referred to, it seems that a demand was made for payment on the new rate. Here was a continuation of the attitude of the association in opposition to the old rate. Can it be supposed that under such a state of facts a tender of the old rate would have been of any avail? Clearly not. It does not even appear that an assessment was ever made upon the old rate after the association went upon its new plan, and such assessment was, of course, necessary before any collection on that basis could be made. *Stewart v. Grand Lodge*, 100 Tenn. 267, 46 S. W. 579; *Insurance Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968. Here was another and continuing evidence to the assured that no payment at the old rate would be received, and that a tender would have been a vain thing. We conclude that the assured was under no obligation to make the tenders referred to.

That the defendant had no right to change its contract with the insured without his consent, merely to facilitate the reorganization of its business upon a more satisfactory basis, is a proposition abundantly supported by the following authorities: *Gaut v. Am. Legion of Honor*, 107 Tenn. 603, 64 S. W. 1070, 55 L. R. A. 465; *Hadly v. Queen City Comp.*, 1 Tenn. Ch. App. 413; *Strauss v. Mut. Reserve Fund L. Ass'n* (N. C.) 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Bragaw v. Sup. Lodge Knights & Ladies of Honor* (N. C.) 38 S. E. 905, 54 L. R. A. 602; *Peterson v. Gibson* (Ill.) 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263; *Thibert v. Sup. Lodge Knights of Honor* (Minn.) 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412; *Covenant Mut. L. Ins. Ass'n v. Kentner*, supra.

There is a diversity of opinion as to the measure of damages applicable in such a case, where the insured sues in his lifetime for breach of the contract (*Strauss v. Mut. Res. F. L. Ass'n*, supra; *Insurance Co. v. Garmany*, 74 Ga. 51; *Barney v. Dudley*, 42 Kan. 212, 21 Pac. 1079, 16 Am. St. Rep. 476; *Speer v. Insurance Co.*, 36 Hun. 322; and see *Insurance Co. v. Robison* (C. C.) 54 Fed. 580; *Insurance Co. v. Weck*, 9 Ill. App. 358); but it was held, and we think correctly, in *Covenant Mut. L. Ins. Co. v. Kentner*, supra, that, in a suit by a beneficiary of the policy after the death of the assured, when there was no evidence as to what an assessment would produce, and plaintiff was otherwise entitled to recover, a judgment for the full amount of the certificate would be proper.

It was further held in that case that the fact that an assessment would have produced less than the face of the certificate, if true, would be a mere matter of defense which would have to be shown by the assocation.

We think the complainant in the present case is entitled to a decree for the full amount of the policy, less the premiums unpaid at the contract rate maturing between October, 1902, and October, 1903, with interest from the filing of the bill. The decree of the Court of Chancery Appeals is therefore reversed.

We are unable to see any just ground for the allowance of a credit of \$108.96, shown by the chancellor's decree. This credit will therefore be disallowed, and a decree entered as above directed. The defendant will pay all of the costs of the cause.

### COWAN et al. v. WALKER.

(Supreme Court of Tennessee. Oct. 17, 1906.)

#### 1. WILLS—PROBATE—CONTEST—PRELIMINARY CONTROVERSY.

The right of a proposed contestant to impeach a will, if disputed, presents a controversy separate from and preliminary to the contest itself, in which evidence may be offered as to the issue joined, and from the decision of which an appeal lies before the contest is heard.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 751, 760.]

#### 2. SAME — PERSONS ENTITLED TO CONTEST WILL.

Where an earlier, valid will leaves no property to a party, he is not entitled to contest the probate of a subsequent will, though he is an heir of the testator.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 550-559.]

#### 3. SAME — ADMISSIBILITY OF EVIDENCE—UNPROBATED WILL.

On an issue as to the right of a party to contest a will, evidence as to an earlier, unprobated, valid will, in which the proposed contestant is left no property, is admissible.

#### 4. SAME—ESTOPPEL.

That a will is probated does not estop the proponents from relying on an earlier unprobated will as a bar to a contest of the will probated.

Error to Circuit Court, Knox County; Joseph W. Sneed, Judge.

Petition of M. H. Walker against Virginia Swepson Cowan, executrix, and others, to certify a will to the circuit court, to be tried on an issue of *devisavit vel non*. From a judgment of the circuit court reversing an order of the county court dismissing the petition, the executrix and others bring error. Reversed, and petition dismissed.

Shields, Cates & Mountcastle and Lucky, Sanford & Fowler, for plaintiffs in error. Templeton, Lindsay & Templeton, for defendant in error.

SHIELDS, J. The defendant in error, claiming in the character of heir, filed the

petition in the present cause asking that there be certified to the circuit court of Knox county, to be tried upon an issue of *devisavit vel non*, an instrument bearing date the 30th of November, 1901, and probated by the county court of that county in April, 1902, as the last will and testament of R. R. Swepson, then lately deceased. The petitioner alleged as a ground for this action that this instrument was not the last will and testament of Mr. Swepson, in that, for more than 12 months before his death, he had been of unsound mind and memory, and thus was incapacitated from making a last will and testament; and further, that the instrument in question was the result of undue influence exercised upon him. The petition contained the further averment that by this instrument the petitioner was given nothing, but that the whole of the estate, both realty and personalty, by its terms passed to others named as beneficiaries therein.

The defendants to this petition, answering, denied that R. R. Swepson was mentally incapable, at the time of making and publishing this instrument as his last will, or that it was executed as the result of undue influence. It was also averred that, in any event, the petitioner had no right to contest this instrument, and as to this defense the answer contains the following paragraph: "These defendants plead and aver that on the 22d day of September, 1900, the said Robert Redd Swepson made and published a valid and legal last will and testament which was witnessed by James Comfort, Jno. E. Horn, and James C. Comfort, in the presence of said testator and at his request, and in the presence of each other, and on the 10th day of April, 1901, the said testator made and published a codicil to said will, and that by said will and codicil he devised his entire estate of every kind, character, and description to certain legatees and devisees named therein, and that the said M. W. Walker was not willed nor bequeathed any part of said estate by said will or codicil. \* \* \* Defendants aver that said will and codicil remained in full force and effect and are still in existence, and were never revoked in any way by the said Swepson, except by the execution of the later will, now being attacked by the said Walker in this case. These defendants, therefore, aver that, even if the will probated by them in the county court of Knox county, on the 3d of April, 1902, is invalid for any of the reasons set out in said petition, and should be set aside and declared to be null and void, the said petitioner, M. W. Walker, would not be entitled to any part of the estate of the said Swepson, deceased, and that he has no interest whatever in said estate, and has no right in law or equity to contest said will of November 30, 1901."

The county court heard evidence upon the

Issue thus raised by the answer as to the right of petitioner to make this contest, and dismissed his petition, from which action the petitioner prayed and was granted an appeal to the circuit court. Upon the trial of the cause upon the same issue in this latter court, the circuit judge reversed the action of the county court, sustained the petition, and sent the case back to that court with a direction that it certify the will in question to the circuit court, for the trial of the issue of *devisavit vel non*. Upon this action error is assigned by the defendants to the petition.

The record shows that, at the trial in the circuit court, evidence was introduced by the petitioner showing that Robert Redd Swepson died on March 23, 1902; that he was never married, and that his next of kin were his nephews and nieces, the children of deceased sisters; that the petitioner was a nephew of Robert Redd Swepson; and that, if the latter had died intestate, the petitioner would have inherited one-twelfth of his estate under the laws of Tennessee.

To meet this case and support the averment of their answer on the point in question, the defendants produced in open court an instrument of writing purporting to be the will of R. R. Swepson, dated September 22, 1900, together with its codicil, dated April 10, 1901, which, together disposed of the entire estate of the testator, omitting, altogether, petitioner Walker from any share in the estate. The due legal execution and publication of this will and codicil, together with the fact that, at the time of the execution thereof, the testator was of sound mind and disposing memory, was shown by uncontroverted testimony. It was further shown by the testimony of Mr. C. E. Lucky, who was legal adviser of the deceased and the draftsman of the will dated November 30, 1901, that this prior will was never revoked, save and except by the execution of the later, and that the testator executed the will of November 30, 1901, to take the place of the will of September 22, 1900, and its codicil dated April 10, 1901, and that he (Lucky) kept both of said wills, at the request of the testator, and had them in his possession at the time of the testator's death.

All of this evidence was excluded, however, upon petitioner's exception, and the judgment was then rendered, as has been already set out, which is now made the subject of criticism on this appeal in error.

It is well settled in this state that the right of a proposed contestant to impeach a will, if disputed, presents a controversy separate from and preliminary to the contest itself, in which it is competent for the contestant and contestee to offer evidence as to the issue joined, and that an appeal lies from a decision thereof, before the contest is heard. *Wynne v. Splers*, 7 Humph.

393; *Keith v. Raglan*, 1 Cold. 474; *Crocker v. Balch*, 104 Tenn. 6, 55 S. W. 307; *Gore v. Howard*, 94 Tenn. 581, 30 S. W. 730; *Ligon v. Hawkes*, 110 Tenn. 514, 75 S. W. 1072; and *Bowers v. McGavock*, 114 Tenn. 430, 58 S. W. 893.

The plaintiffs in error invoke this rule, upon the theory that, if the present contest should succeed, the defendant in error would be without interest in the estate, as the effect of a finding that the later will, which was executed, according to the testimony of Mr. Lucky, to take the place of and as a substitute for the earlier one, was invalid on either of the grounds alleged in the petition, would be that the earlier one remains in force, and by that, the defendant in error, in the disposition of the entire estate to other beneficiaries, is left without any substantial interest therein; and, this being so, he is not entitled to make the present contest.

If the testimony directed to this point is competent, then we think the petitioner must be repelled, as the rule of law is well settled that, if the later will fails for any reason, the earlier will remains in full force and effect.

This rule is announced by various text-writers on the subject and has been often applied by the courts, especially where the earlier will is canceled by the testator with the purpose of making a new one, which, in some way, is disappointed. The rule is thus stated by Mr. Jarmon, in his work on Wills (volume 1, p. 294): "And it may be observed that, where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and, therefore, if the will intended to be submitted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force."

Mr. Pritchard, in his valuable work on Wills and Administration, in section 272, states the rule in very similar language.

But the operation of the rule is not confined to cases of cancellation. Mr. Page, in his recent work on Wills, in section 257, says, in the following language: "The testator may not at the time he performs the act be competent to make a will, and in such case he cannot form the intention to revoke a will. A will can only be revoked by a person of sufficient age, mind and memory to make a valid will. \* \* \* Since the intention to revoke is an essential element of revocation by it, manifest on the will, it follows that, where such outward act is caused by the undue influence of another, it is not a revocation."

These authors support their text by reference to many cases from courts of last re-

In the first of these cases, from our reports, the rule is indirectly recognized. s there said that, if a testator of und mind order his will to be burned, and burned, it will be established after his h as it existed in its integral state, if be ascertainable; if it be not burned, e would be, of course, no revocation. In er v. Kendall, the rule is directly recog- d. It is there said: "Obliteration and rlineation are inoperative to change a If made with a view of making a dift disposition which is not effectually ed out. So, if such change of purpose ot carried out because of sudden death, ny other cause, or the attempted disposi- is invalid, the canceling of the first, be- dependent thereon, is null and void, and ; not effect the revocation of the original , but it will stand as it was before the ellation. In 1 Has. 143, Sir John Mitch- says that such cancellation, 'being pre- tory to the deceased making a new will conditional only, was not a revocation.' l Williams on Executors and Notes, this rine is fully sustained. If the new dis- tion fails for want of proper attestation, effect is the same according to these au- thities."

he question, then, arising is: Can the roated will, of date September 22, 1900, le when, upon the uncontroverted testi- y in this record, the testator was of nd mind and memory, be relied upon in of petitioner's right to contest the later , which was made as a substitute for prior will? In other words, can this iler unprobated will be introduced in evi- ce to show that, while petitioner had an arent interest as heir, yet he is without stantial interest in the estate, even if he uld succeed in the present contest? n McCutchen v. Loggins, 109 Ala. 457, South. 810, the facts were as follows: e bill was filed by complainants under authority of the Alabama statute to test an instrument executed in the year 6, and after death probated as the last l of the testatrix. In this instrument the plainants were not provided for. The und alleged for the contest was that a er will made by the testatrix, in Febru- , 1888, gave an interest in the estate to : complainants, and that this later will tained a clause of revocation of all for- r wills. To this, among other defenses, the pondent, who claimed under the probated ll, set up in reply that in June, 1888, the atrix executed another will in which she roked all other wills previously made by r, except that of 1876, already probated, d that, by this last will, the will of 1876 th its disposition of property was express- reaffirmed. This last and confirmatory ll had not been probated. The case went to the jury and they found

this finding the bill of complainant was dis- missed. By appeal the case was carried to the Supreme Court of Alabama, where it was, in substance, held: First, that the complainants had no status in court to con- test the will of 1876 save as beneficiaries under the unprobated will of 1888, but that as such beneficiaries they did have the right to impeach, if they could, the earlier will; second, that in meeting this attack of the complainants the contestee could avail himself of the unprobated will of June, 1888, which reaffirmed the will of 1876.

To the argument of complainants "that, as the chancery court had no jurisdiction to probate the third will, the verdict of the jury finding this to be the last will and testament of the deceased did not authorize the rendition of any decree," the court said it was without merit, for "complainants can have no standing in court except upon es- tablishing the second instrument as a last will and testament. The verdict of the jury was adverse to them on this issue. It is of no concern to complainants whether the first or last will be probated, or whether any will be probated, if it be true that the instrument under which they claim is not a valid last will and testament."

In other words, the court there holds that a contestee may rely upon an unprobated will for the purpose of showing that the contest- ant had no real interest in the estate, and this, although it appeared that a former will in favor of the contestee had already been ad- mitted to probate. It is evident that the court did not regard the probate of the earlier will as being an estoppel upon the contestee to rely for his defense upon a later unpro- bated instrument.

Barksdale v. Hopkins, 23 Ga. 332, presents a case furnishing an analogy of value in the consideration of the question at bar. The facts in that case were that one Barksdale propounded a writing, dated in 1848, for pro- bate as the will of one Mrs. Bunkley. To the admission of this writing to probate certain of the next of kin of the deceased entered a caveat, resting on several grounds. Among these was this: That the will offered for probate was by the testatrix during her life- time canceled by an obliteration of the seal attached thereto, with the intention thereby of revoking it; and, further, that in 1850 she executed in the presence of witnesses an in- strument in writing whereby she expressly revoked all former wills by her made. This later will was neither probated, nor was it offered for probate. To the admission of this instrument in evidence to show revoca- tion of the earlier will, the counsel for the propounder of the earlier will presented ob- jections, one of which is thus stated in the opinion of the court: "They said that, in every case in which an instrument is to be used as a will, one single case excepted, the

only evidence admissible in proof of the instrument is the judgment of the probate court establishing the instrument as a will; that the single excepted case is that in which the instrument itself is being offered for probate to a probate court; that this instrument was not itself being offered for probate; therefore that, if the purpose of the caveators was to use this instrument, including the revocatory words, as a will, then the evidence of a person subscribing the instrument as a witness was not admissible as proof of the instrument."

To this objection the court made the following answer:

"Now, that this proposition may be true, a second one has to be true, to wit, this: That in a probate court a will can have no revocatory efficacy, unless it has been admitted to probate, or is offering itself for probate. Is then this latter proposition true?

"If a man by will gives property to A., and by a second will gives the same property to B., and B. dies before A., or B. is a person that by reason of some disability cannot take the property given, the second revokes the first; and yet, in both of these cases, the second will is void [citing authorities]. This proposition, I believe, is not disputed.

"These are cases in which it cannot be true that the revoking will was admitted to probate. The revoking will was void. They are cases, too, in which it cannot be true that the revoking will offered itself for probate; that a will professing itself to be revoked should yet offer itself for probate is absurd.

"This second proposition, then, is not true. What is the true proposition on the subject to be deduced from these cases? It would seem to be this: That, whenever a will is efficacious for the purpose of revoking a former will, a probate court may take notice of it for the purpose, although such will is one that has not been admitted to probate, or even one that is not capable of being admitted to probate."

Thus it will be seen, in the first of these cases, a contestant was repelled by an unprobated will, and, in the second, an instrument, which was not only unprobated, but not offered for probate, was held to be competent as evidence to defeat the probate of an earlier will, which was propounded for probate. If these authorities are sound (and in *Rudy v. Ulrich*, 69 Pa. 177, 8 Am. Rep. 238, the Supreme Court of Pennsylvania said the proposition announced in the *Barksdale Case* "was too clear to be doubted"), we are at a loss to understand why plaintiffs in error may not avail themselves of the unprobated will of 1900 to defeat the defendant in error in his effort at a contest in the present case. As was said by the Alabama Supreme Court, in the *McCutchen Case*, that it is unprobated does not concern him. He takes nothing under the instrument, and therefore he is not affected whether it be probated or not.

But, for the petitioner, it is said, though

it should turn out that he has no interest in this estate, yet, as heir he has an apparent interest, and this entitles him to make this contest.

Under our authorities, however, a contestant must have a substantial interest which is to be served by his contest. *Wynne v. Splers*, supra, and the various cases citing it.

Let it be granted, however, to the petitioner, that prima facie, being one of the next of kin of the deceased, he had the right claimed for him by his counsel, yet we think this prima facie case is necessarily met and destroyed by the existence of the earlier, valid, but unprobated, will. This leaves him a stranger to the estate, and as such without any right of contest.

It is insisted, however, that, having probated the last will, the plaintiffs in error are estopped from relying on the earlier will for any purpose, that they will not be permitted to occupy the inconsistent positions of relying upon the last will, and setting up the earlier one as a bar to plaintiffs' contention. We think this insistence carries the rule of estoppel beyond its natural limits. It is true that the judgment of probate of a will pronounced by a court of competent jurisdiction, even in common form, binds all parties until revoked upon an issue of *devisavit vel non*. But this was not the issue that was being tried by the court, and therefore the evidence of the unprobated will was not directed to it. The question, and the only question, then in controversy was as to the right of petitioner to make this contest. The evidence was offered only for the purpose of showing that he was without any real interest in the estate. If petitioner had executed a release of all interest in this estate, it would have been competent for the plaintiffs in error to show that fact as a conclusive answer to his claim to contest. *Gore v. Howard*, 94 Tenn. 577, 30 S. W. 730.

The question as to the release of interest in the testator's estate, and its effect upon the rights of the parties, though next of kin, to raise the issue of *devisavit vel non* upon his will, did not arise incidentally in the case last cited; nor was it disposed of in an incidental way by this court upon appeal. To the contrary, the question went to the core of the issue then being tried, and it was held that, save as to one of the parties, who claimed that she had never signed a release, or authorized any one to sign for her, and whose evidence tending to show that fact was rejected by the trial judge, the judgment of the court below, holding that the contestants who executed these releases were barred from maintaining the proceeding, was sustained by this court.

If it be, as was held in that case, that it was competent to determine the question as to the effect of these releases upon the right of contestants to impeach the probated will of the testator, it would seem that a court

should equally have power to adjudge the same question, arising, as it did in this case, upon an unprobated will, confessedly valid in every respect, disinheriting the contestant. In each case the contestant is shown, by the evidence offered, to be without substantial interest in the controversy. If the one is to be repelled by his own act, why should not the other by the act of the person who had the estate to bestow or withhold at his pleasure?

We find nothing in our cases, unless it be in *Miller v. Miller*, 5 Helsk, 723, which conflicts with this view. In *Wynne v. Splers*, supra, a husband instituted a proceeding to contest the will of his deceased wife, and the executor, in bar of his claim, set up a deed of marriage settlement made by the husband and wife, and also a compromise, or agreed decree, rendered by the chancery court settling the respective rights of the husband and the wife as to the estate of the wife. As to these defenses, the court said: "It is insisted that the stipulations of the deed of marriage settlement of 1844 are such, in point of legal effect, as to exclude him from the succession to her separate property, even if she had made no will. We think this is very probably so. But we should hesitate to give to these instruments in this incidental way the effect claimed for them of presenting an issue upon the validity of the will at the instance of one whose relations to the testatrix gave to him the apparent right to make up such issue. But we feel constrained to give a larger operation to the decree of the chancery court at its October term, 1844. The form and matter of this decree are alike an estoppel against the husband disputing the will of the wife, or obtaining a re-probate of the same."

From this it will be seen that the court did not rule that the deed of marriage settlement was incompetent on the issue then being tried, but simply expressed hesitancy in giving the effect to it on the trial of this preliminary issue claimed by the contestee. The case presented another ground upon which the contestant was clearly barred from maintaining his suit; that is, the agreed decree referred to, and without determining the other point the estoppel was rested upon that. However, the doubt, or hesitancy, there expressed as to the incompetency of such an instrument as evidence on the matter in question, we think, is set at rest in *Gore v. Howard*, supra, for the release there held to be competent had no superior evidential efficacy to the marriage settlement relied upon in the earlier case.

In *Miller v. Miller*, supra, a contest over the will of a deceased husband was instituted, in part, by a widow, who had dissented from it within the statutory period, and, among other objections, it was urged that she could not maintain the contest, as by her dissent she had cut herself off from all interest under the will. The court confessed

that the objection presented a serious difficulty, and one with regard to which there was much trouble in reaching a conclusion. It was determined, however, in view of our statutes fixing the time and the circumstances under which a widow shall dissent, that her right to contest, notwithstanding her dissent, would be maintained. It would seem that, having dissented from the will, and thereby having placed herself on the same plane with a widow whose husband died intestate, she would have no further interest in the will, and that her contest should not have been maintained. However this may be, yet we do not think the case, which for authority must be confined to its exact facts, conflicts with the view that we have already expressed in this opinion. We are satisfied that the evidence adduced by the plaintiffs in error as to this unprobated will was competent, and that the trial judge was in error in excluding it. Upon this evidence it is clear to us the contestant had no substantial interest, and that he was without right to maintain this contest.

This court, therefore, reversing the action of the trial judge, and rendering the judgment which he should have given, orders that the petition in this cause be dismissed, at the cost of the petitioner.

#### SIMMS v. RANDALL et al.

(Supreme Court of Tennessee. Oct. 27, 1906.)

#### INSURANCE—MUTUAL BENEFIT INSURANCE—BENEFICIARY—VESTED INTEREST.

The by-laws of a mutual benefit society provided that members might change beneficiaries on application, accompanied by the consent of the original beneficiary and surrender of the original certificate. A certificate was issued to a member for the benefit of his sister, who died before the member. The member made no change in the certificate, and at his death it remained as it had been originally issued, "payable to" his sister. *Held*, that the sister died the owner of a vested interest in the certificate, and the fund accruing on the death of the member passed under the statute of distribution to her distributees.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1974.]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Action by P. D. Simms, administrator of J. H. Randall, deceased, and Annie M. Randall, deceased, against Mabel Randall and others, for the determination of the proper disposition of a fund accruing from a mutual benefit certificate issued to J. H. Randall, deceased. From a decree awarding the fund to the distributees of the estate of J. H. Randall, deceased, complainant appeals. Reversed and decree rendered.

White & Martin, for appellant. R. H. Williams and Nathan Bachman, for appellees.

BEARD, C. J. One J. H. Randall was a member of the Expressman's Aid Society from the year 1874 until his death, which oc-



curred on the 22d of February, 1905. This was a corporation organized as a mutual insurance and benefit society. On the 7th of July, 1874, at his instance, there was issued to him a certificate, on the face of which it was provided that the benefit secured to him as a member should be paid to Miss A. M. Randall, his sister, who was at that time, in part, dependent upon and supported by him. Miss Randall, the beneficiary, died in the year 1903; her death thus antedating that of her brother. The latter made no change in the certificate, and at his death it remained as it had been originally issued, "payable to Miss A. M. Randall." Both these parties died intestate. The complainant in the present cause qualified as the administrator of the estate of J. H. Randall, and also as administrator of the estate of Annie M. Randall. The fund, accruing from this beneficial certificate, amounting to \$1,524, was paid into his hands by the society, and the present bill is filed against the distributees of these two estates for the purpose of having the court determine the question as to its proper disposition.

In the opinion of the Court of Chancery Appeals, delivered in this cause, the articles of the Expressman's Aid Society, so far as they were necessary to show the purpose of the organization, and to furnish aid in the solution of the question presented, are set out. With regard to the purpose of this organization, it is only necessary to say that its constitution provided that the object of the society was the collection of contributions from its members, in accordance with a fixed table of rates, and the distribution of the same to such beneficiaries as were entitled to the same at the death or permanent disability of a member. It is a purely mutual institution, founded upon the good faith of its members, and it is provided that any employé of a responsible express company in good health, and approved by a member of the express company, might become a member of the society by subscribing to its articles. There is a further provision that at the time of joining the society a certificate of membership should be issued, signed by its proper officers, bearing the official seal of the society, stating to whom the benefit fund should be paid at the death of the member, in case the same is not to be paid to himself. Article 14, however, is that one which controls this litigation. In it, it is provided that members may change beneficiaries by making application therefor in writing through the local secretary of the society, accompanied by the written consent of the original beneficiary, if capable of consenting thereto, acknowledged before a notary public and attested by two witnesses, and therewith returning and surrendering the original certificate. Upon this being done a new certificate was to be issued. By the terms of this article, however, no change could be made where the beneficiary already named was under a

legal disability—for instance, was a married woman, insane, and the like.

Under this article it will be observed that the control of the assured over the certificate after it had been issued, naming some other person than the assured as a beneficiary, was limited. It was not within his power, at his own pleasure, to surrender the old and require a new certificate to be issued payable to another beneficiary. This could only be done with the consent of the beneficiary already named, given in the most formal way, and there was a large class of persons who, laboring under disability, were not permitted to give this consent. In view of this controlling provision in the constitution and by-laws of this society, the question, then, is: Were the benefits to accrue from this certificate so vested in Miss A. M. Randall that they were not affected by her death, though it occurred prior to that of J. H. Randall? It is well settled in this state, and the holding here is in accord with the great weight of authority, that, when a policy is issued payable to a third person whose relationship to the assured is such as to authorize the taking out of insurance for the benefit of such party, a right is at once vested which cannot be divested without the consent of the beneficiary. *Gosling v. Caldwell*, 1 Lea, 453, 27 Am. Rep. 774. An exception to this general rule exists, however, when the by-laws of the association or order, or the terms of the certificate, or policy, permit the member to change the beneficiary at pleasure. In such case, as is said in *Life Association v. Winn*, 96 Tenn. 224, 33 S. W. 1045: "The beneficiary acquires no vested interest \* \* \* owing to the right of revocation, which is by the condition reserved to the assured." In other words, there the beneficiary has a mere expectancy, depending alone upon the will of the assured.

The certificate, however, in the present case, and the article of the society, already set out, are clearly distinguishable from the policy and the conditions in controversy in the case last referred to and the authorities which were cited in the opinion of the court in support of the principle there announced. In the case at bar there was no right of revocation reserved, and the assured, as has already been seen, could not deprive the beneficiary of this certificate without her consent. In this respect, we think, the case is in line with the rule announced in *Gosling v. Caldwell*, supra, and the authorities with which that case is in accord. For, with regard to a policy such as was there in controversy, while the assured could not at his own pleasure change the beneficiary, yet with the consent of the latter, legally competent to give consent, he could make such change. So it is the stipulation in article 14 conferred no more control over the certificate than the assured could have had without it—it neither limited the right of the original beneficiary, nor enlarged the power of the assured over it

—for, without it, upon the consent of Miss Randall, she not being under disability, the certificate issued to her might have been surrendered, and a new certificate naming another beneficiary could have been issued.

We think it clear that Miss Randall died the owner of a vested interest in the certificate, and the fund which accrued upon the death of J. H. Randall passed under the statute of distribution to her distributees.

The decree of the Court of Chancery Appeals is therefore reversed, and a decree will be entered here in accordance with this opinion.

### COWAN v. STATE.

(Supreme Court of Tennessee. Oct. 27, 1906.)

#### CRIMINAL LAW—CORRECTION OF JUDGMENT ON APPEAL.

Where a verdict in a criminal prosecution is in proper form, and the circuit court has rendered an erroneous judgment, the Supreme Court, on appeal by defendant, will make the proper correction, and render such judgment as the circuit court should have rendered.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3190.]

Error to Circuit Court, James County; Geo. L. Burke, Judge.

Cornelia Cowan was convicted of voluntary manslaughter, and she brings error. Judgment modified.

John L. Smith, for plaintiff in error. The Attorney General, for the State.

NEIL, J. The plaintiff in error was indicted for the murder of one Walton in the circuit court of James county, and convicted of voluntary manslaughter. The verdict and judgment of the court, along with the motion for new trial and prayer for appeal, all in one entry, appear in the following language, omitting the formal part of the entry:

"Said jury, after consideration of the case, upon their oaths say they do not find the defendant guilty of murder either in the first degree or second degree, but that she is guilty of voluntary manslaughter of the said W. H. Walton in the manner and form as charged in the indictment, and the jury upon their oaths do further say that for the offense aforesaid the said defendant, Cornelia Cowan, shall undergo confinement in the penitentiary of the state of Tennessee for a period of two years. And now comes the defendant, and moves the court for a new trial for errors which are manifest in the record, which motion, being understood by the court, is overruled, and the court did adjudge the defendant guilty, as found by the said jury. Thereupon the defendant prayed an appeal to the next term of the Supreme Court at Knoxville, Tennessee, which is hereby granted."

There is no bill of exceptions.

The judgment is plainly defective, but it may be amended here so as to permit the entry of a formal judgment on the verdict.

In respect of the powers of this court concerning matters of this kind, the following rules have been established by our cases: Where an error has been committed by the jury in rendering a verdict for a term either higher or lower than that authorized by the statute which designates the punishment for the crime, there is no remedy in this court except a reversal, and a remand to the lower court for further proceedings. *Mayfield v. State*, 101 Tenn. 673, 676, 49 S. W. 742; *McDougal v. State*, 64 Tenn. 660. But where the verdict of the jury is in proper form, and the circuit court has rendered an erroneous judgment on the verdict, this court will, on appeal of defendant, make the proper correction, and render such judgment as the circuit court should have rendered. *Cronan v. State*, 113 Tenn. 539, 82 S. W. 477; *Griffin v. State*, 109 Tenn. 17, 35, 70 S. W. 61; *McCampbell v. State*, 116 Tenn. 98, 93 S. W. 100; *Kelly v. State*, 66 Tenn. 323; *Sword v. State*, 24 Tenn. 101; *Johnson v. Chattanooga*, 97 Tenn. 247, 36 S. W. 1092. The same is true in civil cases. *Nighthert v. Hornsby*, 100 Tenn. 82, 83, 42 S. W. 1060, 66 Am. St. Rep. 736, and cases cited.

In *Kelly v. State* the verdict of the jury fixed a term within the statute 14 months, but the circuit judge rendered a judgment imposing a term of 5 years. This court on appeal corrected the judgment, and rendered one in accordance with the verdict. In *Johnson v. Chattanooga* the circuit judge imposed a fine less than the minimum prescribed by statute. On appeal this court corrected the judgment, and raised the amount to the minimum fine. In *Sword v. State* this court on appeal corrected the judgment of the circuit court, and added imprisonment provided by the statute, which the circuit judge had omitted.

Let the judgment be corrected and affirmed.

### ACKER v. MAYOR AND ALDERMEN OF KNOXVILLE.

ACKER et ux. v. SAME.

(Supreme Court of Tennessee. Oct. 13, 1906.)

#### 1. MUNICIPAL CORPORATIONS—STEAM RAILROADS—STREETS—OCCUPATION.

Where plaintiffs owned land to the center of a street, they were not entitled to recover against a city because it permitted a railroad company to build its line on the side of the street beyond plaintiffs' property line.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1431, 1438-1440.]

#### 2. SAME—STREET GRADE—CHANGE—DAMAGES.

Shannon's Code, § 1988, provides that when any owner of real estate in any town or city in Tennessee shall sustain any damage to his property, by reason of any change in the grade of any highway, he shall be paid all damages

therefor by such cities and towns; but all benefits accruing by reason of such improvements shall be allowed to affect, reduce, and offset the damages provided for. *Held*, that the damages recoverable by an abutter for a change in the grade of a street were such damages only as occurred from the grading, with an abatement of incidental benefits arising from the improvement.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 925-929.]

### 3. SAME.

In an action for injuries to an abutting property owner by changes in a street grade, the measure of his damages is the difference between the market value of his property just before the grading and just after.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 946.]

### 4. SAME—EVIDENCE.

In an action by an abutting owner for change in a street grade, evidence of the cost of a rock wall required as a result of the grading, the possible impairment of the right of ingress and egress, the freedom of the property from dirt and dust of the street, as a result of the improvement, and the rental value thereof, was admissible.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 938-945.]

### 5. SAME—INCONVENIENCE—PROGRESS OF THE WORK.

In an action by an abutting owner for damages from a change in a street grade, under Shannon's Code, § 1988, authorizing a recovery of all damages sustained by reason of any change in the grade, no recovery could be had for inconvenience resulting during the progress of the work.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 938-945.]

### 6. SAME—INSTRUCTIONS—PREJUDICE.

Where a railroad company was permitted to occupy a street, and employed a water company to repair water connections at the railroad company's cost, when such repair was made necessary by a change in the grade of the street, an instruction, in an action by an abutting property owner to recover damages for such change, that if plaintiffs did not own the water pipes from the main in the street to plaintiffs' property line, then any injury to them should not be considered in arriving at plaintiffs' damages, was not prejudicial to plaintiffs.

Appeal from Circuit Court, Knox County; Joseph W. Sneed, Judge.

Consolidated actions by Joseph Acker and wife against the mayor and aldermen of Knoxville. From a judgment for plaintiffs for less than the relief demanded, they appeal. Affirmed.

Templeton, Lindsay & Templeton, for appellants. J. W. Culton and Cornick, Wright, & Frantz, for appellee.

NEIL, J. These two cases were consolidated and heard together in the circuit court of Knox county. The facts in each are substantially the same, and the statement will be made as if they constituted a single case.

The plaintiffs own three lots, located on the north side of Dale avenue, in the city of Knoxville. Their line runs to the middle of the avenue. Prior to 1904 the city graded

the avenue, and the frontage of the lots was then accommodated to that grade. During the year of 1904 the city regraded the avenue, cutting it down about five feet, and permitted a steam railway company to build its track along the south side of the avenue between the center and the south margin, the railway line not touching the plaintiff's property. This action was brought against the city to recover damages alleged to have been sustained by the regrading. There was also a claim put forward in the declaration, based on the theory that damages could be recovered by reason of the fact that the city had permitted the railway to be located in the manner above stated and operated along the avenue. The circuit judge withdrew from the consideration of the jury the claim based upon the second theory, and submitted the case simply for the damages caused by the regrading. There was a verdict rendered and judgment thereon in favor of Acker and wife for the sum of \$200, and also a verdict and judgment in favor of Joseph Acker for the sum of \$500. The plaintiffs not being satisfied with this result, moved for a new trial, and, on this motion being overruled, appealed to this court, and assigned errors.

The first, second, fourth, fifth, sixth, and seventh assignment are based upon the action of the circuit judge, on account of his withdrawal, in various forms, and the second theory above mentioned, from the consideration of the jury. We need not specify these assignments more particularly. We are of opinion that his honor committed no error in this action. The city had the right to permit the railway company to build its line upon the avenue, without the consent of the plaintiffs. It did not run over any part of their property, but entirely beyond their line. There was no wrong done, therefore, to the plaintiffs, and no right of action accrued to them on account of the location of the road in the avenue. If the railway company improperly conducted its business, so as to cast a special burden upon the plaintiffs, that would be a matter for which they could call the company to account, but not the city. They could not sue either the city or the railway company merely because a railroad was built on a public street, if such railroad should be located beyond the line of the plaintiffs' lots, and, so, not an additional burden on the fee. The substance of what has just been said will be found in *Brummit v. Railway Co.*, 106 Tenn. 124, 60 S. W. 505; *Railroad Co. v. Bingham*, 87 Tenn. 528, 11 S. W. 705; *Harmon v. Railroad Co.*, 87 Tenn. 614, 11 S. W. 703; *Smith v. Railroad Co.*, 87 Tenn. 626, 11 S. W. 709; and *Railroad Co. v. Doyle*, 88 Tenn. 748, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933.

The eighth assignment raises an objection to the measure of damages fixed by the circuit judge.

Upon this subject, his honor, after instruct-

ing the jury that they should ascertain the market value of the plaintiffs' lots just before the grading was begun and just after it was finished, and should allow the difference as damages, proceeded:

"You have been permitted to hear proof in this case of what it would cost to establish and build a rock wall in front of these premises; that is permitted as a circumstance, as in incident to the damages in this case, but it is not, as you see from my instruction, a criterion to go by in assessing damages, if you find there are damages, but it is a circumstance, which like the rent of the property, if it is equal to, or more than, it was before, that is a circumstance permitted to be proved in this case, but the fact that it rents for the same, or more, is not conclusive that there was no damage in the case. It is for you to say what the value and effect of these circumstances are, taken in connection with all the other facts and circumstances of the case, as well as the law of the case, as the court has undertaken to explain.

"If you should be of the opinion that the market value of this property was equal to, or greater than, the market value of it before the grading of this street was entered upon, and you should be of the opinion that it is owing to a general increase in the value of property in common with all other property in that neighborhood, or in the city of Knoxville, growing out of the fact that additional facilities have been furnished to the citizens, or that the grading of this street has been more advantageous to all parties adjacent thereto and living upon that avenue, then these are considerations that the jury must disregard and not be guided by in coming to their conclusion in this case, for the reason that benefits and advantages and general increase of property shared in by a community as a whole cannot be looked to for the purpose of placing it to the disadvantage of a particular owner, who brings an action of this character."

His honor also charged that if the street should be half graded and not graded to the whole width, this would be a negligent grading of the street, or an obstruction thereof, and that the plaintiffs would have the right to have this taken into consideration to the extent that their use of the street in the way of ingress and egress had been impaired.

He also charged: "If there is any special benefit to this particular piece of property, if you should be of opinion for instance that the leaving of these lots on a higher grade from that of the street, after it was lowered, made these particular lots more desirable for residence purposes, by reason of not coming in contact with the dirt or any filth that may accumulate on the street, then the jury may take that into consideration in the estimate of damages, and to the extent that it is a benefit, it should be looked to by the jury to reduce damages which oth-

erwise the plaintiffs would have been entitled to recover in this lawsuit, if you find plaintiffs are entitled to recover at all."

The statutes upon which the right of action is based are Acts 1891, p. 67, c. 31, § 1, and Acts 1893, p. 53, c. 41, the latter amending the former. The law as amended, is correctly stated in section 1988 of Shannon's Code, which is as follows:

"1988. When any owner of real estate in any town or city in the state of Tennessee shall sustain any damage to his property by reason of any change made in the natural or established grade of any highway or town-way in any city or town in the state, or by reason of the raising or lowering of such grades, or other acts done for the purpose of improving or repairing such ways, the said owner shall be paid all damages therefor by such cities and towns within said state, which damage may be recovered before any court of competent jurisdiction, at any time in one year from the completion of, or the cessation of, such works, acts, or improvements; but all benefits accruing by reason of such improvements, acts, or works shall be allowed to affect, reduce and offset the damages herein provided for." Acts 1891, p. 67, c. 31; Acts 1893, p. 53, c. 41.

We are of opinion that his honor's charge stated a fair and reasonable rule. The damages for which an action is given in the section quoted are such actual damages as occur from the grading, and the abatement indicated are those arising out of the incidental benefits of the improvement. His honor properly directed the attention of the jury to the cost of a rock wall required as a result of the grading, and to the possible impairment of the right of ingress and egress, and on the other hand, as a benefit, to the freedom of the property from the dirt and dust of the street after the making of the improvement. These incidents would be all such as one would take into consideration in estimating the value of the property, after the grading had been completed. So that the test of the difference between the market value, just before the grading and just afterwards, would be a true one, and would indicate the real injury suffered; the incidents referred to sufficing to direct the attention of the jury to the special elements of the injury and the benefits arising out of the grading, and necessary to be taken into consideration in forming an estimate of the value of the property, before and after.

Nor do we think it was improper to call attention to the rental value. This was a circumstance which the jury might properly look to in estimating the market value in analogy to the rule obtaining in condemnation cases, where it becomes necessary to ascertain the market value. McKinney v. Nashville, 102 Tenn. 131, 137, 139, 52 S. W. 781, 73 Am. St. Rep. 859; Railroad v. Hunton, 114 Tenn. 609-618, 88 S. W. 182.

Further, the cases hold that the measure of damages for a permanent injury to land is the depreciation in market value of the property by reason of defendant's wrong once for all. *Coleman v. Bennett*, 111 Tenn. 705-716, 99 S. W., 734. See, also, *Terminal Co. v. Lellyett*, 114 Tenn. 368, 405, 85 S. W. 881.

The ninth assignment of error is based upon the action of the circuit judge in giving in charge to the jury the following instruction offered by the defendant, viz:

"I charge you that the plaintiffs can recover alone by reason of the change in the grade, and any inconvenience sustained by them during the progress of the work could not be looked to by you, in ascertaining the amount of damages they are entitled to, if any."

There was no error in giving this instruction. Such damages as are referred to in the request, resulting from inconvenience merely, might be made the subject of an independent action, but not of an action under the statute above quoted.

The tenth assignment is based upon the action of the circuit judge in giving the following to the jury, upon request of the defendant:

"I charge you that if you find the plaintiffs did not own the water pipes from the water main in the street to plaintiffs' property line, but that such pipes were the property of the Knoxville Water Company, then this would not be an element to be considered by you in arriving at the amount of damages."

The substance of the evidence on this point was that to one of the lots the connection was restored, without expense to the plaintiffs, immediately after the grading was done, and has been constantly used since. As to the other two lots, the testimony is that they were cut off several years before the grading was done; that is, the water was cut off. The pipes were severed when the grading was done. The plaintiff Acker testifies that whenever he wishes the connection made, he will have to pay for tapping the main. An officer of the water company was introduced, however, who testifies that the company is under contract with the railroad company, that was permitted to go upon the street, to restore the connection whenever desired, and at the expense of the company. Under these circumstances, we do not think there was any harm done by the instruction.

We have hitherto passed without remark the third assignment, which is that there is no evidence to support the verdict of the jury. This assignment, however, is not pressed in the brief of counsel, nor could it be properly, since there is evidence to support the verdict.

It results that there is no error in the judgment of the court below, and it must be affirmed, with costs.

## FT. SMITH LIGHT & TRACTION CO. v. BARNES.

(Supreme Court of Arkansas. July 23, 1906. On Rehearing, Oct. 8, 1906.)

### 1. STREET RAILROADS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a woman about 40 years of age and very deaf, deliberately walked on defendant's street car track after she had looked and knew that a car was coming, her only excuse being that she thought she had plenty of time to cross and kept listening for the gong, but did not hear any. She paid no attention to the car after she saw it the first time until she "heard a confusion," and saw the car was upon her. *Held*, that plaintiff was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 217.]

### 2. SAME—LAST CLEAR CHANCE—EVIDENCE.

In an action for injuries to a pedestrian by being struck by a street car, evidence *held* to sustain a finding that defendant's motorman discovered plaintiff's peril in time by the exercise of ordinary care to prevent running her down, and that he failed to exercise such care, warranting a recovery, notwithstanding plaintiff's contributory negligence.

On Rehearing.

### 3. TRIAL—ISSUES—SUBMISSION.

Where, in an action for injuries to a pedestrian by being struck by a street car, defendant asked for a peremptory instruction, which was properly denied, and then asked that the court submit the question of plaintiff's contributory negligence to the jury, defendant could not object that the court erred in failing to declare that on the undisputed evidence plaintiff was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 331.]

Hill, C. J., dissenting.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by Mary Barnes against the Ft. Smith Light & Traction Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Appellee alleged that while she was attempting to cross Garrison avenue in the city of Ft. Smith, she was struck, knocked down, and run over by one of appellant's cars, and greatly injured to her damage in the sum of \$10,000 for which amount she asked judgment. She alleged that the negligence of appellant, by which she was injured, consisted in operating the car: (1) At an unlawful speed of 25 miles per hour; (2) In failing to sound the gong; (3) In the failure of the motorman to stop the car after he was apprised of her perilous position; (4) In not having the brake on the car in proper condition; (5) In the failure of the motorman to keep a lookout for pedestrians in the street.

The appellant, after denying all material allegations of the complaint, set up the defense of the contributory negligence of appellee. Appellee, a woman about 40 years old, whose hearing was very defective, but whose sight was good, on the morning of

Smith, when she was struck, knocked down, and very severely injured by appellee's car. Appellee was walking leisurely across the street. There were double cars in the middle of the street. The cars in the western direction could be seen for several blocks from the place where appellee was injured. She had gone nearly to the first block before she saw a car. She there looked at a car some distance away, thought she had plenty of time to cross, did not look back, but only listened for the bell, and went on.

She heard "a confusion, looked up and saw the car too close to get out of the way," and then did not remember anything more about it. This was according to appellee's individual testimony. Other witnesses in her behalf say that she was moving across the street deliberately, rather slowly, that she was crossing the street diagonally, and seemed to be looking to the south, "head down, and sidewise." One witness says she had something in her hand, and seemed to be looking at it.

One of the witnesses on behalf of appellee testified that as he came to the front of his car he looked up and saw Mrs. Barnes (appellee) coming across the street, and at the same time he noticed a car, he did not know if the car was over 20 feet from where it struck her, between 20 and 30 feet. He thought she was not going to try to cross the street, but she went on, and when she was on the track where she was struck, the car was then within 12 or 15 feet of her. The witness hallooted. She seemed to hear him, turned and "grabbed at the dash board," and was drawn under the car. At the time the witness saw Mrs. Barnes she was about 10 feet from the north rail of the track, some 8½ to 9 feet from the north rail of the track which she was struck. The car, according to this witness, was running about 12 miles per hour. At the time he hallooted, or shortly after, he heard a gong sound. Just before the car struck appellee, the motorman was trying to lean over and trying to stop the car, and looked like he was hallooting.

Another witness for appellee was in a buggy on the avenue near where the injury occurred, and saw it. Appellee was going diagonally across the street. She had something in her hand and seemed to be looking at it, had her head cast down. She was moving deliberately and slowly towards the tracks. Witness looked toward the river, and saw car coming. It did not seem to be moving faster than they ordinarily travel. The witness heard two sounds of the gong. The bell rang twice in succession. It was a full sound. The witness barely heard it. She was some 62 or 63 feet from the car at the time. Witness looked from the woman back to the motorman. He looked from one to the other. The motorman looked straight ahead down the avenue, and then turned and

looked between the north and south track. When the motorman looked east and turned and talked to the man it was almost instantly. The motorman was within 20 feet of the woman at the time he turned to speak to the man. At the time the motorman turned to speak to the man the woman was between the north and south track. She had not reached the south track at that time, and the witness says she was in no danger. The motorman when the witness looked back at him seemed to have his hands on the iron that controls the car, the brake, and was talking to another man in front. He looked once toward the direction of the street ahead. His vision was in the direction of the woman. Then he turned again and commenced talking to a man. When the motorman looked in the direction of the woman there was nothing to prevent him from seeing her. There was testimony on behalf of appellee tending to prove that the gong or bell was heard to ring, that they had to jump on it to make it ring, and that then it only made a "faint" sound. There was testimony also tending to show that the car at the time it struck appellee was running more than 15 miles per hour. An ordinance of the city prohibited street cars from running more than 15 miles an hour on Garrison avenue. There was testimony on behalf of appellant tending to prove that the gong was in good condition, and the car otherwise well equipped, that the motorman was free from negligence in operating the car, that he did all in his power after discovering the perilous position of appellee to prevent injuring her.

The court among others, gave the following instructions, on its own motion. "No. 4. If you find from the evidence that one of defendant's servants or agents was in charge of one of defendant's cars in and upon Garrison avenue in the city of Ft. Smith at the time mentioned in plaintiff's complaint, and that said servant or agent saw plaintiff on or near the track upon which said car was moving, and that said servant saw plaintiff was in danger of being struck and run over by said car, and that she was unaware of such danger and could not avoid it, and that he so saw her in time to have avoided the said car striking and running over her by the exercise of ordinary care on his part, if, in fact, she was struck and run over by said car, and that said servant or agent, after he so saw plaintiff, neglected and failed to use ordinary care to prevent said car from so striking and running over her, if, in fact, she was so struck and run over, then your verdict will be for plaintiff, notwithstanding you may further find from the evidence that plaintiff was negligent in being upon or near said track."

"No. 6. If you find from the evidence that defendant was, at the time mentioned in plaintiff's complaint, operating a system of

street cars over its track or tracks in Garrison avenue in the city of Ft. Smith, then it became and was the duty of the defendant in so operating its cars over said track, to use that degree of care and caution that a man of ordinary care and prudence engaged in such business would exercise so as not unnecessarily or negligently to injure persons occupying said avenue."

"No. 8. Contributory negligence in actions like this, is a defense on the part of the defendant: But contributory negligence is never presumed. It, like any other fact, must be proved, and the burden of proving circumstances or facts that prove plaintiff herself was negligent, is upon the defendant, which it must establish by the evidence fairly preponderating upon this proposition, unless it sufficiently appears to you from the evidence introduced by plaintiff, and should you find from the evidence that plaintiff herself was guilty of some negligent act or acts that proximately contributed to cause the injuries complained of, your verdict will be for the defendant. Unless you should further find from the evidence, that defendant's agent or servant in charge of one of defendant's cars at the time and place mentioned in the complaint became aware of the negligence of plaintiff. If there was any such negligence, in time, by the exercise of ordinary care and diligence upon his part, to have avoided injuring plaintiff, if you find she was so injured."

And at the request of appellant gave the following: "No. 7. It was the duty of plaintiff to look and listen before she went upon the track, and if she was so deaf that she could not hear an approaching car, or the gong upon such car, as persons of ordinary hearing can, then she was bound to make more careful use of the sense of sight, and if you find that she could have seen the car in time to avoid it, she cannot recover unless you further find that the motorman was negligent after he saw her danger."

"No. 8. The burden of proving that the motorman saw the plaintiff's peril in time to avoid striking her and that he was negligent in not exerting himself to stop after he saw her peril, is upon the plaintiff."

"No. 9. If at the time plaintiff stepped upon the track, the car was so far away that she could have safely turned back or passed on before it, she cannot recover unless the motorman was negligent in failing to stop after he saw her peril."

The court also gave many other instructions covering every phase of the testimony. The court refused to give a general peremptory instruction in favor of appellant, and also refused requests for specific peremptory instructions in favor of appellant on the particular allegations of negligence in the complaint.

The jury returned a verdict for \$1,750. Judgment was entered for said amount which is appeal seeks to reverse.

**Mechem & Mechem and Brizzolara & Fitzhugh, for appellant. Sam R. Chew, for appellee.**

**WOOD, J.** (after stating the facts). First. The uncontradicted proof by appellee and her witnesses shows that she was guilty of contributory negligence. She "deliberately" walked upon the track of a street railway after she had looked and knew that a car was coming. Her only excuse was that after she looked and saw the car she "thought she would have plenty of time to cross" and kept listening for the gong, but did not hear it until the car was upon her. A more palpable case of contributory negligence it would be difficult to imagine. It was shown that her hearing was bad. This made it incumbent upon her to use the more diligently the unimpaired sense of sight, and to continue to use it until the danger had passed. *Railway v. Martin*, 61 Ark. 549, 33 S. W. 1070; *Railway v. Crabtree* (Ark.) 62 S. W. 64. Instead, after seeing and knowing that the car was approaching on the track she had to cross, she practically closed her eyes, relying upon her judgment as to the distance the car was away and the time she had to cross, and upon her imperfect hearing to protect her in case she was mistaken. She was mistaken, and the mistake was inexcusable, and must eliminate every charge of negligence in the complaint except the failure of the motorman to use the means at his command to stop the car after he was apprised of her perilous position. It has been difficult for us to determine, whether the evidence in favor of appellee, giving it the strongest probative force of which it is susceptible (*Railway v. Hill*, 74 Ark. 478, 86 S. W. 303), was sufficient to support the verdict on this allegation. The testimony of the motorman himself pertinent to this proposition is as follows: "I turned this way and I saw the lady, and it seemed to me that I was 50 or 60 feet away from her at the time I saw her. It seemed to me that she was almost standing between the two inside rails of the two tracks. I was on the right hand track going east, and she was in between the north track and the south track, in between the two rails, seemed to be standing perfectly still. I thought at that time that she was standing to wait for the car to pass, would step back and wait for me to pass, and as soon as I saw her she was too close for me to go at that speed; so, as soon as I saw her—my current was already turned off—the brake chains is a chain something like that (indicating) it is owing to how you jerk the chain, but it generally takes a round and a half, sometimes a little more to bring the car to a stop. I tightened up the brake, and slackened the speed of the car, and began ringing my bell—began tapping with this foot; and then I tied my brake, I think, and by that time I was getting pretty close to her, it was just a matter of a few seconds,

and by that time she had stepped from her original position towards my inside rail, and then I saw, whether she moved or not, I was going to strike her, she had gotten too close to me, and I reversed the car. I was then 15 feet away from her when I reversed the car. I cannot tell but something like that. I reversed the car, tightened my brake a little more. The action of the current running backward, the momentum was a little greater than the current at that time and the car slid on a little, and struck her while it was sliding. It knocked her down, and then the car stopped. The platform passed on over her." This evidence discloses the fact that the motorman discovered the appellee when he was 50 or 60 feet from her, and he knew at the time he discovered her that she was too close to the track for him to go at the rate of speed he was then going. He testifies that the highest rate of speed of his car, from the time he stopped to take on a little boy at Seventh street till the accident occurred, could not have been over 10 miles per hour. True, this witness says, he thought that appellee was going to step back, and let his car pass. He shows that the current was turned off, and that he began tightening the brake and ringing the bell when he first saw her, and that, in a few seconds, when he was 15 feet from her and saw that he must strike her he then reversed the car. But the proof by one of the witnesses was that when he was about 20 feet from her he looked toward the woman, then turned and spoke to some one on the platform with him. The witnesses on behalf of the appellee say the car was going all the way from 12 to 18 miles per hour. No one except the motorman observed any diminution in the speed of the car from the time when the motorman says he first saw her. Only two or three sounds of the gong were heard by any other witness and those were very dull and faint. There was no constant tapping of the gong. One of the witnesses did not see the motorman do anything until just before the car struck appellee when he was trying to lean over and trying to stop his car, and seemed to be hallooing.

The testimony of witnesses for appellee differs widely from the motorman's on some points. It was for the jury to determine the facts from all the testimony. After a careful consideration of it, we have concluded that the jury might have found that appellee approached appellant's car tracks oblivious of her danger; that appellant's motorman discovered her peril in time, by the use of ordinary care, to prevent running her down, and that he failed to exercise such care. The motorman from the time he saw her could have diminished the speed of his car more than he did. Indeed, he might have stopped it, or reversed it. It is clear that he had observed her, and equally clear that she had not observed him. Ordinary care under the

circumstances required something more to be done toward giving a warning than attempting to sound a gong that, at best, would only give forth a faint sound. When he saw that she did not hear or was not heeding the warning he should have hallooeed, put on the brakes, and reversed the car, all before he did. The verdict should be sustained under the principle announced by this court in *St. L. I. M. & Sou. Ry. Co. v. Evans*, 74 Ark. 407, 98 S. W. 616, and cases there cited. The instructions of the court were full and clear on every point presented by the pleadings and proof, and, in view of what we have said, it was not error for the court to refuse to take the case from the jury on account of the contributory negligence of appellee.

Affirm the judgment.

HILL, C. J., not participating.

On Rehearing.

WOOD, J. Appellant insists that the court erred in holding that there was any proof that the motorman was guilty of negligence after he discovered the plaintiff's peril. We have carefully considered the testimony bearing upon this question and while it is not without difficulty, we do not see any reason to change the views expressed heretofore. We adhere to the conclusion that there was evidence sufficient here to uphold the verdict. It is also contended that inasmuch as this court has declared as matter of law that the appellee was guilty of contributory negligence, it was error for the lower court to submit that question to the jury. If appellant had asked the trial court to declare that appellee upon the undisputed evidence was guilty of contributory negligence, and the trial court had refused and it had excepted to the ruling or had it rested on its objection to the court's instructions in which the question of contributory negligence was submitted to the jury he would then be in a position to complain. But it did not make such request, nor rest on its objection to instructions given. On the contrary, by asking the court to submit the question of the contributory negligence of appellee to the jury on the evidence as a matter of fact, it abandoned its objections to the court's instructions submitting that question, acquiesced therein, and waived any objections it might have raised here to the ruling of the court in submitting that question. Appellant did not ask the trial court to confine the jury to the question of whether or not the appellant discovered appellee's perilous position, and, having discovered same, failed to exercise ordinary care to avoid injuring her. Not having requested that the issue be narrowed to this inquiry in the court below, appellant cannot complain here because it was not done. True, appellant asked for peremptory verdict, but, as we have determined that there was a question for the jury, the court did not err



in refusing this request. As there was no error in the court's charge of which appellant cannot complain here, the only question for us has been whether giving the evidence its strongest probative force in favor of the verdict it was legally sufficient to uphold it.

BATTLE, J., concurs in the judgment, but thinks that there was sufficient evidence to warrant the submission to the jury of the question of contributory negligence.

HILL, C. J. (dissenting). I was absent the week this case was decided, and did not have the benefit of the consultation, and have had to go into it on the motion for rehearing, for the first time.

There were several charges of negligence against the appellant company and counter-charges of contributory negligence against appellee, the plaintiff below. These issues were sent to the jury and also the question of proper care of the motorman to avoid the injury after discovering Mrs. Barnes' peril. The latter issue predicated upon Mrs. Barnes' negligence and evidence of due care and want of due care after the discovery of her peril was a proper question for the jury to determine. All the judges agree that there was evidence sufficient to sustain a verdict either way upon that point. This should have been the only issue sent to the jury. The opinion of the court shows that Mrs. Barnes' own testimony shows that she was guilty of contributory negligence. A majority of the judges on rehearing reaffirm that fact. Therefore, all questions of negligence against the company were eliminated by her contributory negligence save alone the negligence after discovery of her peril. It was therefore a mistake for the court to affirm the case when other issues besides this one were sent to the jury. The court cannot tell whether the jury found for the appellee upon the only proper question for them to determine or upon one of the several improper grounds that they were authorized to bottom a verdict upon.

It is thoroughly settled law that it is the duty of the court to refuse instructions based on unproved or unfounded hypotheses and it is reversible error to submit a theory not warranted by the evidence. *State Bank v. Hubbard*, 8 Ark. 183; *Worthington v. Curd*, 15 Ark. 491; *Sadler v. Sadler*, 16 Ark. 628; *Richardson v. Comstock*, 21 Ark. 65; *Marshall v. Sloan*, 26 Ark. 513; *Burke v. Snell*, 42 Ark. 57; *Railway v. Townsend*, 41 Ark. 382; *Beavers v. State*, 54 Ark. 336, 15 S. W. 1024; *Railway v. Denty*, 63 Ark. 177, 37 S. W. 719; *Snapp v. Stanwood*, 65 Ark. 222, 45 S. W. 546; *Railway v. Woodward*, 70 Ark. 441, 69 S. W. 55. Therefore it follows that the judgment should have been a reversal instead of an affirmance. The majority of the court concedes this mistake, but say that appellant is not in position to com-

plain of the error as it asked instructions relating to the contributory negligence of Mrs. Barnes.

The record shows that the court gave the instructions submitting these issues and to each of them the appellant objected and its objection being overruled, excepted; and thereafter the appellant asked various instructions, among others these:

"(2) One who is about to enter upon the track of a street railway where she knows that cars pass frequently at considerable speed must look and listen before entering upon such track and must so look and listen when and where so doing will enable her to see and hear a car which is so near that she cannot safely pass before it."

"4. If the evidence shows that in broad daylight, with no obstacles to prevent her from seeing an approaching car, the plaintiff stepped upon the track when the car which struck her was so near that it could not be stopped in time to avoid striking her, she contributed to her own injury and cannot recover."

None of the other instructions went to the issue of contributory negligence alone. They went to that issue in connection with the case of the motorman after discovering appellee's peril and to other phases of the case.

Invited error is predicated upon estoppel, and is invoked properly wherever the appealing party has induced the error or acquiesces in it, or avails himself of the error to his own advantage. It is properly applied where the complaining party asks an instruction similar to the one attacked, and in many similar instances. *Klein v. Bank*, 69 Ark. 140, 61 S. W. 572, 86 Am. St. Rep. 183; *Long Bell Lumber Co. v. Stump*, 30 C. C. A. 260, 86 Fed. 574; *Elliot App. Proc.* §§ 626, 627. But this is not such case nor analogous in principle to it. Here the court, over objection and exception, gives a given theory to the jury. Then appellant seeks to minimize the error by asking instructions presenting phases of the inapplicable theory which, if applicable, would be favorable to his contention. This is not availing himself of the error to his advantage, nor an acquiescence in it, but a proper effort to reduce the effect of the error to the least harmful form. He has not induced or brought about the submission of this question of contributory negligence, on the contrary has objected and excepted to it. The court presents only such phases of it as favor appellee and it was, in my opinion, the duty of appellant's counsel to then ask the court to give such phases of this theory as favored his contention so that he might properly argue to the jury that appellee was guilty of contributory negligence. The court should have said she was guilty of contributory negligence instead of leaving it to the jury, but having left it to the jury, it was the right and duty of appellant's counsel to see that the law on that subject was fairly explained so that the jury could understand

that she was guilty of negligence. In other words, if the law on that subject was going to be given, every phase applicable should be given and not merely that favoring appellee. When the court made shipwreck of the case it was appellant's duty to obtain all the salvage possible, and I do not think the seeking to save salvage from the wreck is an estoppel to complain of the cause of the wreck. It seems to me that this application of the doctrine of invited error is beyond the principle controlling the proper application of it; and is without precedent so far as I can find, certainly without precedent in this state. I hazard the assertion that more than half the reversals in personal injury cases found in the reports would have been obviated had this doctrine as now applied been earlier invoked. I think this decision revolutionary of the practice, and has no sound basis to rest upon.

### GAZZOLA v. SAVAGE.

(Supreme Court of Arkansas. Oct. 8, 1906.)

#### HOMESTEAD—ABANDONMENT.

There is not an abandonment of a homestead where, on the house on the lot being burned, the owner goes to live with her son till such time as she can rebuild, and leases the land for five years, with express reservation that she may pay for improvements by the lessee and resume occupancy of the premises any time that she may desire to rebuild her home.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 320-326.]

Appeal from Circuit Court, Monroe County; Geo. M. Chapline, Judge.

Action by John Gazzola against Mrs. W. J. Savage. From a judgment for defendant on a claim of homestead exemption, plaintiff appeals. Affirmed.

C. F. Greenlee, for appellant. M. J. Manning, for appellee.

MCCULLOCH, J. Appellant, John Gazzola, recovered a judgment against appellee, Mrs. M. J. Savage, on May 28, 1897, in the circuit court of Monroe county for the sum of \$605.42, and on August 29, 1904, caused execution to be issued thereon, which was by the sheriff levied upon a lot owned by appellee in the city of Brinkley. Appellee claimed the lot as her homestead and filed her schedule of exemptions with the clerk of the court, who issued a supersedeas staying the sale under execution. Appellant presented to the circuit court at the next term his motion to quash the supersedeas, which motion was denied, and he appealed to this court.

Appellee is a married woman, and formerly occupied the property as her homestead. The lot had a building thereon, which appellee occupied as a residence and kept a hotel or boarding house therein for about 19 years. The building was destroyed by fire in the fall of 1900 or spring of 1901, while she so occupied it, and she has not since re-

sided upon the lot, but has resided in another house owned by her son in Brinkley. In the year 1903 she leased the lot for a term of five years to one Kelly, who built three houses thereon for business use. These are inexpensive wooden and iron buildings, and Kelly testified that his contract provided that he could remove the buildings at the end of the term, and that, if appellee desired to build a house upon the lot at any time and would pay him for his improvements, he would surrender possession to her. He also testified that he tried to purchase the lot from appellee, but that she declined to sell, saying that she expected to build there and move back on the property. Appellee testified that she never abandoned her homestead claim, but intended to return to the property and rebuild her home as soon as she could arrange her business so as to do it, and had reserved the privilege, in her contract with Kelly, of taking the property back at any time she was ready to rebuild. She refused repeated offers to purchase made by various persons, giving at the time as a reason her intention to rebuild a home on the lot. The trial court made the following finding: "That Mrs. M. J. Savage is, and was at the date of the judgment, the head of a family and a citizen of the state of Arkansas, and resident of Monroe county; and prior to the burning of the property situated on the land described in the motion she had resided and had her residence for more than 15 years, residing thereon with her children; that when the property burned she took up her residence temporarily with a son living in the town of Brinkley; that she intended to return to and make her future home upon said land. Court finds the property was characterized as her homestead and that she never left it with the intention of not returning. The court holds the property exempt from seizure and sale under execution issued herein, and overrules motion to quash supersedeas."

Is the evidence sufficient to sustain the court's conclusion? In *Newton v. Russian*, 74 Ark. 88, 85 S. W. 407, we said: "It is settled by the repeated decisions of this court that a temporary removal and absence from the homestead for the purposes of business, health, or pleasure, without actual intention to abandon the same, will not displace the homestead right [citing cases]. A fortiori, an enforced temporary absence on account of the destruction of the dwelling house will not operate as an abandonment. Nor will such absence under those circumstances raise a presumption of abandonment unless continued for such length of time as to negative any intention to return." The lease given by appellee to Kelly would have raised a presumption of abandonment but for her express reservation of the right to pay for the improvements made by him and resume occupancy of the premises at any time that she might desire to rebuild her home. Such reservation tended to negative any intention

to permanently abandon the homestead, and we think there is abundant evidence to sustain the court's finding that appellee did not intend to abandon the homestead. Where there is substantial evidence in support of the finding of the trial court, the same will not be set aside by this court on appeal. *Robson v. Tomlinson*, 54 Ark. 299, 15 S. W. 456; *Schuman v. Sanderson*, 73 Ark. 187, 83 S. W. 940.

Finding no error in the proceedings, the judgment is affirmed.

### ARENDDT v. ARENDT.

(Supreme Court of Arkansas. Oct. 8, 1906.)

#### 1. WILLS—ESTABLISHMENT—UNIMPEACHED EVIDENCE—INSTRUCTIONS.

An instruction in a proceeding to establish as a will, under Kirby's Dig. § 8012, an instrument in the handwriting of and signed by deceased, but having no attesting witness, and therefore requiring for its establishment the unimpeached evidence of three disinterested witnesses to the handwriting and signature, that it must be established by the unimpeached evidence of three disinterested witnesses, and that by "unimpeached witness" is meant one found to have spoken truthfully and whose conclusion is found to be correct, is substantially correct; there being no evidence reflecting on the character or testimony of the witnesses to handwriting.

#### 2. SAME—FORM OF WRITING—LETTER.

An instrument in the form of a letter, written by deceased on the day of his suicide and addressed to his wife, stating, "Whatever I have in worldly goods, it is my wish that you should possess them," is a will.

[Ed. Note.—For cases in point, see vol. 49, Cent, Dig. Wills, § 229.]

Appeal from Circuit Court, Pulaski County; Edw. W. Winfield, Judge.

Herman Arendt appealed from probate of a will in favor of Sarah Arendt, and from an adverse judgment of the circuit court again appeals. Affirmed.

On the 7th day of February, 1904, William Arendt shot and killed himself at his residence in Little Rock. After his death, about 9 or 10 o'clock at night of the day of his death, the following letter was found on the dresser in his bedroom: "Little Rock, Ark., 2—7—1904. Mrs Sarah Arendt, City—Dear Wife: You will find everything all right, I hope. Whatever I have in worldly goods, it is my wish that you should possess them. I have hoped against hope that everything would come out all right, but I see it is useless. Please mail those letters that I handed you is all I ask of you. So good-bye, sweetheart. Yours, Will." Mrs. Sarah Arendt in due time offered this letter for probate as the will of her husband, William Arendt, and the same was probated as such by the probate court of Pulaski county. Herman Arendt, the father of William Arendt, appealed from that judgment. On the trial in the circuit court the case was submitted to a jury, who returned the following ver-

dict: "We, the jury, find the instrument propounded for the last will and testament of William Arendt, deceased, to have been written, both in the body and signature, in the proper handwriting of said William Arendt, and we find this fact established in the manner required by the statute, and we find said instrument to be the last will and testament of William Arendt. [Signed] George R. Brown, Foreman." The court gave judgment accordingly, and Herman Arendt appealed.

Fulk, Fulk & Fulk and Geo. W. Williams, for appellant. Geo. W. Williams, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal by Herman Arendt from a judgment of the circuit court declaring a certain writing in the form of a letter to be the last will and testament of William Arendt. Our statute provides that, "when the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator, such will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of the testator, even though there be no attesting witness." Kirby's Dig. § 8012. On the trial of this case in the circuit court the court told the jury that, to be valid as a will, both the entire body of the instrument in question and the signature thereto must be in the handwriting of William Arendt, and that this must be established by the unimpeachable evidence of at least three disinterested witnesses; that by "unimpeachable witness" is meant one whom the jury find to have spoken truthfully and whose conclusion they find to be correct." When applied to the facts of this case, we think this statement of the law is substantially correct. There is nothing in the evidence reflecting on the character or testimony of these witnesses who testified to the handwriting and signature of the deceased, and we think it was clearly established by their testimony that the instrument in question was written and signed by William Arendt a short time before his death. This will is in the form of a letter from William Arendt to his wife. But, to quote the language of a distinguished author, "the law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded." 1 Jarman on Wills (6th Ed.) 21; Whyte v. Pollock, 7 Appeal Cases, 409.

There are many decisions that illustrate this rule of law. The Supreme Court of California held that a writing in the following language was a will, and admitted it to probate: "Dear Old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon." *Clarke v. Ransom*, 50 Cal. 595. So the Supreme Court of North Carolina held the following unattested writing to be a will: "It is my wish and desire that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description. David Outlaw." *Outlaw v. Hurdle*, 46 N. C. 150. The same court in a much more recent case held that a letter from the testator to his sister, in which he said, "If I die or get killed in Texas, the place must belong to you, and I would not want you to sell it," was a valid will. *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15. There are many other cases to the same effect. *Webster v. Lowe*, 107 Ky. 293, 53 S. W. 1030; *Jackson v. Jackson's Adm'r*, 6 Dana (Ky.) 257; *Succession of Ehrenberg*, 21 La. Ann. 280, 99 Am. Dec. 729; *Sullivan v. Estate*, 180 Pa. 342, 18 Atl. 1120; *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89; *Cover v. Stem*, 67 Md. 449, 10 Atl. 281, 1 Am. St. Rep. 406; *Gardner on Wills*, p. 69.

The evidence proves that William Arendt was sincerely attached to his wife, and the language of this letter to her, written under the shadow of impending death, shows in our opinion that it was testamentary in character and intended to direct the disposition of his property after his death, and we are of the opinion that the circuit court properly so held. As to the question of his sanity, there is very little to show insanity beyond the fact that he became estranged from his brothers and afterwards committed suicide for what seems a very trifling cause. Numbers of his friends and acquaintances testify that he never at any time exhibited signs of insanity, but acted at all times up to his death as a man of sound judgment and reason might be expected to act. The finding of the jury on this question we believe was correct. The instructions of the court on this point, as well as those instructions refused by him, were somewhat lengthy. But we have read them carefully, and find no prejudicial error.

On the whole case we are of the opinion that the judgment should be affirmed. It is so ordered.

#### Ex parte MERRITT.

(Supreme Court of Arkansas. Oct. 1, 1906.)

#### STATUTES—REPEAL—UNCONSTITUTIONALITY OF REPEALING ACT.

Act March 13, 1885 (Acts 1885, p. 68; Kirby's Dig. § 6876), provides for the collection of a state tax on hawkers and peddlers, and section 6881 makes it a misdemeanor to engage in such business without having paid

the tax. Act April 29, 1901 (Acts 1901, p. 241; Kirby's Dig. § 6886), relating to county taxation, provides that any person, either as owner, manufacturer, or agent who without a license from the county clerk, to be issued after payment of a specified sum into the county treasury, travels and peddles certain specified articles, shall be deemed guilty of a misdemeanor, but that it shall not apply to resident merchants. *Held*, that the latter statute, being unconstitutional, does not repeal section 6876.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 244.]

Certiorari to Union Chancery Court; E. O. Mahoney, Chancellor.

Certiorari by the state, on the relation of the Attorney General, to quash a judgment of the chancery court of Union county discharging on habeas corpus one J. H. Merritt, who had been fined before a justice of the peace for a violation of Kirby's Dig. § 6876. Reversed and quashed.

The Attorney General by certiorari seeks to quash the judgment of the chancery court of Union county. The petition sets up that one J. H. Merritt was duly fined by a justice of the peace in Monroe county, Ark., in the sum of \$50 for violating the provisions of section 6876, Kirby's Dig. That afterwards Merritt was discharged, on a writ of habeas corpus, by the chancery court of Union county, on the ground that the act of 1901 (section 6886, Kirby's Dig.) repealed section 6876 of the Digest. The Attorney General set out a copy of the proceedings before the justice and the chancellor, and asks that the findings of the chancellor be reviewed, etc.

Robt. L. Rogers, Atty. Gen., for appellant. J. H. Merritt, pro se.

WOOD, J. The only question is, was section 6876 of the Digest repealed by the act of April 29, 1901 (section 6886, Kirby's Dig.)? We held in *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030, that the act of April 29, 1901 (Acts 1901, p. 241), was unconstitutional.

The judgment of the Union chancery court is therefore reversed, and quashed.

#### FEW v. MITCHELL.

(Supreme Court of Arkansas. Oct. 8, 1906.)

#### LANDLORD AND TENANT—LANDLORDS' LIENS—RIGHTS OF THIRD PARTIES.

Under Kirby's Dig. §§ 5032, 5033, a landlord's lien is only for rent and advances for necessary money supplies, and cannot be extended to include damages for neglect of the crop and rental value of lands not cultivated, in violation of the lease, as against the intervening rights of a third party, who has a crop mortgage for supplies furnished the tenant.

Appeal from Lee Chancery Court; Edw. D. Robertson, Chancellor.

Action by W. T. Few against J. R. Mitchell. From a judgment in favor of Mitchell, Few appeals. Affirmed.

W. A. Compton, for appellant. H. F. Roleson, for appellee.

**HILL, C. J.** Few rented land to Wilson and Reese who were to cultivate it in cotton and corn for one-half of the crop. Mitchell took a crop mortgage from Wilson and Reese for supplies furnished them. The tenants failed to properly cultivate all the land and gather the crop and Few took possession of the crop and gathered it, and this is a contest between him and Mitchell over it.

The first contention is that Few should have been allowed one-half of the expenses of gathering the crop, but the chancellor's finding in effect gave him that and more and he has no complaint on that score. The other contentions are for damages against the tenants claimed to be prior to the mortgagee's rights. Few contends for \$50 damages for neglect of the crop and for rental value of lands not cultivated in violation of the contract, and for other sums for violations of the contract. The landlord's lien is primarily for rent alone and has been extended by statute to advances of necessary supplies, money, etc. Kirby's Digest, §§ 5032, 5033. It cannot be extended beyond the terms of the statute and the claims here asserted are not within the statute. The right of a third party has intervened, and he can demand that his mortgage be given priority over other claims which do not fall within the statute. The chancellor had a correct view of the law, and his findings of fact are sustained by a preponderance of the evidence.

Affirmed.

**McCULLOCH, J.**, not participating.

#### NEELY v. BLACK.

(Supreme Court of Arkansas. Oct. 8, 1906.)

##### 1. MORTGAGES—TRANSFER OF PROPERTY—ASSUMPTION OF DEBT BY PURCHASER.

Where the maker of a promissory note secured by mortgage sells the mortgaged property to a purchaser who assumes the debt, a third person has the right to purchase the note and to enforce it either by foreclosing the mortgage or by suit against the maker, the maker's remedy not being to compel a foreclosure and deficiency judgment against his vendee, but by proceeding in equity to compel the vendee to pay the mortgage according to his undertaking.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1145.]

##### 2. BILLS AND NOTES—ACTIONS—DEFENSES AGAINST INDORSEE.

That the indorsee of a note secured by mortgage procured the vendee of the mortgaged property who had assumed the debt, to purchase it for him, is no defense to an action by the indorsee against the maker, the only defense in such case being payment by the maker or by the vendee of the mortgaged property.

##### 3. SAME—BONA FIDE PURCHASER—INDORSEMENT WITHOUT RECOURSE.

That a note is transferred by indorsement without recourse does not deprive the indorsee of his rights as an innocent purchaser.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 800.]

Appeal from Circuit Court, Little River County; James S. Steele, Judge.

Action by K. B. Neely against W. A. Black. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

J. T. Cowling, for appellant. O. T. Wingo, B. J. Stuart, and L. A. Byrne, for appellee.

**BATTLE, J.** K. B. Neely brought this action against W. A. Black on a promissory note executed by the defendant to the Creston Loan & Trust Company for the sum of \$400, and assigned by the payee to plaintiff, alleging that the note was unpaid. The defendant answered and admitted that he executed the note, and alleged that the payment of the note was secured by a mortgage on lands in the county of Adair and state of Iowa, executed by himself and wife; that "at the time of its execution defendant was indebted to one J. B. Barcroft of Iowa in the sum of \$636, evidenced by a note then past due; that immediately preceding the 28th day of March, 1900, defendant and Barcroft agreed upon a settlement in which Barcroft agreed to take said land at \$30 per acre and in payment therefor to surrender said note of \$636 and assume and pay the note and coupons sued on herein; that after computing interest, these amounts overpaid, by \$38, the sum to be paid for the land, and that the defendant thereupon paid that amount to Barcroft in cash and executed and delivered to him a deed to the land subject to the mortgage and debt due to the Creston Loan & Trust Company; that during the year 1900, and in conformity with his said undertaking, Barcroft paid off the note to the Creston Loan & Trust Company, both principal and interest, and, colluding with the plaintiff to defraud the defendant and compel him to pay the note twice, he procured the Creston Loan & Trust Company to indorse the note in blank without recourse and surrender it to him in order that it might be used in pursuance of an agreement between plaintiff and Barcroft as a basis for this suit. He denied that plaintiff is an innocent holder and the owner of the note, and that he paid value therefor before maturity, and averred that Barcroft furnished the money to pay to the Creston Loan & Trust Company, that plaintiff never had any interest therein. Defendant further stated that he is a citizen of Little River county, Ark.; that plaintiff is a citizen of Iowa, in which state the land is situated; that Barcroft purchased the land subject to the mortgage or deed of trust and assumed the payment thereof; that Barcroft, or his legal representatives, are in possession of the land and the rents and profits thereof; that the land is worth greatly in excess of the note sued on, and is locally accessible to plaintiff, but, by reason of the conspiracy and understanding between Barcroft and plaintiff to defraud defendant, plaintiff refused to pro-

ceed against the land, well knowing that if he should attempt to do so it would be made to appear that the money paid to the Creston Loan & Trust Company was furnished by Barcroft and plaintiff had no valuable interest therein; that defendant is willing and ready to pay on the note any balance remaining after a sale of the land, if it should be made to appear that plaintiff was entitled thereto; that, if this suit proceeds to judgment and defendant has to pay the judgment, he will be without any adequate remedy to protect his rights and subject the land to the payment of the debt.

"Prayed that the matter be transferred to equity, that plaintiff be required to surrender and cancel the note, or, if, in the opinion of the court, plaintiff has any legal and pecuniary interest in the note, that he be required to prosecute and exhaust his claim against the land before proceeding in this action."

Plaintiff replied to defendant's answer and denied that Barcroft assumed or agreed to pay the note sued on or that the same was paid by him or any one else, and that there was any fraud or collusion in the purchase of the note, or that any part of the purchase money was furnished by Barcroft; and alleged that he purchased and paid for the note with his own money, in good faith, and before the maturity thereof.

There are only two issues in the case, and they are: Did Barcroft assume the payment of the note? Did he pay it and cause it to be transferred or assigned to another?

The note is payable to the order of the Creston Loan & Trust Company, on the 1st day of April, 1903, at its office in Creston, Iowa, and was assigned by the payee to plaintiff without recourse upon it.

Plaintiff testified that he authorized J. R. Barcroft to negotiate for the purchase of the note, which he did, and purchased it; and that he furnished Barcroft with \$424.60 to pay for the note, and received it in return.

Defendant testified that he sold the land mortgaged to the Creston Loan & Trust Company to J. R. Barcroft at and for the price of \$1,200, and received therefor his note held by Barcroft for \$836.38, less \$36.38 unpaid thereon, leaving \$800; and for the remaining \$400 of the \$1,200 Barcroft assumed the payment of the note sued on; and that he conveyed the land to the purchaser by deed in which he recites that he received therefor \$1,200, and covenants that it is free from all incumbrances, except the mortgage to the Creston Loan & Trust Company.

The correspondence between the Creston Loan & Trust Company and Barcroft, in relation to the transfer of the note, was read as evidence. It was commenced by the former writing to the latter that the interest due on the note had not been paid, and that it is informed that he owns the land mortgaged to it, and if so, to send a draft to it

for the same. Barcroft replied that he did not assume payment of the note, and says: "I purchased the land on representations that I find to be entirely false. I will find you a purchaser for the note who will take it at its face and interest under an indorsement without recourse. While this may not be desirable to the holder, I think it will be the cheapest and best for him, all things considered. I will send you draft under this proposition if you will send the note indorsed without recourse in blank to the Citizens' National Bank, Des Moines, Iowa. It will be less trouble and cheaper to have my litigation with him if the note is held by someone here. I have already arranged with one to buy the note. He will furnish the money when the note is sent as directed." This letter was followed by others in which Barcroft sent a draft to the company for the amount of the note and informed it that it was not sent in payment, but for the purchase of the note, that "the money was received from another," and that the note was not to be canceled, "but assigned in blank without recourse and sent to" him. This correspondence was read as evidence to the jury, over the objections of the plaintiff, but, as the objection is not urged in the brief, we consider it waived.

Over the objections of the plaintiff the court gave the following, among other, instructions to the jury:

"No. 5. You are instructed that the assignment in blank, without recourse of an obligation for the payment of money, is, in legal effect, only a quitclaim of the debt, and the one who takes such an assignment cannot claim the rights of an innocent purchaser, so if in this case you find that the plaintiff accepted a transfer of the mortgage bond in question without recourse, these facts were sufficient to put him upon inquiry as to the nature of the transaction, and he will be held to a knowledge of all the facts connected with this transfer."

The jury returned a verdict in favor of the defendant, and the plaintiff appealed.

Appellant had the right to purchase the note sued on. Having purchased it, he had the right to enforce the payment of it by suing Black, the maker, recovering judgment against him for the amount thereof, and suing out an execution and causing the same to be executed, or by foreclosing the mortgage. *Fitzgerald v. Beebe*, 7 Ark. 819; *Benjamin v. Loughborough's Adm'r*, 31 Ark. 210. Black cannot and could not compel the Creston Loan & Trust Company, or Neely, to foreclose the mortgage so as to subject the land to the payment of the debt, and Barcroft, if he assumed the debt, to a judgment for any deficiency, but he could have proceeded in equity to compel Barcroft, if he assumed it, to pay off the mortgage according to his undertaking. *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Cornell v. Prescott*, 2 Barb.

If Neely purchased the note, he had the right to bring and maintain this action, unless Black or Barcroft had paid it. The only defense against the action is payment. That is the only act that will absolve Black from the obligation to pay it to the owner thereof. The fact that Neely procured Barcroft to purchase the note for him, and Barcroft did so and paid for the same with money Neely furnished him for that purpose, will not affect Neely's right to collect it. So the instruction given over the objections of appellant should not have been given. It was inapplicable and calculated to mislead the jury; and it is not correct. As said in *Virginia*, by Green, J.: "An indorsement without recourse is not out of the due course of trade. The security continues negotiable, notwithstanding such an indorsement. Nor does such an indorsement indicate, in any case, that the parties to it are conscious of any defect in the security, or that the indorsee does not take it on the credit of the other party or parties to the note. On the contrary, he takes it solely on their credit, and the indorser only shows thereby that he is unwilling to make himself responsible for the payment." 1 Daniel on Negotiable Instruments (5th Ed.) § 700, and cases cited.

If Neely purchased the note and it was transferred to him in blank, he had the right to fill the blank with his own name and thereby make the transfer to himself complete. *Edwards v. Scull*, 11 Ark. 325.

Reverse and remand for a new trial.

# EOFF, Tax Collector, v. KENNEFICK-HAMMOND CO.

(Supreme Court of Arkansas. July 23, 1906.  
Rehearing Denied Oct. 8, 1906.)

## TAXATION—PERSONAL PROPERTY—PLACE.

Kirby's Dig. §§ 6873, 6913, provide that all property, whether real or personal, shall be subject to taxation, except property exempted by the Constitution, and shall be assessed in the name of the person who is the owner on the first Monday in June of the year in which the assessment was made. Sections 6966, 6968, declare that, if the person whose duty it is to make out a statement of personal property fails or refuses to do so, the assessor shall make return. *Held*, that where plaintiffs, who were nonresidents of the state, brought certain railroad construction appliances within a county temporarily for the construction of a railroad roadbed, such property was not in transit, but had a situs within such county, and was subject to taxation there.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 201.]

Appeal from Boone Chancery Court; T. H. Humphreys, Chancellor.

Suit by the Kennefick-Hammond Company against D. A. Eoff, as collector of taxes of

G. J. Crump and Garner Fraser, for appellant. Pace & Pace, for appellee.

BATTLE, J. The assessor of Boone county listed and assessed for taxation for 1903 the following property of Kennefick-Hammond Company: 14 horses, 88 mules, 75 wagons, 17 boilers, 2 light plants, 2 air compressors, harness, and blacksmith tools, valuing the boilers, light plants, air compressors, harness, and blacksmith tools, in the aggregate, at \$20,670. This property was situated in Boone county on the first Monday in June, 1903—how long before and how long after does not appear. It was used by Kennefick-Hammond Company in the construction of a roadbed for a railroad through a portion of Boone county, about 15 miles in length. How long it required to complete the roadbed was not shown at the hearing of this cause. The taxes of 1903 were levied upon it, and the collector of Boone county was proceeding to collect the same when he was restrained from so doing by an order made by the chancellor of the Boone chancery court, upon application of Kennefick-Hammond Company, which was afterwards made perpetual by the court.

Kennefick-Hammond Company was a partnership composed of William Kennefick and F. S. Hammond, and they were citizens and residents of the state of Missouri before, on, and after the first Monday in June, 1903.

In *Pullman's Palace Car Company v. Commonwealth of Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613, Mr. Justice Gray, speaking for the court, said:

"No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule, expressed in the maxim '*Mobilia sequuntur personam*,' by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner that rule has yielded more and more to the *lex situs*, the law of the place, where the property is kept and used. \* \* \*

"For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and may be taxed, on its account, at the place where it is, although not the place of

the statutes of this state provide that property, whether real or personal, in state \* \* \* shall be subject to taxation except property exempted by the Constitution, of which the property in question is a part. Personal property must be assessed in the name of the person who was owner on the first Monday in June in the year in which the assessment was made. Kirby's Dig. §§ 6873, 6913. And in all cases in which it is necessary for the assessor, "in consequence of the sickness or absence of the person whose duty it is to make out a statement of personal property" or his refusal to do so "to ascertain the several items and the value thereof," the assessor may do so and receive return thereof from the best information he can get. Kirby's Dig. §§ 6966, 6968. But plaintiffs insist that the property was assessed in the state, at the time it was assessed, temporarily; that it had not been incorporated and become a part of the property of the state; had not gained a situs here, but was transitory, and not subject to taxation in this state. Tangible personal property of a resident, in transit, is not subject to local taxation in the state in which it may be temporarily. But when does property cease to be in transit and become of such permanency as will justify taxation in its new situs? It cannot always be in transit. In *Kelley v. Rhodes* (Wyo.) 51 Pac. 593, 1 L. R. A. 594, 75 Am. St. Rep. 904, the plaintiff, who was a resident and citizen of the state of Kansas, was the owner of certain sheep, numbering about 10,000 head, which, on or about October 29, 1895, were in the county of Laramie, in the state of Wyoming, in charge of an agent, who was driving and transporting them through the state of Wyoming from Utah to Nebraska. In driving the sheep it was the practice to permit them to spread out at times in the neighborhood of a quarter of a mile, and while being driven to graze over land of that width, if they were maintained solely in that way. They were driven across Wyoming for the purpose of shipment, and were not brought into the state for the purpose of being maintained permanently therein. The time consumed in driving the sheep through Wyoming was from six to eight weeks, and the distance traveled was about 500 miles. For shipment purposes, it was not necessary that the sheep should be driven into Wyoming, and the railroad over which they were shipped could be reached from the point from which they were first driven by traveling a less distance than was required to drive them to any point in Wyoming. The question was, were the sheep subject to taxation while in Wyoming? The Supreme Court of Wyoming held that they were. The court said: "We are of the opinion, therefore, that, in determining the purpose and the

situation that an owner of live stock, if not otherwise disobedient to the law and observant of the police regulations of the state, has the right to transport them to market by driving on foot as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses, which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation."

This case (*Kelley v. Rhodes*) was taken to the Supreme Court of the United States, and the judgment therein was reversed on the ground that the sheep were property engaged in interstate commerce. *Kelley v. Rhodes*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359. The Supreme Court of the United States said:

"The question to be determined, then, is whether the stock of the plaintiff was brought into the state for the purpose of being grazed at the time it was assessed for taxation. \* \* \* Had the state court found directly the ultimate fact that these sheep were brought into the state for the purpose of being grazed, such finding might have bound us; but, under the facts actually found or agreed upon, we are at liberty to inquire whether they support the judgment.

"The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities."

Again it says: "The question turns upon the purpose for which the sheep were driven into the state. If for the purpose of being grazed, they are expressly within the first section of the act (that is, subject to taxation in Wyoming). But if for the purpose of being driven through the state to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit."

After repeating a part of the facts it says: "It thus appears that the only purpose found for which this herd of sheep was being driven across the state was for shipment, and the agreed statement (of facts) wholly fails to show that they were detained at any place within the state for the purpose of grazing or otherwise. As they consumed from six to eight weeks in traveling about



500 miles, or, as the Supreme Court found, at the rate of about 9 miles per day, it does not even appear that they loitered unnecessarily on the way. As they required sustenance on the journey, and could obtain it only by grazing, it would appear, though there is no testimony upon that point, that they could hardly have been driven more rapidly without a loss of flesh during the transit."

The doctrine of the Wyoming court is not questioned by the Supreme Court of the United States, but the difference of the two courts is in its application to the facts in the case. As interpreted by the latter court it is applicable and should control in the case before us.

In *Fennell v. Pauley*, 112 Iowa, 94, 83 N. W. 799, the plaintiff was a resident of the state of Missouri in 1895-96. In December, 1895, he brought into Fremont county, in Iowa, 202 head of cattle for feeding purposes, and kept them upon land owned by him. In April, 1896, the cattle were taken back to the state of Missouri. The court said: "The contention is that this property, belonging to a nonresident and being only temporarily in this state, was not taxable here. Section 812, Code 1873, provides that all personal property shall be taxed in the name of the owner on the 1st day of January. That property of this nature is taxable is fixed by sections 797-801; and section 817 requires personal property in the hands of an agent to be listed by the assessor. Section 823 requires the assessor to return all personal property found in his township. We understand that property in transit through the state cannot be taxed here, nor can such as belongs to a nonresident, which is here only an incident of its transfer elsewhere. To give the right to assess the personal property of a nonresident found within this state, it must be located here with something like permanency, or for some purpose other than merely aiding its transit. \* \* \* These cattle were here to be fed, in order to increase their weight and value for market. In principle, it was the same as the investment of money in this state, and we cannot see why they should not be taxed here." To the same effect see *Waggoner v. Whaley* (Tex. Civ. App.) 50 S. W. 154; *Hardisty v. Fleming*, 57 Tex. 395.

*Griggsy Construction Company v. Freeman*, 108 La. 435, 32 South. 399, 58 L. R. A. 329, is a case like this. In Louisiana all property in that state is subject to taxation, except that expressly exempted from taxation by law. The statutes provide that, in case the taxpayer fails or refuses to furnish a list of his property within the time prescribed, the assessor "shall himself fill out the list from the best information he can obtain." "In making his assessment for the year 1901 the assessor of the parish of Natchitoches called upon the plaintiff's agent

to furnish, as required by law, a list of its property situated in the parish and subject to taxation. The plaintiff is a Texas corporation, having its domicile at Dallas, Tex. It operates in that state and adjoining states in the construction of dams, dikes, levees, railroad beds, and other earthwork, and for that purpose has outfits, consisting of mules, scrapers, wagons, commissary store goods, tents, etc., which it sends to the places where work is to be done. At the time when its agent was thus called upon by the assessor, plaintiff was doing grading work for the Texas & Pacific Railroad in the parish of Natchitoches, and the property sought to be assessed was a construction outfit and other movables necessary or convenient in the doing of that work. The agent questioned whether said property was liable to taxation in Louisiana, and asked for time to consult counsel. A second attempt was made to get from the agent a list of the property of plaintiff, and, this second attempt proving equally fruitless, the assessor, as required by law, made out a list of the property as best he could, and put the same on his roll. Plaintiff, failing to pay the tax thus assessed, the tax collector proceeded to enforce payment by seizure of some of the mules assessed, and plaintiff brought suit, enjoining the seizure." Supreme Court of Louisiana held that the property was subject to taxation and said: "In the instant case the property was not in the course of transportation, but was here for use likely to be of some duration—possibly a full year—and for the time being was incorporated in the bulk of the property of the state. It was distinguishable from the rest of the property of the taxing district in no respect except the intention of the owner to remove it at some future time more or less distant. Under these circumstances its situs approached nearer to permanency than did that of the sheep in the Wyoming case, or that of the coal in *Brown v. Houston*," 114 U. S. 633, 5 Sup. Ct. 1091, 29 L. Ed. 257; 1 *Wharton on Conflict of Laws* (3d Ed.) § 80a, and cases cited.

The property of plaintiff in this case was not in transit, but was here, chiefly, if not solely, for use and profit, and was subject to taxation.

Decree is reversed, and the complaint of appellees is dismissed for the want of equity.

#### BEEKMAN LUMBER CO. v. KITTRELL (Supreme Court of Arkansas. Oct. 8, 1906.)

##### 1. ACTIONS—JOINDER OF CAUSES.

Plaintiff, in writing, contracted to plane lumber for defendants, they to furnish enough to keep his mill going at full capacity, and after expiration of the time limited for the contract to last, without any extension thereof, they furnished him lumber to plane, and which he used plane. Held, that there was no misjoinder

ing after expiration of the written contract; both causes of action arising on contract and each affecting all parties to the action.

#### **PARTIES — PLAINTIFF — ACTION ON CONTRACT.**

One in whose name a contract is made may thereon in his own name, though stating that it is for the benefit of another.

Ed. Note.—For cases in point, see vol. 37, at. Dig. Parties, §§ 4-8.]

#### **PRINCIPAL AND AGENT—PROOF OF AGENCY.**

Agency may be proved by testimony, though by the declarations, of the agent.

Ed. Note.—For cases in point, see vol. 40, at. Dig. Principal and Agent, § 39.]

#### **PARTIES—PROPER PARTIES.**

The testimony of one suing on a contract in his own name that his wife is interested therein not being contradicted, it is proper though not necessary, to make her a party.

Ed. Note.—For cases in point, see vol. 37, at. Dig. Parties, §§ 13-17½.]

#### **DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS.**

Plaintiff having contracted to plane lumber for defendants, they to furnish a certain amount, which they failed to do, he may recover damages the profits he would have made by doing the work.

Ed. Note.—For cases in point, see vol. 15, at. Dig. Damages, §§ 74-77.]

#### **SAME.**

Damages for breach by defendants of a contract by which plaintiff was to dress lumber for them, at prices ranging from \$1 to \$3 thousand feet, according to the kind of lumber and amount of work to be done on it, they agreeing to furnish sufficient lumber to keep the planing mill plant running at its full capacity, may not be limited to what the profits would have been had defendants furnished lumber for planing only, the price of which was \$1 per thousand, as, if this had been done, the plant, which contained planing machines, an edger, and a resaw machine, could not have been run at its full capacity.

#### **SAME—DUTY TO LESSEN INJURY.**

Defendants, in an action for breach of their contract to furnish lumber to plaintiff to plane, sufficient to keep his plant going at its full capacity, may not complain that he made no effort to lessen the injury; he being under no duty to buy lumber to keep the mill going, and having objected to his doing work for others, claiming that under the contract he must use it for them exclusively.

Ed. Note.—For cases in point, see vol. 15, at. Dig. Damages, §§ 128-129.]

#### **TRIAL—READING INSTRUCTIONS TOGETHER.**

At the request of plaintiff in an action for breach of defendants' contract to furnish him lumber to plane, which they agreed to do "except in cases of delay beyond control of" defendants, the court instructed that such clause meant the act of God or some "calamity" beyond the control of defendants. For defendants instructed that the burden of proof was on plaintiff to show, not only that they had failed to furnish the lumber as required by the contract, "but also that such failure was caused by circumstances not beyond the control of" defendants. Held that, reading the instructions together the word "calamity" would be understood as used in the sense of "mischance" or "misfortune," and so would not be misleading.

#### **PLEADING—FILING REPLY DURING TRIAL.**

The court may allow the filing of a reply after evidence was introduced by plaintiff to

Cent. Dig. Pleading, §§ 834-838.]

Appeal from Circuit Court, Ashley County; Z. T. Wood, Judge.

Action by L. W. Kittrell against the Beekman Lumber Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. M. Hooker, for appellant. Robt. E. Craig, for appellee.

**RIDDICK, J.** This is an action on contract, brought by W. E. Kittrell for the use of his wife, L. W. Kittrell, against the Beekman Lumber Company, to recover damages for breach of contract. The facts, briefly stated, are as follows: W. E. Kittrell is the husband of L. W. Kittrell. Mrs. Kittrell was in 1902 the owner of a planing mill plant located in Ashley county. The Beekman Lumber Company of Kansas City, Mo., was engaged in buying and shipping lumber in that county. In that year W. E. Kittrell made a written contract with the Beekman Lumber Company by which he agreed to dress lumber for that company for certain prices, named in the contract, ranging from \$1 to \$3 per 1000 according to the kind of lumber and the amount of work to be done on it. The contract contained the following stipulation on the part of Kittrell: "I agree, furthermore, to dress lumber exclusively for the said Beekman Lumber Company, except in case of the inability of the Beekman Lumber Company to keep at least one machine stocked, and such custom dressing as not to interfere with the interest of the Beekman Lumber Company. I agree also to run the mill at its full capacity eleven hours a day, except in case of unavoidable accident, said capacity to be at least 15,000 feet per day of eleven hours." On the part of the lumber company there was this stipulation: "The Beekman Lumber Company agrees to furnish the said W. E. Kittrell sufficient lumber to keep said planing mill plant running at its full capacity during this contract, except in cases of delay beyond control of the said Beekman Lumber Company." The contract provided that it should last four months from May 24, 1902, allowing the lumber company the privilege of extending it to January 1, 1903. The contract was not extended, though the lumber company afterwards furnished lumber for Kittrell to plane. This contract was made in the name of W. E. Kittrell, but he brought this suit in his name for the use and benefit of his wife, L. W. Kittrell, and testified that she was the owner of the property and that the contract was made for her benefit.

The complaint contained two causes of action set out in different paragraphs. The first paragraph set up a failure of the defendant company to furnish lumber suffi-

failure plaintiff alleged damages in the sum of \$1,720.28. The second count was an action to recover for planing lumber done after the expiration of the written contract referred to, and for which plaintiff claimed the sum of \$314.95 as due and unpaid. The defendant filed a demurrer to the complaint on account of the misjoinder of actions, which was overruled. It also filed an answer denying the material allegations of the complaint. The plaintiff recovered judgment for \$925 on the first count in the complaint, and for \$314.95 on the second, with interest, and defendant appealed. There were a number of exceptions saved to rulings of the circuit court at the trial, but we shall notice only those points referred to in the brief of counsel.

The first contention is that there was a misjoinder of actions. But this is clearly not tenable, for the two causes of actions sued on arose on contracts, and each of them affected all the parties to the action, and under our statute could be joined. Kirby's Dig. § 6009.

The next contention is that Mrs. Kittrell could not bring this action for the reason that she was not a party to the contract with the lumber company. But the suit was brought in the name of W. E. Kittrell, for the use and benefit of Mrs. Kittrell. As the contract was made in the name of W. E. Kittrell, he had the right to bring the action in his own name, even though it was for the benefit of his wife. Kirby's Dig. § 6002. His stating that the action was for the use and benefit of Mrs. Kittrell did not affect the rights of the defendant company nor prejudice it in any way, and furnishes no ground to reverse the judgment. It is true, as counsel for appellant says, that in an action against a principal the declarations or admissions of the agent are not competent to prove the agency; but this rule does not refer to the testimony of the agent, but to his unsworn declarations. An agency may be established by the testimony of an agent, as well as that of any other witness who has knowledge of the facts. The testimony of Kittrell that his wife was the owner of the planing mill and interested in the contract was not contradicted, and it was therefore not improper to make her a party, though, as before stated, it was not necessary.

The circuit judge instructed the jury that, if the defendant could have furnished a sufficient quantity of lumber to have kept the planing mill plant of plaintiff running at its full capacity, and failed to do so, the plaintiff was entitled to recover such sum as the evidence shows that he would have earned, had the defendant performed its contract and furnished such lumber. Counsel for defendant contends that plaintiff cannot recover for loss of profits in a

erroneous. The rule in reference to the recovery of profits is thus stated in a recent work: "The recovery of profits as in the case of damages for the breach of contracts in general depends upon whether such profits were within the contemplation of the parties at the time the contract was made. If the profits are such as grow out of the contract itself and are the direct and immediate result of its fulfillment, they form a proper item of damages." 13 Cyc. 53, 54. Such damages "must be certain both in their nature and in respect to the cause from which they proceed. It is against the policy of the law to allow profits as damages, where such profits are remotely connected with the breach of contract alleged, or where they are speculative, resting only upon conjectural evidence or the individual opinion of parties or witnesses." 13 Cyc. 53; *Spencer Medicine Co. v. Hall* (Ark.) 93 S. W. 985. Now, in this case the plaintiff had entered into a contract to perform certain work for the defendant, which he was prevented from doing, as the jury found, by the fault of the defendant, and we are of the opinion that the profits which the evidence makes reasonably certain that plaintiff would have made had defendant carried out its contract may be recovered. *Spencer Medicine Co. v. Hall* (Ark.) 93 S. W. 985.

Again, it is said that the prices for work to be done in finishing the lumber varied from \$1 to \$3 per 1000 feet according to the kind of finishing done, and that defendant had the right to select this work and could have chosen the lowest price. But the lowest price, \$1 per 1000, was to be charged for ripping, and defendant would not have complied with its contract had it furnished lumber for ripping only. The contract required that, except in cases of delay beyond its control, it should furnish sufficient lumber to keep the planing mill plant running at its full capacity. Now the plant included two planing machines, besides an edger and resaw machine, and it is evident that this plant could not have been run at its full capacity if lumber had been furnished for ripping only; for the planing machines would have been left with nothing to do. The main purpose of the contract was to dress lumber, and plaintiff testified that the average price under the contract for the lumber actually furnished by defendant was \$2.45 per 1000. He also testified that on the whole contract defendant was over 800,000 feet short on the lumber to be furnished, and the amount of the verdict shows that the jury did not allow much over \$1.50 per 1000 for this shortage. Judging from the evidence this amount was not excessive.

Again, it is said that it was the duty of the plaintiff to lessen the injury and that he should have purchased lumber to keep his

plant running. But there was no contract to purchase lumber, and it was no part of plaintiff's duty to do so. It is true that he should not have allowed his plant to remain idle if he could have obtained work for it to do. Plaintiff testified that, when defendant failed to furnish sufficient lumber, he did make an effort to obtain lumber from other parties, and obtained some, but that defendant objected, and claimed that under the contract plaintiff must dress lumber exclusively for defendant, and that, on account of this objection, plaintiff made no further effort to obtain lumber from other parties. If defendant objected to plaintiff's dressing lumber for other parties, it has now no right to complain that plaintiff refrained from doing so. Whether such objection was in fact made was a question for the jury.

The court, at the request of the plaintiff, told the jury "that the clause in the contract which reads, 'Except in cases of delay beyond the control of the Beekman Lumber Company,' means the act of God, or some calamity beyond the control of the Beekman Lumber Company." For the defendant he told the jury that the burden of proof was on plaintiff to show, not only that defendant had failed to furnish the lumber as required by the contract, "but also that such failure was caused by circumstances not beyond the control of the defendant." Counsel for defendant objects to the use of the word "calamity" in the instruction given at request of plaintiff; but we think, when the two instructions on this point are read together, it is clear that the word "calamity" was used in the sense of "mischance" or "misfortune," and that when these two instructions are read together there could be no misunderstanding of the court's meaning.

Again, the defendant asked the court to tell the jury that, as the allegations contained in its counterclaim had not been controverted by any reply, these allegations must be taken as true. The court refused to do so, and permitted the plaintiff to file a reply to the allegations in the counterclaim. As evidence was introduced by plaintiff on the trial tending to rebut the allegations of the counterclaim as if they were denied, it was clearly within the discretion of the presiding judge to permit plaintiff to file a formal reply thereto, though this was after the evidence had been introduced.

No objection to any other instruction is made in the brief of appellant, and, as we have said, these objections are in our opinion not sound. There was ample evidence on which the jury might well have found a lower amount, or even have returned a verdict in favor of the defendant. But they did not do so, and we are not able to say that their verdict in favor of plaintiff, though it seems liberal, is without evidence to sustain it. On the contrary, we think, under the conflict of the testimony, it was within the province of

the jury to find the amount of

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### 1. SPECIFIC PERFORMANCE—

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### 2. SAME—CERT.

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Appeal from cus L. Hawkin

Suit by Abe : From a decree fendant appeal

Mrs. O. Meyer following conti tract of land Mrs. Meyer: gust 1st, 1899 made between to wit: C. Me. N. W. S. W. 1, 1 W., for a ter ary 1st, 1900, 1903, on the c vided, and C. cabins and one said land, and fence it. Abe put in cultivat to each house, vation of high posts, and bu In consideratio said labor the term, but with ments whatsoe O. Meyer gar to buy said la on 2 or 3 year terest, exclusiv fencing which cording to va Jenkins." Jenl land under th land as he agr of the lease he parties could i the improve

Jenkins against Mrs. Meyer, and referred the case to a master to take proof and determine the value of the improvements. The master heard evidence and made a report that the improvements on the land consisted of a quarter of a mile of wire fencing and 35 acres of cleared land, and that the value of this improvement was \$25 for the fencing and \$10 per acre for clearing the land, amounting in all to \$375. The chancellor, on exceptions to this report filed by Jenkins, found that the value of clearing the land was \$5 per acre, and sustained the exceptions to that extent, and held the total value of the improvements to be \$200. He gave judgment accordingly, and Mrs. Meyer appealed.

E. A. Bolton and Wm. Kirten, for appellant. W. G. Street, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal by Mrs. C. Meyer from a judgment rendered against her by the Chicot chancery court in favor of Abe Jenkins, ordering a specific performance of a contract to sell 40 acres of land. By the contract Mrs. Meyer leased the land to Jenkins for three years and gave him the right to purchase at the expiration of the lease. The price of the land specified in the contract was \$600, and in addition thereto Jenkins was to pay the value of the improvements on the land.

The first contention on the part of counsel for Mrs. Meyer is that the writing in question did not amount to a contract for the sale of the land, and, further, that the price to be paid is left too indefinite to warrant a decree of specific performance. But it seems to us clear that this writing was in effect a contract on the part of Mrs. Meyer to sell the land to Jenkins for the price named therein. It is true that Jenkins does not agree to purchase. That was left optionally with him. He had, under the contract, which is set out in the statement of facts, the right to purchase at the expiration of his lease if he chose to do so. A contract of that kind, which by its terms is binding upon one of the parties only, may be specifically enforced against that party, although the remedy cannot be granted to him against the other party. *Pomeroy, Specific Performance, § 169; Waterman on Specific Performance, § 200.*

Nor can we sustain the contention that the price of the land is not stated with sufficient certainty. In the case of *Milner v. Gray*, 14 Ves. 399, where there was an agreement to sell at the valuation placed on the property by two persons, one chosen by each party, and, in case of disagreement by these persons at the valuation of a third party

unable to agree as to the third person. Sir William Grant, Master of the Rolls, refused to order specific performance, and said that the defendant agreed to purchase at the price fixed by certain persons, but that no price had been fixed by such persons; that therefore no price had been agreed on by the parties, and the contract could not be enforced. In discussing the case, he said that an agreement to sell at a fair valuation would be different, for the reason that, where no particular means of ascertaining the value are pointed out, there is nothing to preclude the court from adopting any means adapted to that purpose. In a later case, decided by the Court of Chancery of New Jersey, the court held that a contract for the sale of land at a fair price would be enforced. The following from the opinion of the chancellor seems to be a correct statement of the law: "This class of cases," he said, "has given rise to some conflict of opinion, and the line which marks the limits of the court's exercise of jurisdiction, is not clearly defined. The true principle seems to be that, whenever the price to be paid can be ascertained in consistency with the terms of the contract, performance will be enforced. But the court will not make a contract for the parties, nor adopt a mode of ascertaining the price, not in accordance with the real spirit of the agreement. In this case the mode in which the price shall be fixed is not designated in the contract. It is required simply that it be a fair price. To ascertain that value by any mode of investigation will conflict neither with the letter nor with the spirit of the contract. I think, therefore, the contract is such as will justify a decree of specific performance." *Van Dorne v. Robinson*, 16 N. J. Eq. 256. See, also, *Pomeroy, Specific Performance, § 148; Waterman, Specific Performance, § 148.*

Now, in the case before us, the price of the land was fixed by the contract at \$600 and the added value of the improvements. This is definite and clear. The value of the improvement can be ascertained, and the contract is one which the courts will enforce. But we are of the opinion that the chancellor erred in sustaining the exceptions to the report of the special master as to the value of the improvements. We have read the evidence, and are convinced that the value of the improvements as found by the master was not excessive.

The decree of the chancellor will be modified, so as to give Mrs. Meyer a judgment against Jenkins for \$600 for the land and \$375 for improvements, with 10 per cent. interest from the 1st day of January, 1903. In other respects the decree will be affirmed. It is so ordered.

**PLEADING—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.**

In an action for personal injuries an amended complaint setting up the same cause of injury, but alleging in addition to the damages alleged originally that, on account of the injuries, plaintiff was put to expense for medicine, nursing, etc., and that her earning capacity had been diminished, did not amount to a tement of a new cause of action.

Ed. Note.—For cases in point, see vol. 39, nt. Dig. Pleading, §§ 686-700.]

**APPEAL—REVIEW—QUESTIONS NOT RAISED BELOW.**

In an action for personal injuries, defendant could not raise for the first time on appeal objections that plaintiff could not recover for medical expenses, as a recovery of such damages must be by an action in the name of her husband, and that she could not recover damages for loss of time and diminished capacity work, and attend to her business.

Ed. Note.—For cases in point, see vol. 2, nt. Dig. Appeal and Error, §§ 1079-1120.]

Appeal from Circuit Court, Pulaski County; Edw. W. Winfield, Judge.

Action by Mrs. Mary Miller against the Little Rock Traction & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rose, Hemingway, Cantrell & Loughborough, for appellant. W. L. Terry and T. Oliphant, for appellee.

**RIDDICK, J.** This is an action by Mrs. Mary Miller against the Little Rock Traction Electric Company to recover judgment for damages on account of injuries sustained by her in alighting from one of the defendant's street cars. The plaintiff alleged that on the 18th day of September, 1901, she boarded a car on defendant's street railway going north; that desiring to get off at Eighteenth and Main streets she asked the conductor to stop the car and let her off, which he did, but before plaintiff had time to alight from the car, and without giving her a reasonable time to alight in safety, the agents in charge of the car negligently and recklessly started with a sudden jerk, and threw her to the ground, causing her great injury. She asked judgment for \$5,000.

The defendant filed an answer denying most of the material allegations in the complaint, and further alleging that if plaintiff was injured, her injury was due to her own carelessness in attempting to alight while the car was in motion, and not to the negligence of the defendant. On March 3, 1905, over three years after filing the original complaint, the plaintiff filed an amended complaint in which after setting out the cause of her injury substantially as stated in her original complaint, she proceeded as follows: "That, on account of the injuries so inflicted, suffered, and sustained, the plaintiff suffered great pain of body and

for medicine, medical attention, care, nursing, and assistance, and loss of time and earning, and will be put to great expense hereafter, in trying to obtain relief, and cure said injuries, and was hitherto and still is and will for a long time, and probably for life, continue to be subject to great pain, suffering, inconvenience, and loss of time and earning, and permanently diminished capacity to work or attend to her millinery or dressmaking business which she had or any business, and is permanently disabled, to her damage \$5,000." Wherefore, she asked judgment for that amount and other relief. The material allegations in the amended answer were also denied by defendant, and it further pleaded the statute of limitations. On the trial the jury returned a verdict in favor of the plaintiff for the sum of \$3,000 composed of the following items: "For pain and suffering they assessed damages at \$1,700, for medical expense \$300, and for loss of time and earnings \$1,000."

In answer to special interrogatories propounded by the court the jury found that the car had come to a full stop at the time Mrs. Miller attempted to step from the car, but that the car was started and its speed quickened while she was getting off. The defendant appealed from the judgment rendered against it, and several grounds for reversal are urged by its counsel.

The first contention is that the different items of damages set out in the amended complaint are barred by the statute of limitations. But we are of the opinion that the specifications of damages set out in the amended complaint did not constitute a separate cause of action from that set out in the original complaint. The cause of action set out in the original complaint is not barred, and, as no other cause of action was set out in the amended complaint, the contention that the action is barred cannot be sustained.

The next contention is that the plaintiff cannot recover for medical expenses caused by her injury, and that a recovery of such damages must be by an action in the name of her husband. But there is nothing in the pleadings or evidence to show that Mrs. Miller is a married woman, or has a husband, and this point does not appear to have been made in the trial court. The same thing may be said of the contention that she cannot recover damages for loss of time and diminished capacity to work, and attend to her millinery and dressmaking business. These points seem to be raised here for the first time, and cannot be entertained. Besides, as before stated, there is nothing in the record to show that plaintiff was a married woman. She testified that she was engaged in the millinery and dressmaking business, that her injury was

such that she was now incapable of attending to that business and that, on account of her injury, she had paid out considerable sums for medicines, and for medical attention. We see no reason why she cannot recover for such items of damage.

The evidence was, we think, sufficient to support the verdict. When considered in connection with the special findings of fact returned by the jury, we can see no prejudicial error in the instructions or rulings of the trial court. We are therefore of the opinion that the judgment should be affirmed, and it is so ordered.

**ST. LOUIS, I. M. & S. RY. CO. v. DAVENPORT et al.**

(Supreme Court of Arkansas. Oct. 8, 1906.)

**MASTER AND SERVANT—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR—BURDEN OF PROOF—RAILROADS.**

Where damage to plaintiffs' farm lands in the construction of defendant's railroad right of way were inflicted by those engaged in the construction of the railroad for the company, the burden was on the latter to show that the injuries were done by an independent contractor, for whose conduct the railroad was not responsible, in order to avoid liability.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1270.]

Appeal from Circuit Court, Marion County; Elbridge G. Mitchell, Judge.

Action by S. A. Davenport and another against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. S. Johnson, for appellant. Woods Bros., for appellees.

**McCULLOCH, J.** The plaintiffs, S. A. Davenport and W. L. Davenport, brought this action against the St. Louis, Iron Mountain & Southern Railway Company and J. H. Reynolds, contractor, and Ben Reynolds, subcontractor, for alleged damages done to the plaintiffs' farm lands in constructing the railroad through the same. Plaintiffs conveyed to the railroad a right of way over the land, and the damage is claimed to have been done to the remainder. The defendants filed a joint answer, denying that any damage had been done to the land. No separate defense was made by the railway company on the ground that the alleged damage was done by an independent contractor.

The case was submitted to the court sitting as a jury. No declarations of law were asked or given, and the court found for the plaintiffs, assessing damages at \$85. Judgment was rendered accordingly against all of the defendants, and they appealed to this court. We think there was evidence sufficient to sustain the finding of the court.

The relations between the railway company and the contractors were not drawn out in the evidence, but it is shown that the damage was inflicted by those engaged in the construction of the railroad for the company, and it devolved upon the latter to show that the same was done by an independent contractor, for whose conduct the company was not responsible.

**Affirmed.**

**WESTERN COAL & MINING CO. v. DOUGLASS.**

(Supreme Court of Arkansas. Oct. 8, 1906.)

**MASTER AND SERVANT—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

Evidence in an action for death of an employé in a coal mine, caused by explosion of gas which accumulated in an entry by reason of a defective door, which should have closed of itself, having remained open, held sufficient to authorize findings that deceased had not left the door open, and was not guilty of contributory negligence in going into the entry when the door was found open.

Appeal from Circuit Court, Sebastian County, Greenwood Division; Styles T. Rowe, Judge.

Action by James Douglass, administrator, against the Western Coal & Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ira D. Oglesby, for appellant. John S. Little and T. B. Pryor, for appellee.

**HILL, C. J.** John Williams, an old and experienced miner, was killed by a gas explosion in a mine of appellant company, where he was at work, and his administrator has recovered a judgment for \$1,500 against the company which has appealed therefrom.

Appellant pretermits all other questions, and rests upon the contention that there was no evidence to sustain a submission of the case to the jury, and consequently the judgment cannot stand. McGraw, the boss driver, and Bussey, and Williams, two miners, were sent by the pit boss into the Fifth East Entry to lay a switch. McGraw drove them and the material for the work to the place. There was a door leading into this entry whose purpose was to prevent the air passing therein, thereby forcing it to continue along its course which would carry it through the Fifth Entry, relieving it of accumulated gas, and giving proper ventilation. If this door was left open the air went through it and short circuited to the return course, thereby leaving this entry without ventilation. This, as all other ventilating doors, was constructed so that it would close itself whenever it was opened. Concussions in the mine from shots, especially windy shots, explosions and probably other causes would open the door, but it should be so hung that it would immediately slam shut. The appellee's evidence shows

ould, and this condition had existed some time, and had been reported to the boss, who promised the fire boss that it would be remedied. McGraw, Bussey, and Williams only staid in the entry a short time and went elsewhere to work and returned to the entry about 2½ hours after they left it and found the door open, and in only a short distance when they were ignited from their open lamps, and from the explosion Williams was so injured he died after lingering through great suffering. The appellant contends that it was the duty of Williams and his companions to close the door when they left the entry, and the evidence shows they failed to do it, and irrespective of this fact that it was negligence to enter the entry when they left the door thereto open. McGraw says they failed to hear the door slam when they left the entry, and Williams went back to shut the door, as he supposed, but he does not know whether Williams did shut it or not. There was much testimony that it was the duty of miners to listen for a door to slam shut after they passed through, to go back and close it if they failed to hear it. This, however, is not material evidence from which the jury might well have decided that Williams did not close the door. This is the inference to be drawn from the testimony of McGraw, and in addition to that three witnesses, each an experienced miner, testify that, if that door had been open for 2½ hours, the accumulation of gas in that time would have caused a most disastrous explosion, blowing out the door and destroying that part of the entry; while the evidence shows that this explosion did not even have force enough to blow out the door, and did no damage other than burning the men who were in it. This testimony fully justified a finding that Williams, or his companions, closed the door when they left. There is no evidence of when the door was opened. The evidence shows that the door on the Fourth West Entry, or similar to this one and on the same course was opened and shut just before the return of these men to the Fifth East Entry. McGraw gives his opinion, from 17 years' experience in mines, that this would be a sufficient concussion of air to open the door to the East Fifth. If the door was properly swung, it would immediately swing shut, if not, it would stay open. Martin

opening of the door on the West Fourth Entry could not cause the door of the Fifth East to open. The jury passed on this conflict and had a right to accept McGraw's theory in preference to Rafter's. But it was hardly incumbent upon appellee to account for the opening of the door. It was sufficient for his case to clear himself and fellow servants of fault in the matter, for it was the master's duty to provide a working place free of gas.

It is earnestly insisted that the entrance to this entry by Williams and his companions with the door open was negligence of itself, and in doing this dangerous act they assumed the risk of the danger encountered. McGraw, who was appellee's witness, says that Williams was riding in the car which was drawn by a mule, in returning to this entry, and Bussey stopped the car and went forward to open the door and found it open and drove on in; and from where Williams was he could not see that the door was open. On the other hand appellant introduces evidence of statements of Williams tending to show he knew the door was open before he went in; that he and McGraw talked of it, and that he did not blame any one but himself for the injury. But these statements also show that he and McGraw talked of the reason the door was open, and that McGraw said Pudlass, the fire boss, was in there, and he asked McGraw if he was sure and McGraw said he would swear it. McGraw, as driver, had been in other parts of the mine while Williams was at work in the Fourth West Entry, and had met and talked to Pudlass, the fire boss, and Jones, the pit boss, in the interval. If the fire boss had gone in the entry and left the door open while there, the inference would be that it was for only a few minutes. It would tend to show that there was no immediate danger in the entry when the man whose duty it was to see to the ventilation was then in there. It must be remembered that only a few hours before Williams was in there and found it safe and properly ventilated. Take either view of the case and it presented a question of fact whether it was negligence on part of Williams, under the circumstances shown, to return to this entry. The court properly submitted this question to the jury, and its finding was sustained by the evidence.

Judgment affirmed.



**ROSE v. STATE**

(Supreme Court of Arkansas. Oct. 3, 1906.)

**1. FORGERY—DEFENSES.**

Where defendant without any authority signed his father's name to an order, and with it obtained money from a bank, he was guilty of uttering and publishing a forged instrument, though he believed that his father would pay the order and not prosecute him.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, §§ 4-7.]

**2. SAME—INSTRUCTIONS.**

Where, on a prosecution for uttering and publishing a forged instrument with intent to obtain the property of a certain person, it appeared that defendant forged such person's name to an order on a bank and obtained money thereon, and he testified that he believed that such person would pay the order and not prosecute him, it was proper to refuse to instruct that defendant should be acquitted, if the jury believed he intended to obtain the money of the bank, and not of the person in question.

Appeal from Circuit Court, Searcy County; Elbridge G. Mitchell, Judge.

J. D. Rose was convicted of uttering and publishing a forged instrument, and he appeals. Affirmed.

J. D. Rose, pro se. Robt. L. Rogers, Atty. Gen., for the State.

RIDDICK, J. The defendant, J. D. Rose, was indicted and convicted in the Searcy circuit court for the crime of uttering and publishing a forged instrument with intent to obtain the property of one John Rose. He was sentenced to two years' imprisonment in the state penitentiary. The evidence showed conclusively that the defendant forged the name of his father, John Rose, to an order addressed to the cashier of the Marshall Bank, requesting him to let J. D. Rose, the defendant, have \$65, and to charge it to the account of John Rose, and in that way obtained \$65 from the bank. Soon after the defendant received the money he started for the Indian Territory, in company with a young girl, 17 years of age, whom he had induced to accompany him, leaving behind him a wife and six children without means of support. After he had got out of Searcy county he heard that a reward had been offered for his arrest. He thereupon of his own accord surrendered to the sheriff of an adjacent county and was by him carried back to Searcy county. On the trial the father of the defendant testified that the defendant had no authority whatever to sign his name to such order. The defendant also took the stand and testified in his own behalf. He admitted that he signed his father's name to the order which he presented to the bank as genuine, and in that way obtained the money from the bank. Continuing, he said: "I signed his name to the check, and also two names of witnesses pretending to show that the check was my father's. I wanted to get the money, and thought the bank would want two witnesses.

The witnesses did not know I signed their names. I did not tell my father about getting his money after I got it and went home. I left soon after this with the girl and traveled on foot part of the way. This all occurred in Searcy county, Ark., and within three years before I was indicted. I want to withdraw that part of my evidence I gave on direct examination to the effect that I signed papers for my father and did business for him. I never did business for him. I never signed but one check, and that was in his presence and for him. I had no authority to get his money, yet I wrote the check, signed his name and the names of two witnesses for the purpose of getting the money, and I did get it. Still I did not believe he would prosecute me. I don't think so now, if it had not been he thought I had gone away forever and left my wife and six children for him to support. He did care for them during my absence."

It is not necessary to look to the evidence introduced by the state, for this testimony of the defendant himself makes out a clear case against him and fully sustains the indictment. The only thing that can be said in his favor is that he seems to have made a candid statement. He admits that he signed his father's name to the order on the bank without authority, and also forged the names of two persons purporting to be witnesses to the signature of his father. But he says that, at the time he did so, he thought his father would pay the order and not prosecute him. But, even had his father done so, the act of the defendant would have still been criminal. The crime charged in the indictment was complete when he passed this forged order and obtained the money from the bank, and no act of his father could have made it less criminal.

Counsel for the defendant asked the court to instruct the jury that, if the defendant at the time he wrote the order to the Marshall Bank did it in good faith, believing that his father would pay the same, and had good reason to believe that he would pay it, then the defendant would not be guilty, even though his father refused to pay it. But this instruction was clearly misleading. The testimony of both the defendant and his father shows that he had no authority to sign his father's name to such an order, and that defendant knew this at the time he did so. He therefore did not act in good faith, and, as we have stated, the fact that he thought his father would pay the check in order to protect him did not make his act the less criminal. This testimony of the defendant shows also that his intention was to obtain the money of his father, and not that of the bank, for he expected that his father would pay the order and say nothing. It sustains the allegation of the indictment that his intention was to fraudulently obtain the property of his father. The court therefore did not err in

refusing to instruct the jury that they should acquit the defendant, if they believed that he intended to obtain the money of the bank, and not that of his father, because there was no evidence to sustain this theory of the case. Not only the testimony of the defendant shows that he intended to get the money of his father in this way, but, according to the authorities, it seems to be immaterial whether he actually intended to cheat his father or not. "Generally," says Mr. Bishop, "there are two persons who may legally be defrauded; the one whose name is forged, and the one to whom the forged instrument is to be passed. And so the indictment may lay the intent to defraud either of these, and proof of an actual intent to pass as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation." 2 Bishop, Crim. Law (4th Ed.) § 555. In such cases the law presumes the intention to defraud the person whose name is forged, when the evidence does not show to the contrary. *Commonwealth v. Butterick*, 100 Mass. 17; *Commonwealth v. Star*, 4 Allen (Mass.) 304; *Regina v. Cook*, 8 C. & P. 586; 2 Bishop, New Crim. Law, § 597. The instructions given by the court fairly covered the law of the case, and under the facts in this case there was no error in refusing those asked by the defendant.

Judgment affirmed.

# **CITIZENS' BANK OF LITTLE ROCK v. ARKANSAS COMPRESS & WAREHOUSE CO.**

(Supreme Court of Arkansas. July 9, 1906.)

## **1. WAREHOUSEMEN — LIABILITIES—MISDELIVERY OF COTTON STORED.**

Where a compress and warehouse company delivered cotton which had been stored with it to one not the owner, on his presentation of the compress receipts therefor, which showed on their face who the owner was, and which had not been indorsed, the company was liable to the owner for the value of the cotton, in the absence of a showing that the owner had been negligent in placing the receipts in possession of the person who presented them, so as to stop it from setting up its rights as against an innocent purchaser.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Warehousemen, § 42.]

## **2. SAME—ESTOPPEL—EVIDENCE.**

In an action by the owner of cotton to recover its value from a compress and warehouse company, evidence held to sustain a finding that the third person, who presented the receipts for the cotton, and to whom it was delivered, had obtained them without the consent of the owners, so that they were not estopped to set up their rights as against the company.

## **3. SAME—TITLE TO PROPERTY STORED.**

Where bills of lading for cotton were delivered to a bank, the title thereto passed to the bank and was not affected by the bank's acceptance of compress receipts in lieu of the bills of lading, which receipts failed to identify the cotton, which was mingled with other cotton by

the compress company.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Ware

## **4. SAME—RECEIPTS.**

The right of a compress company to issue receipts for cotton cover the value of the cotton is not affected by the fact that the receipts passed to the holder of the cotton it being admitted that the receipts represented by the compress company.

## **5. CUSTOMS AND RECEIPTS—STATUTE.**

Under Kirby's Act, warehousemen from any cotton for which they issue receipts, without the written receipts, a custom of the company treating receipts as valid could not justify the holder of receipt in claiming the cotton of person than the person to whom the receipt was issued for the cotton.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Cust

## **6. SAME—APPLICABILITY OF CUSTOM.**

A custom of a compress company to issue receipts for cotton delivered to the company's warehouse, without the written receipts of the company, owned for an employee, the receipts were not valid, and the company does not justify its refusal to issue receipts without the written receipts of the company.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Cust

## **7. INTEREST — WHICH INTEREST.**

In an action to determine the value of cotton it was agreed that the proceeds of the sale of the cotton and its proceeds to the judgment amount deposited in the bank on judgment of the judgment of the court.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Inter

Appeals from the decision of the court in *Jesse C. Hart*, et al. v. *Arkansas Compress & Warehouse Co.*

Actions by *Jesse C. Hart*, et al. against *Arkansas Compress & Warehouse Co.* for the value of cotton stored with them and delivered to *Murray & Co.* without their indorsement. Judgment affirmed on appeal of the *Arkansas Compress & Warehouse Co.* and affirmed as to the *plaintiffs*.

The *Arkansas Compress & Warehouse Co.* is a corporation organized in 1902 and has its office in Little Rock. In the season of 1903 it handled a large quantity of cotton through the company. The books of the company for the season of 1903 show that the books as *Arkansas Compress & Warehouse Co.* and *Ge*

Alphin-Lake Cotton Company had in its name about 7,000 bales. The Alphin-Lake Cotton Company and the other firms named above were cotton buyers doing business at Little Rock. A large part of the cotton purchased by these parties was paid for by money obtained from the different banks in Little Rock. The business was usually transacted in the following way: When the cotton was purchased, the purchaser gave to the seller a draft on the bank, to which was attached the bill of lading given by the railway company over which the cotton was shipped to Little Rock. The bank paid the check, charged the money to the buyer, and held the bill of lading as security. When the cotton was received by the compress company, it entered the cotton on its books as the property of the buyer, issued receipts in his name, and with the consent of the purchaser took up the bill of lading held by the bank and delivered to the bank the compress receipts issued in the name of the purchaser, which the bank held as collateral security for its loan in lieu of the bill of lading surrendered to the compress company. These compress receipts had no written indorsement on them at the time they were delivered to the bank, and were all in the same form, with the exception of the marks or tag numbers. One of them was as follows:

"No. 1214. (1) Bale.

"Arkansas Compress and Warehouse Co.

"Little Rock, Ark., Jan. 15, 1903.

"Received for compression for account of Alphin-Lake Cotton Co.

"One bale of cotton in apparent good order.

"No charge is made for storage on cotton covered by this receipt.

"Not responsible for loss by fire or other damage.

"Marks or tag number. No. Bales Cotton.

"H. T.

"Ozark B-L 198

Ziba Bennett.

"G. H. H., Secretary and Treasurer."

Before this action was commenced this receipt, which was held by the Bank of Little Rock, was indorsed on back as follows: "Alphin-Lake Cotton Co., per G. P. P." The words "Ozark B-L 198" on the receipt mean that the cotton was shipped from Ozark, and that the number of the bill of lading was 198. If the cotton was bought in Little Rock, the purchaser would obtain the money from the bank to pay for cotton by depositing the receipt of the compress company. The compress company, whether the cotton was bought here or shipped in, would also weigh and sample the cotton, place on each bale a tag number of the party in whose favor the receipt was issued, and furnish a list of the cotton, showing the weight and tag number of each bale and accompanied by a sample of each bale, which would be delivered to the person in whose name the receipt was

issued, and a record of it was kept in the office of the compress company. When any one sold cotton that was in the compress, or shipped it out, he would simply deliver to the purchaser or railroad company receipts for so many bales, accompanied by what is known as a "transfer sheet or turnout order," showing the tag numbers of the bales to be transferred or shipped out. This would enable the compress company to transfer the cotton on its books to the purchaser or ship out the cotton, as the case might be.

At the end of the cotton season of 1902-03 the compress company had taken up, in exchange for cotton in the usual way, all the receipts which it had issued during the season, except receipts for 129 bales, which had been issued to Alphin-Lake Cotton Company, and which were held by the Citizens' Bank as security for a loan to that company. The compress company had no cotton on hand in the name of Alphin-Lake Cotton Company to meet these receipts, but it did have on hand 46 bales in the name of McMurray & Co. and 82 bales in the name of Miller & Co. McMurray & Co. and Miller & Co. had no compress receipts to present for the cotton, but did have the turnout orders or transfer sheets. The Citizens' Bank had receipts calling for this number of bales, but it had no turnout order or transfer sheet for the cotton. The compress company refused to deliver the cotton upon the transfer sheets or turnout orders held by McMurray & Co. and Miller & Co., unless they would at the same time tender receipts for that number of bales, and it refused to deliver the cotton to the Citizens' Bank without a turnout order or transfer sheet describing the cotton. Thereupon McMurray & Co. brought an action against the compress company to recover 46 bales of cotton which were held by the compress company. Miller & Co. brought an action in the chancery court against the compress company to compel it to account for 82 bales of cotton or proceeds thereof, while the Citizens' Bank brought an action against the compress company to recover the value of 129 bales of cotton for which it held the receipts of the compress company. The compress company admitted that it had on hand 128 bales of cotton belonging to some of these parties which it was willing to turn over as the court might direct, and that it had lost one bale which it offered to pay for, but denied further liability. Two of the above actions were brought at law, but on motion the two cases at law were without objection transferred to the chancery court, and all three cases consolidated and heard together. While the case was pending in the chancery court, the following order was entered: "By consent it is ordered that the cotton in controversy in this suit be sold for the benefit of whom it may concern, and that the proceeds be deposited with the Citizens' Bank,

the parties other than the Citizens' Bank, the party to whom it is awarded shall be edited by the bank as of the date the deposit is made." The cotton was sold and proceeds, \$6,292.11, deposited accordingly. The court found against the bank and in favor of the other parties, except that the court refused to charge the bank with interest. Judgment was entered against the Citizens' Bank in favor of Miller & Co. for \$178.50, and in favor of McMurray & Co. for \$2,113.61. The bank appealed, and Miller & Co. and McMurray & Co. took a cross-appeal on refusal of court to charge the bank with interest.

Rose, Hemingway, Cantrell & Loughborough, for appellant. W. S. McCain, for appellees Miller & Co. and McMurray & Co. Metcalfe & Fletcher, for appellee Compress Company.

RIDDICK, J. (after stating the facts). In this controversy three separate actions are involved. As these cases rest to a certain extent on the same facts, the parties contended that they should be consolidated and heard together by the chancery court. Without discussing the propriety of this practice, we shall proceed to consider the questions raised by the appeal.

First, as to the action brought against the compress company by Miller & Co. to cover 82 bales of cotton and the action of McMurray & Co. to recover 46 bales. The evidence shows that the identical cotton owned by these parties, and which had been deposited with the compress company by McMurray & Co., and receipts issued to them, was still held by the compress company at the time these suits were commenced. The books of the compress company show that the 128 bales of cotton now held by the compress company belong to these plaintiffs, and, while the receipts given to the plaintiffs were lost or stolen from them, it is admitted by the defendant that these receipts are now in its possession, having been surrendered to it by another party. As to the compress company, for a defense against the claims of these parties to the cotton in its possession, alleges that it has already delivered to the party who surrendered to it the receipts issued for this cotton the number of bales called for by these receipts. It will be necessary to notice the circumstances under which this delivery was made. The evidence shows that the Alphin-Lake Cotton Company had purchased and shipped to the compress company several thousand bales of cotton during the cotton season of 1902-03. All of this cotton was purchased with money obtained from different banks. The compress company issued receipts for this cotton in the name of

Company, but to the banks in exchange for bills of lading held by the banks, and the banks then held the receipts of the compress company as collateral security for the money advanced to the Alphin-Lake Cotton Company. Lake was the general manager of this company and conducted its business at Little Rock. When he desired to ship any cotton held by the compress company, he obtained from the banks receipts for the number of bales he desired to ship, and the compress company would then ship the cotton out on his "turnout" order upon his surrendering receipts for an equal number of bales, without regard to whether these receipts had been issued or assigned to him or not; for prior to this litigation the receipts which the compress company gave for cotton contained only a meager description of the cotton, and cotton standing on the books of the warehouse to the credit of one person would be shipped out on the order of such person, upon his surrendering receipts issued to him or to any other person, for a like number of bales. In other words, the compress company, the banks, and cotton dealers dealt with these compress receipts as if they called for no particular cotton, but only for a certain number of bales of cotton. While business was being carried on in this way, Lake found or obtained in some surreptitious way compress receipts for 128 bales of cotton which had been issued by the compress company to McMurray & Co. for cotton deposited by them, and of which they had afterwards sold 82 bales to Miller & Co. At the time that Lake came into possession of these McMurray receipts, he had at the compress warehouse a large number of bales of cotton which stood on the books of that company in his name, or in his firm's name. But the company knew that he had pledged the compress receipts issued to him for this cotton to the banks as security for loans, and they would not allow him to ship the cotton without the surrender of receipts covering the number of bales he desired to ship. Lake then, in order to get possession of his cotton without paying his debt to the bank presented these receipts of McMurray & Co. which he had found. And though the receipts had never been indorsed by McMurray & Co., and showed on their face that they did not belong to Lake, the compress company, relying on his honesty, and supposing that he was the owner, took them up and in exchange therefor turned over to Lake, not the cotton for which the receipts were given, but 128 bales which, though it stood on the books of the compress company as belonging to him or his firm, had with knowledge of the compress company been pledged to the bank by the deposit of the compress receipts issued therefor. Lake thus obtained 128 bales of

cotton the compress receipts for which were held by the bank as security for its loan, and to which he had no right, and the compress company obtained from him compress receipts that he did not own and had no authority to surrender.

Although our statute makes such receipts "negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes," it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation. That question was ably discussed by the Supreme Court of the United States, in *Shaw v. Railroad Co.*, and the rule stated that the finder of a bill of lading indorsed in blank could not by transfer divest the title of the owner. *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892. The same rule would apply to a lost warehouse receipt, for bills of lading and compress and other warehouse receipts stand in this respect on the same footing. *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603. The compress receipt represents the property, and the transfer of the compress receipt by the owner transfers the title to the property. But a thief who finds a compress receipt can give no more title to a purchaser from him than he could to property which he had found or stolen. *Shaw v. Railroad Company*, 101 U. S. 557, 25 L. Ed. 892. If this is the law, even where the lost receipt had been indorsed in blank by the owner, as held by the Supreme Court of the United States in the case just cited, how clear it is that the finder of an undorsed receipt, which on its face shows the name of the true owner, cannot by selling or surrendering such receipt transfer the title of the owner. In this case the compress receipts issued to *McMurray & Co.*, which were found by Lake, had never been indorsed, and carried on their face notice to any one dealing with them that they belonged, not to Lake, but to another. Lake not only had no title to them, but his finding and surrender of them to the compress company in no way affected the rights of the owners thereof or their title to the cotton which these receipts represented. It is true, as remarked by the Supreme Court of the United States in *Shaw v. Railroad Company*, that the owner of a bill of lading or compress receipt may by his own carelessness put it in the power of a finder to occupy the position of an owner under circumstances that would estop such owner from setting up his rights against an innocent purchaser. In this case there is the suspicious circumstance that the manager of *McMurray & Co.*, who was also a member of that firm, admitted that he had loaned or exchanged compress receipts with Lake on at least one occasion to enable Lake to ship out cotton which a compress company

held. If he had loaned these receipts to Lake by which Lake obtained from the defendant compress company the 128 bales of cotton in controversy here, his firm would clearly be estopped to claim title to such receipts or cotton as against the compress company. But he testified positively that the receipts he exchanged with Lake were those of another compress company, that he had never delivered or authorized Lake to take any receipt issued by the defendant compress company, and that, if he had those receipts, they were obtained without the consent of the plaintiffs in some way unknown to them. The chancellor found in favor of plaintiffs on that point, and we think the evidence supports the finding. That being so, there is nothing shown to estop the owners of these receipts from asserting their ownership to this cotton. It was their cotton and deposited with the compress company as such. They have neither sold it nor transferred the compress receipts therefor to others, and, so far as the law is concerned, their right to recover is clear. The chancellor, we think, correctly decided in their favor against the compress company.

Second, as to the action of the *Citizens' Bank* against the compress company to recover the value of the 129 bales of cotton for which it holds the receipts of the compress company. The evidence shows that this cotton for which these receipts were given is not now in the possession of the compress company. One bale of this cotton the compress company admits that it lost, and the other 128 bales that it ought to have to meet these receipts held by the bank it, as before stated, delivered to Lake on receipts of *McMurray & Co.*, which he had surreptitiously obtained. In other words, the compress company let Lake have 128 bales of cotton belonging to the bank, which it held as collateral security for loans made to Lake upon his surrendering to the compress company receipts given to *McMurray & Co.* But, as we have seen, these receipts had never been transferred or indorsed by the owners and showed on their face that they did not belong to Lake. The compress company simply took Lake's word for it that he was the owner of the receipts. The compress company thereupon surrendered to him cotton for which it had previously delivered its receipts to the bank and to which it should have known that the bank had a claim. Counsel for the compress company attempts to have it evade liability, by contending that the receipts of the compress company held by the bank call for only a certain number of bales of cotton, and do not describe or identify any particular cotton, and that therefore the title to the cotton did not pass to the holder of the receipts. But this cotton was purchased outside of the city and shipped to this market. It was paid for by drafts on the bank to which the bills of lading of the railway company describing the

cotton were attached and held by the bank as security for the loan. This cotton was thus identified at the time of the purchase, and the title thereto vested in the bank by transferring to it the bills of lading issued by the railway company. Afterwards, when the cotton arrived at the compress, the compress company took up the bills of lading and gave the bank, in lieu thereof, compress receipts stating the number of bales of cotton; but this exchange did not affect the title of the bank to the cotton. This was then not an attempted transfer to the bank of a certain number of bales out of a larger number, where title would not pass until a separation or selection was made. It was a transfer to the bank of a certain selected lot of cotton, which while in the hands of the warehouseman, was afterwards mingled with a larger number of bales so as to make identification more or less difficult. But this mingling did not divest the title of the bank, and it still owned a certain number of bales in the hands of the compress company.

But, if we concede that no particular cotton was identified by these receipts, and that no title passed to the bank, the compress company would still be bound for the number of bales of cotton named in the receipts. The receipts would in effect be a contract on the part of the compress company that it would hold for, and on demand deliver to, the owner of the receipt or his assignee the number of bales of cotton named therein. This is not a suit between the bank and a creditor of Lake attaching the cotton, nor between the bank and the person to whom Lake sold the cotton after he withdrew it from the compress company. In such a suit the question as to whether the title of the cotton passed to the bank might be very material. But in this action between the bank and the compress company it is not very material whether the title passed to the bank or not. If the title passed to the bank, the compress company has wrongfully disposed of 129 bales of cotton belonging to the bank and must account to it for the value thereof. If the title did not pass to the bank, still the bank holds the contract of the compress company to the effect that it has received of the Alphin-Lake Cotton Company 129 bales of cotton which it agrees to deliver to the bank on demand, and which contract it has failed to perform and must respond in damages for the value of the cotton, or at least to the extent of the bank's debt or interest in the cotton. If this was an action at law for conversion, it might be material for the bank to show that it had title to the cotton; but, it being now an action in equity to settle the rights of these parties growing out of the transactions set up in the pleadings, the question of whether title passed to the bank is not material to show liability of defendant. There is no denial that the cotton mentioned in the receipts was actually delivered to the compress company.

The compress company had notice that the receipts which it issued therefor were held by the bank as a collateral security for a loan to Lake. Under those circumstances, as between the bank which held the receipts and the compress company which issued them, we think that the compress company is liable to the bank for the value of the number of bales of cotton called for by the receipt, whether the title to the cotton passed to the bank or not.

Again, the compress company undertakes to justify its conduct in turning over to Lake this cotton, for which the bank held its receipts on the surrender by him of receipts issued by the compress company to McMurray & Co., which he had found, by saying that it was the custom to treat all these compress receipts as made to bearer. But the receipts were not issued to bearer. The receipts which the compress company accepted from Lake in exchange for this cotton were issued to McMurray & Co. On the surrender of receipts issued to McMurray & Co., and which had never been indorsed by them, the compress company delivered to Lake cotton which he had pledged to the bank which held the receipts of the compress company therefor. The compress company had notice that the receipts which it had issued to Lake for this cotton had been pledged to the bank, and yet, without consulting the bank, it turned over to him this cotton on his surrendering receipts of another party for other cotton which receipts he had found. In acting in this way the compress company acted in direct violation of our statute, which forbids a warehouseman from removing or permitting to be shipped or removed beyond its control any goods, cotton, grain, or other produce or commodity for which he has given his receipt without the written assent of the person holding his receipt. Kirby's Dig. § 527. The bank did not assent to this act of the compress company, and the compress company cannot set up a custom to protect it from the consequences of its act done in direct violation of the plain mandate of the statute, *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Coxe v. Heisley*, 19 Pa. 243; 29 Am. & Eng. Enc. Law (2d Ed.) 376-378.

But, even if the statute could be abrogated in that way, the evidence does not show any custom that could protect the compress company under the facts of this case. The evidence may show that there was a custom for the compress company to deliver cotton to the party who had placed it in the company's warehouse upon surrender by him of receipts of the compress company for an equal number of bales, whether the receipts were originally issued to him or not, provided that he then owned them and had a right to surrender them. But there is no proof of a custom that would justify a delivery of cotton which the owner had pledged to a bank with knowledge of the compress company upon

the surrender by him of a lost or stolen receipt to which he had no right or title, without the consent of the bank. When cotton was delivered upon the surrender of receipts not issued to the party obtaining the cotton, it was done on the assumption that such party was the owner of the receipts and had the right to surrender them. If the party obtaining the cotton delivered therefor compress receipts that were issued to and belonged to another, and which he had no authority to surrender, the compress company gained no rights thereby, in the absence of fault of the legal owner of the receipt, and was in the same position as if it had delivered the cotton without requiring any receipts in exchange therefor. In fact this custom that the compress company relies on seems to have been based on the theory that all men were honest. So long as no unscrupulous dealers appeared, so long as the compress company was certain that the parties to whom cotton was delivered were the owners of the receipts they surrendered, no great harm was felt, for, while that was so, the compress company always had on hand the number of bales called for by its outstanding receipts, though it might not be the identical cotton for which the receipts were executed. But this loose method of doing business was calculated to attract the attention of dishonest commercial adventurers. That years passed before any harm was felt speaks well for the honesty of those dealing with cotton in this market. But the unscrupulous man arrived at last, and then a day dawned full of danger to these unsuspecting dealers. Taking advantage of this lax method of transacting business, a daring financial buccaneer simply walked off with 128 bales of cotton to which he was not entitled and for which the bank that had loaned him money held the receipts of the compress company. It is a matter of current history that these were not his only victims. Other banks, compress companies, and even railroads suffered from his assaults. The question here is whether this bank or the compress company, neither of which has been guilty of any intentional wrong, must sustain the loss in this case. The substance of the matter is that Lake bought 129 bales of cotton and shipped it to the compress company. He transferred the railroad bills of lading to the bank to obtain money to pay for the cotton. Afterwards the compress company or Lake with the knowledge of that company, procured the bills of lading from the bank by substituting therefor the com-

press receipts issued in his name for the cotton. Although there was no written indorsement of the receipts, the transfer was good in equity and gave the bank an equitable title thereto. The debt of Lake to the bank has never been paid. It still holds the compress receipts. But the compress company, relying on Lake's word that he was the owner of other receipts belonging to McMurray & Co., turned over to him in exchange therefor the cotton that in equity belonged to the bank. As the compress company had notice that these receipts were held by the bank, as it was not in any way misled by the bank, and as the bank has never consented to this act of the compress company in delivering the cotton to Lake, we think that the compress company should account to the bank for the value of the cotton, or for such an amount as will cover the bank's debt. For in delivering cotton to Lake for which the bank held its receipts without the consent of the bank, the compress company violated both its contract and the statute of the state, and must bear the loss resulting from its own carelessness.

On the whole case, the judgment of the chancellor as to McMurray & Co. and Miller & Co. will be affirmed. The judgment in favor of the compress company as to claim of the Citizens' Bank will be reversed, and the cause remanded with an order that the cause be referred to a master or commissioner to hear evidence and determine the value of the 129 bales of cotton for which the bank holds compress receipts, and on the coming in of such report that the bank have judgment against the compress company for the value of the cotton. By consent of parties the 128 bales of cotton in the hands of the compress company at the time these actions were commenced were sold and the proceeds deposited in the bank to await the action of the chancery court. This cotton has been decided to be the property of McMurray & Co. and Miller & Co.; but, under the terms of that agreement, we do not think these parties can recover interest on the money, except from the date of the judgment of the chancery court. Nor do we think that the bank which held the money should be allowed interest on the sums claimed by it, except from the date of that judgment. After the judgment, the bank had no right to retain the fund, and must pay interest and is entitled to recover from the compress company interest on its debt from the same date.

Judgment accordingly.

## HARPER v. STATE.

(Supreme Court of Arkansas. July 9, 1906.)

## 1. CRIMINAL LAW—REFUSAL TO GRANT CONTINUANCE—GROUND FOR NEW TRIAL.

Refusal to grant a continuance in a criminal case is not ground for a new trial unless the court abused its discretion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2161, 2162.]

## 2. SAME—CONTINUANCE—ABSENT WITNESSES—DILIGENCE.

On an application for a continuance in a criminal case, on the ground of the absence of a witness, it appeared that accused was indicted December 20th, that the case was called for trial February 26th, following, and that he had counsel within a few days after his arrest. No showing was made why process had not been served on the absent witness, who was a resident of the county before he left the county. *Held*, not to show proper diligence to procure the attendance of the witness, and the court properly denied the application.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1336.]

## 3. SAME—MATERIALITY OF TESTIMONY.

Where, on a trial for homicide, a witness for the state was not cross-examined as to whether he had endeavored to incite people to join him in mob violence against accused, accused was not prejudiced by the refusal of a continuance on the ground of the absence of a witness who would testify that the state's witness had attempted to incite mob violence; no proper foundation having been laid for impeachment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1323-1327.]

## 4. SAME.

An application for a continuance of a trial for homicide, on the ground of the absence of a witness who would testify that decedent had ill will towards accused, and had, on various occasions, made threats of violence against him, but without any overt acts to carry them out, and without showing that the threats had been communicated to accused, was properly denied, as not furnishing the basis for any excuse or justification.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1323-1327.]

## 5. SAME—CUMULATIVE TESTIMONY.

It is not error to refuse a continuance in a criminal case, on the ground of the absence of a witness whose testimony is merely cumulative.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1328-1331.]

## 6. SAME—APPEAL—REVIEW—HARMLESS ERROR—ELECTION OF COUNT ON WHICH TO PROCEED.

Where, on a trial under an indictment charging in one count that accused committed murder, and in the other count that he aided two persons named in the commission thereof, the evidence showed a conspiracy between accused and the two persons to kill decedent, accused was not prejudiced by the failure of the court to compel the prosecuting attorney to elect, on which count he would proceed before the trial began.

## 7. SAME—ARGUMENT OF PROSECUTING ATTORNEY—GROUND FOR REVERSAL.

Where, on a trial for homicide, the evidence showed a conspiracy between three persons to kill decedent, the argument of the prosecuting attorney that the three were present and helped to do the killing, and that it made no difference which one of them did the killing as they were all guilty, was not ground for reversal.

Appeal from Circuit Court, Craighead County, Jonesboro District; Allen Hughes, Judge.

Ves Harper was convicted of murder in the first degree, and he appeals. Affirmed.

Appellant was indicted at the December term (December 20), 1905, of the circuit court for the Chickasawba district of Mississippi county, for the murder of Eulick Knight. The indictment contained two counts: The first count charging him with murder in the first degree, and the second charging him with being accessory before the fact to murder in the first degree; alleging that James and Ches Harper murdered Eulick Knight, and that he aided and abetted and assisted therein. The cause was continued on motion of appellant to February 12, 1906. On this day the venue was changed to the Craighead circuit court. When the case was called for trial in the Craighead circuit court, on the 26th day of February, 1906, the appellant filed the following motion for continuance: "Come the defendants, James Harper, Ches Harper, and Ves Harper, and move the court for a continuance in this cause, and for cause state that they cannot safely go to trial at the present term of this court on account of the absence of Frank Neely, Gabe Owens, Jesse Smotherman, Jack Sutton, Jack Biddle, and Howard Cable. If Frank Neely and Gabe Owens were present they would testify that the state's principal witness, Wm. Dycus, on the night of the third day after the killing of Eulick Knight, the crime for which these defendants stand indicted in this cause, was going through the neighborhood, in the vicinity where the said Eulick Knight was killed, trying to incite many citizens to join him in a mob to go to Osceola, about 10 miles away, and where these defendants were at that time confined in jail, and take them out and mob them, and that the said Wm. Dycus was making, and did make, many threats of violence about each of these defendants, and showed great prejudice against each of them. If Jesse Smotherman was present he would testify that about one month before the killing of Eulick Knight, that the said Eulick Knight borrowed a loaded pistol from Lum Carney, with which he said he meant to kill both Ves and Jas. Harper within 48 hours. He would also testify that about three weeks before the killing, at a cross-roads, that the defendants Ches Harper and Jas. Harper came in view, and missed meeting Eulick Knight in the due course of their journey about 40 or 50 yards; that he saw Eulick Knight unbutton his vest, and place his hand upon a six-shooter pistol; and say that he was going to kill both the said Ches and Jas. Harper then and there. And if Jack Sutton were present, defendants could prove that the same material facts by him, as above stated, could



also be proved by Jesse Smotherman, and, in addition thereto, he would testify that he had seen the deceased, Eulick Knight, on two occasions within two months of this tragedy with a loaded pistol, and had heard him make threats of violence against both Ves and James Harper, and say that he would kill them both, and that at the May, 1905, term of the circuit court at Blytheville, the deceased, Eulick Knight, attempted violently to assault the defendant James Harper, at a time when the said James Harper did not know of his presence, and was not aware that such attempted assault was being made, and that bystanders had to interfere and did interfere, and held the said Eulick Knight to prevent his making a murderous assault on the defendant James Harper. If Jack Biddle were present, he would testify that he heard Eulick Knight, within three months before his death, say that if defendant Ves Harper did not deed him a one-half interest in his tract of land, he would kill him like a damned dog. If Howard Cable were present, he would testify that he carried a note late in the evening, before the killing of Eulick Knight the next morning, from Eulick Knight to the defendant. That all of the above-mentioned acts of hostility and threats of the said Eulick Knight were communicated to each of the defendants before the said Eulick Knight was killed. That these defendants were indicted and arraigned on the ——— day of December, 1905, and, on the said day, they caused to be issued subpoenas for each of the above-named witnesses. That Howard Cable, Jesse Smotherman, and Frank Neely had been subpoenaed, and that Jack Sutton is temporarily absent in the state of Mississippi. That Frank Neely is sick, and temporarily in a hospital in Memphis, Tenn. That Gabe Owens is temporarily absent—is at present at Owensboro, Ky. That Jesse Smotherman is sick at his home in Mississippi county, Ark., and is unable to attend the present term of this court. That Howard Cable, defendants are informed, is unable to be present because he has no money with which to pay his expenses. That Jack Biddle is temporarily absent, and is at present at Gates, Tenn. That these defendants cannot prove the facts above set out by any other person except these witnesses named, and that all the facts above set out, these affiants believe to be true, and that none of the said witnesses are absent by the consent, connivance, or procurement of any of these defendants. That all of these defendants have been continuously confined in jail since their arrest in August, 1905, and, if they are given until the next term of this court, they will be able to have service of process had on each of the above-named witnesses, who are now out of the state of Arkansas, and have them in court to testify in their behalf. Defendants allege that each of the

said witnesses are bona fide residents and citizens of Mississippi county, Ark., and that in a short while each of them will be back at his respective home in the neighborhood, where they and these defendants reside, and where the killing of Eulick Knight took place. Wherefore these defendants pray that this cause be continued until the next term of this court, to the end that they may have a fair and full investigation of their cause." The motion was duly verified.

In resisting the motion for continuance the prosecuting attorney admitted that Jesse Smotherman was too sick to attend at that term of the court, but further on he stated to the court that, if the defendant were forced to a trial he would have witness Smotherman present to testify for the defendant. It was also admitted by counsel for the state that witness Frank Neely was out of the state. The prosecuting attorney offered to let attorneys for the defense read the motion for continuance as the deposition of the absent witnesses named therein; which offer was refused by attorneys for defendant. The court overruled the motion, stating that it was "of the opinion that both sides were as ready for trial as they would be at another term, owing to the distance they had to come, and the number of witnesses in attendance upon the court," and offered to permit attorneys for the defendant to read the motion for continuance as the depositions of the witnesses named therein. The court gave as one reason why the motion was overruled that attorneys for defendant had had time to take the depositions of the witnesses named who were absent on account of sickness, whereupon the attorneys for the defendant made affidavit that neither of them knew that witness Frank Neely was sick, or in a hospital in Memphis, Tenn., until the cause was called for trial at that term, and they renewed their application for continuance, and the court refused it, to which they excepted. The motion for continuance was not read in evidence. The record recites: "At the close of the evidence nothing was said by any one about election, and the matter did not occur to the court until after the opening argument of the prosecuting attorney had been made, when election was immediately ordered and made." Also the following: "After the trial was concluded and the prosecuting attorney, L. C. Going, had made his opening speech to the jury, he made his election to try defendant on count 1, charging the defendant with murder in the first degree." - But, following these recitals is another recital, showing that the attorneys for defendant moved the court to have the district attorney to elect before the selection of the jury on which count of the indictment he would go to trial." Still another recital following this shows that the attorneys for defendant moved the court

to compel the prosecuting attorney "after the selection of the jury, and before the trial began, to elect on which count of the indictment he would put defendant to trial"; which motion was by the court overruled. The record recites that: "During the opening argument of the prosecuting attorney he" argued at length the evidence tending to show the connection of Ches Harper and James Harper with the killing of Eulick Knight, and showing, and tending to show a conspiracy on the part of the three Harpers to do the killing, saying, among other things that: "All of them were present and helped to do the killing, and that it was the dirtiest and most damnable conspiracy that was ever formed. That it made no difference which 'one of them did the killing as they were all in a conspiracy and all guilty alike." But the record further shows that: "No objection was made to this argument, nor was it called to the attention of the court in any way."

The testimony of William Dycus, who was the only eyewitness to the killing, and other witnesses on behalf of the state, tended to show that appellant killed Knight by lying in wait. The testimony on behalf of appellant tended to show the killing was done in self-defense. The facts are substantially as follows: The testimony of the witnesses for the state showed that decedent was not armed, and was not making any demonstration as if to draw a weapon against accused at the time of the killing. The defense showed that decedent was armed, and that accused shot in self-defense.

S. R. Simpson, J. H. Edwards, and W. M. Taylor, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

WOOD, J. (after stating the facts). First. The court did not err in refusing to grant a continuance. "Continuances in criminal as well as civil cases are, as a general rule, within the sound discretion of the trial court, and a refusal to grant a continuance in a criminal case is never a ground for a new trial unless it is made to appear that such discretion has been abused to the prejudice of the defendant." *Lane v. State*, 67 Ark. 203, 54 S. W. 870; *Puckett v. State*, 71 Ark. 62, 70 S. W. 1041, and many cases cited in 1 Crawford's Digest, p. 362. Of the witnesses named in appellant's motion, it appears that only Howard Cable, Jesse Smotherman, and Frank Neely had been subpoenaed. The record shows that Howard Cable was present at the trial and testified. So Frank Neely and Jesse Smotherman are the only witnesses absent, whom the appellant had used due diligence to obtain. It is alleged in the motion that the absent witnesses are residents and citizens of Mississippi county. Appellant was indicted December 20, 1906, and the case was called for trial February 28, 1906. He had counsel to rep-

resent him, as it appears from their affidavit within a few days after his arrest; and yet no showing is made why process had not been served upon the absent witnesses not subpoenaed, before they left Mississippi county. No showing is made why process had not been served on them before the cause was called for final trial. This does not show proper diligence to obtain these witnesses. Appellant should have gone further and shown why they were not served with process. If process had been served on them, for aught that appears to the contrary, they would have been present. The reasonable presumption is that they would have been. As to the witness Frank Neely, conceding that due diligence was used to obtain his testimony, the refusal of the court to continue on account of his absence was not prejudicial error. Appellant expected to prove by him that the state's principal witness, William Dycus, had gone through the neighborhood where the killing occurred, and had endeavored to incite people to join him in mob violence on appellant, and had made many threats of violence against him, and had thus manifested great prejudice against him. This would have been competent testimony as affecting the credibility of the witness Dycus. But Dycus was on the stand as a witness, and counsel for appellant did not lay the foundation for the introduction of such evidence by asking Dycus whether or not he did the things alleged in the motion for continuance calling his attention to the time and place. Had such questions been asked him, he might have answered in the affirmative. That would have ended the matter. Other proof would not have been necessary. As he was present, and knew whether or not he had engaged in the conduct, he should have been questioned on the subject.

Appellant cannot claim to be prejudiced by the refusal of the court to allow witnesses to testify to such conduct on the part of one of the witnesses, when the witness himself was not asked about it, and had not been given the opportunity to either affirm or deny the alleged conduct affecting his credibility as a witness. See section 3138, Kirby's Dig. It appears that appellant did ask this witness on cross-examination if he had taken an interest in the prosecution against appellant, and if he and some other people "had made up money to employ" counsel in the case to prosecute appellant, and the witness answered that he had. So he may have answered affirmatively the other questions touching his alleged conduct looking to mob violence against appellant, had they been asked him. Appellant is not in a position to claim that he is prejudiced by the refusal of court to grant a continuance on account of the absence of Frank Neely. By witness Smotherman, appellant alleged that he expected to prove that about "one month

before the killing of Eulick Knight, he, Knight, borrowed a pistol from Lum Carney with which he said he meant to kill both Ves and James Harper within 48 hours." And again that "about three weeks before the killing at a cross-roads, that the defendants Ches Harper and James Harper came in view and missed meeting Eulick Knight in the due course of their journey about 40 or 50 yards, that he saw Eulick Knight unbutton his vest and place his hand upon a six-shooter pistol, and say that he was going to kill both the said Ches and James Harper then and there." Certainly no prejudice could have resulted to appellant from the refusal of the court to continue the cause on account of the absence of this testimony. It would have shown no more than that deceased had great ill will toward the Harpers, and that on sundry occasions he made threats of violence against them, and which threats he never put into execution, although it did not appear that there was anything to prevent or restrain him from so doing. The probative result of such testimony would have been bad temper, and evil disposition on the part of Knight towards the Harpers manifested by threats simply, without any overt acts, showing an intention to carry them out. It was not averred that these threats were ever communicated to appellant. Therefore they could not furnish the basis for any excuse or justification of his conduct. *Wiggins v. Utah*, 93 U. S. 465, 23 L. Ed. 941. If competent at all, which question we need not decide, it is clear that they were only competent to show the character of Knight for violence, and his disposition of mind toward appellant, and thus to be considered by the jury in determining who was the aggressor. *Palmore v. State*, 29 Ark. 248; *Brown v. State*, 55 Ark. 593, 18 S. W. 1051. But, for such purpose it was merely cumulative evidence. So, likewise, would have been the testimony of Sutton and Biddle, other witnesses named in motion. The testimony of Felix Pursely for appellant was to the effect that a few weeks before Knight was killed the witness heard him say that Ves Harper had put a tenant on the place, that he, Knight, did not want him there, and that he was going to lick the tenant, and give him a certain number of hours to leave, and if he did not vacate, he, Knight, was going to burn down the house. Another witness, Harlow Carwell, testified that "in June before the killing took place in August, he heard Knight say that 'if Ves Harper did not give him a deed to one-half that farm, he or Ves would sleep in the Hatcher graveyard.'" And the witness said that Knight's manner convinced him that he was in earnest, and he communicated the conversation to appellant. This, together with the testimony of appellant himself, and of William Dycus, as to the quarrel on the evening prior to the morn-

ing of the fatal day, showed that appellant and Knight were living in a state of "undisguised hostility." So, if the purported testimony of the absent witness, Jesse Smotherman, were competent, appellant suffered no prejudice by a refusal to continue in order to enable him to procure it. However erroneous might be the reasons assigned by the court for refusing the continuance, we find no error prejudicial to appellant in the ruling itself.

Second. The other ground urged for reversal is that the court erred in not compelling the prosecuting attorney to elect on which count of the indictment he would stand before the trial began. Whether the appellant's counsel moved the court to require the prosecuting attorney to elect on which count in the indictment he would proceed, before the selection of the jury, and before the trial began, or after the evidence had been concluded and the prosecuting attorney had made his opening argument, it is impossible to determine from the recitals of the record. For these recitals on this point are contradictory and confusing. But we regard this as wholly immaterial in view of the testimony. The appellant admitted the killing, and there was abundant proof to warrant the conclusion that appellant and his father and brother had formed a conspiracy to kill Knight. Appellant himself says that after the quarrel the evening before he told his father and brother what Knight had done and said, and called on them for protection, and his own evidence shows that they stayed at his house with him that night, after he had sent his wife away, and that they carried a pump handle shotgun over there; the very gun with which appellant says he did the shooting. True, appellant says they had gone before Knight and Dycus came, and were not present when the killing occurred, but the circumstances as detailed by Dycus and other witnesses made it a question for the jury to say whether or not there was a conspiracy between appellant and his father and brother Ches, to kill Knight. If there was a conspiracy, it was immaterial when the prosecuting attorney made his election, for the testimony as to the acts and declarations of his father and brother in furtherance of the conspiracy, and while it was in progress, were competent (*Benton v. State* [Ark.] 94 S. W. 688) on either count. Therefore we are of the opinion that no prejudice resulted from the failure of the prosecuting attorney to make his election before the trial began. In this view, the testimony of the witnesses and the argument of counsel which appellant sets up as his eleventh and twelfth grounds of the motion for new trial, and of which he so forcefully complains in his brief, could not avail him, even if his objections thereto had been made, and duly preserved in the bill of exceptions.

The judgment is affirmed.

**INAL LAW—APPEAL—REVIEW—HARM—ERROR—ERRONEOUS INSTRUCTIONS.**  
ere, on a trial for homicide, the evi-  
stified a verdict of murder in the sec-  
ree, voluntary manslaughter, or an ac-  
but there was no evidence of involun-  
nslaughter, the error in submitting the  
involuntary manslaughter, of which ac-  
was convicted, was in accused's favor,  
could not complain.

Note.—For cases in point, see vol. 15,  
Dig. Criminal Law, §§ 3160-3162.]

**— REFUSAL OF INSTRUCTIONS EM-  
D IN THOSE GIVEN.**

is not error to refuse requested instruc-  
bodied in those given as far as they are

Note.—For cases in point, see vol. 14,  
Dig. Criminal Law, § 2011.]

**—AIDER AND ABETTOR—INSTRUCTIONS.**

instruction in the language of Kirby's  
1560, 1561, 1563, that a defendant who  
by, aided, abetted, or assisted" another  
commission of a felony may be convicted,  
rroneous as authorizing a conviction if  
ly stood by, but did not aid or abet or

Note.—For cases in point, see vol. 14,  
Dig. Criminal Law, §§ 81-86, 1818-1820.]

**—TRIAL—INSTRUCTIONS—DUTY TO RE-  
F.**

here, in a criminal case, the court, in an  
tion, uses the language of a statute,  
is reasonably clear, accused, if not satis-  
fied, must point out the defect in the instruc-  
a specific objection.

Note.—For cases in point, see vol. 14,  
Dig. Criminal Law, § 2025.]

al from Circuit Court, Sebastian  
r, Greenwood District; Styles T.  
Judge.

Burnett and another were jointly in-  
for murder, and Eli Burnett was con-  
of involuntary manslaughter, and he  
s. Affirmed.

testimony showed that Arle Smith  
illed. Oliver Burnett fired at him  
ots in quick succession. The evidence  
nflicting as to whether Eli Burnett  
his pistol and fired at decedent.

M. Cravens, J. O. Johnston, and F. A.  
ns, for appellant. Robt. L. Rogers,  
Gen., for the State.

L. C. J. Eli and Oliver Burnett,  
s, were jointly indicted in Scott cir-  
ourt for murder in the second degree,  
li Burnett was convicted of involun-  
manslaughter. There was evidence to  
justified a verdict of murder in the  
degree, voluntary manslaughter, or  
guiltal, according to which version of  
lling of Arle Smith be accepted as  
th, but not a scintilla of evidence of  
atary manslaughter, and no instruc-  
ould have been given on that sub-  
The error of the court in submitting

tifying an acquittal was rejected when the  
jury found this verdict, and if they had not  
been erroneously authorized to have found  
this degree of homicide he would have been  
convicted of a higher grade.

Appellant contends there was error in  
the trial court refusing to give three in-  
structions requested by him, but the court  
is of opinion that so much of the refused  
instructions as are correct were covered by  
those given. The principal contention of  
appellant is in the giving of these three  
instructions:

"If you find from the evidence beyond a  
reasonable doubt that Oliver Burnett killed  
Arle Smith while he (Burnett) was in the  
commission of an unlawful act, without  
malice and without the means calculated to  
produce death, or if you find beyond a rea-  
sonable doubt that Oliver Burnett was in  
the prosecution of a lawful act done without  
due caution and circumspection, and you  
further find from the evidence beyond a rea-  
sonable doubt that the defendant Eli Bur-  
nett stood by, aided, abetted, or assisted  
Oliver Burnett in taking the life of Arle  
Smith, as defined in this instruction, then  
you should convict the defendant of invol-  
untary manslaughter."

"If you find from the evidence beyond a  
reasonable doubt that Eli Burnett stood  
by, aided, abetted, or assisted Oliver Bur-  
nett in unlawfully taking the life of Arle  
Smith, then he would be guilty of some de-  
gree of felonious homicide as defined in  
these instructions, whether there was or  
was not a combination between the de-  
fendant and his brother, Oliver Burnett,  
to do an unlawful act."

"If you find that there was no agreement  
or combination, as defined in these in-  
structions, between Eli and Oliver Burnett  
to do an unlawful act, and you further find  
that Eli did not stand by, aid, abet, or as-  
sist Oliver Burnett in unlawfully taking the  
life of Arle Smith, then Eli would not be  
responsible for the killing of Arle Smith."

The point is that in each of them a con-  
viction was justified if appellant "stood by,  
aided, abetted, or assisted Oliver Burnett."  
These instructions are the language of the  
statutes. Sections 1560, 1561, 1563, Kir-  
by's Dig. These sections mean one who  
stands by and aids, or abets, or assists, and  
do not mean one who stands by or aids, or  
abets, or assists. Presence is necessary to  
constitute an accessory indictable and pun-  
ishable as a principal—the same offense  
which was principal in the second degree  
at common law. Williams v. State, 41 Ark.  
173. Appellant insists that literally these  
instructions mean that he could have been  
convicted if he merely stood by, and did  
not aid, abet, or assist. It is not conceiv-

able that the jury would have understood that they could convict a mere bystander, who happened to be standing by when a felonious homicide was committed. The instruction would have been in better form if the court had put the word "and" in lieu of the comma after the words "stood by," and the word "or" after "aided." But, having used the exact language of the statute, which is reasonably clear, it devolved upon the appellant to point out this formal defect, if he was not satisfied that the form of this instruction correctly presented the thought of it. "If there was ambiguity calculated to mislead the jury, counsel for appellant should have made a specific objection to the instruction on that account.

\* \* \* The defect is one of form only, and

a general objection is not sufficient to raise a question of that kind." *Railway v. Pritchett*, 66 Ark. 46, 48 S. W. 809, and *Railway v. Norton*, 71 Ark. 314, 73 S. W. 1095. The appellant should have pointed out this defect by a specific objection. *Darden v. State*, 73 Ark. 316, 84 S. W. 507; *Thomas v. State*, 74 Ark. 431, 86 S. W. 404; *Railway v. Brown*, 73 Ark. 594, 84 S. W. 783; *Brinkley Car Works, etc., v. Cooper*, 75 Ark. 325, 87 S. W. 645; *McElvaney v. Smith*, 76 Ark. 668, 88 S. W. 98; *Davis v. Richardson*, 76 Ark. 348, 89 S. W. 318.

While there is error in the case, it is in appellant's favor, and he seems to have fared better than he was entitled to under the law and evidence.

Judgment affirmed.

ILROADS—OPERATION—INJURY TO ANIMALS  
—DEFECTIVE GATE—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY.

In an action for the killing of horses which strayed through an open gate from plaintiff's inclosed field onto defendant's right of way, there was no direct evidence as to how the gate became opened. The gate failed to comply with the statutory requirements as to its manner of fastening, but was so constructed that horses could not open it, and there was no evidence to show that whoever opened it would have been more apt to shut it had it been a statutory gate. Held insufficient to show that the improper construction of the gate was the proximate cause of the injury.

Ed. Note.—For cases in point, see vol. 41, 1st. Dig. Railroads, §§ 1527-1533.]

Appeal from Circuit Court, Worth County; Appellate Judge.

Action by Henry Rowen against the Chicago Great Western Railway Company. Judgment of the Court of Appeals, reversing judgment in favor of plaintiff, certified to the Supreme Court. Judgment of the circuit court reversed.

This cause was certified to this court by the Kansas City Court of Appeals for the reason that the conclusions reached and announced by a written opinion is in conflict with a decision by the St. Louis Court of Appeals in case of Kavanaugh v. Railway Co., 75 Mo. App. 78, which was also certified to this court because one of the judges held at the ruling of the majority was in conflict with prior decisions of that court. This case reached the Kansas City Court of Appeals by appeal on the part of the defendant from a judgment in the circuit court of Worth county in favor of plaintiff. The opinion announced by the Kansas City Court

of Appeals was by Broadbuss, J., in which the entire court concurred. It is apparent, therefore, that had it not been for the Kavanaugh Case decided by the St. Louis Court of Appeals, which was afterwards certified to this court and decided by this court (163 Mo. 54, 63 S. W. 374), the present controversy would in all probability have never reached this court. It is here, and the word is before us for consideration.

Kelso, Schooler & Kelso, for appellant. Engelfelter & Hudson, for respondent.

FOX, J. (after stating the facts). We have carefully examined the evidence in detail as developed at the trial of this cause, and find that the statement of the controlling facts as made by the learned judge of the Kansas City Court of Appeals is substantially correct. Therefore the solution of this controversy must be sought in the consideration of the correctness of the conclusions reached and announced by the Kansas City Court of Appeals upon the state of facts disclosed by the record.

The opinion, in full, of Judge Broadbuss is as follows:

96 S.W.—64

plaintiff's horses on defendant's tracks; they having escaped from plaintiff's inclosed premises through a gate at a farm crossing. There is no dispute as to these facts. It is shown by all the evidence that the track of defendant runs through plaintiff's land and that the same is fenced; that at the point where the plaintiff's horses escaped from his premises the defendant had erected a gate for his use in crossing its track, as his farm was situated on both sides of said track; and that said gate was not a statutory gate, not being hung and fastened in the manner required by statute, but otherwise as to construction was a proper gate. The gate in controversy was not hung on hinges or fastened by hooks or latches, but was suspended at one end upon a cleat which was attached to two upright posts set up in the ground, and that it was secured by shoving the other end between two other upright posts. There is little or no controversy about the character of the gate, except that some of the witnesses state that the gate was old and somewhat dilapidated; others, that it was substantially a good gate. The horses were killed during the night of November 4, 1897. In the evening prior, about 5 o'clock, the gate was closed. When Corbett and other witnesses were informed that stock were on the track, they went to the place about 11 or 12 o'clock of the night mentioned, saw the stock that had been injured, and found the gate wide open.

"The witnesses generally agree that the gate as constructed did not easily open and shut; and, judging from a description of the gate, such must have been the fact. The proper way to open said gate was to slide it back over the cleat until its weight was about equally divided on each side of the cleat, and then it could be easily opened or shut. These undeniable facts conclusively show that the horses did not open the gate in the manner it was found by the witnesses. There was an attempt to show that the gate was not closed on the evening preceding the killing of the stock, or that the gate was not securely fastened. The physical facts, as well as the testimony of witnesses, show that the gate was intentionally opened by some person and left open. Certainly, the gate as constructed and hung was not such as the statute required. Under the statute in question, for failure upon the part of railroads to erect and maintain the required fences and gates, they are liable for all damages 'which shall be done by its agents, engines or cars to horses, etc., occasioned by the failure to construct and maintain fences' (which also includes gates).

"The facts in this case are very much like those in Kavanaugh v. Railroad Company, 75 Mo. App. 78, except in that case the gate was secured by hook and staple, and the

court came to the conclusion that the gates (there were two gates in that case) must have been opened by some person passing through during the night, and upheld the finding of the trial court, which was for the plaintiff. In the case of *Morrison v. Railroad Co.*, 27 Mo. App. 418, the facts were greatly different. There it was shown that the gate was made of wire and boards, and one of the posts had entirely rotted off, so that the gate was suspended by the wires and planks, and it had no latch or other fastenings. The only way it would open and shut was by lifting up the gate and post and placing it in position. 'This was so troublesome to persons passing through that the result was that the gate as a rule stood open, and the plaintiff kept his stock up to avoid their escaping through this gate onto the railroad track. This gate had been in this condition for two or three months prior to the injury complained of.' Judge Phillips, who delivered the opinion of the court, refers to the case of *Ridenore v. Railroad*, 81 Mo. 227, and, distinguishing that one from the one he was considering, uses the following language: 'But the chief difficulty, in my mind, is as to the element of fact in the case at bar which distinguishes it in a marked degree from all others to which attention has been called.' He then states facts as given above. The case was for negligence under the statute for carelessly and negligently suffering the gate to be left out of repair. The court found that, by reason of the defective condition of the gate, 'it was habitually left open, \* \* \* as a rule was left open.'

'In *McMillan v. Railway Co.*, 70 Mo. App. 568, the gate in controversy was hung on hinges and secured by a hook which filled into a loop made by a wire twisted around the post. The fastening of the gate had a play of two or three inches up and down. The gate would fly open by force of the wind or other slight pressure. Judge Smith in delivering the opinion of the court showed the similarity of that case to that of *Freet v. Railway*, 63 Mo. App. loc. cit. 554, and makes this significant statement: 'Indeed, there is by one conclusion to be drawn from the evidence, and that is that the gate got open for the want of sufficient fastenings.' In *Freet v. Railroad*, supra, Judge Smith also delivered the opinion of the court, and in commenting on the gate in question, said: 'The gate was old and greatly out of repair. One of the posts and a hinge of the gate were loose. The appliances for fastening the gate were a hook and staple, but these could not be used on account of the condition of the post on each side of the gate. The defendant knew of the insecure condition of the gate. Its section man, who passed along every day, saw its condition of insecurity. He furnishes a piece of wire which was used by him in fastening the gate.' He concluded that the gate came open as a result

of the insecure fastening. In *Duncan v. Railroad Co.*, 91 Mo. 67, 3 S. W. 835, the evidence was similar to that in the case of *Morrison v. Railroad*, supra. The gate in question there had no kind of fastening at any time. Sometimes it was fastened with a rail or sticks, but neither would prevent it from being blown open by the wind. The natural inference was that it got open because it had no fastening.

'We can find but one cause in all the books parallel with the one at bar, and that is *Kavanaugh v. Railroad*, supra, which has been certified to the Supreme Court of the state because one of the judges held that the ruling of the majority was in conflict with prior decisions of said court. We do not think the true rule has been laid down in that case, and it is not sustained upon either principle or precedent. It appears to us that the conclusion of the court therein is founded alone upon theory and not upon evidence, and as such has been condemned. See *Fitterling v. Railroad*, 79 Mo. 509; *Bothwell v. Railroad*, 59 Iowa, 192, 13 N. W. 78. The conclusion of the judge who delivered the opinion of the court that because the gate in question was a sliding gate, that it was securely fastened the evening preceding the night of the injury, and that it was opened and left opened by some person during the night, but that it would not have been so left open if it had not been the kind of gate described, but a statutory gate, we believe is founded upon theory only, and is not necessarily deducible from the facts of the case. The person who opened and left open the gate may or may not have closed it if it had been any other kind of a gate. The additional facts that the crossing was used by persons in the neighborhood, and that sectionmen and tramps were in the habit of going through the gate, does not help the conclusion to any great extent. It was a mere theoretical possibility.

'In the case at bar the gate was found wide open just after the injury. The person who took the trouble to open it to its fullest extent may have been more inclined to have shut it if it had been a statutory gate, but it is not a necessary inference that he or she should have done so. And this is all the case has to stand on. The gate in question had never previously to the injury complained of been found open, and there had been no complaint that it was insecure. It does not appear that the injury in this case was caused by the failure of the defendant to erect and maintain the required gate, but was the direct result of the wrongful act of some persons, without defendant's knowledge and consent, leaving the gate open, through which plaintiff's horses escaped onto defendant's track and were killed. *Ridenore v. Railway*, 81 Mo. 227.

'It follows, therefore, that defendant's first instruction, which was a demurrer to

plaintiff's case, should have been given. The conclusion arrived at dispenses with the necessity of deciding whether the court committed error in overruling defendant's motion for a continuance.

"The cause is reversed. Certified to the Supreme Court. All concur.

The Kavanaugh Case, criticised in the foregoing opinion, was subsequently decided by this court, and the conclusions reached by this court are in harmony with the views expressed by the Kansas City Court of Appeals.

Learned counsel for respondent insist that the proximate cause of accident was the defective gate, and on account of the negligence of the defendant in failing to construct a gate in conformity to the statute plaintiff was entitled to recover, and the judgment should be affirmed. To entitle plaintiff to recover in this action, it must first appear that defendant was negligent in failing to erect and maintain a gate as provided by the statute; and, secondly, that the injury to plaintiff's stock was the result of such negligence. It may be that the gate did not conform to the requirements of the statute, yet, unless such negligence was the proximate cause of the accident, there can be no recovery. There is an entire absence of evidence to show that plaintiff's stock strayed upon defendant's right of way by reason of a defective gate, nor is there sufficient evidence to authorize the court or jury in making a fair and legitimate inference that such defective gate was the cause of the accident. But the reverse is indicated by the testimony of the witnesses, as well as the physical facts, that the gate was opened by some person and left open and by this means the accident occurred. As was said by this court in the Kavanaugh Case: "So long as the gate remained shut and fastened, the gate was sufficient and plaintiff's cows were secure. But, when the gate was left open in manner as aforesaid, then it became wholly immaterial whether or not the gate was so constructed as to be 'easily opened and shut,' because, being left open, the method of its construction was not, and could not be, the proximate cause of the injury. The opening was that cause."

Upon the facts as disclosed by the record in this cause the conclusions reached by the Kansas City Court of Appeals were clearly correct. Entertaining the views as herein indicated, the judgment of the circuit court should be reversed, and it is so ordered. All concur.

## ST. LOUIS, M. & S. E. R. CO. v. CONTINENTAL BRICK CO.

(Supreme Court of Missouri. June 20, 1906.  
Rehearing Overruled Oct. 19, 1906.)

### 1. EVIDENCE—EXPERTS—COMPETENCY.

On an issue as to the value of a brick-making plant, through which plaintiff sought

to condemn a railroad right of way, witnesses who were experienced in the business of brick making and knew the value of property similar to that of defendant as a whole, located within a short distance of a large city, were competent to testify as to the value of the plant and the damages sustained, though they were not familiar with the value of land in that vicinity nor of clay grounds disconnected with a brick plant.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2356½-2359.]

### 2. EMINENT DOMAIN—RAILROAD RIGHT OF WAY—CONDEMNATION—DAMAGES—ELEMENTS.

Where plaintiff sought to condemn a railroad right of way through defendant's brick-making plant, and witnesses, in estimating the value of the property as it existed at the time of the taking, testified that they took into account its capacity, not only as then developed, but as it was then capable of being further developed, and that, without any increase in machinery and equipment, the capacity of the plant could be doubled by the construction of kilns to the east of those already there, which could not be done if the land wanted by the railroad company was taken, an instruction that the jury might consider the hindrance, if any, to the extension or enlargement of the plant in making their award was not objectionable as authorizing an estimate of damages based on "possibilities of the future."

### 3. WITNESSES—CROSS-EXAMINATION.

In proceedings to condemn a railroad right of way through a brickmaking plant, a witness who had acted as a commissioner in similar proceedings with reference to a widow's adjoining farm testified that, in his opinion, the construction of the road through the brick plant did not damage it to any extent. *Held*, that the witness was properly required to state on cross-examination that he had agreed with other commissioners in awarding \$1,650 to the widow for about two acres of her land as affecting his credibility.

### 4. EMINENT DOMAIN—RAILROAD RIGHT OF WAY—ELEMENTS OF DAMAGE—INSTRUCTIONS.

In a proceeding to condemn a railroad right of way through a brickmaking plant, there was evidence with reference to the feasibility of a switch connecting the railroad with the plant, and on this question the court charged that the jury should consider that to obtain a switch, the defendant would either have to obtain the consent of the railroad company or convince the railroad commissioners that defendant's business was such as to justify it, and, if allowed by the commissioners, defendant would have to bear the cost of building and maintaining it. *Held*, that such instruction properly stated the law.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 236, 243.]

### 5. SAME—COMMON BENEFITS.

In proceedings to condemn land for a railroad right of way, benefits accruing to defendant by reason of the construction of the road which were common to other landowners in the vicinity, parts of whose lands were not taken, or the benefit to be incidentally derived from the opening up of a new country by the railroad should not be considered as special benefits to defendant.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 390-393.]

### 6. SAME—DANGER FROM FIRE.

A railroad sought to condemn a right of way through a brickmaking plant, its intention being to run its trains through the plant on a trestle 38 feet high over defendant's works. A witness, in estimating the damage, testified that he considered the danger to the plant by fire set out by the railroad's locomotives, and that, notwithstanding the railroad's statutory liability therefor, such danger depreciated the



value of the plant. *Held*, that the court properly charged that though the jury should not include in their estimate of defendant's damage the possible damage that might be caused to the plant from fire set out by defendant's locomotives, they were entitled to consider whether defendant's property was specially exposed to fire from that cause different from other property in the same neighborhood, and, if it was thereby depreciated in value, they should allow such depreciation.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 294-298.]

#### 7. SAME—EVIDENCE.

In a proceeding to condemn a railroad right of way through a brickmaking plant, evidence that the railroad company had offered to give defendant the clay excavated out of the land in the construction of the road and that defendant had declined it was properly excluded.

#### 8. TRIAL—INSTRUCTIONS—WORDS AND PHRASES.

In a proceeding to condemn land for a railroad right of way, the court, after enumerating various items to be considered in assessing the damages, directed the jury to consider "generally all matters owing to the peculiar location of the railroad over defendant's land, as might, in the judgment of the jury, affect the convenient and future enjoyment of the same considered as a whole," etc. *Held*, that the use of the word "peculiar" did not render the instruction objectionable as intimating that in the opinion of the court there was something peculiar in the location of the road.

#### 9. EVIDENCE—EFFORTS TO COMPROMISE.

Plaintiff's right of way agent, before the commencement of condemnation proceedings, had talked with defendant's president with a view to obtaining a right of way by agreement. He was asked as a witness for plaintiff if in that conversation the subject of a switch was mentioned and what was said. On objection that the question called for statements made in an effort to compromise, plaintiff's counsel stated that he did not ask for what may have been said in an effort to compromise, but only what was said in the negotiation for the right of way. *Held*, that the form of the question left the witness to judge as to whether or not the negotiation was in the nature of an effort to compromise, and was therefore properly excluded.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 745-753.]

Burgess, Fox, and Graves, JJ., dissenting.

In Banc. Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Proceeding by the St. Louis, Memphis & Southeastern Railroad Company against the Continental Brick Company to condemn a right of way. From a judgment assessing defendant's damages, plaintiff appeals. Affirmed.

L. F. Parker and John G. Egan, for appellant. J. L. Minnis, for respondent.

VALLIANT, J. Plaintiff in this proceeding is condemning a right of way for its railroad through a tract of land owned by defendant, near the city of St. Louis, containing 153.13 acres. The defendant is a brick-manufacturing concern and has, located on this tract of land, its brickmaking plant consisting of machinery, kilns, houses, and appurtenances. A branch of the Missouri Pacific Railway passes near the defendant's works and there is a switch track into its premises. The plant had been built about 2 years before the trial, during three years

of which time it had not been operated. It was purchased by defendant in 1900, at a foreclosure sale under a mortgage, for \$50,000 and accumulated interest, and had been operated by defendant ever since. According to defendant's testimony the machinery, kilns, buildings, etc., constituting the plant, would cost to construct at the date of the trial \$75,000 of \$100,000. On the filing of the petition commissioners were appointed by the court, who made their report awarding to defendant the sum of \$2,750. Exceptions to the report were filed by defendant, and a trial by jury was asked and granted. At the trial the jury assessed the defendant's damages at \$14,000 and a judgment for that sum less \$2,750, the amount of the commissioners' award which had been paid to the defendant, was rendered in defendant's favor, and the plaintiff appealed.

The record contains in minute detail a description of defendant's property and the course of the proposed railroad through it, but it is unnecessary to repeat that description here. Appellant's assignments of error relate chiefly to evidence of defendant admitted over plaintiff's objection, and evidence offered by plaintiff and excluded on objection of defendant. The giving and refusing of instructions is also assigned.

1. D. A. Marks, president of the defendant brick company, a witness for defendant, after giving a description of the property and the course of the railroad through it, stated that it was property particularly valuable for brickmaking purposes. Being asked to state the elements going to make it valuable for that purpose he said: "The quality and quantity of clay, the cheapness of fuel, the possibility of marketing brick at a low rate of freight, the abundance of water, the lay of the land so that the clay can be moved to the plant at the least expense." "Q. Do you know the market value of clay lands located in that vicinity? A. There are no other brick plants in that vicinity and there has been no transfer of property for that purpose in a good many years around there." He was then asked to state the market value of the 50 feet of clay land of defendant taken by the railroad, to which plaintiff objected on the ground that he had not shown himself competent to answer. Thereupon, in answer to questions by the court, he said that he knew of no sales in that neighborhood, or nearer than four or five miles, and of them he only knew from hearsay, but that he knew the value of clay land generally over the United States, he had talked with his competitors who had estimated the value of said lands, he knew that clay lands adjacent to the manufacturing end of the plant were more valuable than those distant. The court ruled that witness might answer the question and he answered, placing the value of that part of the condemned right of way embraced in the strip 50 feet wide across the flat near

the kilns, without reference to the other property, at \$2,500, and to further questions he said that the other clay land taken by the railroad company was worth \$1,375 an acre. The witness was then asked to state how much, in his opinion, the taking of the strip of the railroad company would decrease the market value of the property as a whole, to which the plaintiff objected as incompetent, irrelevant, and immaterial, and not the proper measure of damages, and because the witness has not shown himself qualified to testify. The court overruled the objection, and the witness answered that he estimated the depreciation in value of the whole plant at \$40,000. He was asked to state what elements he took into account in making that estimate, to which he answered that the largest element was that the location of the road made it impossible to extend operation of the plant. In further explanation of this point he said that the only practicable way of extending the plant with profit was to build more kilns to the east of those now in operation which could not be done with the railroad where it is. Witness also stated that the danger to the plant from fire from the trains passing on the trestle 38 feet high over the works depreciated the market value of the plant. On the whole he estimated defendant's damages at \$50,000. Mr. Elliott, vice president, secretary, and treasurer of the Hydraulic Press Brick Company, a witness for defendant, stated that he had been in the business 30 years. His company owned 58 plants, none in St. Louis county. They had bought 50 acres of clay land within a mile of defendant's plant but had not worked it. They paid \$105 to \$125 an acre for it. It would be valued as farm land only until a brickyard is established on it. He knew defendant's property and how it was worked. In his opinion the running of the railroad through it depreciated its value \$40,000. In explanation of his estimate he said that, but for the railroad, located so close to the kilns, the defendant could double the capacity of its plant, without increasing the machinery it now has by building six more kilns to the east of those now there. This testimony was objected to on the same grounds as that of Mr. Marks. On cross-examination the witness was asked: "What was the value of that 153 and a fraction acres on the 12th day of last November—brick plant and all? A. I am sure I could not answer that question. Q. Do you know what its value was at that time? A. No, sir. Q. What was its value when the railroad was located there at that time? A. I do not know." Mr. Ittner, who had been in the brick-manufacturing business 40 years and knew the defendant's property, had examined it in reference to the effect of the running of this railroad through it as located, gave it as his opinion that the value of the property was depreciated to the extent

of \$20,000 to \$40,000. On the part of the plaintiff the testimony tended to show that the market value of land of that kind in that neighborhood ranged from \$100 to \$150 an acre. The commissioners, who were farmers living in the county, and familiar with the value of lands in the neighborhood of defendant's property, testified as witnesses for the railroad company, and estimated the total value of defendant's whole property, the 153 acres, brick plant and all at from \$13,000, to \$28,000, and estimated the damages at the amount of their award, \$2,750. In the opinion of plaintiff's witnesses the defendant's property would derive an increased value by the location of the railroad through it, in the increased facilities for reaching the markets with its products.

There was quite a conflict in the opinions of the witnesses for the plaintiff and those for the defendant on the question of the feasibility of putting a switch track from the plaintiff's railroad into defendant's premises, owing to the topography of the country and the peculiar structure and course of the railroad.

The chief insistence of appellant is that the court erred in admitting the testimony of Marks, Elliott, and Ittner, giving their opinions as to values and the amount of depreciation of value to the whole plant. The grounds of the objections were that the testimony was incompetent, irrelevant, and immaterial, and not the proper measure of damages, and that the witnesses did not show themselves qualified to testify. Those grounds, except the last one, were too general to give the trial court an idea of the real point they were intended to cover. The only point of the objection sufficiently specific was the last; that is, that the witnesses were not qualified to give an opinion. We have, in the witnesses for the plaintiff and those for defendant, two classes of experts, each class viewing the subject from a different standpoint. The one class is proficient in knowledge of the value of such lands in the neighborhood as farm lands, but it has no knowledge of the value of such lands when their character is changed by the erection of costly machinery, thereby being made the field of operation for a brick-manufacturing purpose; the other class is proficient in knowledge of the value of such property when converted into a brickmaking plant, but has no knowledge of its value as farming land. Our state Constitution ordains: "That private property shall not be taken or damaged for public use without just compensation," section 21, art. 2. What is "just compensation"? Those words, as used in the Constitution, mean exactly the same that they mean when used in every day business transactions between man and man, they are not circumscribed by any technical definition that places them beyond the comprehension of men of ordinary intel-

ligence. The evidence that goes to the jury impelled to make the assessment is guarded by the law of evidence, and the duty is on the court to see that only legal evidence is given, but the rules of evidence are aimed to elicit the truth, to guard the minds of the jury from false light and lead them to a conclusion which their common intelligence and sense of justice unite in saying is "just compensation." An assessment of damages in a condemnation case is the result of opinion, and the evidence on which it is founded is opinion evidence; even what is deemed as "well-known market value of property" has its foundation in opinion. In weighing opinion evidence one of the criteria by which it is to be valued is the experience that the witness has had in the subject, and his opportunity of knowing what he is talking about. The rules of evidence in regard to expert testimony are drawn from the same reason that actuate intelligent laymen in their business affairs. In the case at bar the defendant, after having invested a large amount of money and established its manufacturing business, was compelled to yield up a portion of its property to the plaintiff, who came armed with the power of eminent domain, and defendant now asks the court to award it that just compensation which the Constitution has promised. How shall we ascertain that sum? On the one hand we have the opinions of men who have spent the best part of their lives in the same kind of business as that in which the defendant is engaged, who say they know the value of such property when equipped for that business and they know the effect that the construction and operation of the railroad through it will have, but do not know the market value of such lands in that vicinity for farming or other purposes; and, on the other hand, we have the opinions of men who knew the general market value of such lands, but knew nothing of its value as the site of a brick plant. To which set of witnesses shall we listen? Suppose a company of intelligent business men should be organized to go into the brick-manufacturing business and aimed to buy such a plant, but, before investing their capital, they wanted information as to the value of the property to be purchased, to which set of these witnesses would they turn for advice? If common business sense would lead them to seek the advice of men experienced in that business so the reason and common sense upon which our rules of evidence are founded require us to seek information from the same source. These men may not know the market value of land in that vicinity, not even of clay grounds unconnected with a brickmaking plant, but they do know the value of such a property as that of defendant as a whole located within four or five miles of a great and growing city, whether it be St. Louis, Chicago, or other

city, and that knowledge is exactly what is needed in order to arrive at an intelligent estimate of the "just compensation" called for in a case like this. The court did not err in ruling that those witnesses were qualified to give expert evidence, and, if the jury credited their testimony, they could not have awarded less damages than they did.

2. The defendant's expert witnesses were asked to state the elements which entered into their calculation of the depreciation of the value of the property, and among those elements they stated that the location of the railroad close to the kilns on the east cut off the only means of extension of the defendant's plant, and that, but for the railroad, the capacity of the plant could be doubled at comparatively small expense. In an instruction given by the court at the request of the defendant, specifying the elements of damages that might be taken into consideration, the jury were authorized in making their award to take into account, among other things "the hindrance, if any, to the extension or enlargement of defendant's plant." Appellant complains of this evidence and instruction as authorizing an estimate of damages based on "possibilities of the future." We do not so understand it. The witnesses were estimating the value of the property as it was in November, 1902, when the railroad company invaded it. In estimating its then value they took into account its capacity as a brickmaking concern, not only as then developed, but also as it was then capable of being further developed, and, if it was true, as they said it was, that without increasing the machinery and equipment as then existed, except to build other kilns in a line to the east of those already there, the capacity of the plant could be doubled, that was a then present existing fact which gave a then present value to the property, and a destruction of it was a depreciation of its then value. *Boom Co. v. Patterson*, 98 U. S. 408, 25 L. Ed. 206; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491, 496. There was no error in the court's ruling on that point.

3. A witness for plaintiff, Wilkins, a farmer living in the neighborhood, testified that, in his opinion, the construction of the railroad through defendant's property did not damage it to any extent. It is complained by appellant that on cross-examination the witness was allowed to say what the commissioners had allowed to Mrs. Chrisner, whose farm was near defendant's property, for her damages for the location of this railroad through it. That complaint seems to be founded on a misunderstanding of the evidence brought out on the cross-examination of this witness. He had been one of the commissioners who had assessed Mrs. Chrisner's damages, and had agreed with the other commissioners in awarding her \$1,650 for about two acres of her land taken in the

own estimate of the widow's damages. We find no error in that.

4. There was a good deal of testimony produced on the question of the feasibility of constructing a switch from plaintiff's railroad into defendant's premises so as to make it a useful appurtenant to defendant's property. That subject was presented very favorably for the plaintiff in a series of instructions given at the plaintiff's request. The evidence, even for the plaintiff, left it not clear, whilst that for the defendant was to the effect that the peculiar construction of the railroad and the topography of the country made it practically impossible to construct a serviceable switch from plaintiff's railroad into defendant's premises. But the court submitted the question to the jury, and plaintiff has no right to complain if the jury came to the conclusion that the defendant could gain no benefit from that source. In instruction 5, given for the defendant, the court instructed the jury that, in considering the switch question, they should consider that to obtain a switch the defendant would either have to obtain the consent of the railroad company or convince the railroad commissioners that the defendant's business was such as to justify it, and if the railroad commissioners should allow it the defendant would have to bear the cost of building and maintaining it. That instruction is complained of, but we think it expresses the law correctly. The plaintiff complains, also, that the court nullified the instructions given at its request on this subject by the following instruction given for the defendant: "The court instructs the jury that in arriving at their verdict they should not consider the benefits, if any, that may accrue to defendant by reason of the construction of said road which are common to other landowners in the vicinity of said road, parts of whose lands are not taken, nor should the jury consider the opening up of new country by the plaintiff as a special benefit to defendant." The meaning of that instruction was that the opening up of a new country was not a benefit special to the defendant that was not shared in by the public in general. We find no error in that.

5. One of defendant's witnesses testified that among the elements considered by him in estimating the damage of the defendant was the danger from fire caused by the trains passing on the trestle 38 feet high over the works of defendant. When, on cross-examination, his attention was called to the fact that the railroad company was liable under the statute for damage by fire set out by one of its locomotives, he said that was so, but the fact that a manufacturing plant was thus exposed to destruction by fire was an element of depreciation in its

struction given at the request of defendant informed the jury that the railroad company would be liable under the statute to pay for property destroyed by fire set out by one of its engines, and that, therefore, the jury should not include in their estimate of defendant's damages the possible damages that might be caused in that way, but that, if the jury should find that defendant's property was specially exposed to fire from that cause, different from other property in the same neighborhood, and that thereby defendant's property was depreciated in value, they should allow for such depreciation. The opinion of the witnesses that there is a present depreciation of value in manufacturing property because of its peculiar liability to destruction by fire, notwithstanding a railroad company may be ultimately liable for the damages incurred if the fire should occur, is not unreasonable. A prudent business man would generally prefer to purchase property in which to conduct his business which is not peculiarly liable to destruction by fire even though the menacing party may be solvent and liable to respond in damages. There was no error in that instruction.

6. Plaintiff offered evidence to show that it had offered to give the defendant the clay excavated out of the land in the construction of the road, and that defendant had declined it. The testimony, on objection of defendant, was excluded. There was no error in that ruling. In the first place, there might be a question as to whether clay quarried as that was in a general excavation for the purpose of railroad construction was of any practical value to the defendant, but, even if it was, the law is not satisfied with the payment of damages in "chips and whetstones" but requires it to be paid in money.

7. In one of the instructions given at the request of defendant, after enumerating various items to be considered in assessing the damages, it was said: "And generally all matters, owing to the peculiar location of the railroad over defendant's land, as may, in the judgment of the jury, affect the convenient and future enjoyment of the same considered as a whole," etc. Appellant complains of the word "peculiar" as there used, as an intimation to the jury that, in the opinion of the court, there was something peculiar in the location of the road. Whilst the word "peculiar" sometimes has an offensive meaning, yet its natural and usual meaning is particular or special, and that is the same in which it was used in this instruction.

8. A witness for the plaintiff, who had been the plaintiff's right of way agent, and had, before the commencement of this suit, with a view of obtaining a right of way by agreement, talked with Mr. Marks, the president of the defendant, was asked if in that conversation the subject of a switch was men-

tioned, and what was said, but the defendant objected on the ground that it called for what was said in an effort of compromise, and the court sustained the objection. In the question propounded to the witness, the counsel for the plaintiff stated that he did not ask for what may have been said in an effort at compromise, but only for what was said in the negotiation for the right of way. That form of the question, left the right of way agent to judge whether or not the negotiation was in the nature of an effort to compromise, and if, in his legal opinion, it was not, then he could tell all that was said. The court ruled correctly on that point. We find no error in the record. The judgment is affirmed.

BRACE, C. J., and GANTT and LAMM, JJ., concur. BURGESS, FOX, and GRAVES, JJ., dissent.

#### PAYNE v. DAVIESS COUNTY SAVINGS ASS'N et al.

(Supreme Court of Missouri. Division No. 2. Oct. 17, 1906.)

#### COURTS—APPELLATE JURISDICTION—SUPREME COURT—CASES INVOLVING LAND TITLES.

A proceeding for an injunction to restrain the sale of land under execution issued against another, who is admitted by plaintiff to have a record title superior to his own, he claiming by adverse possession, is not a "case involving title to real estate," as the term is used in Const. 1875, art. 6, § 12, giving the Supreme Court appellate jurisdiction of cases involving such title.

Appeal from Circuit Court, Daviess County.

Action by George H. Payne against the Daviess County Savings Association and another. From a judgment in favor of plaintiff, defendants appeal. Certified to the Kansas City Court of Appeals.

Hicklin, Leopard & Hicklin, for appellant. Boyd Dudley, for respondent.

GANTT, J. This is an appeal from the judgment of the circuit court of Daviess county, Mo., decreeing a perpetual injunction against the defendants from selling and conveying certain lands under a certain judgment and execution issued thereon.

The petition alleges, in substance, the incorporation of the defendant bank, and that the other defendant, McCrary, was the duly elected and qualified sheriff of Daviess county; that plaintiff is the owner and has possession of certain lands lying in said county of Daviess, and that he has been in the open, notorious, and adverse possession of said land for more than 25 years, under color of title, and that his title thereto had ripened into an absolute fee-simple estate; that his possession was at all times adverse to Mrs. Elizabeth Robertson; and that she at all times recognized his ownership to said land. It is then alleged that, prior to plaintiff's coming into possession of said land, and prior

to the year 1866, the said lands were owned by Francis W. Payne, plaintiff's father; that said Francis W. Payne died in the year 1866, owning said land and living thereon as his homestead; that at that time said land was of less value than \$1,500; that said Francis left surviving him his widow, Elizabeth Payne, now Elizabeth Robertson, the judgment title in the transcript judgment and execution hereinafter set forth, and his sons Jacob Payne and this plaintiff, George H. Payne; that, at the time of the death of said Francis, said land was his homestead, and, under the law then in force, his said widow, Elizabeth, on his death, became the owner in fee simple of said land; that under the law, and upon the face of the record, said Elizabeth would now appear to own the said land; that plaintiff's title thereto is based upon adverse possession under color of title, and is not a matter of record, and proof thereof outside of the record will have to be made in order to establish plaintiff's title thereto, and that under the law, and on the face of the record, the title of said Elizabeth to said land would appear to be paramount to the title of plaintiff and legal acumen would be required to determine which held the paramount title to said land; that on the 7th day of November, 1901, the defendant the Daviess County Savings Association obtained judgment before S. P. Cox, a justice of the peace, against the said Elizabeth Robertson for \$169.74; that execution duly issued to the constable of the township in which said judgment was rendered, and was duly returned, no property being found on which to levy the same; that a transcript was duly filed in the office of the clerk of the circuit court of Daviess county, and the transcript execution issued thereon and placed in the hands of the defendant McCrary, as sheriff, and by him was levied on said land, and said land is now advertised for sale under said transcript execution against said Elizabeth at the courthouse door, during the session of the circuit court on Friday, September 5, 1902, as the property of said Elizabeth Robertson. Plaintiff states that, upon the face of the record of the title of said land, said sale and the sheriff's deed thereunder would convey an apparent record title to said land superior to the title of the plaintiff, and such sale and deed, if made, would cast a cloud upon plaintiff's title, and could and would be used to embarrass plaintiff's title to said land and embarrass a sale of said land, should plaintiff desire to sell, and render title thereof doubtful and questionable; that legal acumen would be required to determine which held the paramount title, and litigation would result on account thereof; that, in truth and in fact, such sale, if made, would convey no title; that the only purpose and intent thereof, and the only effect thereof, would be to harrass and annoy plaintiff, and cast a cloud upon the title of his said land, and destroy the merchantability thereof, and

thereby compel plaintiff to pay the debt of another, which he does not owe, and for which he is not legally chargeable, and thereby compel him to suffer loss and damage to that extent, in order to relieve said land from other apparent title from other said sale and deed; that plaintiff has no adequate remedy at law, and would be irreparably injured by such sale, if made. Wherefore plaintiff prays that the defendant may be perpetually enjoined from selling or conveying said land under said judgment and execution, and for all such orders, decrees, and judgments as may appear just and proper.

The answer of the defendants denies each and every allegation in the petition, except such as are specifically admitted. Defendants admitted that McCrary was the sheriff, as alleged in the petition; that defendant bank was a corporation as therein alleged; that plaintiff was in possession of the land described in the petition; that Elizabeth Payne, now Elizabeth Robertson, became the owner in fee simple, at the death of her husband, Francis Payne, who owned the same in fee simple; that Francis W. Payne died in the year 1866, while living on and occupying the land as a homestead; that judgment was obtained, levy made, and land advertised for sale at the September term, 1902. For further answer and defense the defendants say that on the 18th day of October, 1901, and before the rendition of the judgment under which said real estate was advertised for sale, the said Elizabeth Robertson made, executed, and delivered to the plaintiff, George H. Payne, a good and sufficient deed to said real estate, which deed was duly recorded on the 18th day of October, 1901, in the office of the recorder of deeds of Daviess county, Mo. Wherefore defendants say that the record or paper title of plaintiff would be paramount on the face of the records to any title that could be acquired by a purchaser at a sale of said land under said execution. Wherefore defendants say the said injunction should be no longer continued, but the same should be dissolved. The reply denied the new matter set up in the answer. Upon the hearing of the case at the December term, 1903, of the circuit court, the court found the facts as alleged in the petition, and held that a sale of said land under said execution would cast a cloud upon plaintiff's title and would be a menace thereto, and that legal acumen would be required to determine whether the plaintiff or the purchaser of said sale would hold the paramount title to said land, and that plaintiff would suffer irreparable injury, and adjudged and decreed that the temporary injunction should be made perpetual. In due time the defendants filed their motion for new trial and in arrest of judgment, which were heard and overruled, and in due time and in proper form defendants perfected their appeal from the said judgment to this court.

From the foregoing statement it is appar-

ent that we must have any jurisdiction in this appeal. Title to real estate this court because the \$200, and then question in the bill was to ex rel. v. Court was held that estate under such a sale was not a estate within section 12 of Missouri of 1892. "The result of title to real estate in which a judgment would be a decision has been Bruner Grant 225, 70 S. W. 171 Mo. 455, Balz v. Nelson 527; State ex cit. 63, 79 S. W. 180 Mo. 658, held in the very recent (not yet official) 3, 1906) 95 S. W. 2d that the decision Appeals, 67 Mo. has never been proved, it must jurisdiction of division of the in Neeley v. F. 907.

It results that the Kansas Court accordingly says

BURGESS,

WOAS v.  
(Supreme Court)

1. CARRIERS—  
GENCE—EVIDENCE—  
In an action for damages by a passenger for struck by a missile the presumption of defendant arises jury.

[Ed. Note.—  
Cent. Dig. Ca.

2. SAME—QUESTIONS—  
In an action for damages by a passenger for struck by a missile the plaintiff testified that he was in the car, and in the corner, where he stopped, he saw a person making violent hands. His name

while it is the duty of a railroad company as a common carrier to protect its passengers against violence or disorderly conduct on the part of its own agents or other passengers and strangers when such violence or misconduct may be reasonably expected and prevented, yet it is not liable in an action for damages for a wrong when it is not shown that the company had notice of any facts which justify the expectation that a wrong would be committed; and the court in its opinion says: "All the cases upon the subject impose the qualification that the wrong or injury done passenger by strangers must have been of such a character as that it might reasonably been anticipated or naturally expected to occur." And this statement of the rule has been approved by this court in *Sira v. Wabash Ry. Co.*, 115 Mo. 135, 136, 21 S. W. 905, 37 Am. St. Rep. 386, and in *Connell v. Railroad Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786. And it is quite generally ruled by the courts of this country that the liability of the defendant carrier in such a case grows, not out of the fact that the passenger was injured, but out of the failure of the carrier's servants to afford protection after they have reasonable grounds for believing that violence to the passenger is imminent, and it is necessary, therefore, in all such cases to bring home to the conductor or other agent or officer of the company knowledge or opportunity to know that the injury was threatened, and to show that by his prompt intervention he could have prevented or mitigated it. *Railroad Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Britton v. Railroad Co.*, 88 N. C. 536, 43 Am. Rep. 749. It is clear in this case that the burden of showing negligence was upon the plaintiff, and that the presumption of negligence which arises in favor of the passenger traveling on a train from the mere fact of an accident has no application to a case like this. Such a presumption only arises where the injury can be reasonably attributed to some defect in track, cars, or machinery or the movement of the train, or the conduct of the servants in charge thereof. In *Railroad Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, it was said: "If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others and to take precaution against such acts, then the jury cannot say that a failure to take such precaution is a failure in duty and negligence. Were it worth while, abundant authority might be cited to show that the law does not require any one to presume that another may be an active wrongdoer. It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there would be no freedom of action." In *Fredricks v. Railroad Co.*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 300, a passenger was injured

by the criminal action of certain parties breaking the locks of a switch and uncoupling cars which stood on a side track and causing loaded coal cars to run out on the main track with which plaintiff's car collided, and it was held by the Supreme Court of Pennsylvania that the company was not liable for these malicious acts of a stranger of which it had no notice. To the same effect is a decision in *Deyo v. Railroad Co.*, 34 N. Y. 9, 88 Am. Dec. 418, in which a train was thrown from the track through the culpable act of some unknown person, who maliciously drew the spikes which fastened the chairs and the rails, whereby a passenger was injured. In *Curtis v. Railroad Co.*, 18 N. Y. 534, 75 Am. Dec. 258, it was said: "If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences unless its agents have been remiss in not discovering them." In *Railroad Co. v. MacKinny*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601, it appeared that the plaintiff was a passenger on the defendant's train, and while reading a newspaper in his seat at an open window was struck in the eye by a hard substance and seriously injured. On the trial the court below instructed the jury that they should start with the presumption that the defendant was guilty of negligence for the mere happening of the accident, and that it therefore devolved upon the defendant to rebut that presumption and show it was not negligence. The Supreme Court held that this instruction was erroneous because the accident occurred from something extraneous to the railroad and the appliances of travel, and that it was necessary for the plaintiff to go further and affirmatively prove that there was negligence. The court pointed out the difference between an accident resulting from the mere operation of the road and one which was the result of some extrinsic cause. In the former the presumption of negligence arose from the mere happening of the accident. In the latter no such presumption arose, and the fact of negligence for which the defendant was responsible must be proved by different testimony just as in any ordinary case between strangers. The foregoing cases sufficiently indicate the principles which must govern in the decision of this case.

It being conceded that plaintiff's injury resulted from the unlawful, wanton, and wicked act of a stranger, over whom defendant had no control, was there anything in the evidence which would justify the circuit court in submitting to the jury whether the defendant could have reasonably anticipated that this stranger would have hurled the rock or other missile into the car where plaintiff was seated in time for the defendant's motorman to have taken steps to have prevented it. While plaintiff urges in his

down. The other was to have informed the plaintiff that violent and lawless acts were being committed by the strikers and their sympathizers. The court held that ordinary care did not require of the defendant to take doubtful or unreasonable precaution to guard against the lawless acts of strangers, and that as to the duty to notify the plaintiff of the violent conduct of some of the strikers that plaintiff was bound to know of those things as much as the defendant, and it was unreasonable to suppose that, had defendant given plaintiff this warning, it would have had the effect of protecting him, and the court held that upon the whole record the evidence was insufficient to charge the defendant with actionable negligence.

Another leading case on this subject is that of the C. & A. R. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483. In that case a railroad company stopped at a place not a usual stopping place and took aboard laborers who had taken the place of some strikers. The police guarded the laborers until they entered the train. When the train stopped at a railroad crossing, a mile and one-half beyond, it was boarded by a mob, who attacked the laborers as scabs and shot the plaintiff, a passenger on the train at the time. Scott, J., speaking for the majority of the court, said: "With regard to danger and hazard to travel arising otherwise than on the train, and not incidents of such travel, the degree of care to be observed to discover and prevent all danger to and consequent injuries to passengers must depend in a large measure upon the attendant circumstances. No doubt in many cases, if the carrier observes ordinary care and diligence to discover and prevent injury to passengers, such as any prudent person would do for his own personal safety, it will be exonerated from liability. In other cases and under other circumstances it will, no doubt, be the duty of the carrier to exercise the utmost care, skill, and diligence to protect the passengers from danger and injury, so far as the same, by the exercise of such care, skill, and diligence, could have been reasonably and practically foreseen and anticipated in time to prevent injury. \* \* \* Prior to the time the plaintiff was injured the box cars containing these laborers had been assailed, and it might reasonably have been inferred that danger to passenger cars on the same account was imminent, and common prudence should have induced the taking of extraordinary precautionary measures. \* \* \* Under the circumstances the law would charge the defendant with negligence in stopping a train filled with passengers, in the midst of a howling, revengeful lawless mob, to take on persons whom the mob were seeking an opportunity to maltreat. \* \* \* Defendant ought reasona-

geance so soon as it had passed from the protection of the police, and precautionary measures should have been taken to prevent the injury to passengers. The verdict is a sufficient warrant for the conclusion that reasonable precautions were not observed." Magruder, J., entered a most vigorous dissent from the conclusions reached by the majority.

It is to be observed that in this case the opinion of the majority of the court is predicated upon the fact that the circumstances themselves charge the defendant with notice of the danger to its passengers from an attack of a mob of strikers, and the duty of the carrier under such circumstances to exercise that skill and diligence commensurate with the threatened danger. In both of the cases last cited it is to be observed that the plaintiffs proceeded upon the theory that the carrier was advised of the danger to its passengers and failed to exercise the proper care for their protection. It is obvious that the facts of the case at bar are wholly dissimilar from those two cases, in that in this case there was a total absence of any mob or other public disturbance which would of itself indicate to the defendant any danger to its passengers on the car on which plaintiff was riding. Here the act which caused the injury was the wanton, unlawful act of one man who had assumed to himself the prerogative of punishing the motorman for not stopping the car where he thought it ought to be stopped. In the Fewings Case and in the Pillsbury Case the assaults were aimed at the passengers on the cars, and not merely at a motorman or engineer. It was the threatened injury to the passengers and notice thereof upon which those actions were grounded. In this case it is not pretended that the motorman had any notice of any impending attack upon the plaintiff or the other passengers, nor was any attack made directly upon the passenger, but the attack was directed solely against the motorman, and it was only because of its miscarriage that plaintiff was injured. All the evidence shows that the attack was made with the sole intention and purpose of injuring the motorman, and to hold that the defendant under this evidence was bound to anticipate injury to its passengers would be contrary to reason and common sense. The motorman was standing alone in the vestibule, controlling the action of his car; and it would be utterly unreasonable to hold that he could reasonably anticipate that a person attempting to strike him would inflict injury upon the passengers in the coach. As already shown by the authorities cited, the motorman was not bound to anticipate that this stranger who was hailing his car would be guilty of a criminal assault upon himself or upon his passengers. The circumstances



at a point about 25 feet north of Nineteenth street, she stepped into a hole in said sidewalk, skinning and bruising her right leg, wrenching her hip, injuring her back, causing a concussion of her spine and a severe nervous shock, which resulted in chronic neuritis so that her lower limbs were contracted and drawn out of shape, thereby permanently injuring her in the sum of \$25,000. The plaintiffs are husband and wife. At the time of the accident she was about 28 years old. In August, 1898, they were living at 4020 Woodland avenue in Kansas City. On the morning of August 27, 1898, Mrs. Elliott left her home and went down town to the home of her sister, Mrs. O'Hare, who lived at the corner of Sixteenth street and Baltimore avenue. After lunch she went to the home of a friend, Mrs. G. J. Pierce, who lived at 311 West Twentieth street. About dusk she left the home of Mrs. Pierce to return to her sister's house. She walked east on Twentieth street to Central street and then turned north. Central street runs north and south and is intersected at right angles by numerically numbered streets, the lowest numbers being at the north end. Mrs. Elliott walked on the east side of Central street as she went north. There was a plank sidewalk on the east side of Central street between Eighteenth and Nineteenth streets which was built in 1890 under a city ordinance. This sidewalk consisted of wooden stringers about 12 feet long across which were nailed planks. At a point about 25 feet north of Nineteenth street a plank was missing out of the sidewalk and the dirt had washed out underneath the stringers at a place where two stringers met, causing the sidewalk to sag. Mrs. Elliott stepped into this hole with her right foot, which went down at least as far as her knee for her leg was skinned that far up. She got out of the hole and went on to her sister's house, a distance of three or four blocks. Here she got a package and went one block further on and took a street car for home. On the car pains came on in her leg and back so that when the car reached its terminus at Thirtieth street and Woodland avenue she could hardly walk to her home about two blocks distant. When she got home she went to bed. We deem it unnecessary in the determination of the legal propositions involved in this proceeding to detail all the testimony introduced by plaintiffs and defendant upon the trial. It is sufficient to say that there was testimony on both sides upon the issues presented by the pleadings. There was testimony on the part of the plaintiffs tending to show that her injuries were of a very severe and permanent character and were the result of the negligence of the defendant in not keeping its sidewalk

listed for some time prior to the accident. On the part of the defendant there was evidence tending to show that plaintiff's injuries were slight and not of a severe character and by no means permanent, and also evidence that her condition at the time of the trial and as testified to by the witnesses, was not the result of the accident but was the result of a diseased condition of the plaintiff Mollie Elliott which was in existence prior to the accident. The question of the admission and rejection of evidence during the progress of the trial, as well as the challenge of appellant to the correctness of instructions given by the court, will be given attention during the course of the opinion. As before stated, the nature and character of the testimony as to the nature and character of the injuries received, as well as the results of such injuries, and as to what occasioned them, is conflicting, and it can serve no good purpose to reproduce in detail all of such testimony. At the close of the testimony the court instructed the jury and the cause was submitted to them upon the evidence and instructions, and their verdict was in favor of the plaintiff, assessing plaintiff's damages in the sum of \$8,000. Motions for new trial and in arrest of judgment were timely filed and by the court overruled, and judgment was rendered in accordance with the verdict. From this judgment the defendant, in due time and proper form prosecuted this appeal, and the record is now before us for consideration.

Edwin C. Meservey and W. H. H. Platt, for appellant. L. A. Laughlin, for respondents.

FOX, J. (after stating the facts). The record before us discloses the assignment of numerous errors as grounds for the reversal of the judgment in this cause. We will give the complaints of appellant such attention and consideration as the importance of them may suggest.

The most serious proposition with which we are confronted upon this appeal is the exclusion of the testimony of Dr. Joseph A. Horrigan, which was offered by the defendant upon the trial of this cause. There is a controversy between counsel upon the preliminary question as to whether or not the question of the exclusion of this testimony is properly preserved by the record so as to warrant this court in reviewing the action of the trial court upon that question. Therefore it is essential first to determine this preliminary question. Dr. Horrigan, upon the second trial of this cause in the Jackson county circuit court was introduced as a witness by the defendant and testified in such cause. That he did give testimony in the former trial there can be no dispute. The record in this cause shows that the trial court admitted that he had testified to sub-

rais, and the record of this court furnishes conclusive evidence that he did so testify; however, it is insisted by respondent that does not sufficiently appear from the record this cause that he testified in such former trial without objections on the part of the plaintiff so as to warrant the court in passing upon the question of waiver which is urged by appellant. To fully appreciate this question it is essential to reproduce precisely what the record shows upon this preliminary question. Dr. Horrigan was introduced as a witness upon this trial by the defendant and the following examination was made, which fully discloses the true state of the record: Q. Where do you live? A. 3100 Main street, Kansas City, Mo. Q. Are you a practicing physician and surgeon in Kansas City? A. Yes, sir. Q. How long have you been practicing there? A. 16 years. Q. Have you practiced elsewhere? A. I was four years in the Columbian Hospital before I came to Kansas City. Q. At what colleges did you acquire your medical education? A. Columbian Hospital at Washington. Q. In 1893, doctor, in March, state whether or not you tended in your professional capacity the plaintiff in this case, who was then Mrs. John O'Hare? A. I did. Q. Where was she living at that time? A. At 1508 Main street.

Now, just tell the jury the occasion of your going there to see her and what condition you found her in when you got there, and what you did? Mr. Laughlin, counsel for the plaintiff: I want to ask the doctor some questions on this point in regard to the certification. By Mr. Laughlin: Q. You testified on the first trial of this case did you not? A. Yes, sir. Q. Did you not testify upon that trial you attended a woman there having light-brown hair and eyes? A. I testified something about the hair. It has been long ago I do not remember just what.

Court: You cannot go into an examination of this kind now. You can do that on cross-examination. Mr. Laughlin, counsel for the plaintiff: The plaintiff objects to the question for the reason that it calls for information obtained by the witness in his professional capacity in order to treat the patient, which information was necessary for the witness to treat the patient. Court: Objections are sustained. (To which ruling of the court the defendant by its counsel then and there duly excepted.) Mr. Howell, counsel for the defendant: The defendant by its counsel offers to prove by the witness, Dr. Horrigan, that,

March, 1893, said Horrigan visited the plaintiff at her home at 1508 Main street in Kansas City, Mo., that the witness found the plaintiff at that time suffering from an acute case of pelvic peritonitis, that the inflammation had extended throughout the pelvic parts involving the organ around the source or origin of the sciatic nerve; that there were evidences that there had been, just prior to

that it was necessary to administer chloroform to allay it; that the pelvic part or uterus and vagina were so inflamed that it was deemed by witness unsafe to make a digital examination of these parts, that the witness visited the plaintiff during this sickness four or five times, and treated her for this condition. Court: It is admitted that the same witness testified to substantially these facts at the two previous trials of this case had in Kansas City, Mo., and that his evidence in the last trial of said cause is preserved in the bill of exceptions. Mr. Howell, counsel for the defendant: This witness testified at the two former trials without objection. Mr. Laughlin, counsel for the plaintiff: We make the same objection to the offer to prove as to the last above question objected to. Court: The offer to prove is rejected, and the objections of plaintiff's counsel sustained. (To which ruling of the court the defendant by its counsel then and there duly excepted.)

We are of the opinion that the contentions of respondent that the foregoing examination and offer of the testimony of Dr. Horrigan does not sufficiently preserve the question so as to authorize this court to pass upon the question of waiver, cannot be maintained. In our opinion this record sufficiently discloses that Dr. Horrigan testified at the two trials of this cause without objections, and that the trial court, in passing upon the admissibility of the doctor's testimony, did so with the full recognition that he had testified at a former trial without any objections on the part of the plaintiff. It is clear from this record that the trial court did not exclude Dr. Horrigan's testimony on the ground that defendant's counsel had not offered the bill of exceptions and record in evidence showing that he had testified without objections, but the action of the court was manifestly based upon the theory that the testimony, even though no objections were made to his testifying in the former trial, was inadmissible in the trial of this cause. It was admitted by the court that this same witness testified to substantially the same facts at the two previous trials of this cause as were offered in proof by the defendant upon the present trial. That the court might not be misled, counsel for the defendant, before the final ruling was made, informed the court that the testimony of this witness upon the former trial was given without any objections on the part of the plaintiffs. It will be observed that counsel for respondent, Mr. Laughlin, did not controvert the statement of the counsel for the defendant that the witness had so testified without objections, but simply contented himself with making the same objections to the offer to prove that he had made when the testimony was first offered. The court then made its final ruling and excluded the testimony, to

strictly to the rules of practice which requires all questions for review to be reasonably preserved by the record, however, it is unwilling to adopt the extreme view urged by counsel for respondent upon this question, where it so clearly appears that the counsel for defendant, who is an officer of the court, fully informed the court prior to its final ruling, that the record discloses no objection to the testimony of this witness upon the former trial, and the record does not disclose that the truth of this statement by counsel was controverted either by the court or the counsel for the plaintiff. We are unwilling to take the extreme view that it was essential that counsel for defendant in order to preserve this point, should have exhibited to the court and had it incorporated in the record the bill of exceptions showing that this witness had testified upon a former trial without objections. Under the disclosures of this record, counsel for defendant had the right to assume that the court took it for granted that he was telling the truth when he stated that the witness had testified upon the former trial without objections, and passed upon the question fully recognizing that fact.

This brings us to the consideration of the most vital proposition presented by this record; that is, was the action of the trial court, in excluding the testimony of Dr. Horrigan, error, and, if so, was it such error as would warrant this court in reversing the cause? It is conceded that Dr. Horrigan, the witness introduced by defendant, had, previous to this accident, attended the plaintiff, Mrs. Elliott, as her physician. The record discloses that there had been two former trials of this cause. The first trial resulted in a disagreement of the jury and they were discharged. The second trial resulted in a judgment for the plaintiff for the sum of \$500. From that judgment, plaintiff appealed, and the cause was reversed, and remanded for error committed in the giving of an erroneous instruction. See 174 Mo. 554, 74 S. W. 617. The record discloses that Dr. Horrigan testified upon both of such former trials as to his treatment of the plaintiff, Mrs. Mollie Elliott, prior to this accident, and that this testimony was given by him without any objections upon the part of the plaintiffs. Therefore the crucial question upon this proposition may thus be briefly stated: Dr. Horrigan having testified in the previous trials, without any objections on the part of the plaintiffs, to substantially the same facts as was offered to be shown by him in the present trial, did the plaintiff, Mrs. Mollie Elliott, waive her right to forbid the repetition of the doctor's testimony in the present trial, it having been once given with her consent? In other words, by reason of the consent to the doctor testifying upon the former trials, has she waived her right or

question in judgment before them, are almost uniform that the purpose sought by the prohibition contained in the statute against disclosing professional information is for the purpose of allowing greater freedom between physician and patient, and was enacted as a matter of public policy to confer upon persons seeking the services of a physician a personal privilege, and closing the door to the sickroom, and of preventing the publishing to the world their infirmities. That this personal privilege may be waived all the authorities agree. It is equally well settled, as was said in *Fox v. Turnpike Co.*, 59 App. Div. 363, 69 N. Y. Supp. 551, that "when a patient voluntarily opens the door of the consultation room and gives a view that may have been specially arranged for the purpose, it would not be in accordance with the spirit of the statute or the interest of truth to shut the door against a view to be described by the physician."

In *Morris v. Railway Co.*, 148 N. Y., loc. cit. 92, 93, 42 N. E. 410, 51 Am. St. Rep. 675, the proposition involved in this proceeding was in judgment before that court. The principle was announced in that case that a plaintiff could not sever her privilege, waiving it in part and retaining it in part. It was there expressly ruled that "when she waived it, it ceased to exist, not partly but entirely. Having once consented to and acquiesced in the complete uncovering and making public what before was private and confidential, the seal of confidence is removed entirely, and the waiver cannot be recalled. The information is open to the public, and the patient is no longer privileged to forbid its repetition. A waiver once made is general and not special, and its effect cannot be properly limited to a particular purpose or a particular person. After the information has once been made public, no further injury can be inflicted upon such rights and interests of the patient as the statute was intended to protect by its repetition at another time or by another person."

In *McKinney v. Grand Street, etc., Co.*, 104 N. Y. 352, 10 N. E. 544, the reasons for the application of the doctrine of waiver of a personal privilege were very clearly announced. The court, in discussing the proposition, used this language: "It is claimed by the appellant that the ban of secrecy having once been removed by the patient, and the information having lawfully been made public, the right to object further thereto has not been conferred. There seems much reason in this claim. The patient cannot use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not. After its publication no further injury can be inflicted upon the rights and interests, which the statute was intended to protect, and

such a character, when once divulged in legal proceedings, it cannot again be hidden or concealed. It is then open to the consideration of the entire public and the privilege of forbidding its repetition is not inferred by the statute. The consent, having been once given and acted upon, cannot be recalled, and the patient can never be restored to the condition which the statute, from the motives of public policy, has sought to protect. The stringency with which the rule excluding privileged communications is applied by this court is illustrated in the recent case of *Reninhan v. Dennin*, 103 N. Y. 3, 9 N. E. 320, 57 Am. Rep. 770, but there is no principle or authority for holding, after a consent to publish such information has been properly given, and the evil, if any, is unsummed, that the privileged person can again raise the objection. The object of a statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such case."

In *Schlottherer v. Brooklyn & N. Y. Ferry Co.* (Sup.) 85 N. Y. Supp. 847, the facts upon which the propositions involved in that case are predicated were strikingly similar to the facts involved in the case at bar. In that case Dr. Daley was called as a witness in behalf of the defendant. There was an objection made on the ground of his being disqualified to disclose any privileged information, and subsequently he was called as a witness between the same plaintiff and against the same defendant to recover damages for injuries due to the same accident. Dr. Daley was again called as a witness by the defendant. The plaintiff interposed an objection under the provisions of the Code of the state of New York, which are similar to the provisions of the statute upon that subject in this state. The trial court sustained the plaintiff's objection, to which action of the court the defendant duly preserved its exceptions. The action of the trial court was reversed and the Supreme Court in discussing the action of the lower court, said: "I think that *McKinney v. Grand Street, etc., Co.*, 10 N. Y. 352, 10 N. E. 544, is authority against the ruling, unless the amendments to section 836 of the Code of Civil Procedure made subsequent to that judgment make it applicable. Since 1885, when judgment was rendered in *McKinney's Case*, two pertinent amendments have been made. Chapter 381, of the Laws of 1891, provided that an express waiver of privilege must be 'upon the trial or examination.' Chapter 53, p. 1 of the Laws of 1899, provides that such a waiver must be 'in open court on the trial of the action or proceeding.' The able and learned counsel for the respondent insists that the statute now requires that the waiver must be made upon the particular trial under review, to the effect that, even though

such a waiver, assert his privilege upon any subsequent trial. The letter of the statute does not require a construction which is opposed to the reason of the rule as laid down in *McKinney's Case*, supra. The purpose of the statute is to cover the relation of physician and patient with the cloak of confidence. But the purpose is to save the patient from possible humiliation or distress, not to enable him to win a lawsuit. Now, if the patient once permit the physician to testify, there is no longer any reason at any time for excluding competent testimony under the plea of public policy. If the patient once voluntarily renounce the protection of the statute, his waiver is everlasting and irrevocable. I think, then, that the purpose of the amendment was not to limit the continuous force of a waiver, and thus, to adopt the figure of Ruger, C. J., in *McKinney's Case*, to permit the patient to use the statute once as a shield and anon as a sword, but by way of further assurance that the waiver had been formally, clearly, and certainly made. \* \* \* In my opinion, the language of the statute does not authorize a construction which affords the privilege notwithstanding the reason for its continuance has ceased to exist. It simply means that, when the waiver is made, it must be made in open court on a trial of the action. It thus affords a safeguard that the waiver was duly made, but not a shift of the waiver once made."

In *Lissak v. Crocker Estate*, 119 Cal. 442, 51 Pac. 688, the Supreme Court of that state, in discussing the doctrine of waiver of a privilege conferred by the Code, which provides that "a licensed physician or surgeon cannot, without the consent of his patient, be examined in any civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient," said: "When Dr. Spencer was called as a witness the plaintiff had the right to object to his testifying upon the matters named in this section, or he could consent to his being examined in reference thereto. The privilege given by the statute is personal to the patient, and may be waived by him. It is waived when he calls the physician himself as a witness, or when he permits him to give his testimony without making any objection thereto. If the patient once consents to his testifying, he cannot, after the testimony has been given, revoke the consent and ask to have it excluded. Such consent may be either implied or express, and there was, in the present instance, an implied consent when the plaintiff permitted the witness to be examined in full by the defendant without any objection."

In *Green v. Crapo* (Mass.) 62 N. E., loc. cit. 959, the Supreme Judicial Court of Massachusetts, in discussing the admission of a

communications with him while he was her counsel were privileged, but they were unimportant and it appeared that the privilege was waived in the probate court. Nevertheless the objection was urged when the case came to be tried before the justice of this court, and an exception was taken when he ruled that, the privilege having been waived, it could not be insisted upon before him. We do not think it necessary to remark upon the willingness to hold back this testimony. We content ourselves with saying that the ruling was right. The privacy for the sake of which the privilege was created was gone by the appellant's own consent, and the privilege does not remain under such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice."

In *Borgess Ins. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567, this court in discussing the question of waiver, used this language: "It is said in *Tomlinson v. Ellison*, 104 Mo. 114, 16 S. W. 203: 'The fact that plaintiff had taken defendant's deposition in the same action amounted to a waiver of any alleged incompetency on his part.' While it was said in *Ess v. Griffith*, 139 Mo. 322, 40 S. W. 930, that 'the statement of the legal principle quoted was not necessary to a decision of the case, and can only be regarded as the dictum of the judge who wrote the opinion,' it was ruled that where the deposition of a party to a suit, who was at the time incompetent to testify as a witness in his own behalf, was taken by the adverse party, the question of his incompetency was, by reason thereof, waived, and that he then became a competent witness in his own behalf in the trial of the cause, whether the deposition was read on the trial or not. It was said: 'Plaintiff had the right to examine defendant Pierce as a witness, but in doing so he waived the right to insist on excluding him when called by defendant. This would certainly be so as to all matters concerning which he was examined by plaintiff. He cannot, in fairness, be allowed to assert his competency if his evidence is found to be favorable, and deny it if found to be unfavorable.' In *re Estate of Henry G. Soulard*, 141 Mo. 642, 43 S. W. 617. 'A waiver of objection to competency made at one stage of the taking of testimony is a waiver during the whole progress of that proceeding.' *Rap. Wit. § 178*, and authorities cited in *Ess Case*, *supra*. It would seem from these authorities, and upon principle as well, that when plaintiff took the deposition of Vette and filed it in the cause, it thereby waived his incompetency as a witness for all purposes, whether the deposition was read upon the trial or not."

In *Keller v. Home Life Ins. Co.*, 95 Mo.

the rule applicable to this question. He said: "We discern no reason of public policy to forbid a waiver (by the patient himself) of the professional secrecy imposed upon the physician, by our statute, for the benefit of the patient. \* \* \* The general rule is that a party may waive, for himself, at least, a right or privilege conferred by law for his benefit where such waiver does not conflict with any principle of public policy." During the course of the opinion in the case last cited it was also stated as applicable to the proposition in judgment before the court in that case, that to enforce the rule applicable to the doctrine of waiver would be promotive of fair dealing and the development of the truth concerning the creation and discharge of the contract, which was one of insurance, involved in that proceeding, and that no public policy appears to be adverse to enforcing such a waiver.

There is some conflict in the adjudications upon this proposition, but the greater weight of authority is in harmony with the principle announced in the authorities heretofore cited. We shall not undertake to reconcile such conflict. In our opinion the principle applicable to this proposition, as announced in the New York case, is sound, and that the reasons assigned for the announcement of the doctrine are equally so. It is insisted by learned counsel for respondent that this principle is not applicable to the case at bar for the reason that in the former trials the plaintiff did not introduce the physician, and therefore this rule is inapplicable. It is sufficient to say of that contention that the purpose of judicial investigation is, and should be, to ascertain the truth surrounding the transaction to be judicially determined, and we are unable to make any distinction as to the application of the doctrine of waiver, where the patient herself opens the door to the sickroom, and where she consents and acquiesces in some one else opening such door. In principle there is no difference. We have in this case Dr. Horrigan testifying upon two former trials without any objections on the part of the plaintiffs. His testimony could have only been introduced with her consent and acquiescence, and the presumption must be indulged, having made no objections to his testimony in the former trials and having testified without any objections, that such testimony was given with her full consent and acquiescence. Dr. Horrigan having testified in the former trials without any objections, the reason for the enforcement of the rule in respect to the privilege conferred by the statute ceased to exist; and while this court has uniformly granted this personal privilege when timely invoked, we are unwilling to approve of the action of the trial court where such personal

can in no way tend to accomplish the purpose sought to be accomplished by the conferring such personal privilege. It is error to exclude the testimony of Dr. Orrigan, and that such error was prejudicial to the rights of the defendant there can be no question. The issue as to the nature, character, and permanency of the injuries received by Mrs. Elliott were sharply presented in this trial, and the testimony of a witness was clearly relevant upon that issue, and it constitutes reversible error to have excluded it.

It is next insisted that the court improperly declared the law in instructions numbers 1 and 2 given at the request of the plaintiffs. The instructions complained of are as follows: "No. 1. The court instructs the jury that if they find from the evidence that on the 27th day of August, 1898, Central street was a public street of Kansas City; that on the said day there was a hole in the sidewalk on the east side of said street, between Eighteenth and Nineteenth streets, at a point about 25 feet north of Nineteenth street, which made said sidewalk not in a reasonably safe condition for persons traveling over it; that said hole was known to the officers of Kansas City having supervision of its sidewalks, or could have been known to them if they had used ordinary care and diligence in the discharge of their duties, in time to have repaired the same before said day; that on said day plaintiff Mollie Elliott, while in the exercise of ordinary care, as defined in other instructions, was traveling over said sidewalk, and stepped into said hole, and was thereby thrown down and injured, then your verdict should be for the plaintiff." "No. 2. The court instructs the jury that the plaintiff, Mollie Elliott, had the right to assume that she could use the sidewalk, on which she alleges she was walking when she fell, with safety, using such care as an ordinarily prudent person would exercise under like circumstances, and, though she may have known the sidewalk was defective, yet this fact alone would not prevent her from recovering in this action, but should be taken into consideration by the jury with other facts and circumstances in evidence as to whether she was exercising ordinary care as above defined." It is insisted that instruction No. 1 for plaintiffs assumed the fact that plaintiff was thrown down and injured, and that the jury were not required to find such facts from the evidence in the case. We are of the opinion that the instruction is not subject to the criticism suggested by counsel for appellant. It is insisted by appellant that the instruction does not require the jury to find that Mrs. Elliott was thrown down, but simply requires them to find that she stepped into a hole. That is not a proper analysis of that

stepped into said hole and was thereby thrown down and injured." Those terms clearly required the jury to find not only that she stepped into the hole, but as well that by stepping into said hole she was thrown down and injured. There was no error in instruction No. 1. The complaint directed to instruction No. 2 is that it assumes that plaintiff, Mrs. Elliott, fell on the sidewalk. This instruction is not open to such criticism. This instruction substantially declares the law in such terms as has repeatedly met the approval of this court. Appellant doubtless misinterprets the terms employed in that instruction. It does not undertake, nor was that its purpose, to require the jury to find that plaintiff fell upon the sidewalk. It simply tells the jury that she had the right to assume that she could use the sidewalk, on which she alleges she was walking when she fell, with safety. The terms "on which she alleges she was walking when she fell" were simply inserted in the instruction to designate and point out the sidewalk she had the right to assume that she could use with safety. In other words, in substance it simply says to the jury that plaintiff alleges that she was walking on a certain sidewalk when she fell. "The court instructs you that she had the right to assume that she could use such sidewalk with safety." Instruction No. 1 required the jury to find that she stepped into the hole and was thereby thrown down, and there was no necessity for requiring the jury to find such fact by instruction No. 2, and such requirement is not embraced in such instruction, nor is there any assumption that she fell upon the sidewalk. The terms embraced in the instruction simply points out the sidewalk on which she alleges she was walking when she fell, and there was no error in this instruction.

It is finally contended that the questions propounded to the expert witnesses and the opinions given in response to such questions were not based upon the proper hypothesis, and, therefore, were erroneous. It will suffice to say as to this contention that the rules of law governing expert testimony, both as to hypothetical questions and opinions in response to such questions, are well settled in this state, and as this cause must be retried the complaints of appellant can be safely guarded against in the retrial of this cause.

We have indicated our views upon the legal propositions presented by this record, which results in the conclusion that, for the reasons heretofore pointed out, the judgment of the trial court should be reversed, and the cause remanded for a new trial in accordance with the views herein expressed, and it is so ordered. All concur.

(Supreme Court of Missouri. June 30, 1906.)

**1. PLEADING—ANSWER—LEGAL CONCLUSIONS.**  
Allegations, in an answer to an interplea claiming under a chattel mortgage property attached by plaintiff, that if the mortgage was signed it "did not give to said interpleader any right to the property," and that "said interpleader is by her conduct estopped from claiming any right" to the property, are mere legal conclusions, adding nothing to a general denial also contained in the answer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 12, 23.]

**2. CHATTEL MORTGAGE—FAILURE TO RECORD—POSSESSION—BURDEN OF PROOF.**

Under Rev. St. 1899, § 3404, requiring for the validity, against third persons, of a chattel mortgage not recorded in the county of the mortgagor's residence that the property be "delivered to and retained by" the mortgagee, an interpleader in attachment, claiming under a prior chattel mortgage not so recorded property attached by plaintiff, must show such a delivery and retention.

**3. SAME—MORTGAGED PROPERTY—DELIVERY TO MORTGAGEE—EVIDENCE—SUFFICIENCY.**

On an interplea claiming under a prior chattel mortgage property attached by plaintiff, evidence held sufficient to take to the jury the question of an actual delivery of the property to the interpleader.

**4. SAME—FRAUD—FAILURE TO PLEAD—INSTRUCTIONS.**

Where the answer to an interplea which claims under a prior chattel mortgage property attached by plaintiff is only a general denial, no instruction need be given as to fraud in the giving of the mortgage.

**5. SAME—EVIDENCE—SUFFICIENCY.**

Where the evidence on an issue between an interpleader, claiming under a prior chattel mortgage, and plaintiff, seizing the property under attachment, shows no element of fraud in the interpleader, except that she was defendant's wife, no instruction need be given on such issue.

**6. APPEAL—EVIDENCE—ADMISSION—HARMLESS ERROR.**

Where the answer to an interplea claiming under a chattel mortgage property attached by plaintiff does not attack the bona fides of the mortgage, and on its face it shows a consideration, error in admitting testimony as to the amount of indebtedness secured thereby is harmless.

In Banc. Appeal from Circuit Court, Webster County; Argus Cox, Judge.

Action by Rice, Stix & Co. against James B. Sally; Sarah H. Sally interpleading, and Rice-Stix Dry Goods Company being substituted as plaintiff. From a judgment in favor of the interpleader, plaintiff appeals. Affirmed.

Lyon & Swarts, for appellant. J. B. Harrison, J. P. Nixon, and L. F. Parker, for respondent.

BRACE, C. J. This is an appeal from a judgment of the Webster county circuit court in favor of Sarah H. Sally, interpleader in a suit instituted by Rice, Stix & Co., creditor, against James B. Sally, the husband of the said Sarah H., their debtor, in which certain goods, wares, and merchandise, located at

the sheriff on the 25th of October, 1897, under attachment process issued therein. Mrs. Sally in her interplea claimed the property so seized under and by virtue of a chattel mortgage duly executed and acknowledged by the said James B. Sally on the 21st day of October, 1897, and recorded in Dent county on the 22d day of October, 1897, given to secure the payment of a promissory note of the said James B. Sally of the same date for the sum of \$10,500, payable to the said Sarah H. one year after date, with 8 per cent. interest, which it was alleged in the interplea was given by the said James B. Sally in part payment of the sum of \$12,465.62 due and owing by him to the interpleader on account of moneys received by him belonging to her as her separate estate. The mortgage and the several items of this indebtedness are set out in detail and at great length in the interplea. The answer to the interplea is as follows: "Plaintiffs, Rice, Stix & Co., for answer to the interplea of Sarah H. Sally filed in this case, admit the allegation thereof that said interpleader is and was the wife of said defendant James B. Sally from September 20, 1883, to the present time. Plaintiffs deny each and every other allegation of said interplea. For further answer plaintiffs allege that if said defendant signed and executed the said writing set forth in said interplea, and which is denied by plaintiffs, the same did not give to said interpleader any right, title, or interest in and to the said property referred to in said interplea; the said writing being null and void. For further answer to said interplea these plaintiffs allege that said interpleader is by her conduct estopped from claiming any right, title, or interest in and to the said property, and estopped from claiming the existence of any indebtedness from said defendant to herself. Wherefore, the plaintiffs pray judgment for the retention of said property." The reply was a general denial of the allegations of the answer, and upon the issues thus joined a trial was had, which resulted in a verdict and judgment for the interpleader, from which the plaintiffs appealed to this court, where the judgment was reversed, and the cause remanded for new trial, and in due course the case was again tried on the same pleadings, and from this second trial, in which the interpleader again obtained verdict and judgment, this appeal is taken.

The case on the former appeal is reported in 176 Mo. 107, 75 S. W. 398 et seq., and the elaborate statements contained in the opinion there reported obviate the necessity of a more extended statement here. Since the case has been pending plaintiff has been substituted for Rice, Stix Co., the original plaintiffs. As will be observed, the answer contains a general denial and two legal conclusions, with no facts stated upon which to base either of them; and the whole answer, so far as the facts are concerned, amounts

The ultimate fact charged in the petition was that James B. Sally, under whom plaintiff claimed the property by virtue of the attachment process levied on the 25th of October, 1897, had, prior to that date, to wit, on the 21st of October, 1897, by the chattel mortgage question, conveyed the property levied upon the interpleader. In order to sustain the argument, it devolved upon the interpleader to show, as against the plaintiff, not only duly executed and acknowledged chattel mortgage, but that possession of the property had "been delivered to and retained" by the interpleader thereunder, or that the same had been recorded in the county in which the said James B. Sally resided before the levy of writ of attachment. Rev. St. 1899, § 3404. James B. Sally resided in the county of Phelps. The chattel mortgage was recorded in the county of Dent, so that the only ground upon which the interplea could be maintained was that possession of the property had been delivered to and retained by James B. Sally as required by the statute; and under the pleadings that was the material issue of fact in the case. On this issue, in addition to the evidence on the first, much additional evidence was introduced by the interpleader on the second trial now under consideration. It appeared from that evidence that for two or three years prior to the 21st of October, 1897, the said James B. Sally had been running a general country store in the village of Lecom, in Dent county.

The village is situated in the northwest corner of Dent county, near the line between that and Phelps county, and distant about 12 miles from Rolla, which is the nearest railroad station. The village was a small one, the only business concerns being Sally's store, planing mill, and a blacksmith shop. The trading of the neighborhood generally was done at the store, and it seems to have been the most public and important place in the village. It had no sign on it, and needed none. Sally had three clerks in his employ, to wit, John A. Sally, Pat Smith, and George Martin. The chattel mortgage was executed

at Rolla, Phelps county, on Thursday, October 21, 1897, between 10 and 11 o'clock p. m., and early in the morning on Friday, the 22d, the interpleader and her attorney in fact, J. B. Harrison, appeared at the storehouse of J. B. Sally in Lecom, and took possession of the stock of goods, accounts, etc., therein contained and now in question, under the mortgage, as authorized by J. B. Sally so to do, in manner, as testified to by J. B. Harrison, as follows: "Q. Who were the clerks, Mr. Harrison, of J. B. Sally in that store? A. George Martin, Pat Smith, and John Sally. When they all came up there I announced to them the fact that Mrs. Sally had a chattel mortgage, executed by James B. Sally to her on this stock of goods, and she had placed her in possession of it. Mr.

to us. We discussed the matter with the clerks. I told them everything that must be done in order to make everybody understand that we had possession of it. I told John Sally to go and have a sign painted the first thing. \* \* \* I then announced to a number of parties there that we had possession of the store under the chattel mortgage, and exhibited the chattel mortgage to them. I held it up in my hand in that way [indicating] to the crowd. Q. Where were you at that time? A. I was standing right in the door of the store, in the south door of the store building. Q. Now, what did you do? A. Well, I exhibited the chattel mortgage and made that statement. Q. What did you say in connection with exhibiting the chattel mortgage, if anything? A. I said we had taken possession of the property for Mrs. Sally, and in no event would she recognize any further claims of J. B. Sally, and would not purchase goods in his name nor pay any of his debts; that the sales from now on would be conducted as much for cash as possible. I instructed Pat Smith, one of the clerks, to go with me to the books, and he did. I told him that all the accounts in the books belonged to Mrs. Sally. We had at that time these accounts made out in the nature of a statement, and they were indorsed on the back by Mr. Sally. By the Court: Q. What were those statements? A. They were itemized statements of the accounts, and on the back J. B. Sally's name was indorsed—written on the back. Q. What became of those statements? A. There was 10 or 15 of them, maybe 20. Q. What became of them? A. I turned them over to John Sally to collect. \* \* \* [Witness continuing] I told Mr. Smith to balance all the accounts, and run a red line under them. Q. That was the 22d day of October? A. Yes, sir; that was the 22d day of October, 1897. \* \* \* Q. What did you tell him you wanted that done for? A. Well, I told him I wanted to open up the accounts in Mrs. Sally's name in the entire ledger; that those accounts all belonged to her. \* \* \* Q. Then what took place? A. I then went around over the building, to see if I could see anything of any signs. I did not find J. B. Sally's name on anything except it appeared on some goods boxes that had been shipped there. That was the only thing I noticed with his name on. Q. What did you do then? A. I went to destroying everything in the nature of signs with his name on. [Witness continuing] I destroyed everything in the nature of signs indicating that J. B. Sally owned that stock of goods. Q. Now, if there was any arrangement made to retain the clerks, state about it? A. Yes, sir: I spoke to John Sally, Pat Smith, and George Martin right there in the presence of Mrs. Sarah H. Sally, and asked them if they were willing to work for the same wages and on



they were. I told them then to consider themselves employed. Q. For whom? A. For Mrs. Sally. I told them to announce that fact to everybody—to announce the change of possession to every one. Q. Was there anything said about receiving more goods; if so, what was said and to whom about that? A. I instructed all the clerks not to receive any goods from Rola or from any other place that had been shipped to J. B. Sally or bought by him which were not already in the store. Q. Now, then, outside of the store, did you give notice as to the condition of the store—as to who was the owner of it? A. I did to every one I met. Q. Do you recollect any of them? A. I did to every one I talked with. I went from there to Salem. Q. When did you return now, and what took place then? A. When I returned there was a crowd of customers in the store. Q. At what place? A. The storehouse at Lecoma. Q. How many were there then? A. There was 10 or 15 persons present. Q. What was done then? A. I stated there publicly, and asked those parties that were there to notify others, that a change had taken place; that Mrs. Sally had purchased that stock of goods, or had a chattel mortgage on it, and was in possession of it, and was running and operating it in her own name. I also announced that I had a power of attorney for Mrs. Sally, and was in absolute control of it for Mrs. Sally." He further testified that he was at Lecoma on the following Sunday and Monday, and saw the sign which he had ordered on the front of the store—the sign being a board about four feet long and six inches wide, on which was painted the words, "Mrs. Sarah H. Sally's Store"—that he could read it from the middle of the road.

Pat Smith testified as follows: That he was bookkeeper for J. B. Sally until the morning of the 22d of October, when Mrs. Sarah H. Sally and J. B. Harrison came to Lecoma, and took possession of the stock of goods, including the books, which had theretofore belonged to J. B. Sally, being the same goods and books that were attached in the attachment proceedings of Rice-Stix Dry Goods Company against J. B. Sally. Under directions of J. B. Harrison, acting for Mrs. Sally, he sold goods for account of Mrs. Sally from the morning of the 22d until the night of the 25th, when the goods were seized; that under the direction of Mr. Harrison he had drawn red lines under all accounts in the ledger, and had opened new accounts for all customers to whom goods were thereafter sold; that during the entire time from October 22d until the store was closed by the sheriff it was the general talk there that the store belonged to Mrs. Sally, and that the clerks had to explain it all the time to customers asking questions, and that they told them it belonged to Mrs.

John A. Sally testified that he was selling goods at Lecoma in October, 1897, for his brother, James B. Sally, in the latter's store; that Mr. Harrison and his brother's wife, Mrs. Sarah H. Sally, came to the store early in the morning of October 22, 1897; that he would not be positive about the day of the week, but believed that it was on Friday; that the attachment was levied on the Monday after they came there on Friday; that the store was run two days after they came there, until Sunday, and therefore it must have been on Friday that they came there, in the morning, about 7 o'clock; that after they got there Mr. Harrison gave them notice that the store and goods had been transferred to Mrs. Sally, and said that everything had been transferred to her, and to change all the accounts, etc., and to give all orders in her name; that Mr. Harrison said to him that the transfer had been made by chattel mortgage; that he was already at the store when Mr. Harrison and Mrs. Sally went there; that Mr. Harrison said that the business from that time on should be carried on in her name instead of in his brother's name, and that they should not receive any goods shipped in his brother's name, and that they should not do any more credit business than they could help, and if they sold anything on credit to open up the account with Mrs. Sally, and that the accounts were to be changed and kept in her name; that Mr. Harrison gave orders for the bookkeeper to draw a red line under each account, and he (the bookkeeper) changed it in that way; that Mrs. Sally told him and several there that it was her store; that Mr. Harrison said that they should go ahead with the same clerks, and that all the clerks that were there should stay there; that Mr. Harrison ordered all signs that were hanging on the wall to be taken down, these signs being some shoe signs of the Hamilton-Brown Shoe Company, or something like that, "sold by James B. Sally," or something like that, and that these signs were taken down, some of them by the witness himself, and that Mr. Harrison stated publicly to parties and customers around the store, or anybody that happened to be there, that the store had changed hands, and that it was her store and she had charge of it. He further testified that, in pursuance of Mr. Harrison's instructions to get and put up a sign with "Mrs. Sarah H. Sally's Store" on it, he on Friday employed a Mr. Chamberlin to paint such a sign, but, the sign not being finished Friday evening, he procured a temporary one to be made in Rola by a Mr. Tucker, which he put up on Saturday morning by nailing it to the front of the store building on the south side of the door. The sign was a white board, about four feet long and six inches wide, with the words "Sarah

Monday he saw the sign up where he had placed it, and on the following Tuesday or Wednesday, after the goods had been seized by the sheriff, he saw it on Mr. Lenox's porch, across the road from the store.

George W. Smith, the village blacksmith, testified that he had considerable dealings with J. B. Sally at the store and at the shop and all around; that he remembered Mrs. Sally coming there with Mr. Sally the latter part of the week, and knew that Mr. Harrison was at the shop, and that she was in town; that the store was closed up

Monday following the time he saw Mrs. Sally there the week before; that she was there Thursday or Friday, and the store ran till the evening of the following Monday—about three days, or something like that—that he heard she had taken possession of the store; that he was in the habit of going there every evening to settle up his bills; that they had put up a sign on the building near the door which read "Mrs. Sarah H. Sally." I believe it was"; that he saw it up Saturday evening and on Sunday.

E. E. Comstock, the miller, testified that in October, 1897, he was doing business with the store; that he had a lumber yard and mill, and the store frequently gave orders at the mill, and that he also gave orders at the store for merchandise; that he recollected Mrs. Sally taking possession of the goods about October 22, 1897, when he saw Mr. Harrison and Mrs. Sally about the store there; that he was notified by one of the clerks of that store "that if I should give any orders, to give them in the name of Mrs. Sally, and that if I received any orders, they were to be sent to me in her name, and my books were changed at the time."

C. L. Taylor testified that he was to do the lettering on the sign which Chamberlin was preparing, but it was never finished; that in the meantime a sign was sent out from Rolla, which he saw on the platform of the store leaning against the house on Saturday, October 23d. The sign read "Sarah H. Sally's Store."

Mrs. Mary J. Pemberton testified that she went to the store to do her shopping on Saturday, the 23d of October, directly after breakfast, and when stepping upon the step he saw a sign with the name of Mrs. Sarah H. Sally on it leaning against the wall.

P. M. Lenox testified that he saw the sign there on Sunday, the 24th of October. Before that time he saw Mrs. Sally washing up the queensware and glassware in the store, and that was the first he knew of the store changing hands.

Ben Harrison testified that he saw the sign in the front of the store Sunday evening and on Monday.

J. C. Williams testified that he saw the sign Saturday morning south of the door going into the building. His attention was

drawn to it by Mrs. Clara Lenox, who lived across the road opposite the store, testified that early Saturday morning she saw Mrs. Sally's sign from the porch of her house, resting on a bench on the porch of the store. "Mrs. Sarah H. Sally's Store" was on the sign. That prior to the time Mrs. Sally took possession there was no sign on the store.

Mrs. Sally's evidence on this issue was about the same as on the former trial, and George M. Tucker testified that he painted a sign for John Sally, and that the substance of what was on it was "Mrs. Sally's Store."

There was some other evidence corroborative and cumulative of the foregoing, but this is sufficient to show the interpleader's case on this issue, and for a ruling on plaintiff's demurrers to her evidence.

On behalf of plaintiff several witnesses were introduced who testified that during the time they were respectively in Lecom from Friday morning until Monday evening they saw no sign to indicate a change of ownership, but with this evidence we have no concern on this ruling.

1. Whatever may be thought of the action of the court in refusing to sustain the demurrer to the evidence of interpleader on the first trial, it seems beyond question that the court did not err in overruling the demurrers to her evidence on the second trial. While it is true, as was ruled on the former appeal, that it devolved on the interpleader to show that the possession of the mortgaged goods was "delivered to and retained" by her before the seizure by the sheriff, that such change of possession was open, notorious, and unequivocal, such as to apprise the community or those accustomed to deal with the party that the goods had changed hands, regard being had to the situation and character of the property. It is also true in this case that nothing in regard to the change of possession was done in a corner. It was made with wide open doors and by public proclamation, and, according to interpleader's evidence, the indicia of former ownership was wiped out, and that of the new owner installed as obviously and with as much expedition as the nature of the case would admit. That it was open and unequivocal is beyond question. Was it so notorious as to apprise the community and those accustomed to deal at the store that the goods had changed hands? The sign which, according to interpleader's evidence, after an early hour on Saturday morning, might have been seen by all persons entering the store or passing along the public highway in front of it, proclaiming that this was "Sarah H. Sally's Store," would seem to have afforded sufficient notoriety. But if that were wanting, can any one familiar with life in a small village like this doubt for a moment that everything that transpired in that store on Friday morning was known throughout

was doubtless the most important village event of the season. Thoroughly canvassed, the news spread from store to mill and blacksmith shop, and thence throughout the entire community before the sun went down on the day it happened. Who doubts it knows little about the pervasive celerity with which village news was wont to spread from house to house in the adjoining neighborhood even before the days of the telephone. Under the circumstances, it is difficult to see how the change of possession could have been made more open, notorious, or unequivocal than it was, and the court committed no error in sending the case to the jury.

2. The instructions upon which this issue was submitted to the jury are not complained of. But it is contended that the court committed error in instructions given for the interpleader, and in refusing instructions asked for the plaintiff on the issue of whether the chattel mortgage was given by James B. Sally for the purpose of hindering, delaying, or defrauding his creditors, and whether the interpleader participated in his fraudulent act and purpose. While the instructions on this subject may be obnoxious to some verbal criticism, as a whole they presented that issue to the jury fairly and much more favorably to the plaintiff than it was entitled to, for two all-sufficient reasons: First, because there was no such issue made by the pleadings, and the same ought not to have been submitted to the jury at all; and, second, because whatever James B. Sally's intention may have been, no evidence was introduced tending to show any fraud on the part of Mrs. Sally, except that she was his wife.

3. It is also contended that the court committed error in the admission of certain evidence tending to prove the amount and source of the indebtedness for which the note secured by the chattel mortgage was given—principally admissions of James B. Sally—but as the bona fides of the indebtedness was not attacked by the pleadings, and the consideration for the chattel mortgage was proven prima facie by the instrument duly executed, this evidence was merely cumulative, and any error in the admission thereof could have done the plaintiff no harm.

Finding no error in the record calling for a reversal, the judgment of the circuit court is affirmed. All concur, except GANTT, J., absent, and GRAVES, J., not sitting.

#### KUPKE v. UNITED RAILWAYS CO.

(St. Louis Court of Appeals, Missouri, Oct. 16, 1906. Rehearing Denied Oct. 30, 1906.)

#### APPEAL—BILL OF EXCEPTION—REVIEW.

Plaintiff recovered judgment against two railway companies, as joint defendants. A mo-

court's action in sustaining one, or the other, or both of the motions, and none of the evidence was given or called for. The motion for a new trial was not called for, and the motion in arrest of judgment was not even referred to. *Held*, that the bill was insufficient to authorize review on appeal either of the motion for a new trial or in arrest.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Augusta Kupke against the United Railways Company and another. From an order sustaining a motion of the United Railways Company for a new trial, and in arrest of judgment, plaintiff appeals. Affirmed.

E. E. Woods, for appellant. Boyle & Priest, for respondent.

BLAND, P. J. Plaintiff recovered a judgment against the St. Louis Transit Company and the United Railways Company as joint defendants. The court sustained a motion for new trial, and in arrest of judgment as to the United Railways Company, but overruled both motions as to the transit company. From the order sustaining the motions as to the United Railways Company, plaintiff appealed.

The bill of exceptions is insufficient to authorize this court to review the action of the trial court. The record shows both the motion for new trial and in arrest of judgment, as to the United Railways Company, were sustained; but the bill of exceptions does not specify whether exception was taken to the court's action in sustaining one, or the other, or both of the motions. None of the evidence is given or called for in the bill of exceptions, the motion for new trial is not called for, and the motion in arrest of judgment is not even referred to. In this condition of the record, the court cannot consider either the motion for new trial or in arrest of judgment, and there is nothing the court can consider but the record proper; and as no error is assigned or appears in the record proper, the judgment should be affirmed. *Phillips v. Jones*, 170 Mo. 328, 75 S. W. 920; *Rose v. Township Board*, 163 Mo. 396, 63 S. W. 628.

The judgment is affirmed. All concur.

#### SMITH v. AULTMAN.

(St. Louis Court of Appeals, Missouri, Oct. 16, 1906.)

#### EVIDENCE—JUDICIAL NOTICE—FOREIGN STATUTES.

Judicial notice will not be taken of the laws of another state, but one desiring to avail himself thereof must introduce them in evidence and incorporate them in the record, and this not being done, the case will be adjudicated on the law of the forum.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 51.]

n. Judgment for defendant. Plaintiff  
eals. Affirmed.

Duncan & Bragg, for appellant. Brewer  
Collins, for respondent.

MORTONI, J. This is a suit on a prom-  
isory note. The facts are on May 7, 1901,  
defendant borrowed from the Bank of  
ruthersville, \$250, for which he executed  
note to said bank bearing 8 per cent.  
erest. The plaintiff and George Fair  
ned said note and became joint makers or  
urities thereon for him. Afterwards this  
ntiff and his co-surety, Fair, paid off the  
e at the bank, and took up the same; and,  
value, the bank indorsed and transferred  
said note to plaintiff and said Fair.  
terwards the defendant fully paid and re-  
bursed Mr. Fair for the full amount he  
l expended in discharging and taking up  
half of said note; and, thereupon, said  
r, having been fully paid, transferred his  
erest in the same to the plaintiff, and de-  
ered the same to him with the following  
orsement thereon: "Received order on  
W. Gible for \$50, also Deering Harvester  
mpany's check for \$76, which is under-  
od to be in full for the one-half of this  
te which was due to me. In consideration  
the above payments, I, George Fair, with-  
t recourse on me, relinquish all claim or  
erest in said note, October 23, 1901."   
terwards, the plaintiff instituted this suit  
on the note against defendant for the  
rtion thereof which remained unpaid. At  
e trial, the defendant admitted the note  
d that the plaintiff and Mr. Fair dis-  
arged the same for him at the bank. The  
sver consisted of a counterclaim for work  
d labor, which defendant claims to have  
rformed for plaintiff in Arkansas. The  
aintiff introduced the note, and proved  
w he became the owner and holder thereof,  
above indicated; and, having thus made a  
ima facie case, the defendant assumed the  
rden on his counterclaim. Whereupon the  
lloving material facts were developed.  
aintiff had contracted to furnish a large  
ount of saw timber in Arkansas, and,  
out four years before, employed this de-  
adant to haul logs from the forests to the  
er bank at so much per thousand feet;  
e amount of lumber in said logs to be as-  
rtained by scaling or measuring them on  
e river bank. It appears the defendant,  
th several men and teams, worked at this  
usiness for plaintiff several months, and  
at there a running account between them  
ring that time. Defendant testified that  
had measured and scaled all of the logs  
had hauled, and that, after allowing all  
edits, etc., there was a balance due him  
om plaintiff on his account of \$300; that  
had a book account of the items which

and was insolvent for several years. He  
further testified that he had been wholly  
unable to induce the plaintiff to accompany  
him and measure the logs and settle therefor  
at the time he concluded the work. He  
admitted having received several hundred  
dollar payments from the plaintiff while  
the work was going on, but insisted that  
there was a balance of \$300 due him there-  
on, while on the other hand, the plaintiff  
maintained that he had measured the logs  
and kept an accurate and true account of  
the items and dealings between himself and  
the defendant during the time the labor was  
being performed; that some time after the  
labor was concluded, a settlement was had  
between them and a balance of \$27.40 was  
found to be due to the plaintiff instead of  
\$300, as claimed by defendant. This fact  
the defendant stoutly denied, insisting that  
no settlement had ever been had; that the  
plaintiff actually owed him as a balance on  
the work, \$300. It appeared that the con-  
tract whereby the plaintiff employed the de-  
fendant to haul the logs was made in the  
state of Arkansas; that it contemplated the  
labor to be performed in that state, and that  
all of the labor performed thereunder, and  
everything thereabout, was performed in the  
state of Arkansas. Several witnesses testi-  
fied pro and con, but what has been said, re-  
cites all of the material facts with which the  
court is concerned on this appeal. The case  
was tried by the judge without a jury. No  
declarations of law were asked or given.  
The court found the issues for the defendant,  
and plaintiff appeals.

From the evidence, it is apparent that  
there was substantial evidence introduced by  
defendant to sustain the finding and judg-  
ment in his favor by the trial court. In  
fact, this much is conceded by appellant  
in his brief, and the only question urged  
by him in this court for a reversal of the  
judgment is that, inasmuch as the uncon-  
troverted evidence discloses the contract for  
hauling the logs whereby defendant claims  
the plaintiff is indebted to him on the coun-  
terclaim was made in Arkansas, to be per-  
formed in that state, and that it was fully  
performed in that state more than three  
years prior to the filing of the counterclaim  
herein; therefore the indebtedness alleged in  
the counterclaim accrued more than three  
years prior thereto, and is barred by the  
three-year statute of limitations of the state  
of Arkansas. Section 4822, Sand. & H. St.  
Ark., is cited by plaintiff in support of the  
proposition advanced. This may or may not  
be true. It is the duty of the court to be  
guided, in determining the question, by look-  
ing to the record before us, and, upon an  
examination, we are unadvised as to what  
the provisions of the statutes of that state

are in that behalf. It is elementary  
courts of one state cannot take judicial cog-  
nizance of the statute laws of a sister state.  
The burden is on the party seeking to avail  
himself of the benefit of the laws of a  
foreign state in the courts of another to  
introduce such laws in evidence in the trial  
court and incorporate them in the record.  
Such laws are matters of fact, and must  
be proved the same as any other fact in the  
case. *Flato v. Mulhall*, 72 Mo. 522; *Sloan v.*  
*Torry*, 78 Mo. 623; 13 Amer. & Eng. Ency.  
Law (2d Ed.) 1068. This was not done in the  
court below, and hence, in the absence of  
a showing to the contrary, it was proper for  
the trial court, and it is the duty of this  
court, to adjudicate the case before it upon  
the law of the forum. *Flato v. Mulhall*, 72  
Mo. 522. We are unable to find reversible  
error in the record.  
The judgment is therefore affirmed.

KIRKPATRICK et al. v. ILLINOIS SOUTH-  
ERN RY. CO.  
(St. Louis Court of Appeals. Missouri. Oct.  
18, 1906.)  
OPERATION - FENCES - IN-  
ADEQUATE CAUSE.

2. SAME—PLEADINGS—VARIANCE.  
Proof that cattle strayed upon a  
company had erected n

**3. SAME—CONTRIBUTORY NEGLIGENCE.**  
The turning of hogs into a

Appeal from Circuit C  
County; Robt. A. Author  
Action by J. R. Kirk  
of Noah M. Kirkpatrick  
the Illinois Southern  
From a judgment in  
fendant appeals. Af

pasture came upon the defendant's right of way by reason of its failure to construct such fences along the railroad right of way, and passed into plaintiff's adjacent field, in the month of January, where he had certain standing ungathered corn and a stack of unthreshed wheat, destroying a portion thereof. The circuit court found the issues for the plaintiff on both counts, and assessed the damages at the sum of \$120 on the first count and \$12.50 on the second count, which was doubled under the statute, and judgment was entered against the defendant and in favor of the plaintiff for \$265. Defendant appeals. Other material facts will appear in the opinion.

Wm. S. Anthony, for appellant. D. L. Rivers, for respondent.

NORTONI, J. It is insisted by appellant that, inasmuch as the first count of the petition—that pertaining to the loss of the cattle—counts upon the failure of the railroad to erect and maintain fences only as its specification of negligence, the plaintiff cannot recover, for the reason that there is a variance between the pleadings and proof, as it maintains the cattle came to the place of collision over a point on the railroad tracks where it should have maintained a cattle guard, and by reason of its failure to maintain such cattle guard. The argument is to the effect that the cattle, having passed over such point where there was no cattle guard, no recovery can be allowed upon the pleadings, in that the specification of negligence therein is the failure to construct fences, and for this reason there is a fatal variance. It is true the petition in the first count does allege a failure to construct and maintain fences. It is urged that, as the cattle passed over the point where the cattle guard should have been erected, and came to their injury and death thereafter, the failure to construct the cattle guard, and not the failure to construct the fences, is the negligence upon which plaintiff must rely for recovery. It is not necessary to pass upon the question as to whether such would constitute a fatal variance, for the evidence tends to show that the cattle were at pasture in the inclosure of plaintiff's testator, through which inclosure the railroad passes, and along the sides of which no right of way fence had been constructed as required by the statute; that they came upon the right of way from this pasture by reason of defendant's failure to erect the fence required by law. It is well settled in the jurisprudence of this state that it is the point at which the cattle enter upon the right of way of the railroad which determines the liability or nonliability of the defendant in these cases (*Snider v. Railway Co.*, 73 Mo. 465; *Acord v. Railway Co.*, 113 Mo. App. 84-98, 87 S. W. 537), and not the point at which the actual collision occurred. It is wholly immaterial that, after

going upon the right of way at a point which would affix liability against the railroad, the cattle afterwards in their wanderings passed a half mile north on the track, and over a point where a cattle guard should have been constructed. The proximate cause of the injury was the failure to maintain a fence which would confine the cattle in the pasture, and preclude them, in the first instance, from entering upon the right of way, and not the failure to maintain the cattle guard mentioned. There is no variance between the pleadings and proof. On the contrary, the pleader was precise in counting upon the failure to fence.

2. The evidence shows that the corn and wheat mentioned in the second count were damaged by hogs owned by the plaintiff's deceased; that said hogs passed from the pasture onto defendant's right of way, and escaped from the right of way into the field where the ungathered corn was standing and the unthreshed wheat was in the stack; that the escape of the hogs into the field was by reason of defendant's failure to construct and maintain fences along its right of way, as required by the statute; that said hogs were found in said field on several occasions by plaintiff's testator, and each time returned by him to the pasture mentioned. Upon this state of facts, it is argued by the defendant that this item of damage accrued to the plaintiff's testator by reason of his negligence, which directly contributed to the injury complained of. The point is made that the plaintiff's testator was negligent in repeatedly turning the hogs into the pasture when he knew it was possible for them to escape upon the right of way, and from the right of way into his field. The case of *Milburn v. Railway Co.*, 86 Mo. 104, is cited and relied upon to support this proposition. In that case, which was one of common-law negligence for killing two cows upon a public crossing at different times, the plaintiff and his son testified that they were near by—about 200 yards distant—and saw the cows standing upon the crossing for about one-half an hour prior to their being killed by the regular passenger train. It was shown that the plaintiff knew the train was due. In view of the facts that the plaintiff permitted the cows to stand for one-half an hour upon the track at a crossing, when he had every reason to expect the approach of the regular passenger train, without endeavoring to avert the injury by driving them therefrom, the court held that his negligence was such as to preclude a recovery. We do not understand that case to be in point here. That was an action for common-law negligence, where each—the plaintiff and the defendant—owed to the other the correlative obligation to exercise ordinary care to avert the injury, whereas this case is one involving different obligations between the parties. Here the plaintiff's deceased had the undoubted right to turn his hogs into his pasture,

and thus enjoy his premises, and the defendant owes to him the positive statutory duty of erecting and maintaining a fence along the right of way sufficient to prevent such hogs from passing either upon the track or from the track to his fields. If the law were otherwise, the plaintiff's deceased would be practically prohibited from occupying his pasture and premises by defendant's failure to erect a fence, at the peril of losing his animals without compensation. The statute imposes upon the railroad company the obligation both to construct and maintain fences along the sides of its right of way sufficient to prevent animals from adjacent pastures going upon the railroad, and escaping therefrom into other adjacent fields. This is a positive statutory duty of the defendant (*Davis v. Railway Co.*, 19 Mo. App. 425), whereas the owner of the animals in the adjacent pastures and fields has the undoubted right to occupy and enjoy his own premises, and is not required to restrain his animals from going upon or about the railroad. This is his duty, not his. *Davis v. Railway Co.*, 19 Mo. App. 425; *Gorman v. Railway Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Turner v. Railway Co.*, 78 Mo. 578, 580; *Busby v. Railway Co.*, 81 Mo. 43. The owner of the adjacent lands has the right to occupy his premises, relying upon the railroad to either perform its duty as to fences, or suffer the penalties resulting from a violation in that behalf. It is shown in the evidence that the plaintiff's deceased drove the hogs out of the field as often as they were discovered therein, and thus prevented the doing of much damage by them which otherwise no doubt would have resulted to him, and this was certainly exercising all of the care on his part that the law would require.

The judgment is for the right party, and it will be affirmed. It is so ordered.

HILAND, P. J., and GOODE, J., concur.

#### WARREN COMMISSION & INVESTMENT CO. v. LEON L. HULL REAL ESTATE CO. et al.

(St. Louis Court of Appeals, Missouri, Oct. 10, 1902.)

##### 1. BROKERS' EMPLOYMENT—EVIDENCE.

The H. Company, being the authorized agent of the owner of certain property to sell the same, agreed with plaintiff that it might sell the property and receive one-half the usual commission. The owner was apprised of this arrangement which it ratified by recognizing plaintiff as its authorized agent to sell the property. Held, that such facts were sufficient to establish plaintiff's authority to act as the owner's agent in the sale of the property to entitle plaintiff to recover commissions.

##### 2. SAME—ACTIONS—PERSONS LIABLE.

Where an owner's broker employed plaintiff to sell the real estate agreeing to pay one-half the commissions in case of a sale on the terms set, and the owner thereafter ratified such agreement, plaintiff was entitled to recover

commission against the owner and was not limited to its action against the broker.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 42.]

##### 3. SAME—PERFORMANCE OF CONTRACT.

Where a letter to a real estate broker authorized the sale of certain property for \$30,000 subject to change at any time, but no change was made or suggested until after a sale was negotiated, a subsequent change and the refusal of the owner to complete the sale at the price first named was ineffective to bar the broker's right to commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 94-96.]

##### 4. INTEREST—RECOVERY—DEMAND.

Where a broker brought suit before a justice for commissions, without having first made a demand, he was only entitled to recover interest from the commencement of the suit.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, §§ 106, 108.]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Warren Commission & Investment Company against Leon L. Hull Real Estate Company and others. From a judgment in favor of plaintiff, defendant Standard Stamping Company appeals. Affirmed.

In 1902, the defendant company, a corporation, was the owner of certain real property situated on Second street, in the city of St. Louis. About the first of the year, 1902, it appointed the Leon L. Hull Real Estate Company, a corporation, as its agent to sell the property at a minimum price of \$30,000. On August 30, 1902, Thomas Warren, president of the plaintiff company, a corporation, wrote defendant, inquiring if its property on Second street was for sale, and, if so, to give price at which it was willing to dispose of the same, including a commission of 2½ per cent. Defendant referred this letter to the Hull company, and it was answered over the telephone by Leon Hull, president of the company, who gave plaintiff to understand that the price was \$30,000, but added, "You want 2½ per cent. commission." Warren replied that, "as between agents," he was perfectly willing to divide the commission with the Hull company, as usual, and asked Hull to write and give details as to frontage, etc. On September 27, 1902, plaintiff received the following letter from the Hull company: "St. Louis, Mo., Sept. 27, 1902. Warren Commission & Investment Company, Second and Pine street, City—Gentlemen: Referring to yours of the twenty-sixth inst., in reference to premises on North Second street, of the Standard Stamping Co., the lease that is now on the premises runs until May 1, 1906, at the yearly rent of \$3,000. The dimensions of the lot, as we believe you know, are 65x140 feet. Taxes about \$300. Our present price is \$30,000, subject, however, to change at any time. The lease is made to the house of Sydney Shepard and Company, which makes it as good as a government bond, and the

state Co., Leon L. Hull, President." Thereafter the Warren company was offered other real property in exchange for the Second street property, and at another time it received an offer to buy the property at \$30,000, one-half the purchase price to be paid in stock of the St. Louis Cotton Compress company. Both these offers were turned down. Finally, on the morning of the 18th of November, 1902, plaintiff negotiated a sale of the property to James Y. Lockwood for \$30,000, on the usual terms, and received Lockwood's check on the American Exchange bank for \$500, payable to the defendant company, as earnest money. On receipt of the check, Warren immediately went to the office of the Hull company and offered the check to Leon L. Hull. Hull declined to receive the check, but said to Warren that he would call up Mr. Wiegand, president of the defendant company, and have him take lunch with him, sign a receipt for the earnest money, and would call up Warren about 4 p. m. so he could return with the check. Hull did not call up Warren, but late in the afternoon of the same day Warren called on Hull, who informed him there was a "little hitch" in the matter, but he would get it straightened out in two or three days. Warren then secured a certified check for \$500 and transmitted it in a letter to the Hull company, who returned it to plaintiff. Warren then went to the defendant's office and offered the certified check to Wiegand, who also refused to receive it, but referred Warren to Hull, informing him that the Hull company was the accredited agent of the defendant with respect to the sale of the property. Warren repeated this information to Hull over the telephone and was informed by him that nothing could be done. The evidence shows that Lockwood was abundantly able to pay for the property, and was ready and willing to purchase it at \$30,000. The evidence of Wiegand shows that, after he was informed that plaintiff had negotiated a sale of the property to Lockwood, a meeting of the board of directors of the defendant company was held, at which it was agreed that the property was worth more than \$30,000 and that the company could not consummate the sale. The suit was commenced before a justice of the peace to recover 1 1/4 per cent. on \$30,000, the agreed purchase price of the property. The Hull company and Leon L. Hull were made parties defendant. In due course the case was appealed to the circuit court, where the action was dismissed as to the Hull company and Leon L. Hull, whereupon a trial de novo was had to the judge, sitting as a jury, who, after hearing the evidence and declaring the law of the case, found the issues for plain-

Perry Post Taylor, for appellant. Jones & Hocker and T. P. Wagner, for respondent.

BLAND, P. J. (after stating the facts). 1. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant offered an instruction in the nature of a demurrer to the evidence. The court refused to grant either of these instructions. This ruling is assigned as error on the ground that there is no evidence tending to show that plaintiff was authorized to sell the property as the agent of defendant. The evidence is all one way, and in fact it appears by the defendant's evidence, that the Hull company was the authorized agent of the defendant to sell the property, and that the Hull company, through its chief officer, agreed with plaintiff that it might sell the property and receive, as compensation for its services, one-half the usual commission of 2 1/2 per cent. of the selling price, and that the defendant was not only apprised of this arrangement, but ratified it by recognizing plaintiff as its authorized agent to sell the property. A sale was negotiated by plaintiff on the terms and for the price agreed upon, and, while the Hull company's letter of September 27th stated the terms of the sale were subject to change, no change was made or suggested until after the sale was negotiated, too late to defeat plaintiff's claim for the agreed commission. It is also contended that plaintiff's contract was with the Hull company and not with defendant, and that it should look to the Hull company for its commission. This would be so but for the fact the contract made by the Hull company with the plaintiff was ratified and adopted by defendant.

2. The evidence fails to show that plaintiff made any demand on defendant for the amount sued for (\$375) prior to the commencement of the suit. The court, nevertheless, allowed interest from the date the commission became due, amounting to \$60. This was error. *Shinn v. Wooderson*, 95 Mo. App. 6, 75 S. W. 687; *Patterson v. Missouri Glass Co.*, 72 Mo. App. 492. The commencement of the suit before the justice, however, was a sufficient demand to entitle plaintiff to interest from that date. The suit was commenced November 27, 1902, and judgment was rendered in the circuit court on June 2, 1903. The interest from the date of the commencement of the suit to the rendition of the judgment, at the legal rate, on \$375 would be \$11.35. Therefore, the judgment is for \$48.15 more than plaintiff is entitled to recover, wherefore it is considered that, unless within 10 days from the date of the filing of this opinion the plaintiff remit \$48.15, the judgment will be reversed, and the



**ST. LOUIS STEEL RANGE CO. v. KLINE-  
DRUMMOND MERCANTILE CO.**

(St. Louis Court of Appeals. Missouri. Oct. 16, 1906. Rehearing Denied Oct. 30, 1906.)

**1. SALES—REMEDIES OF SELLER—ACTION FOR PRICE.**

Where a contract of sale has been so far performed by the seller that the property is ready for delivery before he has knowledge of the purchaser's intention to decline acceptance, the seller may treat the property as belonging to the purchaser, hold it subject to his order, and recover the price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 949.]

**2. SAME—RESALE.**

Where a contract of sale has been so far performed by the seller that the property is ready for delivery before he has knowledge of the purchaser's intention to decline acceptance, the seller may sell the property for the buyer's account, and then recover the difference between the proceeds of the sale and the agreed price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 915.]

**3. SAME—ACTION FOR DAMAGES.**

Under such circumstances, the seller may treat the sale as ended, and regard the property as his, and recover the actual loss sustained; ordinarily the difference between the agreed price and the market price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1085.]

**4. SAME—PRICE—DAMAGES.**

Where plaintiff contracted to manufacture stoves for defendant, and after some of the stoves had been completely manufactured and the parts of the remainder had been made, but the parts not "assembled," defendant refused to accept the stoves, and plaintiff, treating the property as his own, sold some of the stoves which had been completed, and sued for damages. *Held*, that plaintiff was entitled to recover the contract price after deducting therefrom the price received for the stoves sold by him, less cost of disposition, and deducting the cost of assembling those not put together and the value of the stoves left on hand.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098-1107.]

**5. SAME.**

Where defendant refused to accept stoves manufactured for him by plaintiff, and plaintiff elected to treat the stoves as his own and sued for damages, it appearing that the stoves were of an unusual make, so that they had no market value, the reasonable value of the stoves at the time and place of delivery under the contract should be ascertained by evidence as to the sales of the stoves actually made by the seller, the frequency of the sales, and the testimony of expert witnesses familiar with the stove trade.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098-1107.]

**6. SAME—INSTRUCTIONS.**

The stoves having no market value, an instruction on the measure of damages, authorizing the jury to award the plaintiff the "reasonable selling value," was not erroneous.

**7. SAME.**

Defendant contracted to purchase of plaintiff stoves, to be manufactured by plaintiff, and after a number of the stoves had been completed, and all the parts for the remainder had been

that an instruction on the measure of damages was subject to criticism for speaking of the property left on plaintiff's hands as "material" out of which to complete the remaining stoves.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the St. Louis Steel Range Company against the Kline-Drummond Mercantile Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

On December 18, 1902, plaintiff, a corporation, entered into a contract with the Luyties Mercantile Company, another corporation, by which plaintiff agreed to manufacture exclusively for the Luyties Company a special design of steel range, to be known as "Luyties Malleable," and not to manufacture or sell said range to any mail order house selling direct to the consumer for a period of five years from the date of the contract, the Luyties Company agreeing to take 1,000 ranges of the designated pattern, with the option to take an additional 1,000. The price of all the 1,000 ranges, except 4, was to be \$20 each. Those 4 were of superior construction and to bring a higher rate. One hundred ranges were to be furnished to the purchaser each month, and a greater number on 30 days' notice, if more were desired. After 104 ranges had been delivered to the Luyties Company, the contract was assigned by said company to the defendant, the Kline-Drummond Mercantile Company, and the latter company was accepted by plaintiff as a party to the agreement in lieu of the Luyties Company. Deliveries were duly made to defendant until it had received and accepted 289 ranges, when it refused to accept any more. At the time of defendant's default, about 603 ranges were still to be delivered under the contract, and the action is for damages suffered by plaintiff on account of defendant's refusal to take them. After the contract was entered into, plaintiff prepared plans for the ranges, and purchased all the materials, not only for the 1,000 which the defendant, as the successor of the Luyties Company in the contract, was bound to purchase, but for the additional 1,000 which it had an option to purchase. However, the latter fact is immaterial in the present case. The testimony goes to show that the ranges were of unusual construction, and that they were of lighter metal than those commonly sold on the market, and perhaps varied from the ordinary patterns in other respects. Each range was to have on it the letters "L. B." and the words "Luyties Malleable." As we gather, these brands were to be on label plates fastened on the range instead of being moulded into pieces of the range itself. At the time of the default about 25 of the unaccepted 603 ranges were finished; that is to say, were put together

use the word of the witnesses. The cost of assembling each range was about \$4.07, and the total cost of the construction of each was from \$13 to \$14. All the ranges received either by the Luyties Company, or defendant, were paid for, and \$2,500 was paid on those not taken. Plaintiff subsequently sold 10 or 15 to the Lincoln Mercantile Company, thus reducing the number left on its hands. There was testimony that the remainder, or the parts left of which to construct them, were worth about \$600 as scrap iron or junk, and had no other value. Defendant's counsel endeavored to adduce testimony respecting the value of the ranges left on hand just as they were—that is to say, with the label plates on them—and also testimony regarding their value with the label plates removed. The court admitted testimony as to what their value was in their actual condition, and also "repressed," as the witness said; that is, with certain shelves, and the name plates taken off and the ranges renicked. But some testimony was excluded going to show the reasonable market value of the ranges with the name plates off, or that in that condition they had a market value. Defendant excepted to this ruling.

The following instruction on the measure of damages was given at plaintiff's request, the defendant excepting: "The court instructs the jury that if you find from the evidence in favor of the plaintiff in assessing its damages you should take into account the total amount plaintiff would have been entitled to receive all told if the defendant and Luyties Brothers Mercantile Company had between them taken the entire 1,000 ranges contracted for, and the jury should deduct from such total amount such sums as have been paid to plaintiff upon said contract, and also such an amount as it would have cost the plaintiff to set up and complete the remaining ranges not delivered under said contract, and also the reasonable selling value of the material on hand out of which to have completed said remaining ranges; and these items deducted from said total amount which the plaintiff would have received if the entire contract had been carried out by Luyties Brothers Mercantile Company and the defendant herein, will show the amount which plaintiff is entitled to recover as the principal sum in this action, if anything; and the jury are further instructed that they should add to such principal sum interest at the rate of 6 per cent. from the first day of November, 1904, to the date of your verdict."

This instruction was requested by defendant, refused, and an exception saved: "The court instructs the jury that if you find for the plaintiff you will assess its damages at such sum as you may find and believe from

in question at the time and place of delivery, and plaintiff is entitled only to receive such actual damages as you may find and believe from the evidence will compensate it for the loss sustained, if you find it has sustained a loss, on account of the nonacceptance of the ranges mentioned in the contract sued upon, and you will find accordingly."

The jury's verdict was for \$3,659.76 in favor of plaintiff, and, judgment having been entered accordingly, defendant appealed.

M. C. Early, for appellant. S. N. & S. C. Taylor, for respondent.

GOODE, J. (after stating the facts). We are called on to determine the rule by which plaintiff's damages are to be ascertained. The case is that of a vendee of personal property who has refused to accept the goods bought, and, as different rules for the measurement of damages are laid down in such cases according to the circumstances presented, it is essential to fix in mind the important facts of the present controversy. At the time of defendant's refusal to accept any more ranges, plaintiff had on hand 603, of which about 25 were completed and ready for delivery, and all the parts of the others were manufactured and ready to be put together. The undelivered ranges were not treated by plaintiff as the property of defendant, or held for delivery to it on demand after its refusal to accept them; on the contrary, plaintiff sold some of them for \$20 each, or thereabouts, and those on hand were being disposed of occasionally at the rate of one a week. At that rate of sale more than 10 years would be consumed in disposing of the entire lot, and, as plaintiff had invested in them about \$6,000, it might prove detrimental to its business to keep that portion of its capital thus invested for so long a time. There was no evidence to show the ranges had a market value in St. Louis or elsewhere, if by market value is understood a current price fixed by sales of similar property as articles of commerce in the ordinary course of business. As stated, the ranges were of an unusual pattern, and of lighter material than is commonly used in ranges, besides having label plates on them which, though the evidence shows they could be detached easily, may have hindered, in some measure, the sale of the articles and have lessened their value. There was testimony that the ranges left on hand were of no value except for junk or scrap iron, but it cannot be doubted that some of the evidence tended to show they had a value as ranges above what they would yield for junk. It looks improbable that such articles, even if of an unusual pattern and weight, could not have been sold at some price as ranges; but what we hold is that the evi-

tion of how plaintiff's damages are to be measured. The guiding principle of the law in cases arising on breaches of contracts for the sales of personal property is to give the aggrieved party the benefit of his contract by putting him in as favorable a condition as he would have enjoyed if the other party had performed, instead of violating, his agreement; in other words, to afford full indemnity for the breach. All other rules, including the one relating to the difference between the agreed and the market value of the thing sold, are but corollaries of this one, used to apply the principle of it to the different classes of cases which occur. Let us then ascertain what plaintiff would have obtained if the contract had been completed. As the ranges actually delivered were paid for, that part of the transaction may be disregarded. If the defendant had accepted the remainder, it would have received the total contract price. Whatever defendant paid in advance on the undelivered ranges is to be deducted, of course, from the amount of its recovery. Some of the ranges were sold to another concern subsequent to defendant's breach, and the amount received for them, less the cost of disposing of them, is likewise to be deducted. There is also to be deducted the cost of assembling those which had not been put together, approximately \$4.07 for each range, because plaintiff would have had to incur that expense before the ranges could have been delivered, if defendant had gone on with its contract. There remains to be deducted the value of the ranges left on plaintiff's hands, and the real question for decision is how this value is to be ascertained.

If the buyer of personalty refuses to accept the subject-matter of the bargain when tendered by the seller in proper condition and at the proper time and place, the law allows the seller several modes of redress. If the contract has been so far performed by the seller that the property is ready for delivery before he has notice or knowledge of the buyer's intention to decline acceptance, he may treat the property as belonging to the buyer, hold it subject to the latter's order, and recover the full agreed price; or he may sell it for the buyer's account, taking the requisite steps to protect the latter's interest, and get the best price obtainable, and then recover the difference between the proceeds of the sale and the agreed price; or he may treat the sale as ended by the buyer's default and the property as his (the seller's), and recover the actual loss sustained, which is ordinarily the difference between the agreed price and the market price. *Dobbins v. Edmonds*, 18 Mo. App. 307, 317; *Kingsland v. Iron Co.*, 29 Mo. App. 526; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *Rickey v. Tenbroeck*, 63 Mo. 563;

from the vendee, the title is regarded, usually, as having vested in the latter without delivery, so as to give the vendor the right, on refusal to accept, to recover the stipulated price. Under such circumstances, the case presented is different from that of a sale of goods generally, like merchandise or corporate stocks currently dealt in, when it is contemplated that specific articles or stocks shall be subsequently selected and delivered pursuant to the contract. *Bethel St. Co. v. Brown*, 57 Me. 9, 99 Am. Dec. 572; *Page v. Carpenter*, 10 N. H. 77; *Bookwalter v. Clark* (C. C.) 10 Fed. 793; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117. The decisions holding vendees responsible for the full contract price in cases of specific articles manufactured for them proceed on the assumption that they have acquired title to the property, and that it is held subject to their order, or else that it is worthless in the hands of the vendors, so that the latter cannot partly reimburse themselves for their loss by using or disposing of it. *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Crown Vinegar & Spice Co. v. Wehrs*, 59 Mo. App. 493; *Bookwalter v. Clark*, *supra*. In the Missouri cases just cited the property sold had been manufactured and was ready for delivery. The opinion in *Lumber Co. v. Warner*, says that when the subject-matter of the contract is specific articles made for the vendee, and the vendor has completed his contract, it is just that the damages in case of refusal to accept the goods shall be their contract price, but that the vendor will hold the property for the vendee. In *Mitchell v. Le Clair*, *supra*, the defendant had ordered 60 tubs of butter, which plaintiff set apart for him but he subsequently refused to take it. Referring to these facts, the court said that if the vendee in such case refused to take the goods and pay for them, the vendor might recover the price, if he kept the goods in readiness for delivery to the purchaser. It sometimes happens, as in the instance of a suit of clothes made for a person, or a portrait painted for him, that the thing sold is obviously worthless to any one else, and then, we apprehend, the seller could recover the full price on the purchaser's refusal to accept, without regard to whether the contract was still executory, provided it had been performed to the extent of having the subject-matter of it ready for delivery. *Allen v. Jarvis*, 20 Conn. 38. This is not such a case, for it is apparent that the unaccepted ranges had a value either as scrap iron or as ranges, and, indeed, this proposition is conceded.

We have said that plaintiff did not elect either to hold the ranges as defendant's property to be delivered on demand, or sell them for defendant as its agent. On the contrary

plaintiff treated the ranges as its own, and proceeded to sell them from time to time. In view of this fact, defendant is entitled to a deduction of the value of the ranges from the agreed price. The rule for ascertaining what that value is would be plain if the articles had a market value, for then plaintiff would be charged with the market value, and entitled to recover the difference between that and the agreed price. But we find no evidence that they had a market value fixed by current sales, as are the values of wheat, cattle, government bonds, and other standard securities or articles of commerce which are the subject-matter of daily transactions, and that is the meaning commonly attached to the term "market value." It follows that defendant's instruction was rightly refused. *Jonas v. Noel*, 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862. What the law intends to allow the seller is compensation for his actual loss. *Rand v. R. R.*, 40 N. H. 79, 85; *Ganson v. Madigan*, 13 Wis. 67, 72; *Williams v. Jones*, 1 Bush (Ky.) 621, 627; *Gordon v. Norris*, 49 N. H. 376, 385; *Culin v. Glass Works*, 108 Pa. 220; *Chamerlain v. Farr*, 23 Vt. 265. The difference between the market and the agreed value is adopted, when it can be, as the most accurate mode of ascertaining what damages ought to be allowed. This is because the seller may forthwith reimburse himself by selling to some one else if the goods have a ready market. Now, when there is no market value in that meaning of the term, the damages must be ascertained in some other mode. 1 *Sedgwick, Damages*, § 495; *Woods' Mayne, Damages*, § 22; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Masterton v. Mayor*, 7 Hill, 61, 42 Am. Dec. 38. The reasonable value of the ranges in controversy at the time and place of delivery under the contract should be ascertained by any testimony tending to throw light on the subject; such as sales actually made, the frequency of the sales, and the testimony of expert witnesses, who are familiar with the trade in ranges and the value of such commodities, as to the value of those in question for any use of which they are susceptible.

In the instruction on the measure of damages the court used the expression "reasonable selling value" to indicate the amount plaintiff was to be charged with on account of the undelivered ranges. This expression was not erroneous under the circumstances of the present case, there being no market value for the articles, and, in view of the facts that they were manufactured to sell, and not to keep or work into other products, and were worthless to plaintiff for any purpose except to sell. Indeed, both parties agree that the amount to be deducted from plaintiff's recovery is the exchangeable value of the ranges left on hand; but plaintiff con-

tends that the value, where the market value is some measure of trade has affixed to the market value. This is often equivalent to the order that plaintiff should be charged with. It may be, but the ranges are worthless junk, and if charged with the value. But, as intimated, they would be junk, either with or without the evidence goes to without much competent on the same character to show what the label placed the court on point out saying that to the trouble duce the damage pay, the jury could have been price above what to be sold by dressed or as

As to the range ant's breach, the measure of taken of these though the evidence were made. I found the ranges were worthless defendant no what they would fact they brought agreed price. on the measure We think it is ing of the price as "material" remaining ranges; tendency to price to plaintiff's ranges were their parts were only to be put inclined toward put issue of the completed completed ones time of the trial designated as "to complete" the

The judgment remanded. All

**DRYDEN v. ST. LOUIS TRANSIT CO.**

(St. Louis Court of Appeals. Missouri. Oct. 16, 1906.)

**1. CARRIERS—STREET RAILROADS—CONTRACTS—BREACH.**

At an intersecting street, plaintiff, a passenger, was offered a transfer to another car, which was at hand, ready to carry him to his destination, four blocks North, but plaintiff refused the transfer, stating that if he had known the car was not going to his place of destination, as indicated thereon, before he boarded it, he would have taken another car; the car being transferred en route to another track in order to make up lost time. *Held*, that there was no actionable breach of the carrier's contract to transport plaintiff to destination.

**2. STREET RAILROADS—REGULATION—ROUTING CARS—ORDINANCES.**

St. Louis city ordinance No. 21,113, § 1760 D, legalized the routing of cars on defendant's street car line, in existence August 28, 1902, and provided that no change of the routing should be thereafter made without the written consent of the mayor, president of the council, and supervisor of street railroads. It also provided that a car should not be turned from its established route except in cases of unavoidable accident or when according to schedule, it was about to be turned into a car shed. *Held*, that such ordinance did not prohibit the diversion of a car from its regular route for the purpose of making up time that had been unavoidably lost, to restore it to schedule, and get the usual space ahead of the car that was following, though it necessitated a transfer of passengers.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Walter B. Dryden against the St. Louis Transit Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Alex. Nicholson, for appellant. Boyle & Priest, for respondent.

**BLAND, P. J.** The action was begun before a justice of the peace, in the city of St. Louis, and, in due course reached the circuit court by appeal, where it was tried anew to the court sitting as a jury, who, after hearing all the evidence, declared the law to be that under the law and the evidence the plaintiff was not entitled to recover, and rendered judgment for the defendant, from which judgment plaintiff duly appealed.

The complaint filed before the justice of the peace stated two separate and distinct causes of action: The first count or paragraph was to recover for an alleged breach of defendant's contract to carry plaintiff to his destination, Broadway and Lucas avenue. The second count or paragraph is predicated upon section 1760 D of the city ordinance (city of St. Louis) No. 21,113, which reads as follows: "Except in case of unavoidable accident or when a car is about to turn in according to a schedule at a car shed, or where extra cars are required to run temporarily under exceptional circumstances to a particular point for the accommodation of the public and are plainly placarded to the effect, every street car company or association operating, managing, controlling or running any line

of cars, shall be required to run each of its cars that may be carrying one or more passengers to the end of the entire route, and shall not require any passenger to alight from any one of its cars and take a preceding or succeeding car traveling over the same route in order to continue to his or her destination. This section shall not be so construed to prohibit the reasonable transfer of passengers from one line to another, or from one division to another, at any reasonable point from which said lines or divisions do not continue on the same route; but no such company or association shall under any existing charter or franchise establish any new route or routes which require the transfer of passengers to another car in order to reach any point accessible without a transfer on August twenty-eighth, nineteen hundred and two, and all routes as then operated shall continue to be operated without abridgment. Provided that in case of emergency, such as the blocking of the tracks caused by conflagrations or under similar exigencies, the cars may in order to accommodate public convenience, temporarily be run over other tracks until the regular route can again be covered; and provided further that such companies or associations may make all lawful changes in the routes when public convenience requires, on condition that the proposed changes first received the written approval and sanction of the Mayor, President of the Council, and Street Railway Supervisor, if there be one, or any two of the said officials, and said written approval has been filed with the Register. And provided further that said written approval may at any time be revoked by any two of the officials above named, and upon such revocation of such approval or sanction as aforesaid, the route originally existing before such sanction or permit shall forthwith be established, subject to the provisions of this ordinance."

By another section of the ordinance, a violation of section 1760 D is made a misdemeanor, punishable by a fine of not less than \$5 or more than \$500 "for each and every offense for every day during which any unlawful order or schedule remains unrevoked." On April 16, 1904, defendant operated what is designated "the Tower Grove Division" of its street railway system, from a point in the southwestern part of the city of St. Louis to its eastern terminus at Broadway and Lucas avenue (Union Market). On said day, plaintiff was received on defendant's car, No. 750, of the Tower Grove division, traveling east, at Twelfth and Market streets, intending to go to Broadway and Lucas avenue, the eastern terminus of the car's route. When the car reached Broadway and Olive street, the conductor informed the passengers that the car would not go to Broadway and Lucas avenue, but would proceed east on Olive to Fourth street, on Fourth to Pine, and on Pine to Sixth, on its return trip to the southwestern part of the city, and requested the pas-

the conductor asked him to take a transfer and board the next car, which he refused to do. Plaintiff was not informed that he would not be carried to his destination until the car reached Broadway, and stated that if he had known the car was not going to his place of destination before he boarded it he would have waited and taken another car; that his fare of five cents was not tendered back to him.

The evidence on the part of the defendant shows that there had been a delay of 15 minutes, caused by a "jammed switch," resulting in a blockade and disarrangement of the spacing of the cars on the line. The superintendent of the line testified that in order to restore the proper spacing of the cars, and to make up the time lost by car, No. 750, caused by the blockade, he ordered the conductor to make the loop at Fourth and Pine streets instead of Broadway and Lucas; that, by doing this, the car would gain about six minutes time on its return trip to the southwestern part of the city. On motion of the defendant, the court required the plaintiff to elect upon which of the two counts of his complaint he would go to trial. Plaintiff excepted to this ruling of the court, and elected to proceed on the first count of his complaint.

1. That there was no substantial breach of the defendant's contract to carry plaintiff to his destination, we think is clearly shown by plaintiff's own evidence. At Broadway, plaintiff was offered to transfer to another of defendant's cars (at hand) to carry him to his destination, four blocks north of where he was. The mere inconvenience to plaintiff of getting off one car to take passage on another to be carried immediately to his destination was not an actionable breach of defendant's contract to carry him; and we approve the finding of the court on this count of plaintiff's complaint.

2. All the evidence plaintiff had to sustain his action on the second count was heard without objection. In this state of the case, the question presented is, conceding the two causes of action were properly joined in the same complaint, and that the court erred in requiring the plaintiff to elect upon which of the two counts he would proceed to trial, was the error prejudicial? It was not prejudicial unless the evidence shows, or tends to show, the defendant was guilty of a violation of the section of the ordinance upon which the second count is predicated. Waiving a discussion of the question as to whether or not a violation of the ordinance gave a right of action to a private individual, we think the evidence falls short of showing a violation of the ordinance on the occasion complained of. The ordinance, in effect, legalized the defendant's routing of its cars as it existed on August 28, 1902, and provided that no change of the routing should be thereafter made without the

a car should be turned from its established routing, except in cases of unavoidable accident, or when it was about to be turned in according to schedule at a car shed. The ordinance does not attempt to take away from the company its lawful right to make all reasonable rules and regulations for the conducting of its business, nor to specialize all and every circumstance under which a car might be temporarily turned from its regular route. As shown by the evidence, it was necessary to turn the car, on which plaintiff was a passenger, from its regular route, for the purpose of making up time that had been unavoidably lost, to restore it to its schedule time, and to give it the usual space ahead of the car that was following.

We think this was not only a reasonable diversion, but a necessary one, for the accommodation of the travelling public, and was in no sense a violation of the letter or spirit of the ordinance relied upon, and hence afforded the plaintiff no right of action; and we conclude that plaintiff's evidence failed to establish a right of action on either count of the complaint, and affirm the judgment. All concur.

#### DE MAET v. FIDELITY STORAGE, PACKING & MOVING CO.

(St. Louis Court of Appeals. Missouri. Oct. 18, 1906.)

##### 1. APPEAL—EVIDENCE—REVIEW.

Where, at the close of plaintiff's case, defendant offered an instruction in the nature of a demurrer to the evidence which was overruled, and at the close of the whole case defendant asked an instruction that the jury be directed to find for defendant, which was likewise overruled and exception duly taken, the sufficiency of the evidence taken as a whole to sustain a verdict for plaintiff was presented for review on appeal.

##### 2. EVIDENCE—WEIGHT AND SUFFICIENCY.

Where plaintiff's own evidence demonstrates that the alleged fact on which he predicates a right of action could not exist, it cannot be said that the testimony of one of the witnesses that such fact did exist was any substantial evidence thereof.

##### 3. SAME—INFERENCES.

In an action for death, the mere concurrence in point of time of the supposed alleged injury, and the fact that deceased took to her bed and died shortly thereafter, did not legitimately give rise to the inference that the death was the result of the injury.

##### 4. HIGHWAYS—INJURIES TO PEDESTRIANS—EVIDENCE.

In an action for death of plaintiff's intestate, evidence held insufficient to warrant a finding that she was struck in the left side by the end of the shaft of a buggy driven by defendant's servant, or that her death was the proximate result of injuries so received, and not from natural causes.

Goode, J., dissenting.

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by Peter De Maet against the

Fidelity Storage, Packing & Moving Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jeptha D. Howe, for appellant. John A. Talty, for respondent.

**TITTMAN, Special Judge.** After stating that defendant is a corporation, organized under the laws of this state, that Morgan street and Broadway were, and are, open public thoroughfares in the city of St. Louis, that plaintiff was lawfully wedded to Predentia De Maet, on April 5, 1887, and continued to live with her as her husband until the date of her death, the petition alleges: "Plaintiff further states that on or about the 4th day of May, 1903, while plaintiff's said wife, Predentia De Maet, was walking in a southwardly direction across said Morgan street on, or near, the crossing on the west line of said Broadway, one, defendant's agent, servant and employé in charge of and driving its horse and buggy, carelessly, negligently and unlawfully drove said horse and buggy against and upon said Predentia De Maet, with such force as to throw her violently to the ground, causing a great and sudden shock to her nervous system, and cutting, bruising, wounding and seriously internally injuring the said Predentia De Maet, causing her to become sick and sore, and from the effects of which she finally on or about the 20th day of May, 1903, died. Plaintiff further states that Predentia De Maet was at all of said times in the exercise of ordinary care, and that her death was caused by defendant's said servant's negligent, careless and unlawful acts in driving said horse and buggy against and upon her and causing the said injuries as aforesaid." Then follow allegations of damages and prayer for judgment. The answer to the petition is as follows: "Now comes the defendant, and, for its answer to plaintiff's petition herein, denies each and every allegation therein made and contained. Further answering, defendant says that, if Predentia De Maet sustained any injuries, they were directly and proximately caused by her own carelessness and negligence, in that she carelessly and negligently walked into and against said horse, without paying the slightest attention to where she was going. Further answering, defendant says that the cause of the death of Predentia De Maet was due to fat and enlarged thyroid gland and degeneration of the heart, liver and kidneys, and many other natural causes contributed thereto, and not as alleged. Wherefore, having fully answered, defendant asks to be hence discharged, with its costs." A reply was filed, denying the new matter in the answer. A trial before a jury resulted in a verdict and judgment thereon, for the plaintiff, from which, after an unsuccessful motion for a new trial, the defendant appealed to this court.

At the close of the plaintiff's case, the defendant offered an instruction in the nature of a demurrer to the evidence, which was overruled. An instruction offered at the close of the whole case, to find for the defendant, was likewise overruled. Defendant having duly preserved the point, it becomes necessary to review the evidence taken as a whole. *Hilz v. Railroad*, 101 Mo. 36, 13 S. W. 946; *Weber v. Railroad*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 519, 18 Am. St. Rep. 541; *Hite v. Railroad*, 130 Mo., loc. cit. 141, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555.

The evidence for the plaintiff tends to show that the deceased was 41 years of age, and up to May 4, 1903, was apparently a strong, healthy woman, the mother of eight children (four living and four dead); that on May 4th she, with a basket on her arm, accompanied by her eleven year old daughter, stepped off the sidewalk on Morgan street, in the city of St. Louis, onto the pavement where Morgan street intersects Broadway, and was struck in the left side by the end of a buggy shaft, knocked down, and injured; that she and her daughter were then taken into the buggy by the driver and driven south to Market street, where they took a street car and went to their home in South St. Louis. The plaintiff testified that when he went home on May 4th, after his day's work was done, he found his wife in bed, "wrong in her mind," unable to give any account of the accident; that she continued in this condition, and on May 16, 1903, he had her taken to St. Anthony's Hospital at Chipewa street and Grand avenue, where she died on May 19th; that, before being sent to the hospital, she was treated for her injuries by Dr. Collasowitz. Louis Margulis, the only witness in the case who gave any testimony tending to show that the deceased was run into or struck by defendant's buggy, testified that, at the time of the accident, he was sitting on a truck in the front of a store, across the street, on the northeast corner of Broadway and Morgan streets, from which point he saw the accident; that, when deceased stepped out a few feet from the north curb on Morgan street, the buggy came around the corner going west on a full trot, and the end of the right shaft of the buggy struck her on her left side, and she fell down on her hands and face "all crouched up," and the buggy had to be backed to get her out; that the buggy was a storm buggy, with all the curtains down except the front one, and was coming from the north on Broadway at a brisk trot. This witness confessed that he signed the following statement: "St. Louis, Mo., June 22, 1903. I, William Louis Margulis, state before Officer Dineen that I witnessed accident at northwest corner of Broadway and Morgan on May 4th, 1903, at 11 or 11:15 a. m., and I witnessed buggy stop for street car going south on Broadway, then started west on Morgan.

less. Louis Marguna. But, in explanation, witness said he did not read the statement, and signed it at the request of a police officer, for the protection of the officer. Two police officers present when he signed the statement testified that he read it and knew its contents when he signed it. Lawrence A. Steinberger testified that he did not see the accident, but heard the deceased scream, and looked and saw her down under the wheel of the buggy; that the wheel was not on her, but she was down under the wheel, doubled up, more on her right than on her left side, and with her face downward; that the driver backed the buggy, and she was assisted to her feet and into the buggy, and she and her daughter were taken away by the driver. Emma De Maet, the daughter, testified that her mother was ahead of her, and, when they came to the corner of Morgan street and Broadway, as her mother was walking across the street, a buggy came along at a fast trot and knocked her down "by the wheel"; that some men picked her up, and the driver took them to Market street, gave her mother a dime, and they got on her street car and went home, and her mother went to bed; that her mother did not talk to her at all on the way home. On cross-examination, witness stated that she did not see the buggy before it came in contact with her mother, and could not tell whether her mother walked into the buggy, or the buggy ran into her; that she was looking at the fish market, and the first she noticed her mother was down; that they were going to take a car and go home, and were trying to catch a car that had just passed. Edwin E. Goebel, the attorney who brought the suit but afterwards withdrew from it, testified that he sent for Charles F. Betts, president of the defendant company, to come to his office, and, in a conversation had there with Mr. Betts, the latter stated that Lawler, the driver of the buggy, was in the employ of the company on May 4, 1903, and had been up in North St. Louis on that day, taking orders and giving bids to people for the storage of their goods, and was on his way west on Morgan street when the accident happened, and that the horse and buggy belonged to the company. Dr. Collasowitz testified that he attended the deceased professionally from the 4th to the 16th of May, 1903, when she was sent to the hospital, after which he did not again see her; that, although he tried several times to have his patient sit up, she was unable to do so, but felt faint; that she could not sit up, and, if she was not supported, she fell back on her pillow; that at times she seemed to be better and at times she was worse, her condition changing from day to day; that he visited her 14 times, found no lesions on the body of the deceased—no evidence of external or internal physical injuries. He fur-

ther testified that the symptoms and from the statement of the injury received by her, he thought that she probably had hemorrhages of the brain, but could not give an opinion whether she died of shock or hemorrhages alone.

Charles F. Betts testified, for defendant, that Goebel's testimony, in regard to the conversation with him at his office (Goebel's office) was wholly untrue; that Goebel called him to his office and tried to induce him to give him \$75 to drop the suit, but he told Goebel he would not give him 15 cents; that he never heard of the accident until told of it by Goebel. Witness testified that, while Lawler was hired by the company by the month, he was not at work for the company on May 4, 1903; that there was a strike of the teamsters on at that time and the company was not doing any business; that Lawler was driving the horse and buggy on his own private business. Both the secretary of the company and Lawler testified that, on account of the strike, the company had no teams out on May 4th, and that Lawler was going about in the buggy on his private business, and not for the company. Several witnesses to the scene testified that the shaft of the buggy did not touch the deceased, but she ran against the buggy and crouched down between the wheels. Lawler testified that he was driving west from Fourth street on Morgan, with all the curtains of the buggy up, and, when he reached Broadway, a car was going south and he stopped until it passed; that he then drove across Broadway in a walk and was on Morgan street, about three feet from the curb, when the deceased stepped down "lively" from the sidewalk against the front wheel of the buggy and crouched down; that he assisted her into his buggy and drove her and her daughter to Market street, and would have driven them home, but the deceased said she preferred to go on the street car, and he gave her a dime to pay fare home; that the police officer present asked her, through her daughter (deceased could not speak English), if she was hurt, and she said that she was not, and, when asked if she wanted Lawler arrested, she said: "No."

Dr. B. H. Grandwohl testified that he was an autopsy physician in the coroner's office in May, 1903, and held an autopsy on Prentiss De Maet for the coroner's office, in the presence of Dr. Dean, the attending physician in the hospital. In regard to what he found, witness testified as follows: "I found a medium-sized woman, weighing one hundred and seventy-five or two hundred pounds. Examined her very carefully for signs of injury or inflammation; that is, on the external surface of the body. Saw nothing indicative of anything on the inspection of the body; but, further performing the autopsy, I first examined the head and brain, and found thickening of the membranes, the covering of the



brain proper. That is a chronic condition which has existed for some time. I found nothing else—no fracture of the skull, no hemorrhage of any kind. I examined the organs of the neck, and I found an enlargement of the thyroid gland. Q. Explain to the jury what that gland is, Doctor. A. It is the body which lies on either side of the neck alongside of the windpipe. In a normal, healthy condition it is so small it cannot be felt, but it occasionally becomes the seat of disease, and, in this instance, it had attained a large size, so that the neck was bulged out. On cutting this open, and examining it, I found it was degenerated. There were large cavities in it, and these cavities were filled with a glue-like material, what we call a degeneration of the gland. Going further downward, I examined the heart and lungs, and I found that there was a bad degeneration of the heart—that there was a filling up of one lung with fluid, which has occurred in the last stages of life, which often occurs before death, what is called edema of the lungs. There were also some blood spots on the inner lining of the heart. An examination of the intestines showed nothing abnormal. The examination of the kidneys showed degeneration—a chronic fatty degeneration. Examination of the liver showed a fatty liver; that is, the liver was filled up with fat. There were no signs of injury either in the chest or in the abdomen, no hemorrhages, no broken ribs—nothing to indicate any injury or any violence. The examination then was completed by examining the genito-urinary organs, the uterus, womb, and the ovaries. I found a chronic inflammation of the interior of the womb and also a degeneration of the ovaries. The spleen was slightly enlarged. The chronic condition of the membrane of brain thickening probably had the same cause which had caused the degeneration of the other organs. The time consumed in that thickening was a long time. I should say at least six months or over. It is a very slow process, and takes some time for it to form. It is a condition which is seen in senility. I would say it would take at least six months or a year for a condition like this to arise. There are a variety of causes that might have induced this condition. Premature age. She might have had some previous disease, which had been followed by chronic inflammatory degeneration, causing this; but, not being acquainted with her previous condition, I can't tell the cause of it. I found no hemorrhages of the brain. A physical shock, such as you are speaking of, a condition whereby the patient suffers some physical violence without any laceration of the body, is caused by jarring of the nervous system, and, if it is sufficient enough to produce death, death will occur in the first 24 or 48 hours, because death is produced by jarring of the vital centers in the brain, and death will occur very

shortly after the injury; but, if it isn't sufficient, the patient gets well. This thyroid gland was enlarged on either side of the windpipe. The enlargement protruded out like that, say about half an inch further forward. You could hardly see the lines of the neck. It was a chronic condition. In order that the gland should enlarge to that extent and become broken down and filled with matter like this, it would be anywhere from a year up. Probably had been going on for several years. The cause of death in this case was disease of the thyroid gland, fatty degeneration of the heart, liver, and kidneys." Dr. Dean was the physician at the hospital, and witness was an official of the coroner and had nothing whatever to do with the case weights of dead persons, and, on cross-examination of the autopsy. Witness said that he had had a great deal of experience in judging amination, testified as follows: "These particular hemorrhages were small spots like you might compare them to freckles on a man's face, only they were blood accumulations—small escapements of blood under the lining of the heart and into the thyroid gland. There is a certain amount of fat about everybody's heart, but the fat I describe in that heart is not a layer of fat. There is a small amount of fat covering a certain part of the heart, but degeneration of fat into the heart muscle is where the wall of the heart becomes filled up with fat globules, and loses its muscular character. Q. What do you say when a woman who had never shown any signs of ill health—done her own washing for a family of five or six, and showed signs of good health—never had the attendance of a physician, 41 or 42 years old, was struck by a horse and buggy and thrown down to the ground, to the pavement, granitoid pavement, taking to her bed after she arrived home on the 4th day of May and never able to leave her bed after that, was in a semiconscious condition, delirious part of the time, rapid pulse and slow pulse alternating, and died on the 19th or 20th, day of May, what would you say the cause of her death was? A. I couldn't say, because I don't believe such a case could exist." On re-direct examination, witness testified that, in answer to the hypothetical question put by Judge Talty, he meant to say that he did not believe, where a normal individual who was struck in that manner and received a shock, that shock could last for that length of time—in other words, it would either pass away or cause death before that length of time would elapse—that, "If the shock received was sufficient to cause death, the patient would not be all right in a buggy, get out, and take a street car and ride two or three dozen blocks, and get off the street car and walk home. The shock is supervised by the symptoms immediately. You are liable to get hemorrhage of the brain and walk around then, but with a shock you

Dr. John Dean testified that he was a practicing physician, and in May of 1903 had charge of St. Anthony's Hospital and attended Predentia De Maet. "She came to the hospital May the 16th. Do not remember seeing her oftener than two or three times, but the patient came in and complained of pain in the left hypochondrium region, that is, in the left side, and naturally we always take a history with all the cases that come in the hospital, and I heard she had been injured by a carriage or buggy of some kind. I examined the side very carefully and the body and hands and legs, and, in fact, examined her entire body, and found no signs of any acute injury. The next day the pulse was very much increased; in fact, she was in a moribund condition. The large thyroid gland was absolutely inactive. Could not obtain the burial permit, because I could not find any connection with what caused her death. Was present at the morgue and found quite a number of conditions, either one of which was sufficient to cause her death. The condition of the thyroid gland was much worse than you would find in a malignant thyroid. The muscles of the heart would indicate heart failure, but I am not so certain about that. She had also an atheromatic condition (thickening in the blood vessels). It is what they call cirrhosis. Either of three conditions named were sufficient to have caused her death. My opinion is that she died possibly from a malignant condition of the thyroid gland—an exophthalmic goiter. If she had died from the shock, she would have died shortly after the time she received the shock, and a lesion which is sufficient to produce connection with shock would show itself on post mortem. There was no hemorrhage in the brain whatever." On cross-examination, witness testified that he was not very well able to diagnose the case without getting the coroner's office to assist him, and did not know at the time that the enlarged gland had anything to do with her death; that he went to the coroner to ascertain the cause of her death; that she complained of pain in the left side just below the ribs; that she was not delirious the first day, but was more restless so on the second day; that she did not complain of pain in the back of her head. The foregoing is substantially the evidence in the case, and from it I am forced to the conclusion that it shows no right of recovery on the part of the plaintiff, either taking plaintiff's evidence alone or supplementing it with that of the defendant, and that, hence, the instructions hereinbefore referred to should have been given. As before stated, plaintiff's witness Margulis is the only witness in the case who gave any testimony tending to show that the defendant's buggy struck the deceased at all, while, on the other hand, the

deceased herself fell into the wheel of the buggy. But Margulis' testimony is to the effect that, when deceased had stepped out a few feet on Morgan street, the horse and buggy going at a full trot, a brisk trot, the end of the shaft struck the deceased in her left side with sufficient force to knock her down on the granite street. The testimony of all of the physicians, for plaintiff and defendant, is to the effect that there were absolutely no lesions to be found on the body, absolutely no evidences of external or internal physical violence. It is, to my mind, simply incredible, against all common human experience, against all physical facts, that the end of a shaft attached to a buggy, drawn by a horse, going at a full, brisk trot, should strike a woman in the left side, with force sufficient to throw her on a granite paved street, and with force sufficient, as plaintiff claims, to cause her death, and yet not leave on the body the slightest sign of violence. Such testimony should be disregarded by both courts and juries, and no probative force should be given to it. *Payne v. Chicago & Alton R. R. Co.*, 136 Mo. 562, 38 S. W. 308; *Nugent v. Kauffmann Milling Co.*, 131 Mo. 241, 33 S. W. 428; *Weltmer v. Bishop*, 171 Mo., loc. cit. 116, 71 S. W. 167, 65 L. R. A. 584. As plaintiff's own evidence demonstrates that the alleged fact upon which he predicates his right of action could not exist, it cannot be said that the testimony of one of the witnesses that such fact does exist is any substantial evidence thereof. *Deane v. Transit Co.*, 192 Mo. 575, 91 S. W. 505.

Again, the mere concurrence in time of two facts, as in this case, the supposed alleged injury, and that deceased took to her bed shortly thereafter, does not legitimately give rise to the inference that one is the result of the other. It is at most a bare conjecture (*Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 406), and plaintiff's expert witness, Dr. Collasowitz, does not make out plaintiff's case in that respect. He frankly states that he does not know what caused the death of Predentia De Maet, and, in light of the developments from the subsequent autopsy made of the body of the deceased, it is not at all surprising that he does not. He gave it as his opinion, based upon hypothetical facts of which he had no knowledge, that the deceased came to her death either by reason of a shock or hemorrhages of the brain, either the result, however, of the alleged and supposed physical injury. The opinion, being hypothetical, must stand or fall with the existence of the facts upon which it is predicated, and, as the matter assumed was not true or did not exist, the opinion is worthless. *Smart v. Kansas City*, 91 Mo. App. 586.

Moreover, the autopsy demonstrated to a certainty that there were no hemorrhages of the brain, and the testimony is uncontradict-

ed that, if the deceased had received a shock from such an injury as alleged and claimed, sufficient to have caused her death, she could not have lived from the 4th to the 19th of May, a period of 15 days, but must, if fatal, have succumbed within a period of 48 hours, at the utmost, after the receipt of the injuries. The physical facts, also developed by the autopsy, conclusively show that the deceased did not come to her death by any injury or shock she may have received on the 4th of May, 1903. That autopsy showed, beyond question, that deceased was afflicted with at least three chronic diseases, of long standing, either one of which was sufficient to cause her death. Even assuming that deceased was struck by defendant's buggy, and that the injury received might have been sufficient to cause her death, which I do not believe, the record here presents a case where death may have resulted from either of four causes, for one of which, and not for the others, the defendant would be liable. In such case, plaintiff must show with reasonable certainty, that the cause for which defendant is liable produced the result, and, if the evidence leaves it to conjecture, the plaintiff must fail. *Smart v. Kansas City*, 91 Mo. App. 586; *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202; *Searles v. Railroad*, 101 N. Y. 661, 5 N. E. 66.

Based upon the same assumption, and allowing to the limit the rule of legitimate inference of consequences following an injury, the most that can be said for the plaintiff is that the whole evidence taken together shows that death resulted either from the injury received from the buggy, or from one of three chronic diseases of long standing, but which of these conditions was the cause can only be a matter of conjecture.

For the foregoing reasons, in my opinion, the judgment of the lower court should be reversed.

BLAND, P. J., concurs.

GOODE, J. (dissenting). Part of the testimony which seems to me to present a case for the jury is as follows:

The daughter of the deceased, who was with her when the accident occurred, swore: "Q. When you came up to the crossing at Broadway, the west crossing of Morgan street, at Broadway, was she (the mother) ahead of you or you ahead of her? A. She was ahead of me. Q. Now, what happened there? A. She was walking across the street, and a buggy came in a pretty fast trot and knocked her over. Q. What did the

driver do before he struck her, if anything? A. No, sir. \* \* \* Q. You didn't see the buggy until it came in contact with your mother? A. No, sir. Q. Where was your mother when you saw the buggy in contact with her? A. She was going across the sidewalk, and the buggy knocked her down. Q. Where was she, and where was the buggy, when you first saw the buggy? A. It was a little distance from the sidewalk. Q. And where was she? A. She was a little ways from the sidewalk too."

The physician who attended on plaintiff after her injury gave this testimony: "Q. What do you say was the cause of her death? A. Well, I couldn't determine any lesion on her body. From my observation of her I must be of the opinion that she died as a result of shock which she received by being struck. Q. By being struck with this horse and buggy? A. Yes, sir. Q. What was her condition—she was weak? A. She was not able to be up. Q. Not able to be up? A. No, sir. Q. How did she evidence she wasn't able to be up? What were the symptoms, Doctor? A. Well, as soon as she would sit up—I tried to have her sit up a few times, and she felt faint, she couldn't sit up, and fell—if she wasn't supported, she fell right back on her pillow. Q. Was that her condition from that time, the 4th day of May, until the 16th, when you sent her to the hospital? A. Yes, sir. \* \* \* Q. If a woman was knocked down by a shaft hitting her in the side on a horse going in a brisk trot, would there be any evidence of it? A. Of what? Q. Have any physical signs? A. Not necessarily. Q. You think that could be done without even bruising the skin? A. Yes—that could be done, in my opinion. Q. Without leaving any blue places or any evidence of it whatever? A. Yes, sir. Q. That can be done? A. Yes, sir. Q. That is your opinion about it? A. That is my opinion. \* \* \* Q. Then the hemorrhage of the brain that you speak about would be the result of physical violence? A. Yes, sir. Q. And not from the nervous shock? A. No, sir. Q. Did you find any evidence on the head of physical violence? A. Only that she complained of pain in the back of her head. \* \* \* Q. And they are brought about, too, by shock, such as being run into as this woman was—by being run into by a horse and buggy as this woman was—shocked? A. Well, I do not think that shock would produce a hemorrhage. Q. Well, being struck by a horse or shaft of a buggy—thrown down on the ground? A. That might produce hemorrhages; yes, in my opinion."

**CARRIERS—BILL OF LADING—TRANSFER—EFFECT.**

Where the sellers of hay drew sight drafts on the buyers, payable to themselves, and attached each of the drafts to a bill of lading, and transferred them to a bank, this did not constitute a sale of the hay to the bank, so as to render it liable for breach of the original contract of sale in that the hay was of an inferior quality.

**BANKS AND BANKING—NATIONAL BANKS—POWERS AND LIABILITIES.**

Under Rev. St. U. S. § 5136 [U. S. Comp. L. 1901, p. 3455], prescribing the powers of national banks, authorizing them to take personal property as security for loans or for bills of exchange purchased by them, but not to deal in merchandise of any kind, the fact that the transfer to a national bank of bills of lading attached to drafts on a purchaser of hay amounted to a sale of the hay would not entitle the final purchaser to recover from the bank for deficiency in the quality of the hay, since the transaction would be *ultra vires*.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 990.]

**CARRIERS—BILLS OF LADING—INDORSEMENT OF DRAFTS—EFFECT.**

Where drafts of a seller of hay were attached to bills of lading and transferred to a national bank, the fact that the bank indorsed all but three of them with a statement that it was not responsible for the quantity, quality, or delivery of the goods covered by the bills of lading, does not render it liable for deficiency in quality of the goods covered by the three bills of lading, the indorsement being mere surplusage.

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Action by Lewis Leonhardt & Co. against V. H. Small & Co. and others. From a decree in favor of complainants, defendants appeal. Reversed and rendered.

Shields, Cates & Mountcastle, for appellants. Jno. W. Green, for appellee.

**WILKES, J.** The complainants, Lewis Leonhardt & Co., brought this suit against V. H. Small & Co., of Evansville, Ind., the Fourth National Bank of Cincinnati, Ohio, and the Mechanics' National Bank of Knoxville, Tenn., to recover the sum of \$300 damages for the breach of a contract which complainants made with W. H. Small & Co. to purchase from them 10 car loads of No. 1 timothy hay. The facts reported by the Court of Chancery Appeals are as follows:

The complainants, Lewis Leonhardt & Co., who reside in Knoxville, Tenn., contracted to buy from W. H. Small & Co., who reside at Evansville, Ind., 10 car loads of No. 1 timothy hay at \$15 per ton f. o. b. cars at Knoxville. W. H. Small & Co. shipped 10 car loads of timothy hay to Knoxville on bills of lading issued to their own order. They drew sight drafts on Lewis Leonhardt & Co., payable to themselves, and attached one of said bills of lading to each of said drafts. They sold all of said drafts to the

bank to the Fourth National Bank of Cincinnati, Ohio, and by it to the Mechanics' National Bank of Knoxville, Tenn., for full value and in the due course of trade. The Mechanics' National Bank presented the drafts to Lewis Leonhardt & Co. for acceptance and payment, and they accepted and paid them all, and the drafts were delivered to them.

When Lewis Leonhardt & Co. unloaded the hay they discovered that it was not No. 1 timothy hay, and that it was worth \$300 less than the hay they had contracted to buy. Thereupon they brought this suit and attached the money that they had paid to the Mechanics' National Bank on the drafts. They charged that the money belonged to W. H. Small & Co., and the Fourth National Bank of Cincinnati, the Mechanics' National Bank of Knoxville, and W. H. Small & Co., were all liable to them for the breach of the contract by W. H. Small & Co. to ship them No. 1 timothy hay, and they prayed for a decree against all of the defendants for said sum of \$300. The Court of Chancery Appeals finds as a fact that the money attached did not belong to W. H. Small & Co., but that it belonged to the Mechanics' National Bank when it was attached. Small & Co. never entered their appearance to this suit, and are not before the court. The complainants do not ask for a decree against them.

The chancery court and the Court of Chancery Appeals have both rendered decrees against the Fourth National Bank of Cincinnati and the Mechanics' National Bank of Knoxville for \$300 damages and costs, and the cause is now before this court upon defendants' appeal and assignments of error to the decree of the Court of Chancery Appeals.

The theory of complainants, which was adopted by the lower courts, is that when the defendant banks purchased said drafts they became the owners of the hay, and responsible for the performance of Small & Co.'s contract for its sale as to quality, quantity, and delivery, and are liable for damages to the purchaser for Small & Co.'s breach of the contract in any of said respects, although the drafts were negotiable, and said banks are innocent purchasers thereof, and on presentation to the drawees, Lewis Leonhardt & Co., they unconditionally accepted and paid drafts.

Complainants' contention is supported by the cases of *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679; and *J. C. Haas & Co. v. Citizens' National Bank*, Supreme Court of Alabama, reported in 39 South. 129, 1 L. R. A. (N. S.) 242; *Searles v. Smith Grain Co.* (Miss.) 82 South. 287.

The case of *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, did not meet the approval of the annotators of that valuable set of reports, and many cases are cited to show that the rule laid down in the case is unsound and out of line with the great weight of authority, and he concludes his notes and criticism as follows:

"From these cases, all of which hold that after a draft attached to a bill of lading is accepted the consignee becomes absolutely liable on the acceptance, and that after payment thereon is made he cannot recover it back, notwithstanding any failure of consideration between him and the drawer, it would seem that the decision in the main case, and in *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48, were based on a wrong principle, and that, if the right principle had been considered, the decisions must have been different.

The American & English Encyclopedia of Law, citing many cases in support thereof, lays down the true rule in these words:

"The payee of a bill of exchange occupies in relation to the acceptor the position of a bona fide holder, and, therefore, between the payee and acceptor, no want, failure, or other defect of consideration existing between the drawer and the acceptor, can be shown.

"And this is true although the drawee has been induced to accept the bill by means of a fraud, such as attaching thereto a forged or fraudulently altered security or bill of lading."

See 4 Am. & Eng. Encyc. of Law (2d Ed.) 198, 199, and authorities there cited.

In the case of *Christian J. Hoffman et al. v. National City Bank of Milwaukee*, 12 Wall. (U. S.) 181, 20 L. Ed. 366, the Supreme Court of the United States, speaking upon this subject, said:

"Where bills of exchange were drawn, accompanied with forged bills of lading, and were discounted by a bank, and subsequently accepted and paid by the acceptors, they cannot recover back from the bank the money paid by them, on the ground of the forgery of the bills of lading, of which the bank was ignorant at the time of their discount.

"Proof that the bills of lading were forgeries could not operate to discharge the liability of the acceptors to pay the amounts to the payees or their indorsees, where the payees were ignorant holders, having paid value for the same in the usual course of business.

"It is immaterial, in that regard, whether the bills were accepted while in the hands of the drawer and at his request, or whether they had passed into the hands of the payee before acceptance, and were accepted at his request."

In the case of *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515, a bank discounted several drafts with bills of lading attached. The consignee, af-

ter accepting and paying several of the drafts, discovered that the bills of lading were forged, whereupon he refused to pay one draft which he had accepted, and sued to recover the amount of the drafts which he had paid. The court held that the bank did not, by discounting the drafts or by indorsing the invoices accompanying the bills of lading "for collection," guaranty the genuineness of the bills of lading, and that its right to recover on the acceptances was not defeated by the mere failure to inquire into the consideration of the drafts because of rumors or general reputation as to the bad character of the drawer. Speaking directly upon the question involved in the case at bar, the Supreme Court of the United States said:

"A bank in discounting commercial paper does not guaranty the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn as in the present case are merely security for the payment of the drafts. The indorsement by the bank on the invoices accompanying some of the bills 'for collection' created no responsibility on the part of the bank; it implied no guaranty that the bills of lading were genuine; it imported nothing more than that the goods, which the bills of lading stated had been shipped, were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid, the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper against which they are drawn." 119 U. S. 555, 556, 7 Sup. Ct. 320 (30 L. Ed. 515).

The latest case upon the subject is that of *Tolerton & Stetson Co. v. Anglo-California Bank*, by the Supreme Court of Iowa. This case repudiates the doctrine laid down in the cases of *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48, and *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, relied upon by the complainants in the case at bar, and reaffirms the long-established doctrine insisted upon by defendants. The facts in the Iowa case are almost identical with the facts in the case at bar, and in discussing the Texas and North Carolina cases, the Supreme Court of Iowa said:

"These decisions proceed upon the theory that the assignee stands in all respects in the shoes of the assignor, and to this broad doctrine we cannot agree. While the rights of such an assignee are to be measured by those of the assignor, his liability is not necessarily the same. \* \* \*

"The rule of the *Landa Case* is founded on the thought that the transfer of the draft and bill of lading to the bank amounted to a sale of the goods, and that the bank as a purchaser undertook to deliver the goods and carry out the canneries company's con-

grant that any warranty was made. We do not think, even as the proposition is thus stated, the premises justify the conclusion; but the premises are not correct. The transaction between the canneries company and defendant was not, and could not be, a sale of the goods, for they had already been sold to plaintiff, and it was the intention of all parties that such sale to plaintiff should be consummated by delivery. What was in fact one by the assignment of the draft and bill of lading was to transfer to the bank the canneries company's right to the price, and to give it the possession of the goods as security. Manifestly, while the bank could collect no more than its assignor would have been entitled to, the character of its engagement was not such as to impose upon it any liability to the buyer which it did not expressly assume. \* \* \*

"The two cases cited stand alone in holding the purchaser of a draft with bill of lading attached liable on a warranty made by the assignor, and the line of reasoning pursued to reach this conclusion is so at variance with well-established principles of law that we decline to accept the rule they announce.

"If there is any liability on defendant's part to plaintiff, it must be on the ground that it has received money which it cannot equitably retain. The canneries company could have collected only the price of the goods, less the damages for breach of warranty. More than this has been paid to defendant. If plaintiff has any standing here, it is to recover this excess paid, on the theory just stated. But the draft given the bank was negotiable, and it is a well-established rule of law that, after the holder of a negotiable draft with bill of lading attached has secured an acceptance of such draft from the drawee and consignee, he is unaffected by any equities originally existing between such consignee and the seller of the goods. In such a case the liability of the drawee becomes fixed to the payee. *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25; *Flournoy v. First Nat. Bank*, 78 Ga. 222, 2 S. E. 547; *Nowak v. Excelsior Stone Co.*, 78 Ill. 307; *Law v. Brinker*, 6 Colo. 555; *Hays v. Hathorn*, 74 N. Y. 486; *Shafer v. Bronenberg*, 42 Ind. 89; *Randolph, Com. Paper*, 1876."

"It is said in the first of these cases: 'The payee of an accepted bill holds the same relation to the acceptor that an indorsee of a note holds to the maker.' Under this rule, the plaintiff, after an acceptance of the draft, could not have set up against the bank any claim for breach of warranty made by the canneries company, and, if this is the effect of an acceptance, it certainly is of a payment."

"There was no matter of mutual mistake in this transaction between plaintiff and defendant. The latter had a right, as against

between plaintiff and the drawer of the draft." 84 N. W. 930, 50 L. R. A. 779-780.

In the cases relied upon by the complainants and followed by the Court of Chancery Appeals, the courts of the states of Texas, North Carolina, and Alabama failed to recognize and apply the well-settled principles of commercial law laid down in the foregoing authorities. They erroneously assumed that the purchase of a draft with a bill of lading attached was a purchase of the goods represented by the bill of lading, and that a presentation of the draft for payment was a contract by the bank to sell the goods to the drawee, when, as a matter of fact, the goods had already been sold by the drawer to the drawee, and, as a matter of law, the bill of lading and goods only passed as collateral security for the draft, which was the only thing the bank bought.

Furthermore, the rule laid down by the Supreme Court of the United States in the case of *Goetz v. Bank of Kansas City*, supra, is necessarily the law in the case at bar, for another reason than that given in the foregoing authorities. If the sale of the drafts was in fact a sale outright of the bills of lading and in legal effect a sale of the hay to the defendant Banks, as held in the case of *Landa v. Lattin Bros.*, 19 Tex. 246, 46 S. W. 48, and in *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, then the entire transaction was ultra vires, and no obligation arising therefrom could be enforced against the banks. National banks may take personal property as security for loans, or as security for bills of exchange purchased by them, but national banks have no power whatever to deal in merchandise of any kind, or in stocks or bonds. Section 5136, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3455]; *Bank v. Kennedy*, 167 U. S. 365, 17 Sup. Ct. 831, 42 L. Ed. 198; *Bank v. Hawkins*, 174 U. S. 365, 19 Sup. Ct. 739, 43 L. Ed. 1007.

The complainants are insisting that the banks by purchasing the drafts with the bills of lading attached, agreed in turn to sell to the complainants 10 car loads of No. 1 timothy hay, and that each of the banks have in turn breached the contract of sale by delivering an inferior grade of hay, and complainants are seeking to recover damages for the breach of the contracts. Hence this suit is obviously for the enforcement of the ultra vires contracts alleged to have been made by the banks.

It was expressly held in the federal cases above cited, and has been held by this court in the case of *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71, that no suit can be maintained by either party in the furtherance or affirmation of an ultra vires contract—not even by a party who has fully executed the contract on his part. "Such illegal contracts," say

It is a fact of common knowledge that a large part of the commercial business of the country is carried on through the medium of drafts, and that the immense crops of the South and West are marketed under contracts to draw for the purchase price with bills of lading attached. If the courts shall adopt the rule insisted upon by the complainants, and enforced by the decree of the Court of Chancery Appeals, it will result in destroying this convenient method of handling, moving, and paying for the crops of the country, for the banks will necessarily be compelled to refuse to buy drafts with bills of lading attached, or to handle them as collateral security or otherwise. Banks have neither the time nor the facilities to investigate the genuineness of bills of lading, or the contracts made between their customers with parties residing in other states, and to hold them responsible for the frauds and mistakes of shippers would utterly destroy the negotiability of drafts with bills of lading attached.

The case of *Haas v. Citizens' Bank*, supra, has also been adversely commented on by the annotators of the L. R. A. reports, in an exhaustive note, citing many authorities.

With all due deference to the ability and standing of the courts of Alabama, Texas, and North Carolina, which have been cited and relied upon, we are of opinion that the rule which they announce is unsound and contrary to the otherwise unbroken weight of authority.

They proceed upon the incorrect theory that the bill of lading so vests the property in the indorsing banks that they are substituted to all the liabilities of the original drawer, and are the absolute owners of the property, while the true rule is that the indorsing banks hold the bills of lading simply as collateral to secure the drafts drawn against them, but they are not the guarantors of the quantity or quality of the goods shipped under the bill of lading. That is a matter between the drawer and drawee.

There is nothing in this holding contrary to the case of *Ochs v. Price*, 6 Heisk. (Tenn.) 484, 488, nor *National Bank v. Merchants' Bank*, 91 U. S. 92, 98, 23 L. Ed. 208.

It is insisted for complainants that all but three of the drafts were stamped by the Evansville bank, which cashed them first and took the bills of lading, with this indorsement: "This bank hereby notifies all concerned that it is not responsible, either as principal or agent, for the quantity, quality or delivery of the goods covered by the bills of lading attached to this draft. [Signed] Citizens' National Bank." And the argument is made that, because three of the drafts were not thus indorsed, it was the intention of the parties that, as to these three drafts, a different rule should apply; and that the holders or purchasers of these drafts would be guarantors of quantity, quality, and de-

drafts implicitly said: "We will be responsible for defects in the hay covered by these three drafts, but not that covered by the other drafts."

We think that this contention is not sound.

The indorsement was surplusage, and under it the bank was in no better condition than if it had not been made.

We cannot infer that the bank intended to render itself liable for the three drafts by failing to stamp the restrictive indorsement on them. For all we can know, they were overlooked. But, however that may be, they were put in circulation without any agreement or contract that a purchaser would be liable for the goods, and we must give them the same status as any other draft of like character.

We are of opinion that there are errors in the decrees of the chancellor and of the Court of Chancery Appeals, and they are reversed, at complainants' cost.

Proper decree will be entered disposing of the fund attached, if still held.

## CHICAGO, R. I. & P. RY. CO. v. McCUTCHEN.

(Supreme Court of Arkansas. Oct. 8, 1906.)

### 1. JUDGMENT—RES JUDICATA.

Where a railroad company constructed an embankment along the side of, but not across, a ditch, through which surface water drained from plaintiff's land, and the ditch was closed and the flow obstructed by the negligence of the railroad company in failing to prevent dirt falling from the embankment into the ditch, a judgment in an action for such obstruction was not a bar to a subsequent action for injury caused by a subsequent filling of the ditch.

[Ed. Note.—For cases in point, see vol. 30. Cent. Dig. Judgment, §§ 1119, 1120.]

### 2. LIMITATION OF ACTIONS — ACCRUAL OF CAUSE OF ACTION.

Where a railroad company constructed an embankment along the side of a ditch, which was obstructed by the falling of dirt from the embankment, limitations did not run against an action for damages caused thereby from the time of the building of the embankment, but from the time of the obstruction of the ditch by the falling of the dirt.

[Ed. Note.—For cases in point, see vol. 33. Cent. Dig. Limitation of Actions, § 305.]

### 3. EVIDENCE—MATERIALITY.

Where a lessee of a railroad was bound, independent of the lease, to keep a drain by the side of its right of way embankment open, the provisions of the lease with reference to the lessee's duties in that regard were immaterial in an action for its failure to perform such duty.

[Ed. Note.—For cases in point, see vol. 20. Cent. Dig. Evidence, § 424.]

Hill, C. J., dissenting.

Appeal from Circuit Court, St. Francis County; H. N. Hutton, Judge.

Action by James McCutchen against the Chicago, Rock Island & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. B. Pierce and T. S. Buzbee, for appellant. J. M. Prewett, for appellee.

McCULLOCH, J. The plaintiff, James McCutchen, is the owner of a tract of land in St. Francis county across which runs the line of railroad now operated by the defendant, Chicago, Rock Island & Pacific Railway Company, as lessee of the Choctaw, Oklahoma & Gulf Railroad Company, and he sues to recover damages alleged to have been sustained by reason of flooding of the land with water which prevented, during the year 1904, the cultivation of a crop. He alleges in his complaint that the railroad company, in raising its roadbed during the year 1901, constructed an embankment which obstructed a ditch draining the surface water from plaintiff's land and that, "because of the failure of the defendant to keep open the said ditch, the water at that point collects and stands on plaintiff's land, and so did collect and stand on it during the crop season of 1904 as to overflow six acres of it and prevent plaintiff from cultivating it, or from using it for any purpose." It appears from the evidence that the railroad company, in raising its roadbed for a sidetrack, obstructed the ditch so that it would not convey the water from plaintiff's land, and allowed the water to accumulate on the land and prevent the making of a crop. The railroad was not constructed across the ditch, but a sidetrack was raised so close to it that the dirt slides off the embankment into the ditch. The railroad company caused the ditch to be opened up several times, but allowed it to fill up again with dirt from the embankment. The plaintiff planted corn on the land in the spring of 1904, and, when the corn was about waist high, it was flooded with water and ruined by reason of the obstruction of the ditch. This action was commenced March 8, 1905, and the defendant introduced in evidence, and pleaded in bar of this action, the record in an action commenced on February 28, 1904, by the plaintiff against the Choctaw, Oklahoma & Gulf Railroad Company to recover damages for flooding of the same tract of land by reason of obstructing the ditch in question. The complaint in the former action contains substantially the same allegations as the complaint in the present case, and the record shows that there was a judgment by consent of parties rendered on September 9, 1904, in favor of this plaintiff for the sum of \$50 damages. The defendant also pleaded the statute of limitation against plaintiff's right of recovery. The jury returned a verdict in favor of the plaintiff for \$36, damages. Judgment was rendered accordingly, and the defendant appealed.

It is contended by appellant that the building of the embankment, and consequent obstruction of the ditch, was a permanent injury to plaintiff's land, as defined by this court in *Railway Co. v. Anderson*, 62 Ark. 360, 85 S. W. 791; that the judgment in the

former action is a bar to further recovery; and that the obstruction to the ditch having been caused more than three years before the commencement of this action, the same is barred by limitation. In the *Anderson Case* just cited, the railroad was constructed across a natural ditch or drainway, and the railway company subsequently caused a trestle to be closed up and the drainage stopped, and the court held that the obstruction constituted a permanent injury and that the statute of limitations began to run against an action for damages from the time the trestle was closed. In *St. L. I. M. & So. Ry. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174, the court said: "Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and it may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. \* \* \* But, when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries." The same doctrine was applied to a similar state of facts in *Railway Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066, and in *Railway Co. v. Stephens*, 72 Ark. 127, 78 S. W. 766. The distinction between the *Anderson Case* and those last cited is that in the former there was a complete obstruction of the drainway, thus creating a permanent obstruction which necessarily caused a permanent injury, whilst in the latter there was only a partial obstruction which rendered the drainway insufficient at times, and made the future injury dependent upon the seasons and the quantity of rainfall. This distinction in pointed out and observed in the recent case of *Railway Co. v. Morris* (Ark.) 89 S. W. 846. Now the testimony in the case at bar does not establish a permanent obstruction. The embankment was not built across the ditch, closing it up as in the *Anderson Case*. The filling in of the ditch was caused by dirt sliding into the ditch from the embankment from time to time, and the negligence of the employees of the company in failing to clean it out. This could easily have been done, and this omission cannot be regarded as a permanent injury to the land. In the case of *Baker v. Allen*, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93, where damages were sought to be recovered for an alleged permanent injury to land from the building of an embankment less than two feet high to prevent the passage of surface water, the court said: "When we consider the ease with which this small embankment could be opened or closed, and also the purpose of the tenant in closing the same, it seems clear that the act of such tenant did not constitute a permanent injury



to plaintiff's land. \* \* \* As the levee could easily be opened, and such prospective injury avoided, it would be unjust, as well as unreasonable, under such circumstances, to presume conclusively that the nuisance would be continual and the injury made permanent."

For still another reason we think that the injury complained of in this case cannot be regarded as permanent so that full compensation can and must be had in one suit. It was caused, not by any wrongful act of the railroad company in building an embankment across the ditch and thus closing it up, but the injury resulted from a negligent failure to open the ditch when obstructed by an accumulation of dirt which was allowed to fall in from the embankment. It would be unjust to presume that the negligence will continue, to the permanent injury of the land, and the owner may recover for each successive injury sustained. We are therefore of the opinion that the right of action for the injury complained of was not barred either by the statute of limitations or by the judgment in the former action.

Error of the court is also assigned in permitting the plaintiff to read in evidence the contract for lease of the railroad between defendant and the Choctaw, Oklahoma & Gulf Railroad Company. It was the duty of the defendant as lessee and operator of the road to keep the drainway open. So the provisions of the contract were immaterial to the issue, and the introduction of the contract in evidence was harmless.

Judgment affirmed.

HILL, C. J. (dissenting). McCutchen testified that the railroad company filled up the ditch in 1901, and that it had ever since been obstructed by the filling up at that time when an embankment of the railroad was raised. Read, who gave testimony more favorable to appellee than his own, says: "I was able to keep the ditch open until they raised the sidetrack. The company has opened it two or three times since. The first big rain, it slides off from the dump and fills it up." This shows that the ditch was filled up over three years before this suit was filed; that the act creating the obstruction was then done; and, despite repeated opening of the ditch, the construction of the embankment in 1901 causes, from its nature and manner, the obstruction to remain in the ditch. The cases of *Railway v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174, *Railway v. Yarbrough*, 56 Ark. 611, 20 S. W. 515, *Railway v. Cook*, 57 Ark. 387, 21 S. W. 1066, *Railway v. Anderson*, 62 Ark. 300, 35 S. W. 791, and *Railway v. Morris* (Ark.) 89 S. W. 846, settle the cause of action as one created by the obstruction in 1901, and consequently was barred when this action was brought.

Appellee, under a complaint which was sufficient to have recovered for all prospec-

tive, as well as present, damage to his land, took a judgment by consent for \$50. This barred another action for the same cause.

The action should be reversed, and dismissed.

### BOYSON v. FRINK.

(Supreme Court of Arkansas. Oct. 15, 1906.)

#### 1. BROKERS—COMMISSIONS—WHEN EARNED.

A broker employed to procure a purchaser, must, to recover his commission, furnish a customer able and willing to comply with the proposed sale.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 75-81.]

#### 2. SAME.

A contract employing a broker to procure a purchaser of land, stipulated that no part of the commission should be paid until a third of the price was paid, when one-half of the commission should become due, and the remainder when one-half of the purchase price was paid. The broker procured a purchaser who entered into a contract of purchase with the owner, and executed notes for the price, which he failed to pay, and the owner surrendered them in payment of a specified sum. Held, that if the notes were good when taken for so much as would earn the broker's commission or part of it, and the owner could have enforced their collection, he could not avoid liability for the commission, while if the sum accepted by him, on surrendering the notes, was accepted in good faith as a settlement of an uncollectable debt, the broker could not recover.

Appeal from Circuit Court, Arkansas County; George M. Chapline, Judge.

Action by L. M. Frink against A. Boyson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Boyson was a real estate dealer and engaged Frink to work for him in the sales of land. A written contract existed between them, the pertinent part of it being as follows: "Mr. L. M. Frink, Colfax, Ill. Herely confirming your appointment as agent for the sale of my lands in Arkansas, I agree to pay you a commission of seventy-five (75) cents per acre for every acre of land sold by me to customers sent or brought by you or your subagents, said commission to be paid you, one-half when one-third of purchase price has been paid, the other one-half of said commission whenever one-half of the purchase price has been paid in cash to me." Frink brought F. S. Hall to the purchase of a tract of 801 acres of land in Prairie county, Ark., at \$16.25 per acre. Hall concluded the contract with an authorized agent of appellant. The terms of sale were a payment of \$215 in 10 days evidenced by a note, and the payment of two other deferred notes of \$3,250 each. Hall failed to pay any of the notes, and, about six months after the contract, a friend of his, an attorney, compromised the matter with appellant by paying \$1,000, and receiving back Hall's notes. Frink sued Boyson for his commission at 75 cents per acre, \$600.75. There was evidence tending to prove that Hall sold out all his holdings at his home,

and went to parts unknown; that Boyson made diligent efforts to find him and to find property of his out of which the notes could be collected, and was unable to do so, and expended considerable sums in these efforts, and accepted the \$1,000 as reimbursement for losses and expenditures caused by Hall's breach of contract. On the other hand, there was evidence tending to prove that Hall had a stock farm near Cropsey, Ill., of considerable value, stocked with a quantity of grain and live stock which might have been subjected to the payment of the notes if the matter of their collection had been promptly attended to; and that Boyson had knowledge of these facts. The court gave these instructions: "(1) If you believe from the evidence that the plaintiff, under the contract, sold the 800 acres of land to Mr. Hall, and the notes were accepted by the defendant and that subsequently the defendant, without the knowledge of the plaintiff, and without the consent of the plaintiff, surrendered the notes to the purchaser, and received from the purchaser \$1,000 and canceled said contract of purchase, the defendant in doing so made himself liable to the plaintiff, as much so, as if he had made the deed to the purchaser, and received payment in full for said land. (2) If you find from the evidence in this case, that this contract was canceled, and \$1,000 received by the defendant in this case, then the plaintiff in this suit would be entitled to recover amount sued for, and your verdict would be for the plaintiff." The court refused this instruction asked by appellant: "If you find from the evidence that the defendant, A. Boyson, held himself at all times ready to perform his part of the contract, and the sale was not consummated through no fault of his, but was the fault of the purchaser, furnished by the plaintiff herein, plaintiff would not be entitled to recover, and you will find for the defendant." Frink recovered the full amount of commission sued for, and Boyson appealed.

J. L. Ingram and Jno. F. Park, for appellant. Pettit & Pettit, for appellee.

HILL, C. J. (after stating the facts). It is the duty of the broker to furnish a customer able and willing to comply with the proposed sale before he is entitled to commission when the commission is conditioned on payment of price. *Rapalje on Real Estate Brokers*, §§ 61, 62. To be sure that his purchasers were responsible Boyson stipulated in the contract with his agent that no part of the commission should be paid until one-third of the purchase price was paid, then one-half of the commission became due and the remainder when one-half of the purchase price was paid. Now Boyson could not, after having accepted a purchaser's notes, defeat the broker's commis-

sion by suit without commission less the purchase money of one who could at least to the fulfillment. no harm could be rendered by the harm he was irresponsible (less than a return of the not recover of one-third nor all of his one-half the the other half Frink's commission. If at least for commission, have enforced not avoid Frink's promise. If Hall's notes a reimbursement of contract, of Frink's is forced, Frink was not in payment of an was a good thing of Boyson to instead of enforcing Frink before venture. The court were they ignore responsible evidence touching of Hall, and lect and his matters discompliance require question the tions be sent are presented considered, portance, from these instructions Judgment for new trial

(Supreme Court)

# 1. APPEAL—I CONTINUATION

The Supreme court for refutation was an working to the

[Ed. Note.—Cent. Dig. 2

# 2. SAME.

Where, on the matter of

the testimony of the witness was a controverted point, and the determination of it by the trial court was reasonable. The refusal to grant the deposition was not he disturbed on appeal. *See* *Sparks v. Bratt*, 201 S.W.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

*Ed. Note.*—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 3631.]

## 2. SAME—HARRIS—HARRIS—HARRIS IN ADMINISTRATION OF EVIDENCE.

In an action for the balance of the price of land conveyed, the grantor claimed that the consideration in the deed was the true consideration, and the grantee claimed that the true consideration was a less sum, which had been paid. The grantee admitted that he stated to the attorney that he was to pay the sum subsequently expressed in the deed. The grantor, without objection, testified that the attorney repeated the statement to her before signing the deed. *Held*, that the error, if any, in permitting the attorney to testify that he repeated the grantor's statement to the grantor was not ground for reversal; there being no objection to the evidence, and its truth being admitted.

*Ed. Note.*—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 4153-4160.]

Appeal from Circuit Court, Benton County; J. N. Tillman, Judge.

Action by Jennie Sparks against J. E. Bratt. From a judgment for plaintiff, defendant appeals. Affirmed.

McGill & Lindsey, for appellant. J. A. Rice, for appellee.

HILL, C. J. Mrs. Sparks owned a farm in Benton county, and sold it to appellant, Bratt. The deed recited a consideration of \$8,000, and Mrs. Sparks contends that was the true consideration, and that \$3,000 was unpaid, for which she sued. Bratt contended that \$5,000 was the consideration, and that it was all paid. Mrs. Sparks recovered, and Bratt brings the case here, and insists that it should be reversed for two reasons, viz.: (1) That the court erred in not granting him a continuance in order to enable him to get the testimony of Marion Sparks, the husband and alleged agent of appellee. (2) That the court erred in admitting the testimony of Mr. Forrest, an attorney and notary who was employed by Bratt to write the deed and secure its execution, to the effect that he told Mrs. Sparks before she signed the deed that Bratt told him that he was to pay \$8,000 for the land.

1. Marion Sparks made conflicting statements as to the facts, and there was a sharp conflict between Mrs. Sparks and Mr. Bratt, and he was, therefore, an important witness to one or the other, and there is evidence tending to prove that each side wanted him away at the trial, and there was a conspicuous lack of diligence to have his testimony if he was as important to Bratt's side as the motion makes it appear. The court allowed Bratt to use a written statement—practically a deposition—of Sparks supporting Bratt's side. This court has often said that it will not reverse a trial court for refusing a continuance unless it appears to have been an

arbitrary abuse of discretion working to the prejudice of the moving party. The matter of diligence and good faith in the efforts to obtain Sparks' testimony was a controverted point, which the circuit judge could better determine than this court, and his determination of it does not appear arbitrary but reasonable, and he maintained the effect of the absence of the witness by permitting the use of the witness' statement as if a deposition.

2. Bratt admitted that he told Forrest that he was to pay \$5,000, and both Forrest and Mrs. Sparks testify that Forrest repeated this statement to her before she signed the deed. It is admitted that the statements to Forrest were admissible evidence, but it is contended that the evidence of their repetition to Mrs. Sparks was prejudicial, in that it furnished another theory for the verdict to rest upon than the proper one. The same testimony was received without objection from Mrs. Sparks. It is argued that the testimony might be sustained as part of the res gestae, or as a declaration in the line of his agency from an agent which would bind his principal, or as an estoppel; but the court is not inclined to decide any abstract questions as to its admissibility, for it was not prejudicial, even if improper evidence. The evidence was in the case without objection from another party. It was admitted to be a true statement, and the jury was instructed on the true issues of the case; and hence it cannot be seen where it could have worked a prejudice to the rights of appellant.

Judgment affirmed.

## KERWIN et al. v. CALDWELL.

(Supreme Court of Arkansas. Oct. 15, 1906.)

### 1. COUNTIES—LIMIT OF APPROPRIATIONS.

Kirby's Dig. § 1500, limiting the appropriation for county purposes for any year to 90 per cent. of the taxes levied for the year, does not prevent the appropriation, in addition to such 90 per cent. of taxes, of other funds of the county.

### 2. SAME—PURPOSE OF APPROPRIATION.

An appropriation by the county court for building and maintaining a county hospital, includes power, in the absence of a showing to the contrary, to purchase land for the hospital site.

Appeal from Jefferson Chancery Court; John M. Elliott, Chancellor.

Action by Coreed Caldwell against E. J. Kerwin and others. Judgment for plaintiff. Defendants appeal. Reversed and remanded.

W. D. Jones, S. M. Taylor, and W. F. Coleman, for appellants. Coreed Caldwell, in pro. per.

HILL, C. J. This is a taxpayer's injunction against the county judge and other officers to prevent the erection of a county hospital. The validity of the hospital plan rested upon an appropriation of the county court appropriating \$500 for the building

and maintenance of a hospital. It was alleged that a hospital building to cost \$35,000 to \$40,000 was about to be erected on a site to cost about \$4,500. The correctness of these statements is challenged, but it is unnecessary to go into these collateral issues. The primary question is the validity of the \$500 appropriation. If it was valid, the hospital plan was valid and could—within proper lines—be carried out; if it was not valid, the whole project was illegal, and should be restrained. The chancellor took the latter view, and the county judge and other officers appeal.

The point of decision in the chancery court is thus stated in the decree: “\* \* \* The court finds the facts to be that the revenue arising from a five-mill county general tax levied would be \$61,780.75, and that the total appropriation made by the levying court at that term, and prior to the appropriating \$500 for the building of a county hospital, amounted to \$77,700, which is in excess of the 90 per cent. of the taxes levied for that year. The court further finds from the testimony that the levying court did not undertake to appropriate any of the money that was on hand in the treasury at that time, and that the appropriation at the time for the building of the county hospital was therefore illegal because the court had appropriated more than 90 per cent. of the taxes levied for that year.” Adding the \$500 for hospital the total appropriations were \$78,200; as stated the revenue from the five-mill tax was \$61,780.75, and, in addition thereto, there was cash in county treasury subject to appropriation of \$27,035.60, and there was an estimated revenue of \$13,100 from liquor licenses, \$2,147.76 from fines in J. P. courts, and numerous other minor sources of income. The appropriations were all general; that is, not specific as payable out of any given source of revenue. The chancellor evidently interpreted section 1500 of Kirby's Digest as inhibiting the county court from appropriating for county objects more than 90 per cent. of the county tax levy unless the appropriation was expressly made out of some other source of revenue than the five-mill tax, for instance, from the revenue derived from liquor license, or other distinct source.

The true construction of section 1500 was given by Mr. Justice Eakin in *Allis v. Jefferson Co.*, 34 Ark. 307. These excerpts are peculiarly applicable here: “The policy of the act seems to be to check extravagance in appropriations with reference to contracts, rather than to encourage the accumulation of funds in the county treasuries. The particular limitation of 90 per cent. was obviously to provide that the taxes collected might meet the appropriations, by allowing for 10 per cent. for loss or delinquency. It was not to retain 10 per cent. of each year's levy in the treasury as a sinking fund. Nor does

it seem that the Legislature had in view, in this section, the revenue to arise from fines, forfeitures, penalties, or licenses. \* \* \* They belong to the county for county purposes, and it would be absurd in the Legislature to prevent the counties from using them, because the whole amount to be used would exceed 90 per cent. of the levied taxes. There is no tie between the subject-matter; nor any conceivable policy making one control the other. The statute, on this point, means simply to say that of the taxes levied and to be extended on the taxbooks for county purposes, not more than 90 per cent. shall be appropriated for that year. A very wholesome provision, inasmuch as, perchance, and very probably, not more than that might be collected. This does not prevent the county from using revenues undoubtedly her own, upon a proper appropriation by a full court.”

In the case at bar, after reserving the 10 per cent. of the current tax levy there were ample funds belonging to the general revenue of the county and subject to general appropriation to render valid all of the \$78,200 appropriated by the county court. The statute is not an inhibition upon proper county appropriations of the available county funds on hand, and it is a mere limitation on using more than 90 per cent. of one class of the county funds, to wit, the amount receivable from the tax levy.

Appellee insists that the appropriation does not include a power to purchase land for the site of the hospital, but contemplates the use of land owned by the county. The appropriation was in this language: “Be it resolved by the levying court now assembled that we do hereby appropriate the sum of \$500 for building and maintaining said county hospital. Same being owned by Jefferson county for all the people.” In *Fones v. Erb*, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353, and *Wiegel v. Pulaski County*, 61 Ark. 74, 32 S. W. 116, it has been decided that it requires the concurring judgment of the levying court and the county judge to make these contracts for public buildings. When the levying court makes an appropriation for the purposes, a proper contract exceeding the appropriation may be made by the county judge. See *Bowman v. Frith* (Ark.) 84 S. W. 709. The appropriation is the assent to the plan, the ground work, the basis for the subsequent contract. Unless there was something to affirmatively show otherwise authorization for the building and maintenance of a public institution would necessarily include necessary grounds for it to rest upon. It may be that the county has suitable ground and place, as in case of replacing a burned building, but, in the absence of any showing of that kind, the authorization to start a new enterprise and build and maintain it would necessarily carry authorization to procure ground for it. A subsequent order of the county court stated that the court had no suitable grounds of its

own for this purpose and authorized purchase of grounds. See 7 Am. & Eng. Ency. Law (2d Ed) pp. 933 & 934, cases and notes.

Reversed and remanded.

### JONES v. BANK OF PINE BLUFF.

(Supreme Court of Arkansas. Oct. 15, 1906.)

**BILLS AND NOTES—INDORSEMENT BEFORE DELIVERY—NATURE OF LIABILITY.**

Those who indorse a note at the time it is executed by the maker, and for the same consideration, are joint makers, and may be sued immediately on the default of the maker, without any proceedings having been taken against him.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 542.]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Proceedings by the Bank of Pine Bluff to collect a claim against the estate of Wiley Jones, deceased, and from a judgment of the circuit court, reversing a judgment of the probate court, and allowing the claim, the administrator appeals. Affirmed.

White & Althelmer, for appellant.

**BATTLE, J.** On December 31, 1903, the Southern Mercantile Company of Pine Bluff executed to the Bank of Pine Bluff its four promissory notes for amounts aggregating the sum of \$9,537, and on June 6, 1904, executed another note to the same party for \$5,000, all of which bear interest at the rate of 10 per centum per annum from date until paid. Before delivery to the payee they were indorsed by Ferd Havis and Wiley Jones. On the 7th day of December, 1904, Wiley Jones died, and James Jones was duly appointed administrator of his estate, and qualified as such. On the 20th day of January, 1905, the notes, duly authenticated, were presented by the Bank of Pine Bluff to the administrator for allowance against the estate of the deceased, and were disallowed by him, "notice and presentation being waived by him." They were then presented to the probate court of Jefferson county for allowance, and were disallowed. The Bank of Pine Bluff then appealed to the Jefferson circuit court, and the notes were by it allowed, and the administrator appealed.

Appellant contends that the bank should be required to first collect of the Southern Mercantile Company all it can by process of law before its claim is allowed against the estate of Jones. This contention is not tenable. Havis and Wiley Jones, having received no consideration in addition to that of the notes, became liable to the bank as joint makers with the Southern Mercantile Company. *Nathan v. Sloan*, 34 Ark. 524. Their obligation, according to the terms of the contract, is the same as that of the mercantile company, and as soon as the latter was in default they were likewise in default, and could be sued immediately for

the whole amount due on the notes and before any proceedings against the latter. They were not liable for only so much as the owner of the notes failed to recover of the latter by process of law, nor upon that condition. Such were not the terms of the contract, and cannot be imposed upon the payee as a condition of its recovery. 1 *Brandt on Suretyship & Guaranty* (3d Ed.) § 110, and cases cited.

Judgment affirmed.

### MONTE NE RY. CO. v. PHILLIPS et al.

(Supreme Court of Arkansas. Oct. 15, 1906.)

**1. RAILROADS—FIRES—ACTION—INSTRUCTIONS.**

Where, in an action against a railroad for damages arising from a fire, it appeared that the fire was caused by a locomotive of defendant or by a stove in plaintiff's house, a requested instruction that, if the evidence failed to establish the origin of the fire, the jury should find for defendant, was properly refused.

**2. SAME—SUFFICIENCY OF EVIDENCE.**

In an action against a railroad for damages from a fire alleged to have been caused by a locomotive, where the evidence is conflicting as to the origin of the fire, it is not essential to recovery that the evidence should exclude all possibility of another origin, or that it is undisputed, but sufficient that the facts and circumstances warrant the conclusion that the fire did not originate from some other cause.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1731.]

**3. SAME—INSTRUCTIONS.**

Where, in an action against a railroad for damages from a fire alleged to have been caused by a locomotive, the only issue was whether the fire was caused by negligent operation of the locomotive, there was no error in refusing a requested instruction that there is no law requiring a railroad to use coal as a fuel, and that the use of wood would not constitute negligence.

**4. TRIAL—ARGUMENT OF COUNSEL.**

In an action against a railroad for damages from a fire alleged to have been caused by a locomotive, it was error to permit counsel to argue that it was negligence for defendant to use wood, instead of coal, where the only issue was whether the fire was caused by the negligent operation of the locomotive.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 284.]

**5. APPEAL AND ERROR—HARMLESS ERROR—ARGUMENT OF COUNSEL.**

The argument was not prejudicial error, where, under the instructions, the jury were required to base a verdict for plaintiff on negligence in the use of insufficient appliances.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4135.]

Appeal from Circuit Court, Benton County; Jno. N. Tillman, Judge.

Action by Thomas M. Phillips and others against the Monte Ne Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

The complaint alleges the negligent burning of a frame residence. It is alleged that the fire was caused by sparks communicated from an engine, which was being negligently operated by appellant. The answer denied that the fire was set by appellant's engine, and denied that the engine was negligently operated.

WOOD, J. (after stating the facts). We need not discuss in detail the evidence bearing upon the disputed questions of fact. The evidence presented conflicting theories as to the origin of the fire; but these were submitted to the jury upon the following instructions asked by appellant: "No. 1. I charge you that the burden of establishing by proof that the fire was set by the engine of the defendant railroad company is on the plaintiffs. If the proof fails to show this proposition, or if it preponderates against it, or is equally balanced, you should find in favor of the defendant."

In *St. Louis, I. M. & Sou. Ry. Co. v. Dawson* (Ark.) 92 S. W. 27, we said: "It is not required that the evidence should exclude all possibility of another origin, or that it is undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause." It was not error therefore to refuse the following: "No. 4. If the evidence fails to establish the origin of the fire, you will find for the defendant." This is abstract. The evidence shows the fire originated from a stove in the house or from appellant's engine. The verdict finds that the fire was caused by the engine of appellant, and the evidence is sufficient here to warrant the verdict.

Appellant contends that the court should have granted the following request: "No. 3. I charge you that there is no law requiring a railroad company to use coal as a fuel, and the use of wood as a fuel would not constitute negligence." The request was a correct proposition of law, but it was abstract here. The only issue presented was whether or not the fire was caused by the negligent operation of appellant's engine. If the fire was caused by the negligent operation of appellant's engine, as the jury finds, it was wholly immaterial whether appellant used wood or coal as fuel. The court should not have permitted counsel to argue that it was negligence for the appellant to use wood, instead of coal, but the argument was not prejudicial, because, under the instructions, the jury had to base its verdict upon the negligence of appellant in the use of insufficient appliances for arresting sparks, and not on its negligence in the kind of fuel used. If the fire was caused by sparks from the engine, as the jury must have found, it was immaterial whether the sparks were from wood or coal fuel. The verdict and judgment are in accord with principles announced by this court in recent cases. See *St. L., I. M. & Sou. Ry. Co. v. Dawson*, supra; *St. L., I. M. & Sou. Ry. Co. v. Coombs* (Ark.) 88 S. W. 595; *St. L., I. M. & Sou. v. Ayres*, 67 Ark. 371, 55 S. W. 159.

**Affirm.**

(Supreme Court of Arkansas. Oct. 15, 1906.)

**1. RAILROADS—KILLING STOCK—NEGLIGENCE—QUESTION FOR JURY.**

In an action against a railway company for killing an animal on its track, evidence examined, and *held* that the question of negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1627.]

**2. COSTS—PENALTY FOR FRIVOLOUS APPEAL.**

A railway company, to overcome the presumption of negligence raised by proof that its train had killed an animal on its track, showed by its engineer and fireman that they kept a lookout, and that the animal was first discovered about 200 feet ahead of the engine; that the engineer, though applying the brakes, could not stop the train before striking the animal; and that they could not see the animal before on account of a curve in the track. Plaintiff showed that the animal could have been seen for a distance of at least 220 yards, and that the train could have been stopped in 100 yards, and that the stock alarm on the engine was sounded about a quarter of a mile from where the animal was killed. *Held*, that the question of negligence was one of fact, and an appeal from a verdict for plaintiff, rendered on correct instructions, was taken for delay merely, authorizing the infliction of the statutory penalty for taking an appeal for delay.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 983-1003.]

**Appeal from Circuit Court, Benton County; Jno. N. Tillman, Judge.**

Action by J. B. Edwards against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

This was an action to recover the value of a cow alleged to have been negligently killed by appellant. The proof tended to show that appellee's cow, valued at \$35, was killed on the railroad track by appellant's train. To overcome the presumption of negligence raised by this proof, appellant's engineer and fireman who were in charge of the engine that killed appellee's cow testified, in substance, that they were keeping a lookout; that the cow was first discovered by the fireman on the track about 200 feet ahead of the engine; that the fireman immediately notified the engineer, who applied the brakes, but could not stop train before striking the cow; that the train could not have been stopped in less than about 1,200 feet. These witnesses testified that they could not see the cow before on account of a curve in the track at that point. Testimony for appellee, in rebuttal, tended to show that the cow could have been seen by the engineer and fireman for a distance of at least 220 yards from the place where she was killed, and that the train might have been stopped in 100 yards. There was also evidence to the effect that the stock alarm on the engine that killed this cow was sounded something like a quarter of a mile from where the cow was killed.

Read & McDonough, for appellant. McGill & Lindsey, for appellee.

WOOD, J. (after stating the facts). The court did not err in refusing to direct a peremptory verdict for appellant. The question of negligence was for the jury, and it was submitted upon correct instructions, and the evidence was ample to sustain the verdict. Indeed, so patent was the conflict in the testimony, and so purely was this a question of fact for the jury, it appears to us that the appeal in this case must have been taken for delay merely.

The judgment is therefore affirmed, with the statutory penalty in such cases. See *St. L., I. M. & So. Ry. Co. v. Shaver* (Ark.) 88 S. W. 961; *Railway v. Shannon* (Ark.) Id. 851; *Railway v. Kimberlain* (Ark.) Id. 599; *Railway v. Thompson* (Ark.) Id. 593; *Railway v. Carlisle* (Ark.) Id. 584.

#### KANSAS CITY SOUTHERN RY. CO. v. CASH.

(Supreme Court of Arkansas. Oct. 15, 1906.)

##### 1. RAILROADS—INJURIES TO ANIMALS—ACTION—PRESUMPTIONS.

Where a horse was killed on a railroad track by being struck by a train, the killing was presumably due to the railroad's negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1578, 1580, 1581.]

##### 2. SAME—EVIDENCE—SUFFICIENCY.

In an action against a railroad for the killing of a horse on the track, the evidence held to warrant a finding that defendant was negligent.

Appeal from Circuit Court, Benton County; Jno. N. Tillman, Judge.

Action by J. J. Cash against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Read & McDonough, for appellant. McGill & Lindsey, for appellee.

BATTLE, J. This action was brought by J. J. Cash against the Kansas City Southern Railway Company to recover the value of a horse of plaintiff killed on the track of defendant by one of its trains. Plaintiff recovered judgment, and the defendant appealed.

It was shown by the evidence that the horse was the property of the plaintiff and was killed by a train of appellant on its track, and that the track was straight for three-quarters of a mile at the place it was killed, and there was nothing to obstruct the view. A. D. Bateman, the engineer in charge of the engine of the train that killed the horse, testified that the horse was about 100 feet from the train and about 50 feet from the track when he first saw it, and was trotting towards the track; that his train was going 35 miles an hour; that in his efforts to stop the train he only slowed it up to about 30 miles an hour; that, when he first discovered the horse, his engine was about 75 or 80 feet from the point where it was struck, and that, when it got on the track, it was

so close that when it turned around to run it was struck; that it was impossible to stop the train from the time the horse came in view until it was hit; that the killing occurred between 11 and 12 o'clock at night; and it was impossible to see the horse any further than the 100 feet.

The law presumed that the horse was killed through and on account of the negligence of appellant; and it devolved upon the railroad company to remove that presumption. It attempted to do so by the testimony of the engineer in charge of the engine of the train that did the killing and failed. The jury were the judges of his credibility and the weight of his testimony, and they did not believe him. They evidently did not believe that the horse could trot 50 feet and get on the track and turn around before the engine could go 80 feet at 35 miles an hour. They had reasons for disbelieving him.

Judgment affirmed.

#### EARL BROS. & CO. v. MALONE.

(Supreme Court of Arkansas. Oct. 8, 1906.)

##### LANDLORD AND TENANT—LANDLORD'S LIEN—ADVANCES SECURED.

Kirby's Dig. § 5033, provides that if a landlord, to enable a tenant to make and gather the crop, advances any necessary supplies, either of money, provisions, clothing, stock or other necessary articles, the landlord shall have a lien on the crop for such advances. Held that, where a landlord advanced a tenant, who raised cotton, a sewing machine, a sum for ginning and wrapping, and a sum for pasturing, and the landlord testified that he furnished the articles "on the faith" of his lien, it was sufficient to warrant a finding that the supplies were necessary, and within the statute.

Appeal from Conway Chancery Court; J. G. Wallace, Chancellor.

Suit by A. D. Malone against Earl Bros. & Co. From a decree in favor of complainant, defendants appeal. Affirmed.

W. P. Strait, for appellants. Chas. C. Reid, for appellee.

McCULLOCH, J. Appellee, Malone, rented land to one Williams, who raised a crop of cotton thereon, and sold a portion of the crop when gathered to appellants, Earl Bros. & Co. Appellee brings forward an account against the tenant in the sum of \$54 for advances alleged to have been made by him to enable the tenant to make and gather the crop, and asserts a lien on the crop for such advances, and sues appellants in equity to recover the amount.

It is alleged in the complaint that appellants had notice of appellee's lien for supplies when they received the cotton from Williams. The chancellor found in favor of appellee, and rendered a decree against appellants for the amount of the debt, which was less than the value of the cotton received by appellants. It is contended on

to enable the tenant to make and gather the crop, and that the testimony in the case does not show that appellee furnished the articles to his tenant for that purpose. The statute in question provides that "if any landlord, to enable his tenant or employé to make and gather the crop, shall advance such tenant or employé any necessary supplies, either of money, provisions, clothing, stock, or other necessary articles, such landlord shall have a lien upon the crop raised upon the premises for the value of such advances, which lien shall have preference over any mortgage or other conveyance of such crop made by such tenant or employé." Kirby's Dig. § 5083. The language of the statute is broad enough to give the landlord a lien for the price of any article furnished to his tenant which was reasonably necessary in the making or gathering of the crop. It is not essential that the article furnished shall have been for direct use in the cultivation. The statute reads "any necessary supplies, either of money, provisions, clothing, stock, or other necessary articles." This court in discussing the question whether or not the price of a cow sold to a tenant could be considered within the language of the landlord's lien statute, said: "But as milk is a common and useful article of diet, and as probably the cheapest way for a farmer to obtain it is to own a milch cow, such animals might be a part of the supplies needed by a tenant and his family, to enable him to make a crop just as any other provisions would be needed; while, on the other hand, if he bought them for speculation only, they would not be supplies for making a crop. So medical supplies and attention when furnished or paid for by the landlord, might be necessary supplies if needed to enable the tenant to go ahead with his work." Bourland v. McKnight (Ark.) 96 S. W. 179.

The items objected to by appellants as not being "necessary supplies" are the following ones found on the account, viz.: 1 sewing machine, \$12.50; ginning and wrapping, \$22; pasturing, \$2. Now, it is just as essential in the economy of a household for the housewife to have a sewing machine with which to provide the wearing apparel of the family, as it is to have the material for the garments; it is as provident for the landlord to furnish a pasture for his tenant's stock as it is to sell him corn to feed them with, and the ginning and baling of cotton is just as essential in the harvesting and preparation of the staple for market as it is to pluck it from the stalk. The language of the statute should be given a reasonable interpretation in the light of the manifest purpose which the Legislature had in view when it was enacted, and it is obvious that it was intended to embrace any

banks, 86 Ga. 616, 12 S. E. 1065; Trimble v. Durham, 70 Miss. 295, 12 South. 207; Brown v. Brown, 109 N. C. 124, 13 S. E. 797. The testimony is not as full or satisfactory as it might be concerning the necessity for furnishing the supplies. Appellant exhibited his account and stated in his testimony that he furnished the articles to his tenant "upon the faith" of his landlord's lien. He was not examined or cross-examined further on the subject, and that was all the testimony on that point. This statement was, however, together with the list of articles furnished which were all appropriate for use in making and gathering the crop, sufficient to warrant the chancellor in finding that they were necessary supplies and were furnished for that purpose.

It is argued here that the right to assert a lien on the crop was barred by the statute of limitations; but, we find, that this was not pleaded below, and the question cannot be raised here for the first time.

Decree affirmed.

#### MOORE v. CAMDEN MARBLE & GRANITE WORKS.

(Supreme Court of Arkansas. Oct. 15, 1906.)

##### 1. FRAUDS, STATUTE OF—CONTRACT—CONSTRUCTION.

An agreement to construct an article especially for, or according to the plans of, another, and not of a kind which the producer usually has for sale in the course of his business, is a contract for work and labor, not within the statute of frauds, though the transaction is to result in a sale of the article.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 150, 151.]

##### 2. SAME—CONSTRUCTION OF TOMBSTONES.

A contract by one taking orders for completed tombstones according to catalogue designs to construct a tombstone according to a design, and with an inscription selected by the patron, is not a contract of sale within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 180, 181.]

Appeal from Circuit Court, Ouachita County; Chas. W. Smith, Judge.

Action by the Camden Marble & Granite Works against Dave Moore. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Thornton & Thornton, for appellant. Geo. W. Hays, for appellee.

McCULLOCH, J. Appellant gave a verbal order to appellee for a tombstone to be made and set up in the burial ground, but refused to accept it when complete and ready for delivery. In this action against him brought by appellee to recover \$40, the agreed price of the tombstone, he pleads the statute of frauds.



The sole question for our determination is whether the contract in question was one for the sale of goods, wares, and merchandise, and therefore within the statute of frauds, or one for work and labor to be done and materials to be furnished, which is not within the statute. In England and Canada the rule seems to be settled that, where under the contract the title to a chattel is to be transferred from one person to another, it is a contract for sale of goods within the meaning of the statute, regardless of the previous condition of the product or the amount of labor and talent to be expended in producing or constructing it. In *Lee v. Griffin*, 1 B. & L. 272, which is the leading English case on the subject, the rule is laid down by Blackburn, J., as follows: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." The learned judge, by way of illustration, said: "If a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel." In that case the suit was for the price of a set of artificial teeth, which the plaintiff, a dentist, had especially prepared for defendant after measurement of his mouth, and the latter died before delivery or acceptance of the teeth. The court held that the contract was one for sale of the completed chattel, and was within the statute of frauds.

The doctrine announced in *Lee v. Griffin* has not been generally adopted by the American courts, but a majority have followed the rule declared in substance by the Supreme Court of Massachusetts that "an agreement by one to construct an article especially for, or according to the plans of, another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor, and not within the statute; but, if the article to be made and delivered is of a kind which the producer usually has for sale in the course of his business, it is a contract for sale and must be in writing." 20 Cyc. pp. 241, 242; *Browne*, Stat. Frauds, § 309a; *Mixer v. Howarth*, 21 Pick. (Mass.) 206, 32 Am. Dec. 256; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Lamb v. Crafts*, 12 Metc. (Mass.) 856; *Cason v. Cheely*, 6 Ga. 554; *Hight v. Ripley*, 19 Me. 139; *Crockett v. Scribner*, 64 Me. 447; *Forsyth v. Mann*, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788; *Bird v. Muhlinbrink*, 1 Rich. Law (S. C.) 109, 44 Am. Dec. 247; *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033; *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; *Higgins v. Murray*, 73 N. Y. 252; *Parker v. Schenck*, 28 Barb. (N. Y.) 38; *Mead v. Case*,

33 Barb. (N. Y.) 202; *Meincke v. Falk*, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722; *Allen v. Jarvis*, 20 Conn. 88. There is some little apparent conflict in the decisions of the American courts in their application of the law to the facts of the various cases, but it is found that the principle announced in nearly all of them may be harmonized upon the Massachusetts rule just stated.

Now, in the case at bar, the facts as found by the jury upon conflicting testimony were that the plaintiff operated a marble yard and took orders for completed tombstones according to patterns and designs displayed in a catalogue. It is not shown by the evidence the precise condition the material out of which plaintiff constructed the tombstone was in when the order was given, but the plaintiff and another witness introduced by him testified in general terms that he made the tombstone after defendant gave the order for it according to the design selected, and cut the inscription upon it which the defendant selected. It was constructed in accordance with the design selected by defendant, and the names and dates were inscribed thereon as he directed. This brought the case within the rule announced, and the court properly refused to instruct the jury that the contract was within the statute of frauds.

Affirmed.

#### JARVIS v. ANDREWS.

(Supreme Court of Arkansas. Oct. 15, 1906.)

##### 1. DEPOSITIONS — ADMISSION IN EVIDENCE — OBJECTION — SUFFICIENCY.

A general objection to each and all the questions and answers in a deposition is not sufficient to charge the court with error in not excluding it, though one answer was hearsay.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 323-328½.]

##### 2. WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT.

Under Const. Schedule, § 2, providing that in actions against an executor neither party may testify to a transaction with deceased, defendant executor, in an action where decedent's estate only is sought to be charged on a note, signed not only by her but by the executor, may not testify that he did not execute such a note.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by L. M. Andrews, administrator, against Floyd A. Jarvis, executor. Judgment for plaintiff. Defendant appeals. Affirmed.

Taylor & Jones, for appellant. Crawford & Gantt, for appellee.

HILL, C. J. Nancy W. Smith filed a claim against the estate of Sarah A. Pitts, alleging that the deceased was indebted to her in the sum of \$900 and interest, evidenced by a promissory note which had been lost, which note was signed by said Sarah A. Pitts. Floyd A. Jarvis, a son of Mrs. Pitts, and Nannie F. Jarvis, the wife of Floyd Jarvis. Mrs. Smith died, and appellee was appointed

mother, Mrs. Pitts. After a trial in the probate court the claim was allowed, and on trial de novo in the circuit court before the circuit judge the claim was again allowed, and Jarvis as executor prosecutes this appeal. The principal contention is as to the sufficiency of the evidence to sustain the finding. It would serve no useful purpose to review the evidence. It has been found sufficient by two trial judges who have heard it, and the court is of opinion that it is sufficient to sustain the judgment, and will pass to the questions of law presented.

1. Appellant points out a bit of hearsay testimony in the deposition of Miss Nannie Pitts. There was an objection to the reading of the deposition, but that was a general objection to all of it, and if any part of the evidence was admissible the objection fails. *Railway Co. v. Hendricks*, 48 Ark. 177, 2 S. W. 783, 3 Am. St. Rep. 220. Two depositions were read, and at the end of them is this entry: "Defendant's counsel objected to each and all of the interrogatories and answers contained in the two foregoing depositions, and asked that the same be excluded from the record. The objection was overruled, to which defendant at the time excepted." The statute contemplates exceptions to depositions to be in writing, and specifying the ground of objection, and the same to be on file before the hearing. Sections 3190-3192, Kirby's Dig. Exceptions to competency and relevancy may be considered at the trial without this proper preliminary, but it is not expected that a court be required, under a general exception to each and every question and answer, without specifying the objection, to go through depositions, and exclude every piece of hearsay which may crop into a witness' answer, which was the case here. The question was proper, and the witness merely rambled into a hearsay answer. To obtain the benefit of an objection it should have been made in apt time and manner, and not a mere dragnet objection, which means nothing at the time, and which may serve to catch an error not otherwise pointed out. Such an objection to a bit of testimony which would unquestionably

that he did not execute and deliver such a note as the one alleged in suit. The Constitution contains this provision: "In civil actions no witness shall be excused because he is a party to the suit or interested in the issue to be tried. Provided, in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statements of the testator or, intestate of ward, unless called to testify thereto by the opposite party." Schedule, § 2; also, Kirby's Dig. § 8093. By the express terms of the law Jarvis was excluded as a witness "as to any transactions with or statements of" Mrs. Smith. The purpose of Jarvis' testimony was to negative the existence of the note sued upon, to which suit he had interposed the plea of non est factum in behalf of Mrs. Pitt's estate. There was no issue as to Jarvis' liability on the note in this suit. The sole issue was as to Mrs. Pitt's liability, and the value of the testimony was to tend to show that he had not executed and delivered the note in question to Mrs. Smith, and impliedly that his alleged joint maker had not done so. Testimony negating the existence of a transaction in issue is as much within the inhibition as testimony affirming the existence of the transaction. The testimony was properly rejected.

3. Appellant complains of exclusion of some evidence of Mrs. Jarvis, which he says was excluded as tending to prove an offset, and counsel admit that the probate court has no jurisdiction of a counterclaim or set-off, but seek to avail themselves of the evidence as tending to prove partial or entire payment of the debt sued upon. There seems to have been no defense based upon payment, but, even if there had been, the excluded testimony is too indefinite to have been a proper basis for finding a judgment upon.

The question of the sufficiency of the evidence has been presented in varying phases and considered, but, as stated, the court thinks it sufficient to sustain judgment, and it is affirmed.

**HOUGHTON v. MOSELY.**

(Supreme Court of Arkansas. Oct. 15, 1906.)

**APPEAL AND ERROR—DISPOSITION OF CAUSE—AFFIRMANCE—INSUFFICIENT PRESENTATION OF CASE.**

Rule 9 of the Supreme Court requires appellant to file an abstract setting forth the material parts of the pleadings, proceedings, facts, and documents on which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented. An abstract did not contain the material parts of the pleadings, but only deductions of counsel as to what the pleadings showed. The testimony was set forth in a fragmentary and disconnected manner, and, while certain findings were set forth in the brief, there was nothing to show that there were no other findings. The transcript showed certain other findings on which the decree might have been based, but they were not abstracted, nor was there any abstract of evidence bearing on them. Held that, as it would be impossible to determine whether there was error without going through the transcript, the decree would be affirmed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4450-4453.]

Appeal from Lawrence Chancery Court; Geo. T. Humphries, Chancellor.

Action by A. L. Houghton against J. W. Mosely for partition, and from a decree denying partition, plaintiff appeals. Affirmed.

W. A. Cunningham, for appellant.

**WOOD, J.** Rule 9 requires the appellant, or plaintiff in error, to file with the clerk of this court "an abstract setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision."

The material parts of the pleadings "are not set forth," but only certain general deductions of counsel as to what the pleadings show. It is impossible for us to tell whether these deductions are correct or not. The conclusions of counsel give us no clear and adequate conception of what the issues are. The testimony is set forth in such fragmentary and disconnected way as not to enable us to understand the real merits of the controversy. Moreover, three separate findings of the court are set forth toward the latter part of the brief, but there is nothing in the entire brief to show that there were no other findings. On turning to the transcript, we discover two other findings numbered 4 and 5, upon which the decree of the court might have been based. These are not abstracted and no evidence bearing upon them. The decree itself is not abstracted. Rule 9 is designed to obviate the necessity for each judge to explore the transcript of the record. It is intended to conserve the time of the court and facilitate the disposition of causes. It is impossible to determine if there be error in

this case unless the individual judges shall "go through" the transcript.

This we decline to do, and the decree is affirmed.

**BRITTON v. OLDHAM.**

(Supreme Court of Arkansas. Oct. 15, 1906.)

**DESCENT AND DISTRIBUTION—SHARE OF WIDOW—STATUTES—APPLICATION.**

Kirby's Dig. § 2709, providing that "if a husband die leaving a widow and no children," the widow shall be endowed with one-half the personalty, "as against collateral heirs, but, as against creditors," etc., is not applicable where, though there are no surviving children, the husband leaves a grandson.

Appeal from Circuit Court, Lonoke County; George M. Chapline, Judge.

Application for an allotment of dower in personal property by Estella C. Britton against W. K. Oldham, administrator. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an application for allotment of dower in personal property. The statute is as follows: "If a husband die leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seised, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs, but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and of one-third of the personal property absolutely. Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors." Kirby's Dig. § 2709. The circuit court held that under this statute the widow was entitled to one-half of the personal estate as dower against collateral heirs but not against a grandson. As the husband left a grandson surviving him the court gave the widow one-third of the personal property as dower and also personal property to the value of \$150 allowed by statute in addition to dower.

Trimble, Robinson & Trimble, for appellant. W. E. Atkinson, for appellee.

**RIDDICK, J.** (after stating the facts). This is an appeal by Mrs. Estella C. Britton from a judgment of the Lonoke circuit court allotting her dower in the personal estate of her husband, J. M. Britton. Britton died leaving as heir a grandson, but no surviving children, and the question as to whether his widow is entitled to one-half or one-third of the personal estate as her dower depends on the act of 1891, which is set out in the statement of facts. Omitting that part of it

children such widow shall be endowed of \* \* \* one-half of the personal estate, absolutely, and in her own right as against collateral heirs, but as against creditors she all be endowed with \* \* \* one-third the personal property absolutely." A consideration of this language shows that the provision that the widow shall be endowed of one-half of the personal property applies on- as against collateral heirs. The statute does not apply where the husband leaves direct descendants. The effect of the statute so far as this case is concerned is the same as the words "direct descendants" were substituted for the word "children" in the act that it would read: "If a husband die leaving a widow and no direct descendants," c.

We are therefore of the opinion that the court properly held that the widow was entitled to only one-third of the personal property as dower, and the other property allowed by law is in addition to dower. Judgment affirmed.

#### HARRIS LUMBER CO. v. MORRIS.

Supreme Court of Arkansas. Oct. 15, 1906.)

#### DAMAGES — PUNITIVE DAMAGES — WHEN AWARDED.

Gross negligence, without willfulness, wantonness, or conscious indifference to consequences, does not justify the infliction of punitive damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 200.]

#### MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

An instruction in an action for injuries to an employé by a defect in a machine, which authorizes a recovery if the appliance was defective and the defects were latent, is erroneous because it makes the employer an absolute insurer of the employé's safety.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 172, 199.]

#### TRIAL — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries to an employé in consequence of a defective machine, there was no evidence that a defect in the lever attached to the machine contributed to the injury, an instruction authorizing a recovery if the lever was so defective that it could not be efficiently used was erroneous.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

Appeal from Circuit Court, Polk County; vs. S. Steel, Judge.

Action by Abner N. Morris against the Harris Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action brought by Abner N. Morris against the Harris Lumber Company to recover damages alleged to have been received by the plaintiff while working for de-

defendant to work at a planing machine in the mill, but was put to work by the foreman at a rip-sawing machine, and, while oiling the machine, the skirt of his blouse was caught by a set screw attached to a collar on the gearing shaft, and that his hand was thrown down against the saw, which was in motion, and seriously and permanently injured. Negligence of the defendant is alleged in permitting the set screw to project out of the collar on the shaft, and also in permitting the lever attached to the rip-saw, whereby the machine could be stopped, to become defective and out of repair. The defendant denied the allegations of negligence set forth in the complaint, and pleaded contributory negligence on the part of the plaintiff. It also pleaded in bar of plaintiff's right to sue a release of all claim for damages executed by plaintiff after the alleged injury in consideration of payment of \$100 by defendant to him. The plaintiff recovered judgment, and the defendant appealed to this court.

Brizzolara & Fitzhugh, for appellant.

McCULLOCH, J. (after stating the facts).

1. The court, over the objection of defendant, gave the following instruction, which is assigned as error, to wit: "No. 9. Damages for torts are not weighed in golden scales, and if the jury find from the evidence in this case that the defendant was grossly negligent in assigning plaintiff to work where the danger was latent and known, or from the condition of the machinery, by the exercise of ordinary prudence or care, should have been known by the defendant, then they are warranted in assessing punitive damages in this case." This instruction was improper, and should not have been given. The evidence does not, in the first place, disclose any elements calling for the imposition of punitive damages. In the next place, it was error to say that gross negligence alone is sufficient, without any element of willfulness, wantonness, or conscious indifference to consequences from which malice may be inferred, to justify the infliction of punitive damages. *Arkansas & La. Ry. Co. v. Stroude* (Ark.) 91 S. W. 18; *Railway v. Hall*, 53 Ark. 7, 13 S. W. 138. It was also erroneous, a fortiori, in declaring that the defendant would be liable for punitive damages if it was guilty of negligence in assigning plaintiff to work in a place which by the exercise of ordinary care it could have known was dangerous.

2. Error of the court in giving the following instruction is assigned: "No. 11. The court charges the jury that if they believe from a preponderance of the evidence that the plaintiff was injured by reason of the set screw, and that the same was so set or arranged that it increased the risks or dangers

of the employé, plaintiff here, or that the lever attached to and connected with the 'idler' was so defective that it could not be properly or efficiently used in stopping said saws when in motion, and that these defects were latent, defendant is liable." The effect of this declaration was to make the defendant the absolute insurer of plaintiff's safety while performing service. It is true, as we said in *Southern Cotton Oil Co. v. Spotts* (Ark.) 92 S. W. 249, the master is bound to know of the structural parts of the machinery furnished to the servant, yet this instruction makes the master absolutely liable, regardless of the question of his negligence or care in selecting the machinery, because the arrangement of the set screw increased the danger. This court has many times said that the master is not the insurer of the servant's safety, but is only held to the ordinary care in providing a safe place and safe appliances in which and with which the servant is to work. *L. R. & S. F. Ry. Co. v. Duffey*, 35 Ark. 602; *St. L., I. M. & So. Ry. Co. v. Harper*, 44 Ark. 524; *L. R. M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230; *Railway v. Jagerman*, 59 Ark. 98, 26 S. W. 591; *Park Hotel Co. v. Lockhart*, 59 Ark. 465, 28 S. W. 23. This instruction was

erroneous in submitting to the jury the question concerning the alleged defect in the lever attached to the machine. There was no evidence that this defect contributed to the injury. There was no evidence that any attempt was made to control the machine with the lever so as to avoid the injury, or that the injury, could have been avoided if the lever had been in perfect order. The plaintiff's own testimony shows that, when the set screw caught his jumper, his hand was thrown upon the saw so quick that he could not get away and could not have stopped the machine by use of the lever.

Other errors of the court are assigned, but, as those already indicated herein call for reversal of the case, it is unnecessary to discuss the other assignments further than to say that the rulings of the court concerning the binding effect of the release executed by the plaintiff, and the necessity for return of the consideration paid therefor, fall within the decision of this court in *St. L., I. M. & So. Ry. Co. v. Brown*, 73 Ark. 42, 83 S. W. 382.

Reversed and remanded for a new trial.

HILL, O. J., disqualified and not participating.

**ELECTIONS — CONTESTS — PLEADINGS — EXCEPTIONS — SPECIFICATION OF GROUNDS.**

In an election contest an exception to an amended answer alleged that those portions setting up new matter "under the statutes of Texas regulating contested elections, comes too late." *Held*, that the reference to the particular law was argumentative only, not precluding constant or the court from relying on any other rule of law condemning the pleading as too late.

**SAME.**

Since the statute referred to makes applicable to election contests the general rules controlling amendments of pleadings in civil cases, no reference to the statute could only have invoked such rules.

**SAME — AMENDMENTS — NEW MATTER — DISCRETION OF COURT.**

The court, in the exercise of a sound discretion, may refuse amendments to an answer in an election contest, not being trial amendments supplying defects, but which introduce new matter into the contest.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 282.]

**APPEAL AND ERROR — REVIEW — DISCRETION OF LOWER COURT.**

The burden of showing an abuse of discretion by the court is on one attacking a ruling refusing amendments to an answer, which introduce new matter, rather than on the opposite party to show that the amendments would have been a surprise.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3814.]

**ELECTIONS — CONTESTS — PLEADINGS — AMENDMENTS — NEW MATTER — DISCRETION OF COURT.**

An answer in an election contest was filed December 16th. On March 14th succeeding, leave was given to file an amended answer. On March 15th, objections to the original answer, on account of vagueness, were sustained. On March 29th, an amended answer containing the same defects was filed. On March 30th, the case was continued to October 2d. On October 2d, the same exceptions were sustained to the amended answer, with leave to amend. On October 3d, an amendment was filed remedying the defects, and also containing new matter. *Held*, that it was not an abuse of the court's discretion to sustain exceptions to such new matter.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 282.]

**Certified Questions from Court of Civil Appeals of First Supreme Judicial District.**

Answers to questions certified from the Court of Civil Appeals of the First District, arising on motion for rehearing before such court, of an appeal by J. C. Lipscomb from a judgment against him in an election contest brought by J. J. Perry.

J. D. Harvey, Keet McDade, W. J. Poole, and John M. Mathis, for appellant. R. E. Tompkins and W. W. Meachum, for appellee.

**WILLIAMS, J.** Certified questions from the Court of Civil Appeals of the First District, as follows:

"This suit was brought by J. J. Perry to contest the declared result of the election for sheriff in Waller county held November 8, 1904. J. C. Lipscomb is the contestee. A

appeal was taken from the new pleading before us on a motion for rehearing. By the first assignment of error appellant assails the action of the trial court in sustaining a special exception to all those parts of his second amended answer, which set up new defensive matter, not in response to any matter pleaded by appellee, and not mere amplification of matter already pleaded in defense. The part of the exception necessary to be here stated is as follows: "The contestant (appellee) especially demurs and excepts to said second amended original answer because he says that it appears from the allegations therein contained, which are hereby referred to for the full contents thereof, that all the matters therein alleged are new matter, and are not amendments of any matter set up in said contestee's original answers to contestant's notice of contest, which was filed herein on December 16, 1904, and are not amendments of any matter therein pleaded, and said matters being pleaded for the first time on this, the 2d day of October, A. D. 1905, under the statutes of Texas regulating contested elections, comes too late, and of this, contestant prays judgment of the court, that the same may be stricken out, save and except the following matters pleaded in contestee's second amended answer." Then follows a statement of the parts of the answer not excepted to. The exception, as urged, was sustained.

"The matter excluded, if admitted and established as true, would have changed the result of the contest. The petition for the contest assailed the conduct of the election at but one voting box in the county, and the evidence establishing the allegations justified the judgment of the trial court. The following is a history of the course of the appellant and the action of the court thereon with respect to his pleading. The contest was filed on December 8, 1904, and due notice being given answer was filed on December 16, 1904. On March 14, 1905, appellant was granted leave to file his first amended original answer of which privilege he did not then avail himself. On March 15, 1905, exceptions were heard to the original answer and sustained on account of the vagueness and indefiniteness of the answer, and all of it was properly stricken out except the general denial. On March 29, 1905, defendant filed an amended answer containing the same defects upon which the court had ruled. On March 30, 1905, the case was continued on application of defendant and, by agreement of parties, was set by the court for trial October 2, 1905. On October 2d the case was called for trial and the questions of law arising on the pleadings were again presented to the court. It appearing that the court's ruling on the original exceptions had in no sense been complied with, the exceptions were again sustained and the first amended

answer stricken out except as to the general denial.

"In all his amendments the defendant had undertaken to set up in offset to contestant's complaint, irregularities at other voting boxes, which, if corrected, would inure to defendant's benefit in the contest. When, on October 2, 1905, the court had sustained exceptions to the amendment defendant was granted further leave to amend and, pursuant to this general permission to amend, defendant on October 3, 1905, and on the eve of a trial previously agreed to for that date, filed a second amendment, parts of which were responsive to previous exceptions, and supplied the lack of definiteness therein pointed out, but the part not excepted to did set up new matter not contained in the first answer. The parts of the amended answer to which the exception first above set out was sustained contained allegations of new and independent matter not embraced in any previous pleading filed by defendant, and which, from its nature and from the general nature of the case, disclosed that in all probability it would have resulted in surprise to plaintiff, and necessitated a continuance. The point of surprise was not made by contestant as far as this record shows, unless the above exception urged and sustained was sufficient to call it to the court's attention. The defendant offered no excuse, and made no explanation of his failure to sooner discover and aver the new matter. The record in no way discloses, except as above indicated, for what reason the court declined to permit the matter objected to to remain as a part of the defensive pleading. This court, on the main hearing, construed the trial court's action as a holding that the statutes governing contested elections did not permit amendments to the original answer except in mere amplification or explanation of defensive matter already pleaded, and following *Bailey v. Fly*, 97 Tex. 425, 79 S. W. 299, we reversed the judgment.

"We respectfully propound for your decision the following questions:

"1. In view of the fact that had the trial court clearly based his action upon the abuse by defendant of the privilege of amendment, his ruling would have been justified, did we err in holding that we could not look beyond the exact exception sustained and uphold his ruling for a reason not given and which did not affirmatively appear to have controlled him?

"2. In holding his action error did we rightly construe the exception sustained?

"3. Were we correct in sustaining the assignment?"

The exception set out in the certificate, as presented by the contestant to the amended pleading of the contestee, asserted that the matters specified were then pleaded for the first time, and that they came too late, and asked that they be stricken out. The statute, regulating contests of elections, was referred

to as the law under which it was contended the pleading came too late. This reference to the particular law was only matter of argument, which was mere surplusage, and which, if erroneous, did not preclude the party from relying upon, nor the court from enforcing, any rule of law which condemned the pleading as coming too late. Besides, as we held in *Bailey v. Fly*, the statute regulating contests of elections expressly makes applicable to those proceedings the general rules controlling the amendment of pleadings in civil cases, and the reference in the exception to that statute could only have invoked those rules. We are therefore clearly of the opinion that it was competent for the trial judge, in passing upon the exception, to apply the well-settled rule which gave to him the discretion to allow or disallow the introduction of new issues as the time and circumstances might, in his judgment, make proper. The contestee did not have the absolute right, at that time, to so change his pleading subject only to the right of the other party to show that he would be surprised and prejudiced thereby, but it was within the discretion of the court, after it had sustained exceptions to the previous pleading, to refuse or permit other pleading than a trial amendment to supply the defects therein, as the justice of the case demanded. *Radam v. Microbe Destroyer Co.*, 81 Tex. 129, 16 S. W. 990, 28 Am. St. Rep. 783; *Contreras v. Haynes*, 61 Tex. 105.

Before the adoption of the rule as to trial amendments it had often been held that there is a limit to the right of amendment, and that a time must come in the progress of a cause when the court may properly refuse to allow its further exercise. *Lewin v. Houston*, 8 Tex. 94; *Matossy v. Frosh*, 9 Tex. 612; *Trammell v. Swan*, 25 Tex. 500; *Reld v. Allen*, 18 Tex. 241. At such time the refusal or allowance of an amendment becomes discretionary with the court, and the party attacking the exercise of that discretion must show that it has been abused to his injury. As we have said, the exception called upon the court to determine whether or not, after all the time and opportunity contestee had enjoyed, after exceptions to his answer had been sustained, and leave granted him to amend preparatory to the trial about to begin, which leave legally gave him only the right to perfect the pleadings to which exceptions had been sustained, contestee should be allowed to add to his defenses already made by the introduction of entirely new matter. When the court acted it was in the exercise of its sound discretion and the presumption is that its action was based upon a due consideration of all of the facts which should affect it. The party complaining cannot say that any absolute right of his was violated and, therefore, in order to successfully attack the ruling, he must show an abuse of the discretion and an injury to him. The burthen

because he would have been surprised by the pleading. The rule laid down in the decisions referred to is not that the right of amendment exists subject to the right of the opposite party to show that the proposed pleading would surprise him, but that, in such situation, the matter is subject to the sound discretion of the court, the exercise of which may be based, not only on the fact that the pleading on its face appears to be calculated to surprise, but also on the fact that it may delay the trial and impede the speedy and orderly administration of justice and the dispatch of the business of the court. *Lewin v. Houston*, supra. For these reasons it is apparent that in reviewing such a ruling the inquiry is not controlled by the fact that, in the exception sustained, surprise is not mentioned as the reason why the amendment should be stricken out. Had the court permitted the plea to stand, it might be that, because of the presumption in favor of the correctness of the ruling, the contestant, in order to show an abuse of discretion and consequent injury to him, would be required to make some such matter appear; but the same presumption sustains the ruling actually made until abuse of discretion is shown.

Because of the character of the discretion with which the law invests trial courts, it would be difficult to hold that the inquiry as to the regularity of the action taken by the trial judge in this case is to be restricted to the precise reason advanced by the successful party to secure the ruling, but, as we have seen, the reason assigned, that the pleading set up new matter when it was too late, did invoke the consideration by the court of all the circumstances affecting the proper exercise of its discretion.

It is therefore enough for this case to answer the second question in the negative and, as to the third, to say that the facts stated in the certificate do not show an abuse by the trial court of its discretion and the Court of Civil Appeals, upon those facts alone, erred in sustaining the assignment.

## TEXAS TRAM & LUMBER CO. v. HIGHTOWER. District Judge.

(Supreme Court of Texas. Oct. 24, 1906.)

### 1. TIME—SOLAR OR STANDARD—COURTS—EXPIRATION OF TERM.

In determining the time of the expiration of a term of court limited by statute to a certain day (statute establishing the Sixtieth Judicial District), solar time, and not standard or railroad time, should be used, though the community has generally adopted standard time.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Time, § 55.]

### 2. MANDAMUS—ADEQUATE REMEDY AT LAW—ENTERING JUDGMENT.

Where the entry of a judgment on a verdict is refused because of a contention that the verdict was not returned during the term,

awarded to compel such entry.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 15, 100.]

Mandamus, on the relation of Texas Tram & Lumber Company, against L. B. Hightower, judge of the Sixtieth Judicial District. Writ awarded.

Andrews, Ball & Streetman, Denman, Franklin & McGown, Greens & Nail, Geo. C. O'Brien, and Oliver J. Todd, for relator. T. D. Cobbs, L. F. Chester, C. L. Bates, and Baker, Botts, Parker & Garwood, for respondent.

GAINES, C. J. This is an original suit, in which a writ of mandamus is prayed for to compel the judge of the Sixtieth Judicial District of the state to enter judgment upon a verdict alleged to have been returned into his court at the April term of the present year.

The facts as alleged in the petition for the writ, stated briefly, but as we think with sufficient fullness for the purposes of this opinion, are as follows: In the year 1901 the Texas & New Orleans Railroad Company, a defendant herein, brought an action of trespass to try title in the district court of Jefferson county against the Texas Tram & Lumber Company, the relator in this proceeding, to recover a parcel of land in the city of Beaumont. The Sixtieth Judicial District having been subsequently established, the cause came on for trial in the latter court (regularly, as must be presumed) during the last days of its April term. Under the statute establishing that district the April term began on the first Monday of that month, and could "continue in session until and including the last Saturday in May" of the same year. At 8 o'clock p. m., on Saturday, the 26th day of May, 1906, it being the last day of the term, the jury, having been charged, retired to consider of their verdict. Before the court was adjourned by the presiding judge at 3 minutes past 12 by railroad time, which was at least 15 minutes before 12 p. m. by sun time, the jury came into court and returned a verdict in favor of the defendant, the relator in this case. Counsel for plaintiff immediately made a motion for a new trial, which was overruled, but no judgment was entered upon the verdict. At the next term of the court, to wit, on the 6th day of June, 1906, a motion was made in behalf of the relator to have judgment entered upon the verdict. This was resisted on the ground that the court was adjourned by operation of law when the verdict was returned, and a counter motion to set the verdict aside and to declare a mistrial prevailed. The trial judge filed his conclusions of fact as above stated, and determined as a matter of law that the adjournment was controlled by the rail-



road time, and that the verdict came too late. We are of the opinion that in this conclusion of law the court erred. We see no reason to doubt that, when the Legislature prescribes the times at which a term of the court shall begin and shall end, the true time at the place of holding the court is meant; and we understand that the true time is to be determined by the instant at which the sun passes the meridian of the place for which it is to be calculated, and not by the time of its passage at some other place. That where at a particular place there are two measures of time, one the true time at that place and the other the time at some other place, the true time at the place of holding a court must govern the hour of its opening, was decided in England many years ago. In the case of *Curtis v. Marsh*, 3 H. & N. 866, the court was holding its session at Dorchester, and by some regulation 10 o'clock in the morning was appointed as the hour for opening the court. The clock in the courtroom was set to Greenwich time, which was 10 minutes earlier than the Dorchester time. The trial judge took his seat upon the bench and promptly opened his court at 10 o'clock, as shown by the clock in court. The case was called, and, counsel for the defendant not having appeared, the plaintiff's counsel proceeded with the case. The evidence having been introduced, the court instructed a verdict for the plaintiff. After this, and a minute and a half before 10 o'clock according to Dorchester time, counsel for the defendant appeared and asked a trial of his case, which was refused. A rule nisi having been obtained, it was by the Court of Exchequer made absolute; the court holding that the Dorchester time must govern and that the proceedings were premature. It appears from the report of that case that Greenwich time was the time upon which the railroads were run in England at that period, so that in that case, as in this, the question arose out of the difference between the railroad time and the true time. In the case of *Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327, the same principle was announced in an elaborate opinion, and the conclusion was reached that the true time must control in determining whether the verdict, which was returned about 12 o'clock p. m. of Saturday, was returned on Saturday or Sunday, and that according to the true time it was Sunday; but since they hold that the verdict was good, though returned on Sunday, it would seem that the determination of the point was not necessary to the decision of the case. See, also, *Searles v. Averhoff*, 28 Neb. 668, 44 N. W. 872.

The question was distinctly presented in the case of *Parker*, Ex parte, 35 Tex. Cr. R.

12, 29 S. W. 490, 790, and in an elaborate and well-considered opinion by Judge Henderson it was held that when the term ended by operation of law was to be determined by the true time, and not by the railroad time. There is nothing in the case from the Supreme Court of Kentucky of the *Rochester Insurance Co. v. Peaslee Gaubert Co.*, 87 S. W. 1115, 1 L. R. A. (N. S.) 364, which conflicts with our views. It was there merely held, where it was shown that "standard time," meaning we presume railroad time, was in common use at the place where the property insured was situated, and the policy of insurance called to expire at "noon" on a certain day, it was a question of fact, to be determined by the jury, whether the parties to the instrument meant "noon" as determined by the true time, or by the conventional time.

To show that the proposition that the railroad time at Beaumont because in general use there should govern is not sound, it is only necessary to state it, in substance, in a different way. The railroad time for the section in which Texas is included is not the true time for the particular locality, but the St. Louis time; so that the proposition resolves itself into saying that because the people at Beaumont have adopted in the conduct of their affairs the St. Louis time, when the Legislature declared that the April term of the Sixtieth Judicial District should continue "until and including the last Saturday in May," the end of the day should be determined by the St. Louis time, and not by the true time, namely, "the mean solar time." It seems to us the proposition so stated carries with it its own refutation. In the case of *Hume v. Schintz*, 90 Tex. 72, 36 S. W. 429, we declined to award a writ of mandamus to compel the trial judge to enter a judgment upon a verdict, for the reason that the verdict, if it had not been set aside (a question we found it unnecessary to decide), could be as effectually pleaded in bar of another action as the judgment itself. We therefore concluded that the relator had a complete remedy by so pleading it, and therefore refused the writ. But the present case is very different. In the first place, the validity of the verdict itself is here at issue, and that depends upon a question of fact. In the second, the original action in this case involves the title to land, which the verdict settles in the relator's favor. It is entitled to have a judgment entered upon the verdict and to have his judgment recorded and its title made marketable. Pleading the verdict in another action is plainly not a complete remedy.

Upon the undisputed facts of this case, we are of opinion that the relator is entitled to the writ as prayed for, and accordingly the writ is awarded.

**1. DEATH—ACTIONS FOR CAUSING—MASTER'S LIABILITY—ACTS OF SERVANT—STATUTORY PROVISIONS.**

Conceding that the statute, giving an action against railroad companies for death caused by the unfitness, negligence, or carelessness of their servants, requires that the death be "negligently," as distinguished from "willfully," caused, it is not essential to liability that death should result from an act unintentionally done, and, if the servant negligently does an act with no purpose of inflicting injury, but it proximately causes death, the railroad is liable.

**2. SAME—SCOPE OF EMPLOYMENT.**

Where one employed in a railroad roundhouse, while using compressed air in the line of his duty, in sport turned it on a subordinate, causing his death, the railroad was not liable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 49.]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Mrs. Orb Currie and others against the Galveston, Harrisburg & San Antonio Railway Company. A judgment in favor of plaintiffs was affirmed by the Court of Civil Appeals (91 S. W. 1100), and defendant brings error. Reversed.

Baker, Botts, Parker & Garwood, Newton & Ward and W. B. Teagarden, for plaintiff in error. Nat. B. Jones and Carlos Bee, for defendants in error.

**WILLIAMS, J.** This writ of error brings before us a judgment of the Court of Civil Appeals of the Fourth district (91 S. W. 1100), affirming a judgment of one of the district courts of Bexar county against plaintiff in error, and in favor of defendants in error, the widow and children of J. B. Currie, for damages resulting to them from his death, charged to have been caused by the negligence of the plaintiff in error.

The facts out of which the questions arise may be stated thus: The act which caused Currie's death, and for which the railroad company is charged with responsibility, was committed by one Nicholls, who was employed by it as one of its engine dispatchers in its roundhouse in San Antonio, and had, under his direction and control, a number of subordinates, among whom were Currie, who was an engine wiper, and one Spahn, who was a hostler. Nicholls, when on duty, had "the care, custody, and control of things used there [in the roundhouse] for the purpose of getting engines in and out," and his duties required him to have all necessary work done on engines; to receive them when they came in; to get them ready, and dispatch them out when wanted for use on the road. His testimony admits of the construction that his duties were such as to include the right, when he thought proper to do so in their performance, to use the compressed air with which the roundhouse was supplied, as stated below.

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clean engines, he might be ordered to do. By means of a main pipe of iron passing through it overhead, the roundhouse was supplied with compressed air, passing through the pipe from a storage tank, and from this main pipe there led downward into each engine stall a smaller pipe, also of iron, to which a rubber hose, one-half inch in diameter, could be screwed, for the purpose of using the air as a motive power; its pressure ranging from 40 to 100 pounds to the square inch. Each of these smaller pipes had upon it a globe valve, by which the amount of air turned into the hose could be regulated. "Cracking" the valve, as used by the employees, meant the turning of it partially on. This compressed air was used, as shown by the testimony, as a motive power, for loading wheels or heavy machinery, for running gear motors, for drilling and riveting, for cleaning flues, by boiler makers and machinists in the performance of their various duties, and in any other way when it could serve a proper purpose. On the occasion when Currie received the injury from which he died, Spahn, the hostler, had brought into the roundhouse an engine with an oil burner in the ash pan of which oil was burning. Up to this time water had been used to extinguish fires in the engines, but, no water hose being at hand, Spahn, for the first time, and as an experiment, determined to use the compressed air to blow the fire from the ash pan, and, having attached a hose to one of the pipes, requested Currie, who was standing by, to turn the valve. He succeeded in thus blowing out the flame, but the loud noise thus made attracted Nicholls and other employees to the spot. The fire was then out, and Currie had shut off the air, but Nicholls, apprehending that the valve confining the oil in the engine might not be properly set, and that escaping oil, running over the hot surface, might reignite, directed Spahn to go upon the engine and see to the condition of the valve, taking from Spahn the hose which was still attached to the air pipe, and directed Currie to "crack" or turn on the air. Some statements in the record, which counsel for defendants in error regard as presenting the aspect of the facts most favorable to them, are to the effect that Nicholls thus held the hose charged with air to be ready to blow out any fire that might spring up in the engine. This will be assumed to be true for the purposes of our decision. As Spahn ascended the engine, Nicholls turned the hose so as to strike him with the escaping air, causing him to jump and the bystanders to laugh. He then, almost immediately, according to some of the evidence, turned the hose upon Currie, so that the air struck him about the buttocks. That this was done in sport as a practical joke is conclusively shown by the evidence. No ill effects were at once noticed;

but, after a few moments, Currie became sick, and complained that he was hurt, and, upon subsequent medical examination and an operation, it was demonstrated that the air had entered through the clothing into the rectum, perforated and lacerated the intestines in many places, and escaped into the abdominal cavity outside of the bowels, eventually causing death. The physician who testified to these facts stated that neither he nor any of the other doctors with whom he talked about the case believed that such a thing could be possible until the unquestioned facts proved it, and that it was the most remarkable accident of which he had ever heard.

The charge of the trial court submitted the cause to the jury under the ordinary rule, by which a master is made responsible for acts of his servant done in the line of his duty, and in the scope of his employment. The verdict necessarily affirmed that the act of Nicholls was of the character to make the railroad company liable under that rule, and the Court of Civil Appeals, in affirming the judgment, held that the evidence warranted such a finding. This presents one of the principal questions now to be decided. Beyond this, counsel for defendants in error contend that liability of the railroad company is established under a principle laid down in the authorities, which, in effect, declares that one who keeps in his possession, or employs in his business, that which, unless carefully guarded and used, is dangerous to others, is bound to exercise proper care to see that it is so kept and used as not to inflict injury; and the negligence of any one into whose care it is committed by the owner, either in failing to properly guard it, or in improperly using it, is that of the owner; and it is claimed that this is true where the servant or custodian, as in this case, employs the dangerous thing, not in the line of his duty or for any purpose of serving the master, but for his own purposes; the contention being that this is a violation of the duty of the servant to safely keep it.

Another question, the consideration of which naturally comes first in order, is made by counsel for plaintiff in error by the contention that an action is not given by the statute of this state for a death caused as that of Currie was. The statute gives such action against railroad companies when the death is caused by the "unfitness, negligence, or carelessness of their servants or agents." There is no pretense that this death was caused by unfitness of Nicholls, and the proposition is that it did not result from his negligence or carelessness, but from his willful and intentional act. The meaning of this statute was to some extent considered in *Lipscomb v. Railway Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804, in which a much more plausible contention on the part of the defense was overruled. In that case the employees of the defendant intended to kill the person at whom they shot, but negligently ex-

ecuted the master's orders in mistaking the person slain for a burglar. Here the servant intended not to kill, but only to play a harmless prank, and, in the effort to do so, mistakenly employed means which caused death. If it be true that the statute requires that the death be "negligently," as distinguished from "willfully," caused, it does not follow that the act from which the death results must be unintentionally done. Thus restricted, the statute only requires that the death be caused by negligence, and it seems plain that, if the servant intentionally does an act with no purpose of inflicting injury, but so does it as proximately to cause death, the result is due to his negligence or carelessness. Indeed, in a large proportion of the injuries resulting from negligence, an act is intentionally, but negligently done, while its mischievous consequences are unintended. We therefore hold that there is nothing in this contention.

But we cannot agree that the evidence, regarded in its strongest light for plaintiffs, warrants the conclusion that Nicholls' act was done in the prosecution or furtherance of his employers' business. The case is controlled, in our opinion, by the proposition, in which all authority agrees that when the servant turns aside, for however short a time, from the prosecution of the master's work to engage in an affair wholly his own, he ceases to act for the master, and the responsibility for that which he does in pursuing his own business or pleasure is upon him alone. Let it be conceded that in holding the hose in readiness to put out any fire that might again flare up, Nicholls was performing a duty as servant, and that had he, while thus holding it, or in attempting to use it for the purpose for which it was held, negligently turned it against one of the other employes, his negligence would have been imputable to his employer as incidental to the effort to do that which was in the line of the servant's duty. It may be further conceded that if, in directing the hose at a fire to put it out, he had also struck with it one of the other servants, either to make him get out of the way, or for some other purpose, the motive thus partly influencing his act towards such other would not deprive it of its legal character, as done in the master's business. It is in cases of the character supposed, where there has been a mingling of personal motive or purpose of the servant with the doing of his work for his employer, that much of the difficulty and conflict of opinion have arisen in determining whether or not the wrong committed should be ascribed to the master or be regarded as the personal tort of the servant alone. It is now settled, in this state at least, that the presence of such a motive or purpose in the servant's mind does not affect the master's liability, where that which the servant does is in the line of his duty, and in the prosecution of the master's work. But, when he goes entirely aside from his work, and en-

principle which charges the master with responsibility for such actions. These principles were accurately stated in the charge of the trial court; but the error was in assuming that the facts presented any basis for a recovery under them. The fact that Nicholls, while holding the hose, conceived the purpose of using it, and did use it, upon the employes, in sport, is undisputed, and is wholly inconsistent with any assumption that he was then in any way attempting to serve the defendant. His act was a clear departure, for the time, from that service, and the quickness with which it was done cannot be made the test. If the turning aside from the master's business be only for an instant, so that it be complete, the authorities agree that there is no liability on his part for the servant's act. 1 *Thomp. on Neg.* 523, and cases cited. If a miner or butcher stand with pick or knife raised to dig or to stab an animal for the master, and, seeing his enemy before him, turn the tool upon him as a weapon to kill him, would any one argue that the master should be held accountable for the death? Where is the difference if the instrument be used merely to frighten for the amusement of the servant. The only difference between such cases and other personal wrongs committed by persons who happen to be employes of other persons, is the fact that in the cases supposed the servants misuse the implements intrusted to them by their masters. But that certainly is no reason for charging the master, as cases almost numberless will show. 1 & G. N. Ry. Co. v. Cooper, 88 Tex. 610, 32 S. W. 517; *Railway v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Golden v. Newbrand*, 52 Iowa, 59, 2 N. W. 537, 35 Am. Rep. 267; *Howe v. Newmarch*, 12 Allen (Mass.) 49.

In the old English case of *Croft v. Alison*, 4 Barn. & Ald. 590, the distinction between an act of a servant done in his master's interest, and one done wholly for himself, while at the same time serving the master, is sharply drawn. The court thus stated the doctrine: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform the master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty \* \* \* the master will be liable; being an act done in pursuance of the servant's employment." In the case last supposed, the result would be the same, although the act of the servant were also malicious. Two other cases, which may be referred to as apt illustrations, are *Hankinson v. Lynn Gas & Electric Co.*, 175 Mass. 272, 56 N. E. 604, and *Evers v. Krouse* (N. J. Err. & App.) 59 Atl. 181, 66 L. R. A. 592. In the Massachusetts case a servant of the defendant, who had ascended a pole for the

with one of the rejected carbons. Some of the evidence tended to show that this was done in the course of the servant's duty in merely throwing the carbon to the ground, while other evidence was to the effect that, in order to attract plaintiff's attention so as to speak to him for purposes of his own, the servant threw the missile at plaintiff's team. The court held that the liability of the master depended on the question of fact thus raised, and that this was properly submitted to the jury by a charge, which instructed that the defendant would be liable if the carbon was thrown "for the purpose of carrying out and performing his [the servant's] duty in his employment," but would not be liable if the carbon was thrown "to carry out some whim of his [the servant's] own, in accordance with some impulse of his own, and not for the purpose of carrying out or accomplishing the purposes for which he was then and there employed." In the *Evers Case*, the defendant's son, treated as his servant, while engaged in sprinkling defendant's lawn with water by means of a hose, turned the water upon plaintiff's horse, causing it to run away. The liability was made to depend on the question of fact whether or not the boy threw the water on the horse in the work of sprinkling, or departed from that, and did the act mischievously and for his own amusement. The court thus clearly expressed the true doctrine: "An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master, in any sense, and should not be deemed to be so as a matter of law. As to the relation of master and servant does not exist between the parties, and, for the injury resulting to a third person from it, the servant alone should be held responsible. *Aycrigg's Ex'rs v. New York & Erie R. R. Co.*, 30 N. J. Law, 460; *Rounds v. Del., Lack., & West. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173, 44 Am. St. Rep. 359."

Exactly this distinction was made by this court in the cases of *H. & T. C. Ry. Co. v. Bell*, 97 Tex. 73, 75 S. W. 484; *Denlson & Sherman Ry. Co. v. Carter*, 98 Tex. 198, 82 S. W. 782, 107 Am. St. Rep. 626; *Branch v. I. & G. N. R. R. Co.*, 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844; *Dawkins v. G. C. & S. F. Ry. Co.*, 77 Tex. 232, 13 S. W. 984; *I. & G. N. R. R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517. In the last-cited case the engineer and fireman intending to play a practical joke on plaintiff, by injecting cold water into his pocket through a hose, by mistake turned on

hot water and steam. The gist of the decision is expressed in these sentences: "In this case, the fireman and engineer were, at the time the injury was inflicted, in the employ of Campbell, receiver, and were engaged in the performance of a service to him; that is, they were operating a locomotive, each performing his duty as engineer or fireman. The injury, however, did not occur from anything done in the performance of such duty, but by the independent act of the servants, in no wise connected with the duties thus being performed. It is true that circumstances might have required the discharge of hot water from the boiler by means of the appliances used in this instance, but, upon this occasion, the evidence shows that the act done, was not for the purpose of discharging a duty, but simply as one of sport and mischief on their part towards the injured party." In that case the time consumed in the departure of the servants from the master's service was probably longer than in this, but that can make no difference in the principle, the fact of departure being clear and distinct.

The many cases in which railroad companies have been held liable for the consequences of the acts of the servants in so using in malice or sport the whistle, the steam, or other parts of locomotive engines, or the engines themselves, under their control, as to frighten animals or people have been placed either on the ground that the acts were in the performance of duty to the employer, the purpose of the employé merely accompanying it, or upon the doctrine which we will presently discuss as to the liability of the master for the conduct of his servants in keeping and using extra dangerous instrumentalities and agencies committed into the charge of the servants. These authorities do not at all dispute the principle applicable when the servant in the discharge of his ordinary duties steps aside therefrom to accomplish some end wholly his own, and, in doing so, inflicts injury. Counsel for defendants in error, however, argue, as indicated at the beginning of this opinion, that there is an enlargement of the liability of the master for the acts of the servant when the latter is intrusted with the custody and control of highly dangerous agencies employed in the business of the master, by which the master is made responsible, not only for acts and omissions of the servant in the course of his employment, but for any misuse of such agency for his own purposes, and not in the execution of any duty to the master. Since no question as to the existence of facts which may be necessary to establish such a liability was submitted to the jury, everything essential to its existence would have to be admitted or conclusively established by the evidence before we could affirm the judgment on that theory. The doctrine relied on is thus stated by Judge Thompson: "Every person who employs highly dangerous agencies up-

on his premises or about his business stands under the obligation of exercising, to the end that third persons shall not be injured through those agencies, a degree of care proportionate to the danger of such injury. This has been characterized as a very high degree of care, and in some cases, according to one view, the person employing the agency is liable as an insurer. If a person employing such an agency commits the custody of it to his servant, he thereby commits to the servant the obligation to discharge his own duty of caring for it, so that it will not injure third persons. If, while so charged with this duty, the servant negligently abandons the custody of it, so that a third person is injured in consequence of this negligence, the master will be liable; and it will make no difference at all with his liability, whether, in so abandoning the duty, the servant did so for the purpose of effecting some purpose of his own, or in furtherance of the business of his master. In either case the master committed to the servant the discharge of a duty which the law has imposed upon the master for the safety of third persons, and the servant has abandoned that duty; and this is enough to render the master liable, without any regard to the motive of the servant. This may be illustrated by the case where a railway company furnished its servants with dynamite cartridges to be placed upon the track, for the purpose of alarming trains approaching other trains in times of fog, darkness, storm, etc., in which the ordinary signals cannot be seen. The servants of the company playfully placed some of them on the track, in order to frighten some ladies with whom they were acquainted, and one of them was left there, and was picked up by a child, who carried it some distance, and then caused it to explode, injuring another child. It was held that the railway company was liable to pay damages. The railway company was under the duty of keeping the dangerous agents carefully guarded. It committed this duty to its servants. It was not merely their duty to use them, but also to guard them, and, for the failure of this duty, the master was liable, on the footing of its being negligence within the scope of the employment of the servants." 1 Thompson on Neg. § 523. Again, in section 532, the same author says: "So, a master who employs dangerous agencies upon his premises, or in the prosecution of his business, and commits such agencies to his servants, thereby commits to them his own obligation of using care in respect to them to the end that third persons be not injured by them, and he is responsible for the negligence of his servants in discharging this obligation, although they may have been guilty of the act of negligence, for the sole purpose of accomplishing some object of their own outside the scope of their employment." This seems to be an accurate summing up of the cases cited by counsel

in the application of the law thus given, these questions arise: (1) Is the compressed air introduced by the defendant into roundhouse shown to have been so dangerous that a person of ordinary prudence so doing it would have adopted special precautions for guarding it to prevent injury to others? (2) Were the arrangements made by the defendant for keeping it such as would have been employed, as sufficient, by such a person considering its character and the danger likely to result from its presence and use? (3) If not, did the death of Currie result from the want of such care on the part

of the defendant or of its servants into whose custody the agency was committed, which concludes the further question, whether or not the defendant's act, in diverting the air from any use to which he was authorized to put it for the defendant and converting it into a playing ball, is to be imputed to the defendant as a failure to perform its duty to properly guard it? To fix liability on the defendant in all of these questions must be determined in favor of plaintiffs. As to the first, it seems to be assumed that the question whether or not the thing used is of so dangerous a nature as to impose the special duty of guarding it, is one of law to be decided by the court. But this is obviously not true as a general proposition. In the absence of some positive law forbidding or regulating the keeping or use of the thing, the fundamental question is one of negligence vel non, depending, as in other cases of negligence, upon the inquiry whether or not there has been a neglect or violation of the duty which the law imposes upon all persons to use due care in the use of their property or the conduct of their business to avoid injury to others. Some of the older cases in England seem to assert the absolute liability of an insurer, but it is settled in this state that the question is one of negligence. (*Railway v. Oakes*, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835), and this becomes a question of law only, as it becomes such a question in other cases, when the facts are undisputed and allow but one reasonable conclusion. Obviously, the same reflections apply to the second question stated. It is by no means clear that the evidence was sufficient to have authorized a finding in favor of the plaintiffs on those questions (the first and second), but it is clear that it would not justify this court in holding that the necessary facts are conclusively established. Further elaboration upon these propositions is unnecessary, because we are of the opinion that the answer to the third question is conclusive against the plaintiffs. We cannot agree to the proposition to which this contention would come that, because an instrumentality may become dangerous to others, its owner, when he commits it to his servant to be employed in his business, makes himself

responsible for the management of his business by the servant, and not for injuries done by the servant's independent conduct of his own affairs. In such matters, it may be granted that the exercise of proper care for the safe keeping of the dangerous thing is the duty of the master, and that the omission of that care by the servant is, in law, the omission of the master. But when the servant employs the thing, not in the master's service, but wholly as an instrument of malice or amusement, he takes himself for the time out of the employment. It is true that when using such an instrument for his own purposes to injure or frighten others or to amuse himself the servant is not keeping it safely; but it is true also that in the act he does, he is not representing the master, and the injury he inflicts is the result of that act, and not of a mere failure to properly keep. As was said in *Railway v. Cooper*, 88 Tex., at page 609, 32 S. W., at page 517: "The dangerous character of the machinery does not affect the question, because the injury did not result from the dangers connected with the operation of the machinery." The distinction is not technical merely but is made necessary by the reason upon which the rule respondeat superior rests.

For reasons of public policy the law holds the master responsible for what the servant does, or omits, in conducting the master's business, because the master has voluntarily substituted for his personal management and supervision that of the servant. But the law also recognizes that the servant is still an independent and responsible being, with capacity, which the master cannot efface or control, to engage in projects of his own, and does not include in the responsibility laid upon the master liability for those acts of the servant which are but the exercise of his freedom about his own affairs. The fact that the servant, in pursuing his own business or pleasure, neglects also to perform some duty which rests upon the master, may make the master responsible if injury fall upon another as the consequence of that neglect; but that is a very different proposition from that maintained by plaintiffs, asserting liability for an injury resulting, not from the mere neglect, but from the positive personal wrong of the servant. This may be illustrated by reference to the leading case in this country upon the subject which is stated in the section above quoted from *Thompson on Negligence*. *Railway Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658. The injury there was not inflicted by the servant in the attempt to play a joke, but resulted from his negligence in leaving the cartridge where the children found it; in other words, from his failure to safely keep it. The question we are discussing would have arisen if the servant in the effort to injure or frighten, and not in the perform-

ance of any duty, had caused damage by exploding the cartridge. A liability might have arisen also, if the car, in passing over the cartridge, had exploded it, and injured some person, because the injury would have resulted from the movement of the defendant's car over its track in the doing of its business; and it is upon this ground we think the judgment in *Euting v. Railway*, 116 Wis. 13, 92 N. W. 358, 60 L. R. A. 158, 96 Am. St. Rep. 936, may be sustained. The doctrine, or at least some of the reasoning, in the *Shields* Case, has been criticised by other courts (*Obertoni v. Railway* [Mass.] 71 N. E. 980, 67 L. R. A. 422; *Sullivan v. Railway* [Ky.] 74 S. W. 171), and there are some broad statements of doctrine in that as well as in the *Euting* Case, and in others following them which, if separated from the facts in the minds of the courts, would tend to sustain plaintiffs' contention; but the conclusions reached upon the facts in those cases do not seem to conflict with the views we express. Among the other decisions most relied on as applying the doctrines of those cases are *Harriman v. Railway*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; *Alsever v. Railway* (Iowa) 88 N. W. 841, 56 L. R. A. 748; *Merschel v. Railway* (Ky.) 85 S. W. 710; *Barmore v. Railway* (Miss.) 38 South. 210, 70 L. R. A. 627; *Mattson v. Railway* (Minn.) 104 N. W. 443, 70 L. R. A. 503.

It may be just to charge a master with liability for the failure of a servant to properly guard a dangerous agency, with the duty of guarding which the servant has been intrusted, when, in consequence of such failure, injury proximately results to another; but to say that the master, assuming that there has been no negligence in selecting and retaining the servant, is liable for the independent act of that servant in diverting the thing from the master's business, and using it in his own, or as an instrument of malice or amusement, is to lose sight of the principle underlying the whole subject. The distinction is thus illustrated in the *Shields* Case: "To better illustrate the ground of this distinction, we may, for example, suppose a servant, with others under his control, employed with a construction train, repairing the track of his master. He may, for a time, quit his employment, and, with his men, go off on affairs of his own. Whilst thus out of the master's employment, he may build a fire which, through his negligence, may consume the property of another, and, in the meantime, loss of life and property may result from a collision with the train negligently left standing on the track. Now whilst, as has been held, the master would not be liable for the loss resulting from the fire, because the act was done outside the servant's employment (*Morlier v. Railway Company*, 81 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793), yet it is equally certain that, for the loss occasioned by the servant's negligence in leaving the train on the track, the

master would be liable in damages, for the plain reason that, in abandoning the custody of the train, he was guilty of negligence in the employment of the master, whilst, in building the fire, he was not." *Railway v. Shields*, 47 Ohio St. 394, 24 N. E. 658. In the case here stated the train and the engine drawing it would be eminently dangerous forces which may give rise to dangers in many different ways, and they are of such a character and so used that it is difficult for any employé connected with them to so completely divert them, or any of their more dangerous parts, such as their whistles, their steam, and the like, from the railroad operations as to entirely disconnect his personal use of them from his use as a servant. And it is the coexistence of representative and personal action that may sustain most of the decisions in cases where engines, or parts of them, have been used in malice or sport. *Railway v. Starnes*, 9 Helsk. (Tenn.) 52, 24 Am. Rep. 296. But in some instances the separation may be complete as in *International & Great Northern Railway Co. v. Cooper*. Another instance may be supposed by extending the illustration used in the *Shields* Case. Among the dangers to which railroad engines give rise, none is more familiar than that of communicating fire. It is therefore undoubtedly the duty of an engineer to carefully keep in the fire used by him to prevent damage. But add to the facts supposed in the illustration that he had taken fire from his fire box, and with it had burned a building to gratify his malice, or had built a bonfire for his amusement, would there be any difficulty in declaring that the act was his alone, and not that of the railroad company? Yet the hose containing the compressed air in this case was as easily and as completely turned from the service of the railroad company, and used as exclusively for *Nicholls'* amusement as would be the fire in the instance supposed, or the hose and the water in the *Cooper* Case.

The fallacy of the argument that, because a master is bound to use due care to guard dangerous things, he is responsible for any unforeseen and sudden misuse his carefully selected servant may make of them, may be illustrated by reference to other duties quite as clear as that invoked. Masters are bound to use due care to furnish to their servants safe and suitable tools and places to work and may intrust that duty to a particular employé, and it would be quite as reasonable to say that an assault committed by that employé upon another, to whom the duty was owed with the tool or in the place furnished, would be a violation of that duty, as that the use made by *Nicholls* of the air hose was a breach of the duty to safely keep. The answer to both propositions is that such acts are to be regarded as those of the man who commits them because, by thus departing from the service, he loses his power to represent the master. If *Nicholls'* employer had

not because he failed to guard the compressed air, but because he did the act. Nicholls' act, in doing which, he could not represent his employer, was no less his independent act. The failure of duty to guard the dangerous thing has nothing to do with the liability in either case.

The conclusion that it conclusively appears that the plaintiff in error is not responsible for Currie's death leads to the reversal of the judgments below, and the entry of judgment in its favor.

Reversed and rendered.

**MAYS v. COBB**, District Judge, et al.

(Supreme Court of Texas. Oct. 25, 1906.)

**ELECTIONS—NOMINATION BY CONVENTION—  
CERTIFICATE OF NOMINATION.**

Under Laws 1905, p. 550, § 120, providing that the result of a nominating convention of a district shall be certified by the chairman thereof to the county clerks of the counties composing such district, the certification of the chairman is conclusive, and the propriety of his action cannot be reviewed by the party executive committee for the district, so mandamus will not be awarded in favor of a contestant.

Mandamus, on relation of Richard Mays, against L. B. Cobb, as district judge, and others. Writ denied.

R. S. Neblett, Scott Field, A. J. Harper, and Freeman & Morrison, for relator. W. J. McKie, F. M. Etheridge, and Lewis Carpenter, for respondents.

**GAINES, C. J.** We are of opinion that the writ of mandamus prayed for in this case should be refused.

As we construe section 120 of the act of the Legislature commonly known as the "the Terrell Election Law" (Laws 1905, p. 550), it was the purpose of the Legislature to devolve the duty of determining the nominee of a party for a district office upon the convention called for that purpose, and also to make it the duty of the chairman of that convention to certify the result. It appears from the allegations of the petition and the answer that the chairman of the convention called to make a nomination of a candidate for the office of a representative in Congress for the Sixth Congressional District has given his certificate as required by the section named showing that Rufus Hardy was nominated. This, we think, is conclusive and that the Democratic Executive Committee for the district is without power to review that action. Whether the chairman of the convention acted properly or not it is not for us to decide.

Since we conclude that the relator has shown no right to be declared the nominee of the convention, a writ of mandamus should not be awarded in his favor.

(Court of Criminal Appeals of Texas. Oct. 4, 1906.)

**1. COURTS—SPECIAL TERMS—POWER TO CALL.**

Under Const. art. 5, § 7, providing that the Legislature shall have power under general or special laws, to authorize the holding of special terms of the court, or the holding of more than two terms in any county, the Legislature could authorize the judge to fix the date of these terms.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 207.]

**2. SAME—STATUTES—CONSTRUCTION.**

Acts Twenty-Ninth Legislature (Gen. Laws 1905, p. 116, c. 83, § 1) providing that when advisable, in the opinion of the judge of the district court in which any county may be situated, a special term or terms of the district court therein may be held, but that nothing contained therein shall be held to repeal any part of the provisions of Sayles' Rev. Civ. St. tit. 28, c. 4, except so far as inconsistent therewith, repeals that provision of articles 1113, 1114, which requires that the order of the judge calling the special term should be made at a preceding term of the district court therefor, therefore the judge might in vacation make a valid order for a special term.

**3. SAME.**

Under Acts Twenty-Ninth Legislature (Gen. Laws 1905, p. 116, c. 83, § 1) together with Rev. St. 1895, arts. 1113, 1114, permitting the judge of the district court to call special terms in vacation and providing that nothing therein shall repeal any part of the former law except so far as inconsistent therewith, it was proper for a judge, in making an order in vacation for a special term, to comply with the provisions of the former statute (Rev. St. 1895, art. 1115) providing for the posting of 30 days' notice.

**4. CONSTITUTIONAL LAW—EX POST FACTO  
LAW—REMEDY—SENTENCE.**

Laws Twenty-Ninth Legislature (Gen. Laws 1905, p. 116, c. 83, § 1), together with Rev. St. 1895, arts. 1113, 1114, permitting a judge of the district court to make an order in vacation for a special term at which to sentence one convicted of crime, comes within the rule authorizing remedy and procedure and is not ex post facto as to one whose conviction antedated the passage of the law.

Davidson. P. J., dissenting.

Application by John Boyd for a writ of habeas corpus. Application refused.

L. D. Brown, for applicant. J. E. Yantis, Asst. Atty. Gen., for the State.

**HENDERSON, J.** Relator has presented before the court his application for the writ of habeas corpus, upon the following state of facts: Relator was regularly tried in the district court of Fayette county, on the 17th of December, 1905, on a charge by indictment, of the offense of rape; was convicted, the jury assessing his punishment at death. The case was appealed to the Court of Criminal Appeals, and on the 23d day of May, 1906, said court (94 S. W. 1053), affirmed the judgment of the court below. On June 8th, mandate was issued from said court to the court below, and filed among the papers in

\*Writ of Error granted to Supreme Court of the United States by Presiding Judge Davidson on October 4, 1906.



said cause in the district court on the 9th of June. The term of the district court for Fayette county adjourned on June 2, 1906, and the mandate was filed during vacation. No regular term of said district court could be held until the third Monday in November, 1906. On June 28th, Hon. L. W. Moore, acting as district judge, in vacation made an order calling a special term of said court to convene on the 30th day of July, 1906, at La Grange, Tex., the county seat of Fayette county—the sole purpose of said special term being to pass sentence on relator, John Boyd. The order was spread on the minutes of said court, and notice given of the holding of said special term. Six notices of the holding of said special term were posted in said county. When the day for holding said special term arrived, on objection urged by relator sentence was not passed upon him at that time; but said judge, on July 30, 1906, in vacation made an order fixing Saturday September 1, 1906, as the date for holding a special term. This order is as follows: "La Grange, Texas, July 30, 1906. In vacation. By virtue of the authority of my office, under the Constitution and laws of the state of Texas, I do hereby order a special term of the district court in and for Fayette county, Texas, to be holden beginning September 1st, 1906, at La Grange, Texas, in said county and state, and said special term to continue for one day, and for the purpose of pronouncing sentence upon John Boyd, defendant in case of John Boyd v. The State of Texas (No. 4024) 94 S. W. 1053, who has been duly convicted of the offense of rape and his punishment fixed at death. It is further ordered that this order be entered upon the minutes of said court, and that the district clerk issue the notices as provided by law." This order was copied in the minutes of the district court of Fayette county. The clerk certifies that the same is not a part of the minutes of the special term of the court held on September 1st. The notices, which contained a copy of the order of the judge, were issued by the clerk and posted at six public places in Fayette county; one of which was at the courthouse door, for 30 days prior to the 1st of September. On September 1st, the court was convened, and relator Boyd was brought into court, his counsel being present, and objecting to all proceedings, and sentence was passed on him at that time, ordering the execution of his sentence, being death, on Friday, October 5, 1906. These proceedings were spread on the minutes of the court at said special term. Relator prepared an application for the writ of habeas corpus from said proceedings, and has presented it to this court.

Relator contends, among other things, that said sentence is null and void, because the district judge of said district had no authority in vacation to order a special term of said court. As we understand, he insists that the act of the Twenty-Ninth Legislature (Gen.

Laws 1905, p. 116, c. 83, § 1), does not authorize the district judge out of term time to make an order for a special term of the district court. That said act, in the first place, must be read into articles 1113 et seq., Rev. Civ. St. 1895, and is merely amendatory thereto, not repealing the same, except as inconsistent with its provisions. In the second place, if it is not so considered, it does not of itself furnish any mode by which said judge can act, and, on account of its vagueness, is null and void. This statute was construed by this court in *Ex parte Young*, 95 S. W. 98, 15 Tex. Ct. Rep. 852; and it was there held that said statute authorized the judge of the district court of any county in this state, to convene a special term of his court at any time which may be fixed by him. We think the proposition there announced, in construing said statute, is a sufficient answer to this application. We would observe, however, that the Constitution (article 5, § 7) gives plenary power to the Legislature to authorize the holding of special terms of the district courts. We quote therefrom, as follows: "The Legislature shall have power, by general or special laws, to authorize the holding of special terms of the court, or the holding of more than two terms in any county for the dispatch of business." Of course, the Legislature could authorize the judge to fix the date of these terms.

Did the act of the Twenty-Ninth Legislature repeal that part of the old law (Rev. St. 1895, arts. 1113, 1114) which required said order to be made at a preceding term of the district court? It would seem that one of the purposes of the new statutes was to obviate this, and to authorize the judge in vacation to order a special term of his court. Sections 1 and 2 of the new act in effect re-enacted said above-mentioned sections of the old act, leaving off any reference to an entry of the order during a regular term. Moreover, the language of the new statute, in effect, eliminates the idea that the order must be entered during term time. The judge is authorized, where he deems it advisable, to order a special term, and authorizes him to convene such special term of the court at any time which may be fixed by him. "Where" in this connection, we take it, does not refer to place, but to the time when he may deem it advisable. Of course, he must fix the term of the court before he convenes it. We might state, in passing, as we understand, it was one of the purposes of this new act, if not the main purpose, to expedite the trial and disposition of a certain class of crimes which have become more or less prevalent in this country, and it was intended to authorize the judge, in vacation, to call a special term of the court, and as a new feature of the act, gave him power to impanel the grand jury to indict offenders, and try such cases. It will be seen that one of the main objects of the enactment would

before he could call a special term of his court. It will be observed as to the notices of the holding of the special term, that they were published in accordance with the old law; that is, they were posted for 30 days. If the old act be read into the new statute, as to time of notice, this was in accord herewith. Certainly it was a reasonable time, and relator (who was present) made no objection on the score of time. Of course, it follows, if the judge was authorized to make an order for a special term in vacation, he was not required to spread said order on the minutes of the regular term. Indeed, there was no authority to do this. But the fact that said order was spread on the minutes of the court, though in vacation, while it may not have been required in order to validate said special term, still it would appear to be the best practice. The spreading of the order on the minutes on the convening of the special term, in connection with the proceedings, as was done in this case, would be sufficient.

We agree with counsel for relator that the act of the Twenty-Ninth Legislature does not assume to repeal the provisions of the former act, except as inconsistent therewith; and it occurs to us that the judge who ordered the special term, for the purpose of sentencing relator, followed the procedure indicated in the old law, so far as the same was consistent with the new act on the subject of ordering special terms. We cite in this connection the following authorities which sustain the view we have taken. *Grant v. State*, 62 Ala. 233; *Daughrill v. State*, 118 Ala. 7, 21 South. 378; *Toler v. Com. (Ky.)* 23 S. W. 347; *Friar v. State*, 8 How. (Miss.) 422; 11 Cyc. 730, 732. *Grant's Case*, supra, holds, under an act evidently similar to our own, that the order for a special term may be made by a judge in vacation and need not be entered on the minutes of the court until it convenes, and a recital on its records that the special term was held at the place appointed by law, pursuant to an order made by the presiding judge, after notice given as required by law, sufficiently shows that the special term was called according to law.

Relator further contends that even if the special term was called in accordance with law, the effect of the same was to hasten the execution of his sentence, and would be as to him an *ex post facto* law. We believe that such an act as this, comes within the rule authorizing remedy and procedure, and is not *ex post facto*. It occurs to us, that if the Legislature could authorize the judge to call a special term under our Constitution, which we have seen is the case, the judge could call this special term so as to hasten the relator's execution, in the same way that the Legislature might change the terms of the district court in his county after the com-

regulating the mode of procedure only in the prosecution of antecedent crimes are not *ex post facto*, and that it is within the power of the Legislature to change the form and method of procedure in any manner which, in relation to the offense or its consequences, does not alter the situation of the accused to his disadvantage. \* \* \* A statute which abolishes an existing court, or creates a new court, or confers an additional jurisdiction on a court, does not fall under the constitutional ban against *ex post facto* laws. A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment." "A statute passed after a criminal has been convicted and sentenced to capital punishment, fixing the time and place for executions and restricting the number of witnesses, is constitutional, though retrospective in its application." See *Ency. of Law*, vol. 12, pp. 533-4 (2d Ed.).

For the reasons stated, the application for the writ of habeas corpus is refused.

BROOKS, J. I concur, but do not think 30 days' notice is required.

DAVIDSON, P. J., dissents.

DAVIDSON, P. J. (dissenting). I respectfully enter my nonconcurrence to the disposition of this case by my Brethren. Some of the reasons upon which I predicate this dissent are to be found in *Ex parte Tom Young*, 95 S. W. 98, 15 Tex. Ct. Rep. 852. The phase of the law discussed in that opinion in regard to the special act applicable alone to the counties of Williamson and Travis does not arise in this case, and therefore the reasons set forth in that dissent have no application here, but are pretermitted. The act of the Twenty-Ninth Legislature, by express terms repeals such provisions of the prior statutes, found in the Rev. Civ. St. 1895, as are in conflict. Under the prior law the order for the special term was required to be entered during a regular term by the judge, the date for such special term to be fixed "at a date not less than 30 days after the adjournment of the regular term" (Rev. Civ. St. 1895, art. 1114) and limits specifically the authority of the court at such special term to the "transaction and disposition of the accumulated business undisposed of." Article 1113. Articles 1115 and 1116 provide for notices and manner of service in regard to the undisposed of cases to be tried at the special term. Article 1114. By the terms of article 1117 no grand jury could be impaneled under the prior law. Under the act of the Twenty-Ninth Legisla-

ture, p. 116, c. 83, special provision was made in the discretion of the judge for the calling and impaneling of the grand jury. Under the act of the Twenty-Ninth Legislature, the judge may call a special term when he deems it advisable. This then is in direct conflict with that provision of the old law which requires the order to be entered at the regular term fixing the date for the special term at not less than 30 days, and which is in direct conflict with those provisions of the law with reference to notices and the manner of giving those notices. Under the new act, no provision is made for notices, or of any character of service upon parties litigant whose cases are to be disposed of at the special term. There is no intimation in the new law as to how parties to the undisposed of business are to know their causes are to be tried. The whole matter is left to the discretion of the trial judge to call a court when he deems it advisable. So far as the terms of the latter act are concerned, notices are not required, and service upon the parties litigant, notifying them that their cases are to be tried, is not even intimated. The whole matter is arbitrarily left with the judge as to when and where or how he shall call the court for the special term. The Constitution provides for regular and special terms of the district court, and authorizes the Legislature to enact suitable laws for the holding of such court. By the express terms of the Constitution, this is legislative duty; and it requires at their hands appropriate legislation to put into operation both the regular and special terms of court. The Legislature cannot delegate its authority, under any provision of our Constitution of which I am aware, to another co-ordinate branch of the government. It certainly has no right to delegate its legislative power and function to a judge and make it discretionary with him to provide rules and regulations for the holding of courts and the manner of convening them, and the notices that are requisite in vacation. In other words, the Legislature cannot divest itself of its constitutional authority, and invest a co-ordinate branch of the government with its legislative duty. Ours is supposed to be a country and a government of law, governed by law and not by the discretionary whims of its officers. It has always been understood in America and among our race that, before parties litigant could be called to trial, where their lives, liberties, or property are involved, it should be done after due notice and statement of the cause of action, and of notice of the time and place where the trial should occur, and the court before whom the right should be had. This has always been fixed and determined by law.

Now, we have before us a proposition, sustained by decision, that the judge can call a special term of court at his discretion arbitrarily and without provision for notice as to time or place of trial, and all of this

to occur in vacation. He may call a special term when and where he pleases, and arbitrarily give or omit notices to the parties litigant of the time or place; and dispose of the life, liberty, and property of the citizenship, with or without notice. It would take no reasoning, it occurs to me, to understand that, where the Constitution authorizes a court and special terms of courts, it means a definite time and place, and that all parties who have business before that court should have ample time for preparation to try their matters of litigation pending before that court, and this independent of the whims or caprices or arbitrary discretion of the presiding judge. When the Constitution speaks of courts, it means courts; and all of the paraphernalia of courts as has been understood in the history of the Anglo-Saxon race, and especially under the constitutional forms of government in force in the American Union. The people of this country do not hold their lives, liberty and property subject to the arbitrary discretion of the officers of the government, but in accordance with the law of the land. The upholding of this arbitrary discretion of the judge is not "due process of law." The Legislature cannot, if it would, and ought not, if it could, delegate this legislative function and power to any branch of the judiciary, especially to the trial court. Our law holds the life, liberty, and property of the citizenship of this country above arbitrary discretion.

In regard to the other questions in this case, I gave some expression to my view in the dissent in the Tom Young Case, *supra*. I wish to say further and emphasize what I said in my dissent in the Tom Young Case, that this character of case is not an "undisposed of" case, pending at the time of the adjournment of the regular term of the district court. The case was not pending there. The court had lost its jurisdiction by the appeal to this court. I desire to state further and emphasize, that this is not a case for trial within the contemplation of either the old or new act of the Legislature. One other thought, that our Code of Criminal Procedure provides that, where in a death penalty, the case has been decided adversely to appellant and the judgment against him affirmed in the appellate court, sentence shall be pronounced against him at the next term of the court. This statute has not been amended or changed. It means a regular term of the court. Both the old and new statutes under discussion provide alone for the trial of undisposed of cases, with the addition under the new statute that authority was given the district judge to impanel a grand jury and try the new cases under indictments presented by that grand jury. This emphasizes the proposition that nothing but the trial of undisposed of cases is meant both by the new and old law, except as provided, especially in regard to new indictments.

I have not deemed it necessary to go into

was inhibited by our statute on the subject?

Appellant claims that he had a right under the circumstances to take prosecutor's fence loose from his, while prosecutor claims that, although it be conceded that his fence was joined onto appellant's, appellant could not take it loose without notifying him under the statute. Rev. St. 1895, art. 2501. We do not believe said article applies in this case. It appears to be conceded that the west line of the fence between appellant and prosecutor belonged to appellant, although there is testimony from prosecutor that the common vendor had told him that it was on his land, and that he claimed the land, and he told appellant that the fence was on his land. However, we take it that appellant was in possession and was the actual owner of this fence. Did appellant join his fence? Evidently, according to the proof, which is not gainsaid, this fence constituted a part of prosecutor's inclosure, for without being utilized as such he had no cow lot, but would only have had three sides of such a lot. The effect of placing his fence was to use appellant's fence as the fourth side of his inclosure. He testified himself that he placed his post close to appellant's post, and that the poles of his fence protruded through the line fence about a foot. We do not believe that he had any right to utilize appellant's fence without his consent. Appellant was certainly authorized to remove his fence so as to open the inclosure; but, if he had moved it back, he would have had to move more than a foot, because prosecutor had protruded his posts into his inclosure that distance. We do not believe the action of appellant, under the circumstances, rendered him liable to a prosecution under article 794 for injuring the fence of prosecutor. He removed the fence off of his own inclosure and disjoined the fence in that manner from his own, which the prosecutor had no right to place there against his consent. While *Klein v. State* (Tex. Cr. App.) 39 S. W. 369, is not exactly in point, it has some bearing on this case. We hold that, under the circumstances in evidence, appellant's requested special instruction No. 2 should have been given, to the effect that, when he found that prosecutor had committed a trespass on him by joining his fence to appellant's, appellant had the right to remove said fence by any means short of a breach of the peace.

The judgment is reversed, and the cause remanded.

#### POTTS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 17, 1906.)

#### INTOXICATING LIQUORS—SALES AND GIFTS TO MINOR.

Defendant, at the request of a minor, made out an order for one dozen bottles of beer, which was sent to another city, from whence the beer

was shipped C. O. D. to the minor. He paid the charges, placed the beer in defendant's cold storage, paid defendant \$1 for the storage, and, when he wanted beer, went to the storage and got it. *Held*, that there was neither a sale nor gift by defendant.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 159-163.]

Appeal from Camp County Court; J. D. Bass, Judge.

Charles Potts was convicted of selling liquor to a minor, and he appeals. Reversed and remanded.

W. W. Ballew and John W. Hooper, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of making a sale of intoxicating liquor to a minor, and his punishment fixed at a fine of \$50; hence this appeal.

An examination of the statement of facts discloses that there was neither a sale nor a gift of the intoxicating liquor to the minor. The evidence shows that appellant, at the request of the prosecutor (a minor), made out an order for a dozen bottles of lager beer; the particular brand being Budweiser. This order was sent to Texarkana, in Arkansas. The beer was shipped C. O. D. by express to prosecutor, who went to the express office, paid the express charges thereon, and hired a negro man to take the case of beer to defendant's cold storage. Defendant kept this beer on ice about 10 days, for which prosecutor paid him \$1. When prosecutor wanted beer, he went there, got it, and drank it. Was this a sale to the minor by appellant of the beer in question? It was not. All that he did was to make out a C. O. D. order, send it to Texarkana, Ark., and the sale was made there. *Keller v. State*, 87 S. W. 689, 13 Tex. Ct. Rep. 264, 1 L. R. A. (N. S.) 489, and authorities there cited. Was it a gift to prosecutor by appellant? Under the proof here made, the beer sent by prosecutor to appellant's cold storage was already prosecutor's beer. Because appellant kept it for him in his cold storage, and charged for keeping it, did not constitute this a gift of the beer by appellant to the prosecutor.

The judgment is reversed, and the cause remanded.

#### WASHINGTON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 17, 1906.)

#### HOMICIDE—QUESTION FOR JURY—DEGREE OF OFFENSE.

Deceased having refused to continue to be defendant's paramour, he sought her out, and demanded that she talk to him. She refused to, and he followed her, threatening to kill her if she did not talk to him, whereupon she said, "You son of a bitch; go away from me." Defendant then shot her several times, and it appeared that the act was deliberately designed. *Held*, that it was proper to submit the issue of

ments of error, and the only question presented in the motion for new trial relates to the sufficiency of the evidence. Without the evidence before us, this question will not be revised. The judgment is affirmed.

### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 17, 1906.)

#### WEAPONS—CARRYING WEAPONS UNLAWFULLY—DEFENSES.

In a prosecution for unlawfully carrying a pistol, it was no defense that the pistol was broken, in the absence of proof that it was broken so that it could not be fired.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Weapons, § 7.]

Appeal from Panola County Court; J. G. Woolworth, Judge.

Perry Smith was convicted of carrying a pistol, and he appeals. Affirmed.

J. E. Yantis, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of carrying a pistol, and fined \$100.

The only assignment of error complains of the insufficiency of the evidence. The state's evidence makes out a case. Appellant claims that the pistol was broken. However, there is no evidence in the record that it was broken so that it could not be fired. Furthermore, the conflict in the evidence was settled by the jury adversely to appellant, and we do not feel authorized to disturb their finding.

The judgment is affirmed.

### STEVENS v. CAMERON.

(Court of Civil Appeals of Texas. Oct. 10, 1906. Rehearing Denied Oct. 31, 1906.)

#### 1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT—QUALIFICATIONS—WIDOWS—NONRESIDENCE.

In view of Sayles' Ann. Civ. St. 1897, art. 2026, forbidding the removal of administrators from the state for a period of three months without the permission of the court, neither a nonresident widow nor son can demand an appointment as administrator, under article 1914, giving such persons in general terms the right to letters in preference to creditors.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 65.]

#### 2. SAME—RENUNCIATION AND APPOINTMENT.

A widow and son, each of whom is disqualified by nonresidence to act as administrator, cannot renounce such claimed right in favor of a third person, under Sayles' Ann. Civ. St. 1897, art. 1916, authorizing a surviving spouse or heir to "renounce" his right to the administration in favor of some other qualified person.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 57-59.]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Applications by C. F. Stevens and B. F. Cameron for appointment as administrator of J. T. Buselle, deceased. From a judg-

ment appointing Cameron, Stevens appeals. Affirmed.

Stevens & Pickett and J. F. Dabney, for appellant. Marshall & Marshall and H. E. Marshall, for appellee.

JAMES, C. J. The following is a statement of the matter of controversy: Appellant and appellee each applied for letters of administration upon the estate of J. T. Buselle, deceased. Both were qualified for the office. Cameron applied on behalf of creditors, and Stevens by virtue of a power of attorney executed by the widow and son of the deceased, who were both residents of Polk county, Iowa, in which instrument they renounced their right to administer. Cameron was appointed, and the question involved in this appeal is whether or not it was the duty of the court, under our statutes, to appoint Stevens. It is our opinion that, although we have no enactment in express terms that a person must reside in the state in order to legally qualify him to be appointed an administrator, such is the only intent that is consistent with the provisions and policy of our statutes relating to the estates of deceased persons. They contemplate that such officers shall reside and remain in the state, at least in cases where they are acting under the control of the probate court.

Article 2026, Sayles' Ann. Civ. St. 1897, provides that they may be removed when they absent themselves from the state for a period of three months at one time without permission of the court. This clearly indicates that it was intended that they were to be and remain within the state, where they would be personally subject to the control of the court and in ready reach of its process. It follows that neither the widow nor son, they being nonresidents of the state, had the right to demand the appointment for themselves. Article 1914, Sayles' Ann. Civ. St. 1897, in general terms gives the widow and also the next of kin of the decedent the right to letters in preference to a creditor. Article 1916 enacts: "The surviving husband or wife, or if there be no such survivor the heirs or any one of the heirs of the deceased to the exclusion of any person not equally entitled may in open court, or by power of attorney duly authenticated and filed with the clerk of the county court having jurisdiction of the estate renounce his right to the administration in favor of some other qualified person and thereupon the court may grant letters to such other person." The above article presupposes the existence in the person so appointing of a right in himself to ask for letters; for it plainly refers to the act as the renunciation of the right. It was not intended to apply in favor of persons not themselves entitled to ask for letters. The wording of the statute shows the intention to authorize a substitution of one to act in place

\$50, against the Missouri, Kansas & Texas Railway Company of Texas for \$316.66%, and against the Missouri, Kansas & Texas Railway Company for \$633.33%. The latter two companies alone appeal.

Complaint is first made of the court's charge upon the measure of damages. The charge is in the following words: "The measure of damages in this case is the difference between the market value of these cattle in Kansas City in the condition and at the time in which they should have arrived there, the difference in and their market value at the time and in the condition in which they should have arrived there, transported with ordinary diligence." That this charge fails to give the proper measure of damages and is unintelligible is conceded. Appellees insist, however, upon the authority of *Cook v. Wootters*, 42 Tex. 296, that, inasmuch as no exception was taken to the charge and no counter instruction asked on behalf of appellants, the error will not be sufficient ground for the reversal of the judgment "unless it clearly appeared that the jury were misled by the charge given and complained of." The language to this effect used in the case of *Cook v. Wootters* was not necessary to the decision and evidently not intended as an announcement of the general rule, or, if so, is not supported by a single case therein cited in support of the decision. On the contrary, we think the cases cited support the rule, which we understand to be now well established, that the duty of the appellate court is to reverse for error plainly appearing, unless it can be said from a consideration of the entire record that injury to the complaining party did not result. A careful consideration of the record in the light of this rule impels the conclusion that the judgment should be set aside.

The evidence shows that the cattle were delivered in the Ft. Worth Stockyards at 11:30 a. m. on Tuesday, December 14, 1904, and were not shipped out from this point on the Missouri, Kansas & Texas Railway of Texas until about 2 o'clock p. m. of the next day. This delay constituted one of the principal delays of the shipment after leaving Colorado. The cattle were fed and watered at Ft. Worth. The trainmen testify to careful handling, and E. B. Carver, who sold the cattle in Kansas City for appellees, testifies that they arrived in "fair condition." Appellees' evidence on the issue of damages is that of expert witnesses only, and it also appears that Sam McLaughlin, the sole agent of the appellees in charge of the cattle in question from Ft. Worth to Kansas City, was not called as a witness. J. M. Williams, one of the appellees, and whose testimony is perhaps most favorable to them, testified as an expert that the unnatural shrinkage of the cattle, because of the delays shown, "over and above what they would have

shrunk had they been transported with reasonable care, diligence, and dispatch, was from 40 to 50 pounds per head, and that this unnatural shrinkage would cause them to sell from 15 to 25 cents per hundredweight less." He also testified that "the market at Kansas City on Friday, the day the cattle were sold, was from 15 to 20 cents per hundredweight less than it was on Thursday, the day they should have been sold." Damages estimated upon this testimony as a basis will doubtless be found to equal the verdict, as appellees urge. Appellants, however, proved by the deposition of J. Conway that he weighed the 333 cattle at Ft. Worth immediately preceding their delivery to the stockyards; that their net weight was 240,100 pounds, or an average of 721 pounds each. Appellants also proved by the deposition of E. B. Carver that he weighed 331 head of appellees' cattle at Kansas City after they were fed and watered at that point; that they then weighed 242,015 pounds, or an average of 731 pounds. W. Lake Henry testified that he also weighed 329 head of the cattle at Kansas City; and that the weight was 239,440 pounds, or an average of 728 pounds. Appellee Williams testified that the reasonable "fill" on cattle such as those involved in this controversy at Ft. Worth would be from 15 to 20 pounds. He also testified that a reasonable and natural shrinkage on cattle transported from Ft. Worth to Kansas City was "from no pounds to 40 pounds." If this testimony as to actual weights be accepted, and it is uncontradicted, appellees' cattle in the transportation from Ft. Worth to Kansas City could not have depreciated in weight, disregarding all natural shrinkage, more than 10 pounds. If the damages be estimated upon the basis of a 10-pound loss upon each animal shipped from Ft. Worth to Kansas City, and upon a depreciated selling price of 25 cents per hundredweight arising from this cause, and of a decline in the market of 15 cents per hundredweight, as testified by the witness Williams, the verdict and judgment are largely excessive. Appellees insist that the jury had the right to disregard the testimony of the witness Conway. He testified, however, by deposition. He is not shown to be an employé of either of the appellant companies, and no reason appears of record why his testimony should be disregarded. Neither his testimony nor that of the witnesses Carver and Henry is contradicted except by the testimony of experts who did not accompany the cattle beyond Ft. Worth, to the effect that, in their opinion, delays of the hours shown and embodied in the hypothetical questions would result in depreciated weights as stated by them. Mere opinions, even of experts, are usually attended with some degree of uncertainty, and the evidence in this case as a whole is such as to make it doubtful if the

jury reached the right result. It was at least important to the rights of the appellants that the court should not improperly instruct the jury upon the measure of damages. Rev. St. 1895, art. 1317, requires the court to charge the jury "the law arising on the facts," and we feel unable to say that the charge given was not misleading and prejudicial.

Several other questions should perhaps be noticed. The court, over the objection that it was a privileged communication, compelled appellants' local counsel to give in testimony the contents of a letter received by him from appellants' general attorney relating to an issue arising on the trial. Under the circumstances shown, we fail to see why the contents of the letter were not privileged within the meaning of the general rule on the subject. The general attorney, it is true, was not the corporation, but a corporation can act only by its officers, and he was the officer having general supervision and control of all litigation, including this; he employed the counsel testifying, and it would seem that, in relation to the matter under consideration, the general attorney would be the alter ego of the corporation, and that hence the communications between him and local counsel would be in the nature of privileged communications. 1 Green. Ev. § 237.

We think, also, that the telegram and letter of appellees' agent at Kansas City incompetent evidence of market values at the times stated therein. See *W. U. Tel. Co. v. Bradford*, 91 S. W. 818, 14 Tex. Ct. Rep. 1006.

No error appears in the action of the court in overruling appellants' motion to quash the depositions of W. Lake Henry and E. B. Carver. Appellants had full five days' notice of the time and place of taking the depositions. The fact that the notary who took them did not do so at the time he stated in the notice given to appellants' counsel that they would be taken, seems wholly immaterial in view of the further fact that one of appellants' agents attended before the notary on the day specified in the notice, and no objection appears to have been made to a postponement.

It appears that the transcript contains pleas of privilege and certain bills of exception not made the basis of any assignment of error, and appellees pray that the costs thereof be taxed against appellants. We think the motion therefor should be granted. The rules provide for the elimination of all such useless matter, and we think the party so incumbering the record of a cause on appeal should at least be required to pay the costs relating to the same. Appellants are therefore taxed with the cost of the motion of the redundant matter specified therein.

Judgment reversed and cause remanded.

**TEXAS & P. RY. CO. et al. v. BAILEY.**  
(Court of Civil Appeals of Texas. June 30, 1906.)

**1. TRIAL—INSTRUCTIONS — WEIGHT OF EVIDENCE.**

In an action for injuries to cattle by delay in shipment, there was an issue as to which connecting carrier was liable for a delay after the cattle reached Ft. Worth, and prior to their being carried on by the connecting carrier, it being claimed that the delivery to the Texas & Pacific Railway Company should have been at the yards in North Ft. Worth, which were two or three miles from the Ft. Worth stockyards, at which the Texas & Pacific Railway Company contended actual delivery was made to the connecting carrier. The court charged that it was the duty of the Texas & Pacific Railway Company to deliver the cattle to the connecting carrier at North Ft. Worth, and refused to charge that, if the jury found from the evidence that the connecting carrier assumed control of the cattle at the stockyards, then the Texas & Pacific Railway Company could not be liable for delays occurring after the connecting carrier assumed such control. *Held*, that the instruction given withdrew from the jury the right to determine the question where delivery to the connecting carrier should have been made, and was therefore on the weight of the evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 439-466.]

**2. CARRIERS—CONNECTING CARRIERS — INJURIES TO CATTLE—DELAY—INSTRUCTIONS.**

An instruction that, if plaintiff's cattle were injured en route to market, but the jury were unable to determine from the evidence which, if either, of the connecting carriers caused the injury, the last carrier handling the cattle was liable therefor was erroneous.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 950.]

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Action by A. A. Bailey against the Texas & Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Ed. W. Smith, for appellants. Whitaker & Gibbs, for appellee.

**SPEER, J.** A. A. Bailey sued the Texas & Pacific Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company for damages to two shipments of cattle from Colorado, Tex.; the first shipment, being of cows and bulls, was made to National Stockyards, Ill., and the second, being two cars of calves, was made to Kansas City. Plaintiff recovered judgment against the Texas & Pacific Railway Company for \$100 with 6 per cent. interest from December 16, 1904, the date of the sale of the calves in market, and against the Missouri, Kansas & Texas Railway Company of Texas for \$125 at 6 per cent. interest from the same date, and against the Missouri, Kansas & Texas Railway Company for \$125 at 6 per cent. interest from November 2, 1904. All of the defendants have appealed.

Amongst other things there was an issue

on the trial as to which road was liable for a delay after the cattle reached Ft. Worth, and prior to the time they were carried out by the connecting carrier, and in this connection the trial court charged the jury as follows: "Gentlemen of the jury, you are instructed that it was the duty of the Texas & Pacific Railway Company to deliver plaintiff's cattle to the Missouri, Kansas & Texas Railway Company of Texas at North Ft. Worth, Tex.," and refused the Texas & Pacific Railway Company's requested charge to the effect that, if the jury found from the evidence that the defendant Missouri, Kansas & Texas Railway Company of Texas assumed control of appellee's cattle at Ft. Worth Stockyards, then the Texas & Pacific Railway Company would not be liable for any delays occurring after the Missouri, Kansas & Texas Railway Company of Texas had assumed control of the cattle. The charge given, in view of the evidence in the record, is such as to indicate that the court was of the opinion that the delivery by the Texas & Pacific Railway Company should have been made at yards in North Ft. Worth, which are shown to be some two or three miles from the Ft. Worth Stockyards, at which latter place the Texas & Pacific contends actual delivery was made to its connecting carrier. This charge, therefore, was on the weight of the evidence, inasmuch as it took from the jury the right to determine the question of where the Texas & Pacific Railway Company should have made delivery to the Missouri, Kansas & Texas Railway Company of Texas. The special charge could with propriety have been given, for, as stated by us in *Tex. & Pac. Ry. Co. v. Scoggin & Brown*, 90 S. W. 521, 14 Tex. Ct. Rep. 297, if the Missouri, Kansas & Texas Railway Company of Texas assumed control of appellee's cattle at Ft. Worth Stockyards, and agreed to ship them out from that place, then such necessarily would operate as a delivery to it by the Texas & Pacific Railway Company.

The court's charge on the measure of damages is open to the same objection as that in the case of the *M., K. & T. Ry. Co. of Tex. et al. v. Williams & Scoggin* (this day decided by us), 96 S. W. 1087.

The court also erred in giving the following special charge requested by the Texas & Pacific Railway Company: "If you find from the evidence that any of plaintiff's cattle in either or both shipments were injured en route to market, but are unable to determine from the evidence which, if either, of the carriers caused such injuries, then you are charged that, under the law, the last carrier handling said cattle is liable for such injuries, if any." This charge, under a similar state of evidence, was condemned by us in the case of the *Texas &*

*Pacific Railway Company v. Scoggin & Brown*, supra. That case had not been decided, however, at the time the present case was tried.

We think appellee's pleadings were sufficient, certainly in the absence of a special exception, to admit proof concerning a decline in the market from Tuesday, December 13th, to Friday, December 16th, on which latter day the shipment of calves was sold.

The question of excessiveness of the verdict can hardly present itself on another trial as it is presented in this, and, therefore, need not be discussed.

For the errors indicated, the judgment is reversed, and the cause remanded.

### HOLLEY v. DUKE.

(Court of Civil Appeals of Texas, June 23, 1906.)

#### APPEAL—FINAL JUDGMENT.

The judgment for plaintiff against defendant in an action accompanied by attachment, in which defendant reconvened for damages not only against plaintiff, but asked to have the sureties on the attachment bond cited, and prayed for judgment against them also on the bond, not having disposed of the sureties, who answered, is not such a final judgment as will support an appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 484-493.]

Appeal from Terry County Court; W. N. Copeland, Judge.

Action by C. W. Duke against Tom Holley. From an adverse judgment, defendant appeals. Dismissed.

W. R. Spencer, for appellant. W. T. McPherson, for appellee.

SPEER, J. We have no jurisdiction to determine the merits of the controversy presented on this appeal, since there was no final judgment rendered in the cause in the county court. The suit was instituted by appellee against appellant on a stated account, and contemporaneous with the institution of the suit an attachment was sued out and levied upon property alleged to belong to appellant. Appellant reconvened for damages not only against appellee, but also asked to have the sureties on appellee's attachment bond cited, and prayed for judgment against them also on such bond. The sureties answered, but the judgment nowhere disposes of these parties. Until the judgment does dispose of all the issues and all the parties, it is not such final judgment as will support an appeal to this court. *Stewart v. Leonoir* (Tex. Civ. App.) 72 S. W. 619; *Riddle v. Bearden*, 80 S. W. 1061, 10 Tex. Ct. Rep. 346, and authorities cited in these cases.

Appeal dismissed.



**STEWART et al. v. JACOB SACHS & CO.**  
(Court of Civil Appeals of Texas. June 23, 1906.)

**1. SALES—ACCEPTANCE OF GOODS—RECOVERY OF MARKET VALUE.**

Where it was undisputed that defendants actually received and appropriated merchandise shipped to them under a contract to pay a specified price, they were bound to pay the reasonable market value thereof, irrespective of the invalidity of the contract or the fact that the goods were of an inferior grade.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 460.]

**2. TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

Where it was conceded that goods sued for had some value in the market, an instruction assuming such fact was not objectionable as a charge on the weight of the evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 432, 433.]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by Jacob Sachs & Co. against W. F. Stewart and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. A. Hauger, for appellants. W. B. Pad-dock, for appellees.

**CONNER, C. J.** This is an appeal from a judgment in favor of defendants in error upon an account for certain whiskies, wines, cigars, etc., sold to the firm of A. B. Castleman & Co., showing a balance of \$768 due thereon.

The only defenses necessary to notice were that the order or contract for the goods was made on Sunday, and that the articles furnished were inferior, adulterated, etc. It is urged that the court erred in his charge in so far as the jury were thereby authorized to find for plaintiffs below the market value of the merchandise in question, on the ground that the suit was upon an express contract for a stipulated price. While it is true that the petition alleged that defendants agreed to pay the prices stated in the itemized account sued upon, it was also alleged, in substance, that said prices were identical with the reasonable market value of the articles specified. Besides, the issue of reasonable or market value was raised by the evidence and defensive pleading. It is undisputed that said firm actually received and appropriated the merchandise shipped in answer to the order made. This being true, plaintiffs in error were liable for the reasonable market value thereof, irrespective of the asserted invalidity of the order, and regardless of the fact that the goods may have been of inferior grade. Indeed, it was only in submitting the defenses named that the charge was given; the jury being otherwise charged peremptorily to find for plaintiffs below the amount shown to be due by the account, unless they should find for defendants under said defensive issues.

The foregoing conclusions, we think, sufficiently dispose of the remaining assign-

ments, unless perhaps we should notice the objection that the charge is upon the weight of the evidence in that it assumes that the property mentioned "had a market value." But, if it be conceded that the charge is subject to this criticism, there can be nothing in it, inasmuch as it seems certain that the property had at least some value in the market.

Finding no error in the proceedings of which plaintiffs in error can complain, and that the pleadings and evidence support the judgment, it will be affirmed.

**CHOCTAW, O. & T. RY. CO. v. McLAUGHLIN.\***

(Court of Civil Appeals of Texas. June 23, 1906. Rehearing Denied Oct. 13, 1906.)

**1. MASTER AND SERVANT—INJURIES TO SERVANT—METHODS OF WORK—RULES—SUFFICIENCY—QUESTION FOR JURY.**

An employé constructing a railroad track was injured by a construction train being backed on him. The evidence showed that his position while bolting the rails was within two or three feet of the rear end of the train, and that the noise attending the work was such as to render it difficult to hear the whistles of the engine. A code of signals had been established requiring the engineer to give blasts of the whistle to warn the workmen in the rear of the train. *Held*, that the question whether reasonable care did not require the further precaution of stationing a brakeman near the rear of the train as additional protection was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1032, 1033.]

**2. TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

Where, in an action for injuries to an employé, the grounds of negligence were the failure of the engineer to warn the employé of the backing of the train, and the failure to keep a brakeman stationed near the rear end of the train to warn the employé, and there was nothing in the evidence to suggest any other grounds of recovery, an instruction that if the person in charge of the engine at the time of the injury was guilty of negligence in operating the engine, followed by a distinct disjunctive statement of the two grounds of negligence alleged, is not misleading, though connected by the word "or," used in the sense of "that is."

**3. SAME.**

Where, in an action for injuries to an employé, the court defined proximate cause and used in its instructions the word "proximate" several times, the use of the word "approximately" for "proximately" in a charge relating to proximate cause was not erroneous.

**4. MASTER AND SERVANT—SERVANT OF SUBCONTRACTOR—INJURIES—NEGLIGENCE OF SERVANT OF PRINCIPAL CONTRACTOR.**

A railway company employed a construction company to build a line of road under the chief engineer of the railway company. The railway company furnished a construction train. The wages of the train crew were paid by the construction company, but they were employed and subject to discharge by the superintendent of the railway company, and received orders from him. The train crew, while backing the train, injured an employé of a subcontractor of the construction company. *Held* that, as the injury was received from the manner in which

\*Writ of error denied by Supreme Court.

ces in which appellee was placed seem to have called for more than ordinary precautions for his safety; his position while bolting the rails being within two or three feet of the rear end of the construction train, and the noise attending the work in which he and others were engaged being such as to render it difficult to distinctly and readily hear and recognize even the whistle of an engine when at any considerable distance from him. We note, also, that two similar grounds of recovery were submitted, seemingly with approval, in the case cited and so much relied on.

The following clause of the charge is also objected to: "And if you further believe from the evidence that the person or persons in charge of said engine and construction train at the time of such injury was guilty of negligence in operating said engine or train, made up as it was and in the manner you believe the same was handled at the time of the injury." It must be conceded that the charge would have been in better form if this clause had been omitted; but as only two grounds of recovery were alleged, and as there was nothing in the evidence to suggest any other ground of recovery, and as this clause, containing only a general statement, was followed by a distinct, disjunctive statement of these two grounds of recovery, we have concluded that it would be unreasonable to suppose that the jury were in any way misled by the clause objected to. It was a mere introductory statement, and the word "or" following it must have been used in the sense of "that is."

The use of the word "approximately" for "proximately" in the last clause of the charge above quoted is criticised, and the definition of proximate cause elsewhere found in the charge is also criticised; but this definition we approve as being substantially correct, and inasmuch as several times and everywhere else in the charge "proximate," instead of "approximate," was used, we think this mere lapsus calami could not have done any harm.

The most important, and at the same time most troublesome, issue in the case, is raised by the assignment complaining of the following charge: "Third. Before you can find for the plaintiff under the above paragraph of this charge, you must find, either that the construction train behind which plaintiff was working was under the control and direction of defendant, through its agents or servants, employed by the defendant company and under the control of said defendant company, or that the person or company in whose employ they were, was the agent of, or under the control of, or identical with, the defendant company in point of fact. Should you find that the person or persons in charge of said construction train were the employees of a separate and distinct corporation or person not identical with, agents of, nor un-

der the control of, defendant, the Choctaw, Oklahoma & Texas Railroad Company, but was an entirely separate and independent corporation or person, acting for itself independently, then your verdict will be for the defendant." The following is the proposition, and the only proposition, submitted under the assignment complaining of this charge: "The evidence is undisputed that the construction train was not under the control and direction of the defendant at the time of the accident, and is undisputed that the company employing the persons operating the construction train at the time of the accident was not the agent of, or under the control of, or identical with, the defendant company."

The written contract between the construction company and the railroad company, after reciting that the railroad company "had secured from the state of Texas a charter empowering it to build a new line of railway" between Amarillo and New Mexico, and that the construction company was desirous of performing all the work and furnishing all the material for the construction of this line, obligated the construction company, "under the direction and subject to the approval of the chief engineer of the railway company," to locate the railway, provide the right of way, construct the railroad, including section houses, stations, machine shops, et cetera, and equip the same with rolling stock and motive power, all at its own expense, and obligated the railway company to allow the use of its name in securing the right of way and to issue and deliver to the construction company, in consideration of the full performance of its covenants, all the first mortgage bonds and certificates of stock the railway company would be authorized by the Railroad Commission of Texas to issue, and to assign and deliver to the construction company all subsidies received for the construction of the railroad. The construction train used in laying the track, the backing of which without giving the requisite signal caused the injury, was the property of the Choctaw, Oklahoma & Gulf Railway Company, but seems to have been furnished by appellant through its superintendent; and, while the wages of the crew furnished with this train to operate it seem to have been paid by the construction company, there was evidence tending to prove that these trainmen received orders from, and had been employed and were dischargeable by, the superintendent of appellant, the Choctaw, Oklahoma, & Texas Railway Company, which the circumstances indicated belonged to the family of railroad companies designated the "Rock Island System," although this was denied by the president of the construction company, who was also vice president of the Chicago, Rock Island & Pacific Railway Company, the parent company of this family or system. It is claimed, however, and there was testimony to that effect, that the construction company

rari. A probate order may be brought before the district court either by appeal, at the instance of any person who may consider himself aggrieved by it, as provided in article 2255 of the Revised Statutes of 1895, or by certiorari, at the instance of any person interested in the estate, as provided in article 332 of the Revised Statutes of 1895, or possibly by both methods; but, when the matter has once been tried de novo and disposed of in either proceeding, the litigation in that court is at an end. Especially is this the case in a proceeding to set aside a homestead, since it is a proceeding in rem, which answers the contention of appellant that the minors were not parties to the appeal taken by the administrator and therefore not bound by the decree rendered therein. Any other construction of the articles of the statute above cited would lead to endless litigation. It could not have been the purpose of the lawmakers, in providing for the administration of estates of deceased persons, to allow any person considering himself aggrieved by an order of the probate court to have a trial de novo on appeal, and at the same time allow every other person interested in the estate to have the same matter again tried de novo on writ of certiorari. The error of the court in proceeding to try the issue again, notwithstanding the judgment previously rendered on appeal, which was urged in bar of the proceeding, was not one, however, of which appellant can be heard to complain; but inasmuch as the court undertook by this judgment to deprive the surviving widow of a part of the annual income of the homestead, to that extent altering the original judgment, of which complaint is made by cross-assignments, we have concluded to reverse the entire judgment and dismiss the certiorari proceeding.

Reversed and dismissed.

#### TEXAS & P. RY. CO. v. BRANNON.\*

(Court of Civil Appeals of Texas. June 23, 1906. Rehearing Denied Oct. 13, 1906.)

##### 1. RAILROADS—PERSONS ON TRACK—DISCOVERED PERIL.

Where servants of a railroad company operating a train discovered the presence of decedent lying on the track, either asleep or drunk, or both, when the train was over 1,800 feet away, within which space defendant's servants could have stopped the train before striking decedent by the exercise of ordinary care, the evidence raised the issue of discovered peril, and was sufficient to sustain a verdict for plaintiff in an action for decedent's wrongful death.

##### 2. TRIAL—REQUEST TO CHARGE—REFUSAL.

Where, in an action for death of decedent while lying on a railroad track, the court's charge fairly presented the issue of discovered

peril, is not necessarily conclusive at all upon

3. EVIDENCE—OPINION OF WITNESS.  
In an action for death of a person on defendant's railroad track by being struck by a train, evidence as to the distance within which witnesses had seen similar trains to that in question stop at the same place was not objectionable as the opinion of the witnesses as to the distance within which such a train could be stopped.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2150.]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by W. T. Brannon, as next friend of the minor children of W. A. Cawthon, deceased, against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. C. Shropshire, for appellant. J. M. Richards and Bernard Martin, for appellee.

SPEER, J. This suit was instituted by appellee as next friend of the minor children of W. A. Cawthon, deceased, alleging that said Cawthon was killed by one of the defendant's freight trains through the negligence and carelessness of its servants and agents, and resulted in a judgment for the plaintiff in the sum of \$1,000, which was divided among the three children of deceased.

The vital issue in the case is one of discovered peril, it appearing that, at the time deceased was run over and killed, he was lying on appellant's track on a bridge, asleep or drunk, or both. The testimony offered by appellant tends very strongly to show that its servants, operating the train which killed deceased, did everything in their power, after having discovered the presence of deceased on the track, to avoid injuring him; while, on the other hand, there is testimony in the record from which we think the jury might reasonably have found that its servants were negligent in this particular after discovering the perilous position of deceased on the track. Deceased was lying somewhat near the west end of a trestle known as bridge No. 74, which is shown to be about 1,800 feet west of a trestle known as bridge No. 75, and was killed by a west-bound freight train. There is testimony in the record from which the jury might reasonably have concluded, and they probably did conclude, that the servants of appellant operating this train discovered the presence of deceased on the track and his peril, when the train was in the vicinity of bridge No. 75, and there is ample testimony to show that this was in time to avoid killing deceased. The testimony of appellant's train operatives as to the distance they were from deceased when they discovered his peril, and that they did everything in their power after such discovery to avoid striking him, is not necessarily conclusive at all upon

\*Writ of error denied by Supreme Court Nov. 14, 1906.

this issue, but the testimony of other witnesses and the circumstances surrounding the transaction may have been, and we think were, of such cogency as to authorize a finding against appellant upon this issue. This conclusion disposes of appellant's contention that the court should have given a summary instruction to the jury to return a verdict in its favor, and the further contention that the verdict returned and judgment rendered are not supported by the evidence. Upon the issue of discovered peril the court charged that, "if you believe that W. A. Cawthon was upon one of defendant's bridges on its track and in a dangerous or perilous position, and if you believe from a preponderance of the evidence, while one of the defendant's trains was approaching said bridge, that the engineer operating said train discovered the presence of the said W. A. Cawthon upon said bridge, and discovered his dangerous position in time to have stopped the train, before reaching the said W. A. Cawthon, by means within his power, and if you further believe that the said engineer negligently failed to use all the means at his command to stop the train before reaching the said W. A. Cawthon without endangering the lives of those upon said train, or the destruction or damage of the defendant's property, and if you believe that, by reason of such negligence on the part of the engineer to use the means at his command to stop the train, the same ran over and killed the said Cawthon, and that the plaintiffs were thereby damaged, you will find for the plaintiffs," etc., and further, "if the said W. A. Cawthon was lying down upon the bridge of the defendant, and if the engineer when he first saw him, if he did see him, thought the object that he saw was a log or some other inanimate object, and if later he discovered it was a human being, and if the engineer, after discovering that the object on the track was a human being, used all means in his power to stop the train before striking the said Cawthon, without endangering the lives or safety of those upon said train, and without endangering the property of the defendant, the defendant would not be liable, for in such case the defendant was under no duty to the plaintiffs to stop train until the agents in charge of the train knew, or thought, the object upon the bridge was a human being." This was a fair presentation of the issue of discovered peril so far as appellant is concerned, and there was, therefore, no necessity for giving its special charges requested.

Bills of exception Nos. 1, 2, and 3 show that appellant objected to various witnesses' testifying to the distance within which such a train as that which killed deceased could be stopped, upon the ground that it did not appear from the statements of the witnesses that they had ever had any experience in operating trains, and were therefore not qualified to testify as to such a matter. The

bills further show, however, in each instance, that the witnesses did not undertake to give an opinion at all, but simply detailed instances in which they had seen similar trains stop at the same place, and the distance within which they were stopped. The testimony was not, therefore, open to the objection made, even though it may have been subject to another objection.

We find no error in the judgment, and it is therefore affirmed.

#### SMITH v. FLORENCE.

(Court of Civil Appeals of Texas. June 30, 1906. Rehearing Denied Oct. 13, 1906.)

#### PUBLIC LANDS—SCHOOL LANDS—SETTLEMENT—EVIDENCE.

On an issue as to whether defendant was an actual settler on school land at the time of his application to purchase, it appeared that he drove onto the land with a wagon filled with household goods and provisions, the wagon having bows, and a sheet stretched over the bows; that that night he ate supper in the wagon and slept in it, and ate breakfast in the wagon next morning, though he did not make any fire; and that the next morning he left the wagon and household goods on the land, and made his application. Defendant was an unmarried man and had no family, and went upon the land for the purpose of making it his home. *He'd*, that the evidence was sufficient to show him an actual settler.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 548.]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Action by Hiram Smith against W. P. Florence. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Jno. R. McGee, L. W. Dalton, and W. O. Benson, for appellant. Wm. J. Berne and H. C. Randolph, for appellee.

STEPHENS, J. This suit was brought by appellant to recover from appellee two sections of school land in Lubbock county, which had been awarded to appellee on applications made about two years prior to those of appellant. The case was submitted on special issues, and the jury found (1) that appellee was an actual settler at the date of his purchase from the state (— day of September, 1902), and that he had thereafter continuously resided on the land, making permanent improvements thereon of the value of \$300; (2) that appellant was an actual settler at the date of his application, and had also continued to reside on the land.

Appellant strenuously controverts the sufficiency of the evidence to warrant the finding that appellee was an actual settler at the date of his purchase, making the following quotation from his testimony to sustain the contention: "My name is W. P. Florence, and I am the defendant in this case. I drove on section No. 113 of the land in controversy with my wagon, to which was trailed a buggy, on the 22d day of September, A. D. 1902.

each pillow, kitchen and cooking vessels, grips and boxes containing clothing, two carpets, lamp and oil, window curtains, some provisions, and a lot of books, about 200 volumes, and other articles. The wagon had bows and a sheet stretched over the bows in the usual way. I drove on this section of land in the evening with the wagon, buggy, and household goods as stated, ate my supper there in the wagon and slept there in the wagon that night. I had some provisions cooked and ate a cold supper. The next morning I ate a cold breakfast of the same provisions. I have no recollection of making a fire there the next morning. This wagon and buggy was standing on the section No. 113 of the land in controversy; and this is what I did in making settlement on the same: The next morning, September 28, 1902, I hitched my horses to the buggy, leaving the said wagon and household goods there on the land, and leaving the household goods in the wagon the same as they were when driven on the land the evening before, drove into the town of Lubbock, and made my applications to purchase the land in controversy in this suit on that day, the 23d day of September, A. D. 1902. When I left my wagon there that morning, I left everything that I had there in the wagon. I left nothing outside of the wagon on the ground, and had nothing else on the land at that time. I never did have a tent on the land and never had anything on the land but my wagon with the household goods in it as stated up to the time that I built my house on this section of land in November following, except the lumber, wire, feed, and posts that I put there in the latter part of October, 1902." The evidence further disclosed that appellee was an unmarried man (though he had once been married) and had no family; that he went on the land for the purpose of making it his home, taking with him all his household goods and means of living, and treating the covered wagon, which remained stationary, as his place of abode until he had constructed a house and made other substantial improvements, which were made, however, after the award to him, but before appellant had filed his applications; and that appellee had no other home or place of residence.

We are thus again confronted with the difficulty, so often encountered heretofore, of determining the sufficiency of the proof offered of actual settlement on the part of a purchaser or an intending purchaser of school lands. See *Borchers v. Mead* (Tex. Civ. App.) 43 S. W. 300, and several other cases. The definitions by which the proof in a given case is to be tested are as follows: "Actual settlement means actual residence." *Mosely v. Torrence* (Cal.) 12 Pac. 430. The same court, in *Gavitt v. Mohr* (Cal.) 10 Pac. 337, used this language: "An actual settler

for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state." In *Bratton v. Cross*, 22 Kan. 673, this language was used: "To settle upon land we think means to fix one's place of residence thereon; and a settler upon land is one who resides thereon. This is in accordance with all the definitions of the words 'settle,' 'settler,' and 'settlement,' when applied to settlements upon land"—citing, among other cases, that of *Burleson v. Durham*, 46 Tex. 152, where the question is discussed at length. Read in the light of these definitions, can we say that the facts of this case did not warrant the inference that appellee established himself or fixed his residence on the land in controversy when he went there and stopped his wagon, prepared and intending to then and thereafter live and remain permanently? We think not. There must always be a time when residence, or the state of being a resident, begins, and the use of a covered wagon as a habitation until something better can be provided is not conclusive evidence that one so living is a wayfarer and not a settler.

It is not easy to distinguish this case from the unreported case of *Hawley v. Rodgers* (decided by us November 26, 1904) in which we adopted the conclusions of the trial court and in which a writ of error was refused. The principal difference between that case and this is to be found in the fact that *Rodgers*, after going on the land in his wagon, took the wagon bed off, slept a part of one night in it, and left on the running gear of his wagon early the next morning, after building a brush pen around the wagon bed to protect the provisions and other things he had placed in it. He was a married man, had his wife with him, and cooked and ate one or two meals while there.

The other findings were also warranted by the evidence.

The judgment is therefore affirmed.

#### KEELER v. PAULUS MFG. CO.

(Court of Civil Appeals of Texas, June 30, 1906. Rehearing Denied Oct. 13, 1906.)

##### 1. SALES—SAMPLE—IMPLIED WARRANTY.

Where goods are sold by sample, there is an implied warranty on the part of the seller that the goods shall be equal to the sample, and hence, notwithstanding the order provided for delivery, *f. o. b.* cars at the seller's place of business, the buyer had the right on tender of the goods at destination to examine the same and to reject them if not according to sample.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 769-771, 403, 404.]

##### 2. SAME—RIGHT TO REJECT.

Defendant purchased certain bombs and firing canes, together with ammunition for the same by sample. When the goods were tendered,

they were contained in three boxes, the canes being in one box, and the ammunition therefor with the bombs in the other boxes. On examination it was discovered that the canes were defective, and not equal to sample. *Held*, that such defect entitled the buyer to reject the entire consignment.

Appeal from Cooke County Court; J. M. Wright, Judge.

Action by the Paulus Manufacturing Company against D. D. Keeler. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Potter & Potter, for appellant. Green & Blanton, for appellee.

CONNER, C. J. Appellees sued to recover the contract price for certain bombs and firing canes, popular with Young America on certain holiday occasions, together with ammunition for the same, that had been theretofore ordered by the firm of which appellant is the surviving member. When tendered in Gainesville, the firm refused to receive the property mentioned on the ground that the order therefor had been countermanded. The court, however, found that the order was not subject to countermand, and rendered judgment for appellee for the price of the bombs and ammunition therefor, but denied a recovery for the price of the canes and cane ammunition, for the reason that the canes were not such as called for by the contract. The court, who filed his conclusions of fact and law, also further found, that when the goods were tendered, "they were contained in three boxes, but that the canes were contained in one box and the ammunition for the canes was contained in one of the other boxes with the Aerial bombs." Appellee has filed no cross-assignment to the finding we have quoted, nor does appellee in like manner contest the court's finding that the canes were defective, and did not equal the sample exhibited at the time the order for them was made. This being true, the findings are conclusive, and the court erred in holding that appellant was bound to receive and pay for the bombs. The sale being by sample, there was an implied warranty on the part of the appellee company that the canes should be equal to the sample, and notwithstanding the order provided for delivery f. o. b. cars at appellee's place of business in New Jersey, appellant had the right, upon tender of the goods at Gainesville, to examine the same, and to reject them, if not in accord with the implied warranty. Tiedeman on Sales, § 114. And we think, in this case, the right of rejection extended to the whole of the goods tendered. The ammunition for the canes was valueless without effective canes.

Canes, bombs and ammunition were all included in one order. The price charged therefore aggregated the sum for which the suit was instituted, and we do not think appellant was required to separate the merchantable articles from those that were not, and to undertake the solution of questions of abatement in cost of drayage, freights, etc., or of prices charged, that would in such case naturally arise. Mr. Tiedeman on Sales (section 113), in speaking of the duty of acceptance, says: "The buyer is not obliged to accept the goods, unless they have been tendered to him exactly in accordance with the terms of the contract. In other words, the requirements of the law as to delivery, must be observed by the seller, before the buyer is obliged to accept. If, for example, the seller has failed to make the proper delivery, either because he has made it at an unreasonable time of the day, or he has failed to deliver the exact quantity of goods, either more or less, or mixed with other goods, or he has delivered less than the required quantity, or has not delivered in the form called for by the contract of sale; in every such case the buyer may refuse to accept the goods, and relieve himself from all liability by rejecting them and notifying the vendor of the rejection. The buyer is, of course, not obliged to accept the goods unless he has an opportunity to inspect and examine them." In note 3 to the section stated the author says: "The buyer is not obliged to select the goods he ordered from others shipped in the same package without being ordered." Citing a number of cases not available to us. It can make no difference, we think, that appellant assigned a right to reject that the court finds did not exist, or that appellant did not make an examination before refusing to receive the goods. In order to entitle it to a recovery, the burden was primarily upon the appellee company to show a compliance on its part with the contract of sale and a wrongful breach by appellant. This included a necessity for proof that the goods tendered were substantially such as ordered, and, under the court's findings, it is clear that there was a substantial failure in this respect. It is also clear that appellant had reason for believing that the canes ordered, were practically worthless, and that had examination at the time of the tender been made, a refusal to accept would certainly have followed.

We accordingly, approve and adopt the court's findings of fact, but conclude, as a matter of law arising thereon, that the judgment should have been for appellant. The judgment below, is therefore reversed, and here rendered in appellant's favor.

**WILLIAMS et al. v. DALLAS, C. & S. W. RY. CO.**

(Court of Civil Appeals of Texas. Oct. 17, 1906.)

**EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACT—VARIANCE.**

Where a railroad subscription contract provided that the railroad should be built to a certain city within a specified time, and should locate its depot within a certain prescribed territory, parol evidence was inadmissible, in the absence of proof of mistake, to establish an agreement to locate the depot on a particular lot within such territory.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2030.]

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

Action by the Dallas, Cleburne & Southwestern Railway Company against W. P. Williams and others. From a judgment for plaintiff, defendants appeal. Affirmed.

S. O. Padelford and Walker & Baker, for appellants. W. Joe Gray, Brown & Bledsoe, and Ramsey & Odell, for appellee.

**KEY, J.** Appellee brought this suit against appellants upon a written contract by the terms of which the latter promised to pay \$250.50, upon condition that a certain railroad should be built to the city of Cleburne within a specified time, and locate its depot "east of the public square in Cleburne, not more than three blocks east of the Santa Fé passenger depot, and within two blocks south or three blocks north of Henderson street." Appellants admitted signing the contract, and sought to avoid liability upon the ground of fraud, alleging that they signed the contract relying upon certain representations to the effect that the depot would be located on a particular lot within the territory prescribed in the contract. After hearing the testimony offered in support of the defense referred to, the trial court instructed a verdict for the plaintiff, and its action in so doing is assigned as error. The trial court was correct. There was no proof tending to show that any mis-

take was made in writing the contract, or that appellants were deceived as to its terms. Such being the case, it is not permissible to vary the terms of the written contract by showing an agreement to locate the depot on a particular lot, when, by the terms of the written instrument, it was permissible to locate it elsewhere. *Wooters v. Railway Co.*, 54 Tex. 294; *Fairies v. Cockerill* (Tex. Civ. App.) 29 S. W. 672, and 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528. The two cases just cited are quite similar to the one in hand. It is true that in *Fairies v. Cockerill*, the Supreme Court reversed the Court of Civil Appeals, but not on the question now under consideration. Upon that point the Supreme Court sustained the decision of the Court of Civil Appeals.

No error has been shown, and the judgment is affirmed.

**RENSHAW et al. v. BRENNAND.**

(Court of Civil Appeals of Texas. Oct. 17, 1906.)

**APPEAL AND ERROR—ASSIGNMENTS OF ERROR—NECESSITY—AFFIRMANCE.**

Where there are no assignments of errors in the record a judgment will be affirmed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4450.]

Appeal from Sterling County Court; A. V. Patterson, Judge.

Action between A. D. Renshaw and others and Thomas Brennand. From a judgment in favor of Brennand, Renshaw and others appeal. Affirmed.

Kellis & Kellis, for appellants. Jeff D. Ayres, for appellee.

**FISHER, C. J.** Appellee moves to affirm on the ground that there are no assignments of errors in the record. An inspection of the record shows that the motion should be granted.

Judgment affirmed.

**COOPER'S ADM'R v. OSCAR DANIELS CO.**  
et al.

(Court of Appeals of Kentucky. Oct. 30, 1906.)

**1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—LIABILITY OF MASTER.**

A girder to be placed on pillars in a building was lifted by means of a derrick and a steam engine in charge of an engineer receiving orders from the foreman in charge of the work. The foreman signaled the engineer to hoist the girder. The engine, because of a defect therein, did not stop until the rope which held the girder broke and injured an employé charged with the duty of putting the girder in position on the pillars. The engineer knew of the defect. He had no authority over the employé. Held, that an instruction in an action for the injuries received, authorizing a recovery if the employer or its agent "superior in authority in its service to" the employé whose duty it was to inspect or keep the engine in order knew of its unsafe condition, was erroneous because the duty of exercising care to furnish safe machinery rests on the master which duty cannot be delegated.

**2. SAME—ASSUMPTION OF RISK.**

An instruction authorizing a recovery, if the employé did not know of the unsafe condition of the engine and could not have known of it by the exercise of ordinary care, was erroneous, as he was entitled to recover for defects in the appliances, though he knew of the danger, if under the circumstances a man of ordinary prudence would under similar conditions have continued in the work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

**3. SAME—FELLOW SERVANTS—WHO ARE.**

An engineer in charge of an engine and a derrick used to raise girders to be placed on pillars in a building in process of construction, and an employé charged with the duty of putting the girders in position on the pillars, are fellow servants, and the employer is not liable for the negligence of the engineer.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 490.]

**4. EVIDENCE—DECLARATIONS OF SERVANT—ADMISSIBILITY.**

Where an action for injuries to an employé is brought against the employer and a fellow servant, statements made by the fellow servant to the employé after the accident, with respect to what he tried to do to prevent it, are admissible as substantive evidence against the fellow servant but not against the employer, and may be considered as against the employer only for the purpose of contradicting the testimony of the fellow servant as a witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 912.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Henry L. Cooper's administrator against the Oscar Daniels Company and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Matt O'Doherty and Kinney & Fitzgeralds, for appellant. O'Neal & O'Neal and Humphrey, Hines & Humphrey, for appellees.

**HOBSON, C. J.** Henry L. Cooper was in the employ of the Oscar Daniels Company as a structural iron worker, and was one of a crew of which J. J. Hessian was foreman, which was engaged in raising to position a

strut or girder and placing it on top of two pillars, in the erection of the shops of the L. & N. R. R. Co. at Louisville. The pillars were about 18 or 20 feet high and about this far apart. The strut was lifted by means of a derrick and steam engine. Cooper went upon one of the pillars and one Mofield upon the other to put the strut in position when it was raised to the proper place. The engine was in charge of a man named Parsons who received his orders from Hessian the foreman. Hessian gave the engineer the signal to hoist. The strut was lifted until Mofield caught the end next to him, which was first to be attached to the column. He ran his wrench through a hole in the end of the strut and into the east pillar, but he needed a little more space and Hessian gave the order to hoist a little. Parsons started his engine and Hessian gave the signal to stop, seeing that he was moving too far. The engine kept moving. Hessian repeated the signal and finally called several times to the engineer who was some 80 or 100 feet away. Some of the other men called but the engine did not stop until the rope which held the strut broke and both Mofield and Cooper were thrown to the ground. Cooper died from his injuries a few weeks later, and this suit was filed by his administrator to recover for his death against Parsons the engineer, and the Oscar Daniels Company. The jury to whom the case was submitted found for the defendants, and the plaintiff appeals.

The accident occurred on Monday evening about 4 o'clock. The plaintiff proved that on the preceding Saturday Parsons, the engineer, complained to the boss that the valves of his engine were out of fix so that he could not control it, and the superintendent said that after Monday he would have three or four days to fix it. The proof for the plaintiff tended to show that the engineer shut down his engine and it would not shut down at the time Cooper was hurt. Something was the matter with the valves. It also showed that if the engineer had stopped his engine pursuant to the signal there would have been no trouble and that when Cooper fell Parsons was the first man to get to the foreman who said to him, "See what you have done." Parsons answered, "You don't blame me; I tried to stop as soon as I got the signal." On the other hand the testimony of Parsons on the trial was to the effect that he stopped his engine as soon as he got the signal, and that the thing happened so quick as not to allow time to stop the engine after the strut was wedged between the pillars. The testimony for the defendants also was to the effect that it was part of Cooper's duty to guide the strut as it was lifted; that this he failed to do and, by reason of his failure to guide it, the strut became wedged upon some projections on the side of the pillar which would not have happened if he had



guided it in the proper way. The evidence for the defendants also tended to show that Parsons had on Sunday fixed the valves in the engine, and that the engine was not out of order at the time of the accident.

The evidence was very conflicting, and the only question we deem it necessary to consider is whether the court properly instructed the jury. Instruction 1 is in these words: "The court instructs the jury that it was the duty of the defendant Oscar Daniels Company to furnish its employes with reasonably safe machinery with which to do the work required of them, and if they shall believe from the evidence that the engine mentioned in the petition was in a defective and unsafe condition at the time H. L. Cooper was injured, and that because of its defective and unsafe condition the iron girder which was being hoisted by it was caused to fail and by reason thereof the said Cooper received the injury which caused his death, and that defendant or any of its agents or employes *superior in authority in its services to the said Cooper* whose duty it was to inspect or keep the said engine in order knew, or could have known by the exercise of ordinary care, of its unsafe condition, if such was its condition, *and the said Cooper did not know thereof, and could not have known by the exercise of ordinary care*, then the law is for the plaintiff as against the Oscar Daniels Company, unless the said Cooper was negligent and thereby helped to cause or bring about his injury and but for his negligence, if any there was, he would not have been injured." The words, "superior in authority in its services to the said Cooper," should have been omitted from this instruction. The engineer was not superior in authority to Cooper. He simply had charge of the engine. He had no authority over Cooper. There was testimony from which the jury were warranted in concluding that the engine was defective and that the engineer knew it. The duty of exercising reasonable care to furnish reasonably safe machinery and appliances rests primarily upon the master. It is a duty which cannot be delegated. The servant has a right to look to the master for the discharge of this duty, and, if he intrusts it to another servant, he is responsible to the servant who is injured from a want of proper care in the person to whom the duty is delegated, without regard to the rank or title of the agent intrusted with its performance. *Vandyke v. Packet Company*, 71 S. W. 441, 24 Ky. Law Rep. 1285, and authorities cited. The court should also have omitted from the instructions these words, which we have placed in italics, "And the said Cooper did not know thereof, and could not have known by the exercise of ordinary care." Cooper had nothing to do with the engine. His sole duty was in putting up the iron. The engine was some 80 feet away and in charge of the engineer. Cooper was working in the presence of, and under the direct orders of, the foreman. The

rule is that, where a servant is directed to perform the labor and acts in performing it under the immediate orders of the master, he may recover for defects in the appliances or machinery, although he knew of the danger, if, under all the circumstances, a man of ordinary prudence acting with such prudence would under similar conditions have continued in the same work under the same risk. *Ross Paris Co. v. Brown*, 90 S. W. 568, 28 Ky. Law Rep. 813; *I. C. R. R. Co. v. Keebler*, 84 S. W. 1167, 27 Ky. Law Rep. 306. In handling the strut the engineer, Parsons, and Cooper were fellow servants; one was, by means of the steam engine, raising the strut while the other was helping to put it in position. The Oscar Daniels Company is not liable for the negligence of Parsons in raising the strut, although Parsons is liable to Cooper's estate if he was so negligent. The case of *Dana v. Blackburn*, 90 S. W. 227, 28 Ky. Law Rep. 695, is conclusive on this point. See, also, *Ryan v. McCully*, 123 Mo. 686, 27 S. W. 533; *Wood v. New Bedford Coal Company*, 121 Mass. 252; *Clark County Cement Company v. Wright*, 16 Ind. App. 630, 45 N. E. 817. If it was Cooper's duty under his employment to guide the strut and he negligently failed to do this and but for this negligence on his part the injury would not have occurred, he cannot recover.

On another trial the court will also instruct the jury that any statement made by Parsons to the plaintiff, Cooper, may be considered as substantive evidence against the defendant Parsons and that any such statement made by Parsons to Cooper is not substantive evidence against the Oscar Daniels Company, and may be considered by the jury as to the Oscar Daniels Company only for the purpose of contradicting the testimony of Parsons as a witness. On another trial the court will instruct the jury as above indicated.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### STEINBERGEN v. MILLER et al.

(Court of Appeals of Kentucky. Oct. 26, 1906.)

##### 1. FALSE IMPRISONMENT — DEFENSES — JUDICIAL PROCESS.

Under Const. §§ 139, 140, establishing in each county a quarterly court presided over by the judge of the county courts, and establishing in each county a county court, and Ky. St. 1903, § 1050, providing that the quarterly court shall be presided over by the county judge, and section 4354, providing a fine of \$10 against any one obstructing a passway, and Cr. Code Prac. § 13, subsecs. 5, 6, conferring on judges of county courts the same jurisdiction as justices' courts possess, and conferring on justices' courts jurisdiction over offenses, the punishment of which is limited to a fine not exceeding \$100 or imprisonment not exceeding 50 days, or both, one charged with obstructing a passway may be tried before the officer holding the commission of county judge, and it is immaterial whether he styles himself "judge of the county court" or "judge of the quarterly court," and a *capias* issued for the arrest and

imprisonment of accused on his failure to satisfy the judgment of conviction rendered before the officer holding the commission of county judge in proceedings in which he styles himself as "judge of the quarterly court" is valid, and affords protection to those arresting and holding accused thereunder.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, §§ 32-42.]

## 2. SAME—GROUNDS OF ACTION.

In an action for false arrest and imprisonment, the burden is on plaintiff to prove that defendant acted both maliciously, and without probable cause.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, § 99.]

## 3. SAME—PROBABLE CAUSE—PROOF OF CONVICTION.

A conviction of the crime charged by the prosecutor shows probable cause for the prosecution, and the prosecutor is not liable for false arrest and imprisonment under a valid process calling for the arrest and imprisonment of accused for failure to satisfy the judgment of conviction.

Appeal from Circuit Court, Taylor County.  
"Not to be officially reported."

Action by B. F. Steinbergen against I. K. Miller and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John W. Lewis and John A. Wolford, for appellant. W. C. McChord and John T. Moss, for appellees.

LASSING, J. Appellant sued the appellees, I. K. Miller and others, in the Taylor circuit court to recover damages of them for an alleged false arrest and imprisonment of appellant procured and caused by appellees. Appellees answered, in substance, that appellant had obstructed a private passway used by appellees; that they were advised by the county attorney to make affidavit of the facts before the county judge of Taylor county, and take out a warrant before him for the arrest of appellant; that I. K. Miller made said affidavit; that said county judge issued the warrant; that appellant was arrested thereunder, brought before the county judge, tried by a jury, convicted and fined \$10 and cost; that afterwards a capias pro fine was issued, and appellant was arrested and imprisoned on same. A certified transcript of the record and proceedings under the warrant is filed with and made a part of their answer. A reply was filed and issues joined. Appellant introduced his testimony, and, at the conclusion thereof, judgment was rendered for appellees on a peremptory instruction given by the court. From that judgment this appeal is taken.

The record discloses the following facts: That I. K. Miller in his affidavit charged appellant with obstructing a public passway, and the warrant charged appellant with the offense of obstructing a public passway. And the court instructed the jury that if they believed from the evidence beyond a reasonable doubt, that the passway described in the warrant was used by the traveling public as a matter of right for a period of 15 years,

or longer, in practically the same place, and if they further believe from the evidence beyond a reasonable doubt, that the defendant, Steinbergen, stopped up or obstructed the said passway, as set out in the warrant, they should find him guilty, and fix his punishment at a fine of \$10. Under this instruction and the proof offered, the jury returned a verdict fining the appellant \$10. The record does not disclose the fact that appellant made any objection to the instructions limiting the amount of the fine which might be assessed against him to \$10, or that he asked that any other instructions be given, or that the jury be instructed to fine him not less than \$5 nor more than \$50. The record further discloses the fact that all of the proceedings before the county judge were signed by him as judge of the Taylor quarterly court, and the appellant contends that while the law confers jurisdiction upon the county judge, as a magistrate to try and impose penalties for minor misdemeanors, that it does not confer upon him such jurisdiction while presiding as judge of the quarterly court, and for this reason all of the proceedings had before the county judge, sitting as the judge of the quarterly court during the trial of appellant, were absolutely null and void, and that the capias issued by him on the judgment so rendered offered no protection to the officers executing same, or to those who aided, encouraged, or assisted him in the execution of the same, and that appellant, an old man, was arrested for one offense, taken before a tribunal which had no right or authority of law to try him for the offense with which he stood charged, and was in said court tried and convicted for an offense other than that with which he stood charged. And afterwards, at the instance of appellees, arrested and imprisoned under a capias which issued from said court on said void judgment.

The question to be determined in this case is, was the judgment entered against appellant a void judgment? If so, the proceedings had thereunder are void, and the officer who executed the capias pro fine, and the appellees who procured its execution, are afforded no protection by it. On the other hand, if the judgment complained of is a valid judgment, appellant cannot complain of appellees for procuring his arrest and imprisonment in satisfaction of said judgment.

Section 139 of the Constitution provides: "There shall be established in each county now existing, or which may be hereafter created in this state, a court to be styled the quarterly court, the jurisdiction of which shall be uniform throughout the state, and shall be regulated by a general law and until changed shall be the same as that now vested by law in the quarterly courts of this commonwealth. The judges of the county courts shall be the judges of the quarterly courts." Section 140 of the Constitution provides:

"There shall be established in each county now existing or which may be hereafter created in this state, a court to be styled the county court, to consist of a judge who shall be the conservator of the peace, and shall receive such compensation for his services as may be prescribed by law." These two sections of the Constitution establishing the quarterly court and county court provide that the same individual shall preside as judge over each of said courts. And the Legislature in conferring civil and criminal jurisdiction upon these courts used the names "judge of the county court" or "judge of the quarterly court" indiscriminately. Section 1050, Ky. St. 1908, provides that the quarterly court shall be presided over by the county judge, and that the quarterly court shall be held on such days as the county judge may fix. And sections 4340, 4342 provide for the punishment of certain violations of law named therein by a warrant before the quarterly court. Section 4354 provides a fine of \$10 shall be imposed against any one who obstructs a passway; the amount to be recovered by warrant in the name of the commonwealth. Cr. Code Prac. § 13, subsec. 6, provides that: "Judges of county courts shall have the same original criminal jurisdiction as justices' courts." By subsection 5 of section 18, it is provided that: "Justices' courts shall have jurisdiction concurrent with city or police courts, but exclusive of circuit courts (except of indictments in the circuit court against surveyors of public roads), of prosecutions for offenses the punishment of which is limited to a fine not exceeding ten dollars, and concurrent jurisdiction with the circuit courts in prosecutions for offenses the punishment of which is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, or both such fines and imprisonment."

Under the Constitution, the individual holding the office of county judge is empowered to hold two courts, and only two—the county court and the quarterly court. It is not contended by appellant that the county judge did not have jurisdiction to try him for the offense with which he stood charged, but he makes his objection because of the fact that the judge signed his name to the warrant, and to the record of the proceedings had in his court, as judge of the Taylor quarterly court. But it will be observed that, in conferring jurisdiction in misdemeanor cases, the jurisdiction was not given to the county court, or to the quarterly court, but the jurisdiction is conferred on the county judge, the officer, rather than to the court over which he presides. And as this same officer is authorized to hold two courts, and only two courts, he must exercise his jurisdiction, when exercised at all, while sitting as judge of one or the other of these courts. And it is wholly immaterial to either the commonwealth or the accused in the trial of misdemeanor cases, whether he

styled himself "judge of the county court" or "judge of the quarterly court" or simply county judge, so long as the one charged with the misdemeanor is tried before the officer holding the commission as county judge and the punishment of the offense with which he is charged does not exceed a fine of \$100, or imprisonment for 50 days, or both. The requirements of the law have been fully complied with, and the proceeding is regular and in accordance with the provisions of the Constitution and statutes enacted thereunder. We are therefore of opinion that the prosecution in the case complained of was conducted in the manner and form as the law directs, and that the judgment rendered therein on the verdict of the jury was a good and valid judgment, and as binding upon defendant as though the proceedings had been in the name of the county judge alone, without designating either of the courts. The judgment being regular and binding upon appellant, and he failing to satisfy same, the *capias* issued and appellant's arrest and incarceration in the county jail was under and by virtue of this *capias*. The trial and conviction of appellant for the offense with which he was charged in the warrant, which was procured on the affidavit of I. K. Miller, is the best evidence that, in making the affidavit as he did, the said I. K. Miller had probable cause to make the charge therein contained, and the trial court, on the presentation of these facts, instructed the jury to find for appellees.

In the case of Tandy v. Riley, 80 S. W. 776, 26 Ky. Law Rep. 98, where one charged with malicious prosecution had laid all the facts upon which he based his prosecution before a competent attorney, and acted upon the advice of his attorney, that such prosecution was legal, and he acted in good faith upon this advice, this court held it to be a complete defense to the action against him, although defendant in that prosecution was acquitted, nevertheless, he having acted upon the advice of a competent lawyer, this court said that he had probable cause to institute the prosecution which he did. In order to maintain an action for false arrest and imprisonment, or malicious prosecution, the burden is upon plaintiff to show that the defendant acted both maliciously and without probable cause. In the case before us, appellees had good grounds upon which to base the charge made against appellant by the affidavit filed by I. K. Miller and his conviction before a jury is a complete refutation of the charge that he acted without probable cause. Appellant, having failed to show that appellees acted without probable cause in securing his arrest, trial, conviction and imprisonment, the trial judge properly instructed the jury to find for appellees.

The judgment is affirmed.

# ADAMS EXPRESS CO. v. COMMON-WEALTH.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

## 1. INTOXICATING LIQUORS—VIOLATION OF PROHIBITION LAW—EXPRESS COMPANIES.

Where liquor is shipped from without the state by unknown persons, through an express company, to one in the state who has not ordered it, and does not know who sent it, but who, on being informed that it is in the express office ready to be delivered to him on payment of charges, makes the payment and receives the package, the company which thereupon forwards the money, less commissions to the sellers, is guilty of violation of the prohibition law.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 159-161.]

## 2. SAME—LOCAL AND GENERAL PROHIBITION LAWS.

Acts 1883-84, vol. 2, p. 70, c. 843, prohibiting the sale of intoxicating liquors in certain counties, is in force, except as modified by the general prohibition statute of 1894.

Appeal from Circuit Court, Pike County.  
"Not to be officially reported."

The Adams Express Company was convicted of violating the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., W. L. Brown, Joseph S. Graydon, and Walter S. Harkins, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

**BARKER, J.** The Adams Express Company was indicted by the grand jury of Pike county, Ky., charged with the offense of selling spirituous liquor contrary to the prohibition law. The evidence shows that a gallon of whisky was shipped by unknown vendors, through the Adams Express Company, C. O. D., to John Parson, at Pikeville. Parson did not order the liquor, nor did he know who sent it to him; but, having been informed that it was in the express office ready to be delivered to him upon payment of \$3.80 charges, he made the payment and received the package. The purchase price, less commission, was forwarded to the vendors in Cincinnati. A trial resulted in the defendant being fined \$100, of which it complains. The facts as to the sale bring the case within the principle announced by us in *Adams Express Company v. Commonwealth*, 92 S. W. 932, 29 Ky. Law Rep. 224, and to that extent it must be controlled by that case.

But, in addition to the questions arising in the case cited, the appellant complains that the evidence did not clearly establish that prohibition had been adopted in the district in which the delivery of the whisky was made. Without stopping to examine this contention with particularity, although we are inclined to disagree to it, it is sufficient to say that the sale of liquor is prohibited in Pike county by an act of the Legislature entitled "An act to prohibit the sale of intoxicating liquor in the counties of Pike, Letcher and Martin," approved April 17, 1884 (Acts 1883-84, vol. 2, p. 70, c. 843). This act is now in full force and effect, ex-

cept as modified by the general prohibition statute of 1894. *Crigler v. Commonwealth*, 87 S. W. 276, 27 Ky. Law Rep. 918; *Locke v. Commonwealth*, 74 S. W. 658, 25 Ky. Law Rep. 76.

Judgment affirmed.

# SHEPHERD v. GAMBILL.

(Court of Appeals of Kentucky. Oct. 30, 1906.)

## 1. INJUNCTION—BOND—LIABILITY.

Where defendant, by the issuance of an injunction restraining plaintiff from teaching a certain school and from interfering with defendant in teaching it, wrongfully kept plaintiff from teaching the school and receiving the money apportioned to the school district by the state, plaintiff was entitled to recover the damages sustained on the injunction bond, though defendant, because of the invalidity of his employment, received nothing for his services in teaching the school.

## 2. SAME—MEASURE OF DAMAGES.

Where plaintiff was deprived of the right to teach a school by an injunction wrongfully obtained by defendant, the measure of plaintiff's damages, in an action on the injunction bond, was not the money apportioned to the district by the state, which plaintiff would have received if he had taught school, but the difference between what he would have received if he had carried out his contract, and what he in fact made, or could have made by ordinary diligence from other employment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 586-598.]

## 3. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH—DAMAGES.

Where plaintiff was wrongfully deprived of the right to perform a contract for his services, the burden was on him in order to recover more than nominal damages, both to allege and prove that, after reasonable effort, he failed to find employment or, finding it, was not paid as much as he would have received for like services under the contract.

## 4. INJUNCTION—BOND—DAMAGES—ELEMENTS—ATTORNEY'S FEE.

Where an injunction is the relief sought in an action and in fact gives the relief if sustained, an attorney's fee cannot be recovered in an action on the bond.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 597.]

## 5. APPEAL—REMAND—AMENDMENT OF PLEADINGS.

Where plaintiff's petition was sufficient only for the recovery of nominal damages, plaintiff, on remand after reversal of a judgment for defendant, might have leave to amend.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4677-4683.]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Action by Green Shepherd against Charles Gambill. From a judgment for defendant, plaintiff appeals. Reversed.

J. J. C. Bach and Kelly Kash, for appellant. O. H. Pollard, for appellee.

**HOBSON, C. J.** In July, 1902, appellant Shepherd and appellee Gambill each claimed to be the regularly employed teacher of common school district No. 13, in Breathitt county. Gambill brought suit against Shepherd

enjoining him from teaching the school, or interfering with Gambill in teaching it, and, while the injunction was in force, Gambill went on and taught the school. Shepherd appealed from the judgment in that case to this court where the judgment was reversed. The court concluded its opinion with these words: "The court is of opinion that the judgment requiring the county superintendent to pay the public fund appropriated to this district to appellee was error. Nor would it have been right to have adjudged it to appellant, because he did not teach the school. His remedy is upon the injunction bond, as is that of the county superintendent, if anything has been paid to appellee under his contract and the judgment of the court." *Shepherd v. Gambill*, 75 S. W. 223, 25 Ky. Law Rep. 333. After the determination of that case Shepherd brought this suit upon the injunction bond, alleging the facts above stated, and that, by reason of the order of injunction, he was prevented from teaching the school and receiving the amount of money apportioned to the district by the state, \$246.34; that by his contract of employment with the trustees of the district he was to receive this sum for his services; that he had been forced to employ an attorney to represent him in the former action, and that he had paid his attorney \$100 for his services, which was a reasonable fee. The court having sustained a demurrer to his petition, he filed an amended petition in which he alleged that, by reason of the injunction, he was prevented from teaching the school or from drawing or receiving the money apportioned to the district, and had been damaged in the sum of \$246.34, no part of which had been paid. The court sustained a demurrer to the petition as amended, and the plaintiff appeals.

It is insisted that the demurrer was properly sustained because the petition fails to allege that any sum had been paid Gambill out of the public fund. It is said that Gambill taught the school in good faith; that he has received nothing for his labor, and that it would be manifestly unjust to impose upon him the additional penalty of having to account for money he has not received. The county superintendent had no authority to pay Gambill the school money because, as held on the former appeal, Gambill was never employed to teach the school. He had no authority to pay it to Shepherd because Shepherd in fact did not teach the school. Shepherd's cause of action against Gambill on the injunction bond does not rest upon the ground that Gambill has received money that Shepherd was entitled to. It rests upon the ground that Gambill by injunction prevented Shepherd from teaching the school and earning the money apportioned to it. Shepherd lost by reason of the injunction his employment to teach the school. It is entirely immaterial that Gambill did not make anything out of the school or out of the injunction.

96 S.W.—70

The liability upon the injunction bond is for what Shepherd lost by reason of the injunction. Shepherd is not entitled to recover on the injunction bond the amount of money apportioned to the district by the state, for this is what he would have received if he had taught the school, and he did not teach the school. Where an employment is lost the measure of recovery is what the plaintiff would have received if he had carried out his contract less what he in fact made during the time or, by ordinary diligence, could have made. In cases of this kind, in order to recover more than nominal damages, the burden is on the plaintiff to both allege and prove that, after reasonable effort, he failed to find employment, or finding it was not paid as much as he would have received for like services under the contract. *Lewis v. Scott*, 95 Ky. 484, 26 S. W. 192, 44 Am. St. Rep. 251; *Dufficy v. Brennan*, 10 Ky. Law Rep. 637; *Hill v. Hager*, 7 Ky. Law Rep. 519. Where the injunction is the relief sought in the action and in fact gives the relief, if sustained, an attorney's fee cannot be recovered. (*Tyler v. Hamilton*, 108 Ky. 120, 55 S. W. 920, and cases cited.) In the case at bar the injunction was the relief sought in the action, and no attorney's fee can therefore be recovered upon the injunction bond. As there was no allegation in the petition that the plaintiff after reasonable efforts remained out of employment or was unable by reasonable efforts to make during the term as much as he would have earned if he had taught the school, the petition warranted the recovery of only nominal damages, but to this extent it was sufficient. On the return of the case the plaintiff may have leave to amend his petition.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### WHALIN v. BAILEY et al.

(Court of Appeals of Kentucky. Oct. 2, 1906.)

##### 1. WILLS—CONSTRUCTION—ESTATES CREATED—DEFEASIBLE FEE.

A testator gave his farm, containing 150 acres, to his sons J., N., and S.; J. to have 50 acres "where he now lives to include his home and improvements," and N. and S. to have the remaining 100 acres—"all to use said land for their use and benefit," and provided that if either of the sons died without heirs their interest should go to the surviving sons. *Held*, that each son took an estate in fee subject to be defeated on his dying without issue.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1354, 1355.]

##### 2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—CONVEYANCE TO TRUSTEE FOR BENEFIT OF CREDITORS—TITLE ACQUIRED BY TRUSTEE.

A devisee in a will, creating an estate in fee subject to be defeated on the devisee dying without issue, died, leaving a son. Before his death he conveyed all of his property to a trustee for his creditors. *Held*, that the title to the property devised passed to the trustee subject to the condition of the trust.

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

*Appeal between Edward Whalin and Harry Bailey, trustee, and others, for the construction of a will. From a judgment for the latter, the former appeals. Affirmed.*

W. M. Hardin, for appellant Harry Bailey, Daniel Durrin, and W. T. Lafferty, for appellees.

O'REAR, J. The question presented in this case is: What estate did Newton Jasper Whalin take in the land devised to him by the will of his father? That part of the will up for construction on this point reads as follows: "To my three sons, John William Whalin, Newt. Jasper Whalin and Solomon Thomas Whalin, I bequeath my farm on which I now reside, containing one hundred and fifty acres, John Whalin to have fifty acres where he now lives, to include his house and improvements, and Newt. Jasper Whalin and Solomon Thomas Whalin to have the remaining one hundred acres, all to use said land for their use and benefit, and I further stipulate in the bequest of my real estate that if either of my sons die without heirs then their interest in said land to go to my surviving sons or son unto the last remaining one or their heirs." It is insisted by appellant that Newt. Jasper Whalin took a life estate with remainder to his issue, failing which, to his brothers and their issue. The court is of opinion that each of the sons named took a defeasible fee in the land devised to him. The contingency upon which the fee was to be defeated is dying without issue. If, then, he had issue living at his death, the event upon which his fee was to be defeated did not transpire, and it was consequently not defeated.

Newt. Jasper Whalin died leaving a son. Before his death, he had conveyed all of his property to a trustee for his creditors. We are of opinion that the fee-simple title vested in his trustee, subject to the condition of the trust. *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75; *Collins v. Thompson*, 48 S. W. 227, 19 Ky. Law Rep. 1104; *Dorsey's Committee v. Maddox*, 108 Ky. 253, 44 S. W. 632; *Crozier v. Cundall*, 85 S. W. 546, 18 Ky. Law Rep. 116; *Harper v. Baird*, 85 S. W. 638, 18 Ky. Law Rep. 110.

Judgment affirmed.

#### WILDER v. HAST et al.

(Court of Appeals of Kentucky. Oct. 31, 1906.)

##### 1. TRUSTEES—EMPLOYEES SERVICES.

Testator appointed accountant as trustee to manage his estate, with full power and authority to employ attorneys in fact or at law, agents, and employes, including a certain trust company, to remove the same and appoint and employ others at her discretion, etc. *Held*, that the trustee was not required to pay the cost of the services of such employes out of her commissions, but that such expense should be met from the income of the estate.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 322.]

##### 2. SAME—COMPENSATION—AGENT.

Testator left an estate of over \$500,000, much of which was invested in improved real estate and farm lands, and the balance in stocks, bonds, and similar investments. He created a trust thereof for certain beneficiaries, and appointed accountant trustee, with full power to appoint attorneys, agents, etc., to assist her in the management of the estate. Accountant managed the trust with marked ability for 15 years, without loss of any character to the estate, and to the satisfaction of the beneficiaries. *Held*, that accountant was entitled to a commission of 5 per cent. on the income collected and disbursed by her for her services.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 445-450.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Judicial accounting of Edith V. Wilder as trustee of the estate of J. B. Wilder, deceased, in which Emma Hast and others filed objections. From an order fixing the trustee's commissions at an amount less than the sum demanded, she appeals. Reversed and remanded.

W. O. Harris, for appellant. Peter & Newcomb, for appellees.

O'REAR, J. This case involved the determination of appellant's commission as trustee under the will of J. B. Wilder. The judgment appealed from allowed her 4 per cent on the income of the trust estate, and directed that her future compensation should be 5 per cent, "out of which she must pay the services of her agent, the Louisville Trust Company." Her contention is that she should be allowed a commission of 5 per cent. clear of all necessary and proper expenses. The estate of J. B. Wilder, which was committed by his will to appellant, who was his daughter-in-law, comprises something over \$500,000. Much of it is improved real estate in the city of Louisville, while a large part of it consists of stocks and bonds and similar investments. Some of it is real estate in Kansas and farm lands in Kentucky. The testator, J. B. Wilder, died in 1888. Appellant was made a trustee under the will to manage the trust estate, "with full power and authority in her to appoint and employ attorneys in fact or at law, agents and employes, including the Louisville Safety Vault & Trust Company, and to remove the same and appoint and employ others at her discretion, and to rent or lease real estate, and to collect all dues coming to my estate or appertaining to said trust, and to sell and convey and reinvest proceeds of any unimproved real estate I may own at my death, including the lot on the East side of Fourth street between Chestnut and Broadway streets," etc. The testator had but two children, both of whom died in his lifetime. Appellant was the widow of testator's only son, and at the time of testator's death had a family of small children. The children of the deceased daughter of the

estate was placed in trust by the will, to continue during the lifetime of the beneficiaries named, to be managed in their behalf by the trustee, the income to be applied for their use and paid over to them, subject to certain devises as provided in the will. For 15 years after the qualification of appellant as trustee, which by the will she was permitted to do without bond, she has managed this trust estate with marked ability and success. Biennially she made settlements with the county court of Jefferson county. All the beneficiaries, except two of her children, are more than 21 years old, and have been for some years. They were present in person, or by attorney, when the various settlements were made. In each of these settlements she was allowed 5 per cent. commission on the income of the trust. In addition, she was allowed and had paid the sum of \$60 a month to a bookkeeper and agent, who assisted her in many details in the management of the estate. The services of the bookkeeper were necessary, and the compensation paid him was moderate enough. It is rare that a record involving an extended management of such an estate presents such a clean and successful history as does this one. It has been conducted through one great panic, and has suffered from three disastrous fires. It has involved numerous transactions with tenants and builders. Yet it is not shown, nor is it claimed, that the estate has lost a dollar in the whole period covered by the trust by mismanagement, negligence, or even an erroneous exercise of judgment. The last biennial settlement was not made at the time it was due. This is accounted for by the serious illness of the trustee, and the concurring illness of her son-in-law and other members of the family, and by the death of the son of her bookkeeper and agent. In the midst of these troubles they let the period of settlement run by, but when the settlement was made, as it was subsequently, everything was shown up to the satisfaction of all concerned. At least there is no legal ground of complaint. Under these circumstances we are of opinion that the trustee should have been allowed the customary commission of 5 per cent. on the disbursements. The disbursements were about \$30,000 per annum. She should also have been allowed the expenses incurred by her in the management of the trust, including the services of the bookkeeper and agent, who looked after many of the details of collecting rents, making repairs, and such. This was clearly contemplated by the testator, who created the trust and directed how it should be discharged. When he authorized the trustee to employ agents, appoint attorneys in fact and attorneys at law, and to employ a trust company to assist in the man-

more than the commission ordinarily allowed to the trustee, should be paid by the trustee out of her commission. In addition to the special confidence placed by the testator in the trustee, in her ability and integrity, and in her interest in the welfare of the cestui que trust, he evidently contemplated that by the commissions which would be allowed to her a source of sustenance would be added to the annuity, comparatively small, which he had given to her by his will.

The learned chancellor who tried this case, in a written opinion filed, pays a high and deserved tribute to the faithfulness and skill of the trustee and of her agent in the management of the trust. He seems to have regarded that the straight commission of 5 per cent. upon the income would not have been more than a just and reasonable compensation to her under the circumstances, and he would have allowed it to her, but for what he regarded as a constraint placed upon his judicial discretion by the opinion of this court in *Stanberry v. Robinson*, 27 S. W. 973, 16 Ky. Law Rep. 810. In that case, an estate of \$213,924.28, \$210,000 of it was in bonds, stocks, and such choses which the administrator turned over in specie to the heirs of the decedent. The administrator was allowed 5 per cent. of the total estate as commission. This court held, very properly, that the allowance was exorbitant. But there is a marked difference between the two cases. Here is an active, continuing trust, requiring the exercise of skill and judgment, imposing a very large responsibility of a high order. It was something more than the mere collection of rents as a real estate agent, or the making of repairs. While the statute fixes the commission of administrators, executors, and guardians, it does not fix the commission of trustees of express trusts. Ordinarily, where the duties to be discharged are the same, the rate fixed by the statute as compensation to administrators and executors is regarded as a fair criterion to measure the value of similar services rendered by the trustee, but it is not always necessarily so.

Some stress was also laid by the chancellor upon the fact that it is customary for trust companies in the city of Louisville to charge only 5 per cent. commission upon the income of trust estates being administered by them, and that this commission includes bookkeeping and the services of agents, etc. This fact was probably well known to the testator when he wrote his will. The fact that he expressly provided for the employment of a trust company as assistant of the trustee nominated by him indicates to our minds that he contemplated that the trust estate should pay the trustee her commissions in addition to the compensation paid to the trust company. The testator was not

letting the execution of this trust to the lowest bidder, nor was he providing that the trustee named by him should receive no more compensation than if the work was done by a trust company.

Under the peculiar facts in this case and the language in the will, we think that the criterion of charges usually made by trust companies for similar services ought not to have been the controlling factor in fixing the compensation of appellant. The commissioner to whom the case was referred for settlement allowed appellant the sum she had paid to her bookkeeper and agent, and in addition allowed her commissions of 5 per cent. straight upon the income collected and disbursed by her. We are of opinion that the exceptions to the commissioner's report should have been overruled, and that it should have been confirmed.

The judgment is reversed, and cause remanded, with directions to enter a judgment in conformity with this opinion.

#### CITY OF VERSAILLES v. BROWN et al. (Court of Appeals of Kentucky. Nov. 1, 1906.)

##### 1. MUNICIPAL CORPORATIONS—STREETS—CONTRACT TO IMPROVE—CONSTRUCTION—PERFORMANCE.

Complainants conveyed certain land to a city for a street, the city agreeing to grade and macadamize the street within two years from the date thereof. The street was in an outlying district where it was well known to both parties that the city was in the habit of macadamizing only the center of the street to a width of from 14 to 16 feet, for a driveway. *Held*, that they should not be construed to require the city to macadamize the street to its full width, but only in accordance with its recognized custom.

##### 2. EVIDENCE—PAROL EVIDENCE—CONTRACT—CONSTRUCTION—CONDITION OF PARTIES.

Where a conveyance of land to a city for a street bound the city to macadamize the street within two years, parol evidence was admissible to explain what the parties meant by macadamizing "the street" and to show the conditions surrounding the parties at the time the contract was made.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2104, 2105, 2129.]

Appeal from Circuit Court, Woodford County.

"Not to be officially reported."

Suit by Ruth B. Brown and others against the city of Versailles. From a decree in favor of plaintiffs, defendant appeals. Reversed, with instructions to dismiss.

D. T. Edwards, for appellant. Field McLeod, for appellees.

CARROLL, C. In June, 1900, the appellee and her husband executed and delivered to appellant a conveyance, the material parts of which are as follows: "Whereas, in various sales of land made and contemplated by the undersigned Ruth B. Brown and J. P. Brown, her husband, it has been represented and agreed both to and with divers purchasers and others of the general public that a

public street 66 feet wide, to be called Brown avenue, should be opened along the line hereinafter described by courses and distances, and, whereas, the city of Versailles does by the acceptance of this deed agree and bind itself to grade and macadamize said street, within two years from the date hereof, Now, therefore, for and in consideration of the premises, and for the purpose of carrying out and performing said representations and agreements, the said Ruth B. Brown and her husband do hereby grant \* \* \* to the city of Versailles the land hereinafter described, with right, power, and authority to use the same as a public pass way and street \* \* \* for the use and benefit of the city and the general public \* \* \* to be hereafter considered and used as a public highway \* \* \* said strip hereby conveyed consists of all that strip of land lying and being and situated 33 feet upon each side of that certain line which begins," etc.

In October, 1902, appellees filed their petition in equity against the city, alleging that they had performed all the stipulations imposed on them in the deed, but that the city had failed to macadamize any part of the street except a strip 16 feet wide in the middle thereof, although it had graded and leveled 10 feet on each side of the street for use as sidewalks, leaving a driveway 46 feet in width; and that between the part so macadamized and the 10 feet on each side graded for use as sidewalks, there is only clay and dirt without any covering of stone, rendering the property of appellees abutting on said street inconvenient and inaccessible and less desirable and valuable than it would be if the city performed its contract by macadamizing said street the full width of the driveway. They asked that a specific performance of the contract be decreed, and that the city be compelled to macadamize the street the full width of the driveway, or 46 feet. In its answer, the city denies that the plaintiffs had performed all the conditions in the deed, or that it violated its contract, and that, by the expression in the deed that the city "by the acceptance of this deed agrees and binds itself to grade and macadamize said street," the parties to the deed intended to contract and did contract and agree that the usual and ordinary signification and the true and proper meaning and construction of said words and expression was intended to be, and was, that the city should macadamize such a portion of the land included in said street, not exceeding 16 feet in width, as would furnish to its citizens and the traveling public sufficient metal upon which to ride and drive; and it states that prior to, and contemporaneously with, and subsequently to, the delivery and acceptance of the deed, the grantors admitted and asserted such to be the true intent and meaning of said expression and obligation by the city; that in compliance with the mean-



ing and intent of its contract, it had macadamized along the center of the street a strip of land 16 feet in width; and in another paragraph it stated that Brown street was situated in a remote part of the city, and extended through a sparsely settled neighborhood, and that by the well and universally known and established usage and custom prevailing prior to and at the time of the execution and delivery of said deed in and about Versailles, the true and generally accepted intent and meaning of the word "macadamize," when applied to a street or road situated upon or near to the city limits, was and is that such street should be furnished with broken stone, according to the macadam principle, spread over the surface of the street at or near the center thereof to a width of from 14 to 16 feet, and that the contract and agreement was made and executed in contemplation of said usage and custom, and with a full knowledge of the same by the parties thereto, who fully understood and conceded at the time, and subsequently to the execution and delivery thereof, that such meaning and construction would be applied to said words and agreement in its performance by the city. A reply controverting in appropriate language the affirmative matter in the answer completed the pleadings, and, on a hearing of the case, the chancellor granted the relief sought.

Several interesting questions are discussed by counsel, but, in view of the conclusion we have reached, it is only necessary to dispose of the one involving the proper interpretation of the language in this contract obligating the city "to grade and macadamize said street." The contract does not specify the width of the macadam to be placed on the street, and we do not think, in view of the evidence, that a fair compliance with it requires the city to macadamize the street its entire width. The evidence does not show that prior to or at the time the contract was entered into there was any agreement or understanding between the parties as to the width of the macadam that should be placed on the street. This question was not discussed, and, therefore, in arriving at the intention of the parties, we must look to the contract and the conditions surrounding the parties at the time. The grantor Mr. J. P. Brown, who conducted the negotiations leading up to the contract, and the members of the council, were familiar with the character of the streets in and about Versailles. They knew that few of them were macadamized the entire width, and that on a greater part of them the macadam was only from 14 to 16 feet wide. They also knew that Brown street was a continuation of Green street, which is nearer to the center of the city than Brown avenue, and that the macadam on Green street was only 14 or 16 feet in width. It is therefore fair to assume that when this contract was executed it was intended

and contemplated by the parties that Brown street would be macadamized in the same manner and for the same width as other streets in the city occupying towards the center of its population approximately the same relation as Brown avenue. It is also reasonable to conclude that it was the intention of the parties that this avenue should be macadamized for such width and in such manner as would enable the traveling public to use the street with safety and convenience; and the evidence is uncontradicted that, with the macadam on this avenue 16 feet wide, it is amply sufficient to furnish reasonable and proper accommodation for all persons using this street either on horseback or in vehicles. It is not necessary in adjudicating this case to determine whether or not the contract is to be interpreted or controlled by the usage or custom prevailing in the city of Versailles in respect to the construction of streets, as we are disposed to rest the case upon the meaning of the language employed in expressing the intention of the parties at the time the contract was made, viewed in the light of their knowledge of the existing conditions of street construction at that time.

In *Crane v. Williamson*, 63 S. W. 610, 975, 23 Ky. Law Rep. 689, this court said: "In all contracts the thing to be arrived at by the court in fixing the liabilities of the parties is the actual intention of the instrument. While we cannot consider the parol negotiations between the parties previous to the execution of the written contract, in order to ascertain its proper meaning, we may consider their situation and surrounding, and arrive at the real intention of the instrument where its terms are indefinite or uncertain." In *Thompson v. Thompson*, 2 B. Mon. 161, it is said: "The intention of the parties is a fundamental and should be a governing principle in the construction of instruments, and when the language is ambiguous or of doubtful import it is allowable to look behind the instrument into the state and condition of the parties, their motive, object, aim, and end in its creation as means of leading to a proper understanding of its import." In *Montgomery v. Fireman's Ins. Co.*, 16 B. Mon. 427, the court said: "Contracts are to be construed according to the real intent and understanding of the parties, to be ascertained primarily by the words which they have used, with the aid, if necessary, of such other evidence as may show the sense in which they were used, or in which the party using them must have supposed them to have been received." To the same effect is *Marshall v. Piles*, 3 Bush. 249; *Railroad Co. v. Ormsby*, 7 Dana, 276. Applying the familiar principles announced in these cases to the facts of this record, the difficulty in arriving at a correct interpretation of this ambiguous contract, and the intention of the parties at the time it was made, is removed. A number of witnesses

were introduced, not to contradict or vary the terms of the written contract, but to explain its meaning and describe the conditions surrounding the parties at the time of its execution, and this evidence was competent for these purposes. *Railroad Co. v. Ormsby*, 7 Dana, 276; *Edrington v. Harper*, 3 J. J. Marsh. 353, 20 Am. Dec. 145.

As the city had performed its contract in accordance with our interpretation of its terms, the judgment of the lower court is reversed, with directions to dismiss the petition.

### BUCKLER v. ROBINSON et al.

(Court of Appeals of Kentucky. Oct. 30, 1906.)

#### 1. WILLS—REMAINDERS—DESCENT.

Testator bequeathed all of his property to his wife for life, and at her death her brothers and sisters were to have \$3,000, and the balance was to be divided between testator's brothers and sisters, equally. *Held*, that on the death of one of testator's brothers, during the life of the widow, his share of the remainder descended to his heirs.

#### 2. DESCENT AND DISTRIBUTION—ESTABLISHMENT OF INTEREST AS HEIR OF REMAINDERMAN—PREMATURE ACTION.

An action by an heir of a remainderman to establish her interest as heir, etc., prior to the death of the life tenant, and before the falling in of the outstanding freehold, was premature.

#### 3. ATTORNEY AND CLIENT — UNNECESSARY SERVICES—COMPENSATION.

Where a suit instituted by an attorney for the benefit of the heir of a remainderman to establish her rights in the remainder was wholly unnecessary, as well as expensive, a note given for the attorney's services in conducting such proceedings was without consideration.

Appeal from Circuit Court, Nicholas County.

"Not to be officially reported."

Action by Winfield Buckler against Harry Robinson and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

Winfield Buckler, John F. Morgan, and Sam Holmes, for appellant. I. B. Ross and John P. McCartney, for appellees.

**BARKER, J.** The appellant, Winfield Buckler, instituted this action in the Nicholas circuit court against the appellees, the children of Mrs. Mollie Robinson, deceased, to recover a judgment on a note for \$1,000 which their mother executed and delivered to him in her lifetime. In addition to seeking a judgment for the amount of the note, it was sought to settle the estate of the decedent, and have the judgment paid out of the proceeds of her property. The administrator, Harry Robinson, answered pleading want of consideration for the note, and also that it was procured by fraud and overreaching on the part of appellant. These questions of fact were submitted to a jury on an issue out of chancery, with the result that a verdict was rendered in favor of the defendants, and thereupon a judgment was rendered by the

chancellor dismissing the petition, of which appellant is now complaining.

The note was given for services to be rendered by the appellant as attorney for Mrs. Mollie Robinson in obtaining a favorable construction of her uncle's (G. H. Talbott's) will, by which she was to be declared the owner of a vested remainder in his estate, which was quite a large one, subject to the life estate of the testator's wife, Mrs. Mary F. Talbott. So much of the will in question as is pertinent to the issues here is as follows: "I give, devise and bequeath to my beloved wife, Mary F. Talbott, all of my property, both real and personal, to have and to use for her benefit without administrator or executor, she to pay all my just debts and funeral expenses, and to hold the balance during her natural life, and at her death her brothers and sisters are to have \$3,000.00, and my brothers and sisters to have the balance to be divided equally." The testator, at his death, had five brothers and two sisters; but, at the time appellant undertook to have his will construed, all of these were dead except two brothers, Charles and James Talbott. The life tenant, Mary F. Talbott, was then alive, and appellant instituted an action in the Harrison circuit court wherein he made her a party defendant with the two brothers, Charles and James Talbott, and the heirs at law of the dead brothers and sisters. In the petition filed it was alleged that the two brothers, Charles and James Talbott, claimed to own as survivors the whole estate of the testator, subject to the rights of the life tenant, Mary F. Talbott, to the exclusion of Mrs. Mollie Robinson, who was the only child of one of the dead brothers of the testator, and who, it was alleged, was entitled, as the heir of her father, to one-seventh interest in remainder in the devised estate. To this petition the two surviving brothers, Charles and James Talbott, filed an answer in which they specifically admitted that Mrs. Robinson was the owner in remainder of one-seventh interest in their brother's estate, and alleged that they so told her attorney, the appellant, before he instituted the action to have her rights declared. The life tenant, Mary F. Talbott, made no response to the petition; there being no allegation or prayer antagonistic to her interest. A judgment was entered establishing Mrs. Robinson's interest in the estate as claimed. Subsequently Mrs. Robinson died, and after her the life tenant also died, whereupon, as said before, this action was instituted, and the issues made up with the result mentioned. Upon the trial Harry Robinson testified that his mother was addicted to the use of morphine to such extent that her will power was destroyed, her judgment overthrown, and that she was practically under the dominion of her attorney, upon whom she relied implicitly for advice and guidance in her business affairs. Appellant was allowed to testify without objection in his own behalf, and stated that the brothers, Charles and

James Talbott, claimed that his client had no interest in her uncle's estate; and that she was perfectly able, mentally, to make a contract and to understand it; that she employed him to bring the suit to have her rights established in the estate of her uncle, and that he did so in good faith; that he was both surprised and pleased at the answer which was filed by Charles and James Talbott, admitting his client's rights to be as he had claimed them; that he himself did not think she was entitled to anything, at least, that her rights were exceedingly precarious and doubtful; that he advised his client that the best thing to do was to put on a bold face and to claim her rights, with the hope that the other side would admit them. On the question of the decedent's soundness of mind, appellant was corroborated by the testimony of her physician.

We do not think the evidence in this case shows fraud or overreaching on the part of appellant in dealing with his client, but the suit that he instituted was wholly unnecessary and useless to her. The life tenant was still alive, and the remaindermen could not obtain any part of the estate until after the falling in of the outstanding freehold. The result which followed the filing of the petition shows beyond question that there was in reality no adverse claim to Mrs. Robinson's right. Indeed, her ownership of one-seventh in remainder was too plain to question.

The jury were evidently satisfied that no valuable service was rendered to the maker as a consideration for the note, and that the litigation was useless as well as expensive. They may have found that if was true that she was addicted to the use of morphine, and was dependent upon the advice of her attorney in the management of her estate. Under all the circumstances, they must have thought the attorney misconceived the real interest of his client, and that, had he left the matter alone, she would have come into her estate at the proper time without any litigation or expense. We think the jury had a right to reach this conclusion, but we do not think they reflected upon the honor of counsel, or that the facts justify such reflection. Believing, as we do, that the attorney in this case was actuated by good faith, we are still of the opinion that he rendered no valuable service to Mrs. Robinson for the note sued on.

Judgment affirmed.

#### PICKETT v. TAYLOR.

(Court of Appeals of Kentucky. Nov. 1, 1906.)

#### REFORMATION OF INSTRUMENTS — GROUNDS — MISTAKE.

A widow, with little business ability and illiterate, was advised by friends of her deceased husband to convey to an adopted child property she had inherited; she to receive the rents thereof until the child became of age. She agreed to do this. The deed she executed was an absolute conveyance to the child. *Held*, that she was entitled to have the deed reformed

so as to reserve to her the rents until the child became of age.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 69-71.]

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Action by Sallie Taylor Pickett against William Henry Taylor. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

J. L. Blanton and A. M. Cox, for appellant.

HOBSON, C. J. In December, 1897, Henry Taylor died a resident of Cynthiana, in Harrison county, owning a two-story brick dwelling, a brick livery stable, and considerable other property in the town. He left surviving him his widow, Sallie Taylor, who was his only heir at law; he having no other relatives. They were negroes. Sallie Taylor could not read or write and seems to have had little business sagacity. They had a child, William Henry Taylor, living with them who was no kin, but they were raising him. After her husband's death she adopted the boy. At the time of Henry Taylor's death, D. B. Veech was occupying the livery stable as his tenant. After his death the administrator, with the consent of Sallie Taylor, rented the stable to Ware Bros., and there was some prospect of litigation over the matter; Veech declining to go out. At this stage of the business, F. G. Veech, the father of D. B. Veech, who was a friend of Henry Taylor and was regarded by Sallie Taylor as her friend, suggested to her that she deed the livery stable to the boy, she to receive the rents until he was 21 years of age and then to turn it over to him. She agreed to this, and Veech had N. B. Wilson, a farmer and surveyor, to prepare a deed, which Sallie Taylor signed and acknowledged and had put to record. After the deed was put to record, she went on collecting the rents as before for some six years and using the money. At the end of this time she was ruled by the county judge to settle as guardian and account for the rents. She then learned that the deed which Wilson had drawn and she had executed was simply an absolute conveyance to the boy, which reserved nothing to her. She thereupon brought this suit, asking that the deed be reformed so as to conform to the intention of the parties, and, the circuit court having dismissed her petition, she appeals.

Both F. G. Veech and Wilson are dead, but she sustained the allegations of her petition by D. B. Veech and Rev. John Johnson, who were present and heard the arrangement made; Johnson qualifying at the time as guardian of the boy. In view of the testimony of these witnesses, the ignorance of the woman, and the facts and circumstances

surrounding the transaction, we are of opinion that she was entitled to have the deed reformed so as to reserve to her the rents of the property until the boy is 21 years of age. This was manifestly what they intended.

Judgment reversed, and cause remanded for a judgment as herein indicated.

### BROWN v. CRUMP & FIELD.

(Court of Appeals of Kentucky. Nov. 1, 1906.)

#### COURTS—JURISDICTION—COURT OF APPEALS—ORDER OF QUARTERLY COURT—PROVISIONAL REMEDIES.

Civ. Code Prac. tit. 8, c. 5 (regulating the appointment of receivers), section 298, provides that the order of the court, appointing a receiver, "shall be deemed a final order for the purpose of an appeal to the Court of Appeals." Title 18 regulates appeals to the Court of Appeals. By title 16 (regulating quarterly and other inferior courts), section 700, the provisions of the Civ. Code are made applicable to proceedings in quarterly courts except as otherwise provided. Section 721 makes a special provision for the trial in such courts of an action in which there is an order for a provisional remedy. Sections 724-731 provide for appeals from orders and judgments of quarterly courts to the circuit court. Ky. St. 1903, § 950, prohibits an appeal to the Court of Appeals "from any order or judgment of a quarterly court." *Held*, that an appeal does not lie directly to the Court of Appeals from an order of the quarterly court appointing a receiver.

Appeal from Circuit Court, Pike County.  
"To be officially reported."

Action by Crump & Field against Mary Brown. From an order of the quarterly court placing certain goods in the hands of a receiver, defendant appeals. Appeal dismissed.

J. S. Cline, for appellant.

HOBSON, C. J. Crump & Field filed this suit in the Pike quarterly court charging that they were in the wholesale grocery business and had sold goods to Lacy Cassady, who was engaged in the retail grocery business, to the amount of \$182; that the debt was unpaid; that Cassady had sold his entire stock of goods to Mary Brown, and that neither Mary Brown nor Cassady had complied with the act of March 8, 1904, regulating the sale in gross of stocks of goods; that under the act, Mary Brown held the stock for the use and benefit of all the creditors of Cassady, and was liable to them for their debt. See acts 1904, p. 72, c. 22. On the next day, upon notice to Mary Brown, the judge of the quarterly court made an order placing the stock of goods in the hands of a receiver, on the ground that it was in danger of being lost, moved, or materially injured. To this order she excepted, and prayed an appeal to this court, which was granted. This is the appeal before us.

The only question we deem it necessary to consider is whether we have jurisdiction of the appeal. Title 8 of the Civil Code of

Practice regulates provisional remedies. Chapter 5 of this title regulates the appointment of receivers. Section 298 of the Code, which is a part of this chapter authorizing the appointment of a receiver, contains these words: "The order of a court, or of the judge thereof, appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal to the Court of Appeals." Title 16 of the Code regulates quarterly, police, county and justices' courts. By section 700, which is a part of this title, the provisions of the Civil Code of Practice regulate proceedings in civil actions in quarterly courts, except as provided in that chapter. Section 721 provides for the trial of an action in which an order for a provisional remedy is made, and, by sections 724-731, appeals from judgments of these courts are regulated. Title 18 of the Code regulates appeals to the Court of Appeals. Reading together these several provisions of the Code, we think it evident that appeals from the orders of the quarterly court are to be taken to the circuit court and not to this court, and that the language quoted from section 298 refers to orders of the circuit court or a judge of the circuit court, and not to orders made by a judge of the quarterly court, a police judge, or a justice of the peace. This construction of the Code is borne out by section 950, Ky. St. 1903, which provides that no appeal shall be taken to this court "from any order or judgment of a quarterly, city, police, fiscal, or justice's court." The legislative intent in the words quoted from section 298 of the Civil Code of Practice is to make the order appointing a receiver final for the purpose of an appeal to the Court of Appeals, in those cases where this court would have jurisdiction. It will be observed that section 298 does not confer jurisdiction upon this court in such cases. It simply makes the order a final order for the purpose of an appeal. The state of case in which this court will have jurisdiction is not regulated by section 298. This is regulated by the other provisions referred to. In cases like this the appeal lies from the quarterly court to the circuit court, and from the circuit court to this court.

We therefore conclude that we have no jurisdiction of the appeal, and it is accordingly dismissed.

### DENTON v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Court of Appeals of Kentucky. Nov. 1, 1906.)

#### 1. INJUNCTION—REMOVAL OF OBSTRUCTION—PETITION—REQUISITES—POSSESSION—PRESUMPTION.

Where, in an action to enjoin a telephone company from maintaining its poles on plaintiff's land, the petition admits the possession of defendant when plaintiff bought the property, and falls to allege that such possession was wrongful or the entry without right, it will be presumed that the premises were rightfully occupied by defendant.

**2. LICENSES—RECORDING—FAILURE—EFFECT.**

It is not necessary to the validity of an agreement giving a right of occupation of land that it be recorded.

**3. VENDOR AND PURCHASER—RIGHT OF THIRD PARTY—PRIOR OCCUPANCY—ACTUAL NOTICE.**

Where the owner of land at the time of his purchase has actual notice of a prior occupancy thereof by another, failure of such other to record the instrument under which he holds is immaterial.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 474.]

Appeal from Circuit Court, Henderson County.

“Not to be officially reported.”

Action by Dr. A. S. Denton against the Cumberland Telephone & Telegraph Company. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

B. S. Morris and S. V. Dixon, for appellant. Yeaman & Yeaman, for appellee.

CARROLL, C. The appellant brought this action against appellee, alleging that in 1903 he became the purchaser at decretal sale of a certain tract of land, and “that about the year 1895 the defendant [appellee] constructed a line of telephone poles over and upon said land for a distance of about twelve hundred yards, and that it strung quite a number of telephone wires thereon, and dug holes and planted therein posts or other poles on said land, several feet from and to the side of said telephone poles, and fastened them to same with wire, and is now occupying and retaining said line of telephone poles and wires through and over his land without his consent or agreement, and has failed and refused to remove the same, although requested so to do, \* \* \* that at the time he purchased said land and had his deed there-to recorded there was no record in the county clerk’s office of Henderson county of any deed, contract, or other title whatever to defendant to any right of way over or any interest in said land, and that at said time he had no knowledge or notice of any deed, contract, or other legal or equitable right of defendant to any such right of way over or interest in said land,” and sought to recover damages and to enjoin appellee from occupying his land with its wires and poles. To this petition a general demurrer was sustained, and, electing to stand by his pleadings, the same was dismissed and he prosecutes this appeal.

It is insisted for appellee that, as the petition shows that it was in possession when appellant purchased, he must be charged with notice of its possession, and that nothing else appearing the presumption is that it was in possession rightfully and under claim of title sufficient to put appellant on inquiry as to the existence and nature of its claim, and to charge him with knowledge of all the facts which reasonable inquiry would bring to light; and therefore the demurrer was properly sustained. The petition does not

charge that appellee was wrongfully in possession or that it entered on the land without right, and, in the absence of an averment of this character, the presumption is that it was rightfully occupying the premises. To invest it with the right to erect its poles on the land it was not necessary that the agreement to this effect should be recorded; nor does the failure to have recorded the writing, if there was any, giving it the right to erect its poles and wires, affect the question here involved, because appellant admits that at the time of his purchase he had actual notice of its occupancy.

If, in fact, the appellee is a trespasser and therefore wrongfully occupying the land, appellant may have this question determined in another action, but he failed to state a cause of action in the pleadings before us, and therefore the judgment of the trial court was proper, and is affirmed.

**CAIN v. CAIN.**

(Court of Appeals of Kentucky. Oct. 30, 1906.)

**DIVORCE—DESERTION—YOUTHFUL MARRIAGE.**

Where, without reason, a youthful husband abandons his wife with whom he had lived but a few months, and who was but 14 years old when the runaway marriage occurred, and the abandonment continues beyond the statutory period, a divorce should be granted.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 107-138.]

Appeal from Circuit Court, Warren County.

“Not to be officially reported.”

Petition for divorce by Georgia Cain against Elbert Cain. From a judgment dismissing the petition, plaintiff appeals. Reversed, with directions.

Sims & Grider and Byron Renfrew, for appellant.

CARROLL, C. The chancellor dismissed a petition brought by appellant in which she sought a divorce from appellee on the ground of abandonment, and she appeals.

The parties at the time of their marriage in 1903 were both very young; appellant being only about 14 years of age. The marriage was a runaway affair. Neither of the contracting parties had any conception of the duties or responsibilities of the engagement they entered into, and they only lived together a few months when the separation took place. The evidence does not disclose any sufficient reason either for the marriage or the separation. To the contracting parties these words had little meaning. They appear to have lived agreeably together during the short period of their married life, and the abandonment of the child wife by her youthful husband seems to have been without fault on her part, and as it continued longer than the statutory period she was entitled to a divorce.

The judgment of the lower court is reversed with directions to grant appellant a divorce.

### MCGREGOR v. OVERTON'S EX'RS.

(Court of Appeals of Kentucky. Oct. 30, 1906.)

#### 1. HUSBAND AND WIFE—TRANSACTIONS BY WIFE—RIGHT OF HUSBAND TO ATTACK.

A father gave property to a daughter and surrendered a claim against her and required her to execute notes to a brother and sister. The transaction was made for the purpose of equalizing the gifts the father made to his children, and was based on the theory that the daughter had paid \$500 on the claim against her, while her husband claimed that he had loaned her \$800 which she had also paid thereon. *Held*, that under Ky. St. 1903, § 2128, providing that a wife may make contracts and sue and be sued as a single woman, any claim of mistake in the transaction must be made by the daughter, and her husband could not, in his own name, set the same aside.

#### 2. DESCENT AND DISTRIBUTION — ADVANCEMENT—REMEDIES OF PARTIES.

A father giving property to a child and surrendering a claim against her and requiring her to give notes to a brother and sister to equalize his gifts among his children, is not guilty of fraud for failing to credit the child with a payment on the claim, and no claim can be made against the father's estate therefor, he being under no obligation to give his daughter anything.

Appeal from Circuit Court, Fleming County.  
"Not to be officially reported."

Action by A. T. McGregor against J. T. Overton's executors. From a judgment of dismissal, plaintiff appeals. *Affirmed*.

W. G. Dearing and J. H. Powers, for appellant. John P. McCartney, for appellees.

**BARKER, J.** The purpose of this action was to recover by the appellant from the executors of his father-in-law's will the sum of eight hundred dollars under an implied assumption. The case arose in this way: In 1896 J. T. Overton, the appellant's father-in-law, and L. E. McGregor, appellant's wife, purchased 92½ acres of land in Fleming county, Ky., for the sum of \$7,400; one half was to be owned by the father, and the other half by the daughter, Mrs. McGregor. The latter not having any money, the father paid the whole purchase price of \$7,400, and the deed was made by the vendor conveying one-half to each, with a written agreement on the part of the daughter to repay the father the sum of \$3,700 which he had advanced to her in purchasing the land, and to secure which the title deeds were retained by him. Subsequently the daughter paid to her father \$500, which was duly credited. On the 28th day of August, 1902, J. T. Overton, evidently nearing the end of his life, undertook to settle with his children the accounts existing between him and them, and to divide his landed estate among them. This he did with his six children, but we have only to do here with the settlement between him and his

daughter L. E. McGregor, wife of appellant. On the day mentioned, the father and daughter cast up their accounts, and agreed that the sum of \$500 had been paid on the indebtedness due the father for the land before mentioned, and in order to equalize with her two of his other children, who received lands less valuable than that which Mrs. McGregor was about to receive, the father required her to execute and deliver notes to a brother and sister, aggregating \$1,250, to secure the payment of which a lien was retained on the land then and there given to her. To effectuate this settlement, the father executed and delivered to his daughter a deed conveying to her for natural love and affection his half of the 92½ acres, which they had theretofore jointly purchased, in which it was recited that he forgave her the unpaid balance of the \$3,750 advanced by him for her. On the 8th day of September following this conveyance, J. T. Overton died. The appellant seems not to have been present at, or known of, this settlement between his wife and her father. As soon as he was aware of it, he claimed that his wife had not been given credit for \$800 which he, himself, had paid to his father-in-law on her debt, and that, instead of having paid only \$500, she had paid \$1,300. Thereupon he hunted up a check, dated January 15, 1898, which showed that, at that time, he had paid to his father-in-law that sum. This check was exhibited to the father-in-law, and the evidence is conflicting as to what took place when the matter was explained to him. Appellant, who was allowed without objection to testify as to what took place between him and his father-in-law, states that he recognized the justice of his daughter's claim to having paid more money than he gave her credit for in the settlement, and promised to rectify the error. The other children of J. T. Overton, who were present at the interview, being some four or five in number, testified, positively, that instead of recognizing the justice of the claim made by the daughter and her husband, the father emphatically denied that the sum of \$800, evidenced by the check, had been paid on the land, and said further that the claim was unjust. In a few days after the transaction, as above stated, J. T. Overton, without having made the correction, died testate as to his personal property, and this suit was then instituted against his executors.

The appellant has no standing in court. He shows himself that he paid the money, he now claims the right to recover, to his father-in-law for his wife. The transaction, as stated, established no contractual relations between him and the decedent. He loaned the money to his wife; she, in legal effect, made the payment to her father; and whatever complaint can be made of mistake in the settlement (assuming the most favorable view for appellant) must be made by her. The settlement between the father and daughter

ter, by which she was forgiven the larger part of her indebtedness, and received in addition \$3,700 worth of property as a free gift, obviously was of great advantage to her, and, so far as this record shows to the contrary, was then, and is now, entirely satisfactory to her. That it is not to her advantage to have the settlement set aside, or vacated, and the parties placed in statu quo, is too plain to need amplification. Under the statute (section 2128, Ky. St. 1903) she had the power to contract and be contracted with, sue and be sued, as a single woman with reference to her property, and her husband has no right, in his own name, to set aside and annul a settlement which the wife made with her father concerning her property, and which was so advantageous to her. This action was not instituted to recover money paid under mistake either of law or fact. On the contrary, the petition alleges that the father deliberately perpetrated a fraud upon his daughter. This could not be true. The father was under no obligation to give his daughter anything. What he gave her was a matter of grace on his part, and not right in her. In the settlement had, the daughter received as a gift from her father, in money and property, about \$6,000; and, even if it were true that the father deliberately failed to credit his daughter with \$800 involved here, that could not be fraud, because he still forgave her \$2,400 of debt. So the question comes down to this: the daughter owed her father \$3,700; if she was only credited with \$500, then he forgave her \$3,200; if her account is credited with the additional \$800 claimed to have been paid for her by the husband, then the father forgave his daughter only \$2,400; so, after all, it is only a question of the amount which the father forgave his daughter of her indebtedness to him. Had this been a strictly business transaction between the father and daughter, with a genuine overpayment of the indebtedness, made in the manner claimed by appellant, the cause of action would have accrued to the wife—not to her husband. While we do not deem it as at all controlling of the case, it is not inappropriate to say that it is neither alleged in the pleadings, nor shown in the proof, that, without the claimed credit, Mrs. McGregor received less than her brothers and sisters. We think the evidence overwhelmingly established that J. T. Overton denied that appellant paid him \$800 on the indebtedness of his wife, and refused to recognize the claim as a just one. This being so, appellant has no cause of complaint that his father-in-law did not give his wife as much as he thought should have been given her.

The case below was heard on the equity side of the docket, and the chancellor dismissed appellant's petition.

This judgment accords with the views herein expressed, and it is therefore, affirmed.

## LOUISVILLE & N. R. CO. v. DEASON.

(Court of Appeals of Kentucky. Nov. 2, 1906.)

### 1. CARRIERS—PASSENGERS—INJURIES—TIME—EVIDENCE—SUFFICIENCY.

In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, evidence held sufficient to go to the jury on the question of the time when the accident occurred.

### 2. SAME—IMPEACHING TESTIMONY—EFFECT—INTOXICATION.

In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, the evidence tended strongly to show that, contrary to plaintiff's own testimony, he was drunk when the accident occurred. Plaintiff testified to a mental stupor resulting from the accident, and his statements to others as to how he was injured were conflicting. Held, that while his statement that he was not drunk might affect his credibility, if false, yet the drunkenness itself might explain his failure to remember such condition, his supposition that the stupor resulted from the injuries, and his conflicting statements, and that hence the question of his drunkenness was not vitally material.

### 3. SAME—JERKING OF TRAIN—EVIDENCE—SUFFICIENCY.

In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, evidence held sufficient to go to the jury on the question as to whether the train gave the lurch alleged.

### 4. SAME—CAUSE OF INJURY.

In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, evidence held sufficient to go to the jury on the question as to whether plaintiff was discovered on the track at a time sufficiently removed from the time of the alleged accident to permit his having walked to the place where he was found, instead of having been thrown from the train in passing such place.

### 5. SAME—INSTRUCTIONS.

In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, an instruction to find for plaintiff if, inter alia, defendant "negligently or carelessly gave the same [train] a sudden or violent jerk," defines "negligently" in language not susceptible of criticism by defendant, not requesting a definition of such term.

### 6. SAME—MANAGEMENT OF TRAIN—VIOLENT JERK.

It is negligence in the operation of a passenger train to suddenly and violently move it forward without notice to the passengers alighting from it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1228-1229.]

### 7. SAME—CONTRIBUTORY NEGLIGENCE—DRUNKENNESS.

That a passenger alighting from a train is drunk does not per se constitute contributory negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1350.]

### 8. SAME—INSTRUCTION.

Where, in an action for injuries to a passenger alleged to have been occasioned by a sudden lurch of the train as he alighted, the only evidence of contributory negligence is that plaintiff was drunk, any error in leaving to the jury to determine what was contributory negligence was against the plaintiff.

### 9. SAME.

Where, in an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, defendant

claimed that the injury was caused by plaintiff falling from the train at another place while drunk, an instruction to find for defendant, if plaintiff received his injury in any other way than set out in an instruction based on plaintiff's contention, sufficiently precludes recovery, if plaintiff fell from the train at such other place.

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Action by H. W. Deason against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Benjamin D. Warfield and Joe McCarroll, for appellant. L. Yontz and Breathitt & Bell, for appellee.

O'REAR, J. Appellee claimed that he was a passenger on one of appellant's passenger trains, due to arrive at Hopkinsville at 8:35 p. m., April 30, 1904; that, as the train reached Hopkinsville, the conductor, or some other person in the discharge of that duty, announced "Hopkinsville," and, as the train came to a stop at the station, announced, "All off for Hopkinsville"; that thereupon appellee arose to descend from the coach, that being his destination. As the train stopped, some four or five other passengers preceded him in alighting; that, as he was about to step off the car, the train gave a sudden and unexpected lurch forward, by which he was thrown from the train, alighting on his right shoulder on a stone pavement, dislocating and breaking his shoulder, to its permanent impairment; that he was confined to his bed and room for seven weeks as the result of the injury; and that his capacity to labor and earn money has been materially lessened. Appellant denied that appellee was a passenger on the train at all, and therefore denied that he was injured by falling off the train at Hopkinsville. It put in issue all the allegations of the petition, and pleaded affirmatively that appellee's injury was caused by his own negligence. There were two trials of the case. The first resulted in a verdict for the plaintiff for \$3,000. A new trial was granted to appellant, and upon a retrial the verdict was for \$2,000. From the judgment based upon that verdict, this appeal is prosecuted.

Appellant is a young man. He was about 21 years old when he received his injury. If he is entitled to recover at all, we do not regard the verdict as excessive. Appellant urges upon us with great earnestness two grounds for reversal, more particularly the first one, which is that the verdict is papably contrary to the evidence. It may be admitted that there is a sharp conflict between the evidence for the plaintiff and that for the defendant in the case. It is possible, however, to reconcile all or nearly all of appellant's evidence with that of the plaintiff. It is impossible to reconcile the plaintiff's evi-

dence with that of appellant. Briefly stated, the evidence for the appellee sustains the statements of his petition as to how the accident occurred. Five witnesses testified to having seen it; one of them positively identifying plaintiff as the man who fell, having been acquainted with him for some four or five years before, and being in plain view of him, and only a few yards distant. The other witnesses corroborated this last witness and appellant in such detail as should leave little doubt, if they were telling the truth at all, that the incident they testified to seeing was the injury of the plaintiff. They all agree that the train came to a stop; that four or five persons had alighted from the coach in which appellant was riding; that, as appellant was about to step from the car, the train gave a sudden lurch forward, by which he was thrown heavily to the pavement, alighting on his shoulder; that he arose, picked up his hat with his left hand, put it on his head, then taking his right arm in his left hand, turned and started back down the railroad track in the direction from which he had come, and towards the Acme Mills, situated some distance away. Appellee, it is true, is unable in his testimony to account for himself from that time until the following evening, when he boarded the train to return to his home at Pembroke. He professes not to have remembered anything that occurred after he arose from the platform where he had fallen, except a vague impression that the doctor that he was taken to see that night told him that he was not badly injured, and that some young man carried him there in a wagon. He denied having been drunk. We notice that many people do that who have been drunk. Perhaps that it is because they really think they were not as drunk as they appeared to others, and in fact were. While in this condition appellee is proved to have admitted to the physician who attended him that night, and to the young man who carried him to the physician, and to a number of others who asked him about his condition, that he had fallen from the train down near the Acme Mills before it had stopped. Appellant's evidence shows that appellee was seen about the depot some time after the night accommodation train came in that he says he came upon, except they place it a week later than appellee and his witnesses fix the time of the occurrence. A number of witnesses for appellant testified to appellee's admission that he had fallen from the train down near the Acme Mills. They all say that he was more or less drunk. The trainmen in charge of the train testified that the train did not give a sudden lurch forward on the evening of April 30, 1904, nor on the evening of May 7, 1904, when the accident is supposed to have occurred. From this it is argued that the evidence is overwhelmingly on behalf of the defendant, appellant, and that we should set aside the ver-



the discrepancies in apparently conflicting evidence. We notice that the principal points of discrepancy are: First, the day upon which the accident is said to have occurred; second, whether the train actually gave a lurch forward or sudden movement; and, third, as to the condition of appellee on the evening when he was hurt—that is, whether he was drunk or sober. It is possible that the witnesses on either side may have been mistaken about the date—nothing is easier to be mistaken about than dates, after two or three years have intervened from the occurrence of an event, not very important to the witnesses testifying. This thing occurs in nearly every litigated question where a date is involved, and the fixing of it depends upon the memory alone of the witness. Whether appellee was drunk or not is really not so material. It might have affected appellee's credibility as a witness, if he was drunk, and notwithstanding testified that he was not. The other witnesses who testified for him did not know, and did not purport to state, whether he was drunk or sober. The evidence seems to be convincing that he was probably drunk, but, if he was, he could have been so drunk he could not remember it afterwards; that is, that the period following his injury until he regained consciousness was so blank to him that he did not realize that he was as drunk as he was, but supposed that his mental stupor was from his injury. Of course, it may be possible that he was lying about it. If he was drunk, that may account for his not remembering where he was, and not remembering what occurred after the injury, until he left next day. It might also account for his conflicting statements as to how he was injured.

As to whether the train gave the lurch or sudden movement forward on the particular evening, we all know that trains sometimes do move forward a little from one cause or another after they have once come to a full stop apparently. This is common enough that the occurrence would not be apt to impress itself particularly upon persons standing by, who did not have their attention called to the fact by some unusual and striking circumstance connected with it. It would not be surprising, therefore, if in fact the train did make the movement, yet, if nothing else occurred to attract the attention of people standing by, that a year or two afterwards they would not be able to remember or recall the fact whether the train had made such a movement. But to the man who fell from the train from that cause, and to those who actually saw him fall from that cause, this incident would be such an unusual one that it would be apt to be fastened upon the memory of such witnesses, so that when the former say that the train did

disbelieve the testimony of those who say the train did not move, nor discredit their integrity when we find the contrary. But, if we should conclude that the train did not move, then we must discredit the veracity of those who swore that it did. A witness for appellant testified that, as the train came in, he had occasion to go to the Acme Mills to get his overcoat; that he heard some one call for help up the railroad track towards the station; that he answered him, and was responded to by another call for help, and went to the spot whence the call came; that there he found, some 20 or 25 steps from the Acme Mills crossing, the appellee, who claimed to be suffering from an injury sustained, as he then said, from having fallen from the train that just then had passed. This witness says that he then took appellee to the station, and helped him to the express wagon, in which he was carried to the office of the physician alluded to above. The distance from the mill to the station is such that it is hard to reconcile this witness' statement of the occurrence, if accepted literally, with that of appellee and the four witnesses who say they saw him fall, and upon arising immediately start back toward the Acme Mills, as the time elapsing from the fall to the time of appellee's discovery near the mill was so short, according to the witness who said he found him there, as to make it improbable that appellee could have covered it within that time. On this point appellee's witnesses' testimony easily accounts for his presence on the railroad track near the mill. That was the direction they say he took after he got up from his fall. The only discrepancy at all in this phase of the case is as to the time when the young man said he found appellee near the mill crossing. About this he must have been mistaken, or all the other witnesses were mistaken. It is fairly within the province of the jury to say, certainly we cannot say, that the preponderance was not upon their side, when they did say that the one witness was more apt to be mistaken as to his recollection of the time than that the five witnesses should be mistaken about the fact of the fall. We have set out the evidence in this case at this length to show that it is not properly a case for the appellate court to say that the verdict is flagrantly against the evidence. It is not. The peculiar province of the jury is to weigh matters of this kind, to reconcile such apparent discrepancies, and to arrive at the truth by discarding that which to their minds is most unbelievable, lest we would have trials by the court alone, with the juries merely to record the verdict of the judge.

The court instructed the jury upon his own

for further exploitation. The appellants (plaintiffs) filed a petition in the Wayne circuit court for an injunction against appellees (defendants) to prevent them interfering with their operations on his land under the lease. A trial of the case resulted in a judgment in favor of the plaintiffs, and a permanent injunction was awarded, under the shelter of which they were put in possession of the land in question for all the purposes of the lease, and it seems that they proceeded to operate for oil and gas. In the meantime, an appeal was prosecuted to this court, with the result that the judgment granting the injunction was reversed, and a mandate issued to the lower court directing it to dismiss the plaintiffs' (appellants') petition. This mandate was filed in the lower court, and based upon it the defendants (appellees) entered a motion for an order restoring them to the possession of the land. To this motion the plaintiffs (appellants) tendered a response, in which they undertook to set up, as a reason for the defendants not being restored to possession of the property under the mandate, certain equities which they claimed arose by reason of improvements made on the land by digging wells and erecting machinery and buildings necessary for the prosecution of the business of obtaining oil, gas, etc., during the pendency of the cases in this court.

We do not deem it necessary, or even appropriate, under the view we have of the merits of this response, to enter with any particularity into its allegations, or to in any wise rule upon their validity. In the former opinion of the court it was said: "We therefore conclude that Williams abandoned the lease, and that in 1902, when appellee entered for the purpose of boring the well deeper, it had no rights under it. The other question to be determined is: What was the effect of appellee's re-entry and work on the well? While Duncan objected to this entry, we think that it follows from the proof that he did not stand upon his objection, but acquiesced in appellee's boring the well deeper. This acquiescence on his part would estop him to complain of the entry of appellee, or to say if it had then found oil that it was not entitled to the rights conferred by the contract. But, when appellee again abandoned the property, he was not estopped to deny it the right to return a second time. In other words, the estoppel only cut him off from complaining of what appellee was then doing. It conferred on appellee no right to leave the premises and come back at its pleasure to renew its operations. When appellee, after making the second experiment, took away its property, and left the premises, the parties were just where they were before the entry was made. Duncan did not induce it to come upon his premises, or to spend any money there. It came of its own volition, and against his protest, with full knowledge of all the facts. It was in no way mis-

led, and when after making its experiment it left the property, taking everything it had there away, there is no principle of estoppel upon which Duncan would be required to submit to any further entry by it, or to wait upon it before leasing the land to others. Judgment reversed and cause remanded, with directions to the circuit court to dismiss appellee's petition." The mandate based upon this opinion ended the litigation. After it was entered the plaintiffs were out of court, and had no rights which they could litigate in this case. The court having erroneously placed them in possession, it follows that it was its duty, upon the filing of the mandate, to restore the defendants to the position they held with reference to the land before the order of injunction was issued.

The precise question here arose in the case of *Watson v. Avery*, 3 Bush, 635. By a judgment of the Jefferson chancery court, *Avery, McNaughton, and Leech* were held to be the ruling elders of the Warren Street Presbyterian Church in Louisville, Ky., and entitled to the possession, management, and control of it under the regulations of the Presbyterian Church in the United States of America. Upon appeal, that judgment was reversed, and the court decided that these men were not the ruling elders in the church, and were not entitled to the possession of the property, and a mandate was issued to the following purport: The judgment "reversed, and the cause remanded for proper corrective proceedings respecting the possession, control, and use of the church property, and for final judgment in conformity to said opinion." When the case returned, the chancellor permitted these three men to file additional or supplemental proceedings, and awarded them an injunction against *Watson, Hackney, and Gault*, who were the successful litigants for the lawful possession of the church property, forbidding them to interfere with *Avery, Leech, and McNaughton* in the management of the church. Upon a motion of *Watson, Hackney, and Gault* made in this court, a rule was awarded them against the chancellor to show cause why he should not be required to carry into effect the mandate issued, and place the successful litigants in possession of the property. In passing upon the sufficiency of the chancellor's response, it was said: "Whatever may be the rights of a defeated litigant to review, by proper original proceedings, a final judgment against him, or to enjoin or vacate it for causes not litigated and concluded in the previous action, it seems to us, for obvious and important reasons, such renewed litigation should not be permitted in a suit which has reached its final decision, and especially should it not be allowed for the purpose of preventing the lower court from correcting its own erroneous judgments in obedience to the mandate of this court. In the case of *Morgan v. Hart*, 9 B. Mon, 79, cited and relied on by the chancellor, this court said:

'We are also satisfied that it would be an inconvenient practice to allow any other demand outside of the original suit, and not disposed of by the decree, to be brought into litigation on the rule or motion for restitution.' Such demand, if just and subsisting, should be set up in an independent suit; and, if there be any equitable reason for not coercing the order or decree for restitution, it should be made available as a ground for enjoining, and not for preventing or modifying, the order of restitution."

This is conclusive of the merits of this appeal, and the judgment of the trial court, refusing to allow the response of appellants to be filed, and awarding a writ of possession restoring the defendants to the possession of their property, is affirmed.

# PENN MUT. LIFE INS. CO. v. BARNETT'S ADM'R.

(Court of Appeals of Kentucky. Nov. 2, 1906.)  
INSURANCE—LIFE POLICY — LAPSE—PAID-UP INSURANCE.

After payment of 12 annual premiums there was a lapse of a life policy providing that if it lapsed after payment of two annual premiums the company would extend the full amount insured by the policy for such time as the full reserve would carry it, or would grant paid-up insurance, payable at death, for an equitable amount; and if such lapse was after payment of five annual premiums, the paid-up policy should be for as many twentieth-parts of the sum insured as there had been annual premiums paid. Before the lapse insured borrowed money of the insurer on his note, giving the policy as collateral security, the note providing that if it was not paid at maturity the insurer could ascertain the cash value of the policy, and cancel it, and with the cash surrender value pay the loan, and with the balance credit insured with as much paid-up insurance as such balance would purchase at the then age of insured. *Held*, that on settlement of the policy, which should be at the time of its lapse, insured had the right to a paid-up policy for twelve-twentieths of the original policy, and the insurer had no right to deduct from the amount with which a paid-up policy should be bought, 25 per cent. of the reserve, and enough to continue the original policy till the note was due and interest thereafter to accrue, in addition to the principal of the note and the interest thereon to date.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Action by Jonathan T. Barnett's administrator against the Penn Mutual Life Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Thos. W. Bullitt and A. Scott Bullitt, for appellant. Jas. T. A. Baker and John Roberts, for appellee.

NUNN, J. On the 6th day of April, 1885, the appellant issued a policy for insurance for the sum of \$5,000 upon the life of Jonathan T. Barnett; the annual premium due thereon being \$189.60. The assured paid the premiums regularly to the number of 12, but failed to pay the thirteenth, when, ac-

cording to its terms, the policy lapsed. The policy in question contains, among others, the following provisions: "(11) That if this policy shall become void, all payments previously made upon it shall be forfeited to the company, but if the lapse shall occur by nonpayment of premium after two full annual premiums have been paid, the company will, subject to the other conditions of the policy: First, extend, without participation, the full amount insured by this policy for as many years and days as the full reserve, by the actuaries  $4\frac{1}{2}$  per cent. table of mortality, at the time of such lapse (less any indebtedness upon this policy under the company's rules), will carry the same at the present established rates of the company, but if death shall occur within three years after such lapse by nonpayment of premium, and during such extension of insurance, there shall be deducted from the amount payable the sum of all the accrued premiums [less surplus], with interest thereon; or, second, upon written application by the owner of this policy, and the surrender of all claims thereunder to the company at its home office within 60 days after such lapse, will grant nonparticipating paid-up insurance payable at death, for an equitable amount; but if, at the time of such lapse, five full years' premiums have been paid on this policy, then the paid-up policy shall be for as many twentieth parts of the said sum insured as there shall have been full annual premiums paid thereon; provided all outstanding liability under this policy be first paid off."

On the 26th day of September, 1896, Barnett executed a note to the appellant for \$1,000. He only received \$940, the remaining \$60 was advanced in the payment of interest on the note for 12 months. He assigned his policy as collateral security for the repayment of the sum to the company. The note contained the following provision: " \* \* \* It is agreed that, if said loan be not paid at maturity, the company is hereby authorized, with or without notice to the undersigned, to ascertain [according to its rules for the purchase of policies], the cash value of said policy, to cancel and annul the same, and, with the cash surrender value thereof, pay this loan note and any interest and costs that may be due on the same, and with the balance, if any, purchase and pass to the credit of said policy, on the books of the company, as much paid-up nonparticipating insurance (payable as the policy is, payable), as the amount will purchase at the then age of the insured; or apply the said balance according to the terms of the policy." The premium due April 6, 1897, was not paid, and by its terms, as said before, the policy lapsed. It is admitted that, at that time, the reserve fund on the policy due the insured amounted to \$1,506.25, and the appellant, without notice to the insured, appropriated \$33.75 of this fund to carry the policy to September 27th, the day the note fell

first arbitrarily deducted 25 per cent. of the total reserve, leaving \$1,138.34; from this it deducted \$33.75, the charge for carrying the policy from April 5 to September 27, 1897, and \$1,000, the amount applied to payment of the note, which left, according to its calculation, \$104.59 with which to purchase nonparticipating insurance payable at his death. Barnett was then 51 years of age, and the company reported to him that the balance of the reserve to his credit would purchase a policy for \$215. The insured died in the year 1903, whereupon the appellant company offered to pay to his administrator \$215, which he refused to accept, and instituted this action for an adjudication of his rights under the policy. Appellee claims that, under the terms of the policy, his decedent, on the 6th day of April, 1897, when the policy lapsed, was entitled to paid-up insurance for twelve-twentieths of \$5,000, which amounted to \$3,000. This was controverted by appellant, claiming that the terms of the note, which was executed for \$1,000, changed the terms of the policy. The lower court adopted appellee's view, and rendered judgment in his favor for the \$3,000, subject to a credit of the note for \$1,000, with interest, leaving the judgment in favor of appellee for \$1,802.

It seems to us that appellant was entitled to have a settlement of the policy when it lapsed; it was not obligated to await the death of the insured before adjusting the same; by so doing the interest on the note might have exceeded the value of the policy, and it would have lost money as a result. The rights of the parties were not changed by reason of the fact that the insured died within a few years thereafter. A true basis for the settlement is to ascertain the actual cash value of the policy at the time it lapsed, April 6, 1897, considering the age of the insured and his expectancy of life under the mortality table; from that sum deduct the debt of \$971.50, owed by the decedent, reduced by reason of payment of interest in advance. The balance would have been due to the assured. However, as the parties have treated this case upon another principle, and, as the result reached is practically the same, we will determine it upon the method fixed in the pleadings and proof. We do not think appellant had the right to deduct 25 per cent. of the reserve of \$1,506.25; nor did it have the right to apply the \$33.75 for the purpose of continuing the policy. This reserve, which belonged in full to the insured, after deducting the amount due on the note at the time the policy lapsed, April, 6, 1897, would have purchased a nonparticipating policy, payable at the death of Barnett, for the sum of \$1,104.50, and for this sum appellee is entitled to a judgment, with in-

96 S.W.—71

versed, and demanded, for further proceedings consistent herewith.

## BOWLES' EX'R v. JONES et al.

(Court of Appeals of Kentucky. Oct. 2, 1906.)

### 1. CHATTEL MORTGAGES—PRIORITY—FAILURE TO RECORD—ATTACHMENT.

The lien acquired by the levy of an attachment has priority over an unrecorded mortgage of which the attaching creditor had no notice at the time the debt was created.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 253.]

### 2. LANDLORD AND TENANT—LANDLORD'S LIEN—PRIORITIES.

A landlord's lien on the crop was superior to that of an insurance company to whom the tenant gave a mortgage, but inferior to the lien of attaching creditors of the tenant; and the lien of the insurance company was superior to that of the attaching creditors, but inferior to the lien of the landlord. *Held*, that, as against the insurance company, the landlord was entitled to the proceeds of the crop, but out of such sum, as between the landlord and the attaching creditors, their claims must be first paid, the landlord being entitled to the remainder.

### 3. CHATTEL MORTGAGE—LIEN PRIORITIES.

Where a mortgage executed by a tenant on the crop expressly referred to a rent claim on the crop, the mortgagee could not subsequently be heard to assert that his lien was superior to that of the landlord.

Appeal from Circuit Court, Christian County.

"To be officially reported."

Suit by the executor of B. W. Bowles against Robert S. Jones and others; and from a judgment in favor of plaintiff, granting insufficient relief, he appeals. *Reversed*.

C. H. Bush, and F. L. Wilkinson, for appellant. G. Clifton Long and R. W. Harrison, for appellees Jones and others. Frank Rives, for appellee H. C. McGee. J. T. Hanbery, for appellee B. J. Wall.

CARROLL, C. On October 27, 1902, Robert S. Jones executed to J. W. Bowles, his landlord, a rent note for \$450, due on or before January 1, 1904, for the rent of a farm for the year 1903. In September, 1903, Jones entered into a contract with the executor of Bowles to rent the farm for the year 1904, and as a part of this contract he agreed "to mortgage the live stock and implements and the present crop of tobacco to secure the rental for the present year in addition to the rent for next year." On February 3, 1904, Jones executed a mortgage to appellee, the Giant Insurance Company, on the tobacco raised on the rented farm in 1903 to secure a note for \$165 due the insurance company. This mortgage recites "that the said first party (Jones) hereby expressly warrants his title in and to the same against the claim

of all persons whatever except \$450 rent claim on tobacco." The 1903 rent was due on January 1, 1904, but the landlord did not take any steps to enforce his landlord's lien on the tobacco raised in 1903 by Jones on the rented premises within the time permitted by the statute, and it conceded that the landlord has no statutory lien on the tobacco. In June, 1904, and before all of the 1903 tobacco crop was sold, the appellees Wall Bros. and McGee obtained attachments and had them levied on the tobacco. Afterward, the appellant landlord, brought this suit in equity against the tenant, the attaching creditors, and the insurance company, setting up that he had a lien on the tobacco and on the proceeds of that part of it which had been sold, and asked that his lien be adjusted priorly over the mortgage of the insurance company and the liens of the attaching creditors. The insurance company and the attaching creditors denied that the landlord had a superior lien, and asserted by appropriate pleadings their claims and liens. Pending the litigation, the tobacco was all sold and the proceeds paid to the court receiver. On a hearing of the case, the court adjudged the landlord a lien on the proceeds as against the tenant, but held his lien to be inferior to the liens of the insurance company and the attaching creditors—giving to the insurance company priority over the attaching creditors, and directing the receiver to pay the claims in the order mentioned, including the costs of McGee and Wall Bros., which costs amounted to about \$140. Under this judgment, there was only left for the landlord \$17.19, and he appeals.

The principal question to be determined is whether or not the landlord by virtue of the contract made in September, 1903, had a lien on the tobacco raised on the rented premises in that year. At the time this contract was entered into the landlord had a lien on this crop for the rent of 1903 which was not due until January, 1904; and although this contract was not recorded, it is the contention of the landlord that it created an equitable lien upon the crop of 1903 to secure the rent for 1903, and that, in a contest between the equities of the attaching creditors and the landlord, the oldest equity must prevail. The Giant Insurance Company insists that its mortgage lien is superior to the lien of the landlord, but this position is not tenable because in the mortgage executed to the insurance company the rent claim for \$450 on the tobacco mortgaged to it is expressly mentioned and as between it and the landlord it had actual notice of the landlord's claim for \$450, it must be held to have taken its mortgage subject to this claim, and will not be permitted in the face of the recitals in the instrument under which it asserts a lien to say that its lien is superior to that of the landlord. On June 15, 1904, and while the tobacco or most of it was on the rented prem-

ises, the tenant executed to the landlord a mortgage which was put to record on the day of its execution. This mortgage recites that "in order to secure the rent for 1904, which is evidenced by a promissory note of the party of the first part of this date, for \$450 due December 1, 1904, and any balance that may remain due on the rent for 1903, after exhausting his present crop of tobacco which has already been mortgaged for the rent of 1903, the party of the first part has this day mortgaged," etc. It appears that the claim of the attaching creditor, H. C. McGee was created on April 11, 1904, and the account of the attaching creditor Wall Bros. was created during the year 1904; therefore both of these claims were created subsequent to the agreement between the tenant and the landlord made in September, 1903, and the attachments obtained by these creditors which were issued before the mortgage of June 15, 1904, was lodged for record take precedence to the unrecorded and hidden lien of the landlord in the contract made in 1903. *Wicks v. McConnell*, 43 S. W. 205, 20 Ky. Law Rep. 86.

The respective priorities and liens of the parties then are as follows: The landlord's lien is superior to that of the Giant Insurance Company, but inferior to the lien of the attaching creditors. The lien of the Giant Insurance Company is superior to that of the attaching creditors, but inferior to the lien of the landlord; and as to the landlord, the attaching creditors have a prior lien, as to the Giant Insurance Company a junior lien. There is, however, no doubt that the landlord's lien is superior to that of the insurance company, and the mere fact that the lien of the attaching creditors is superior to that of the landlord ought not to prejudice the rights of the landlord as between him and the insurance company. The amount, in the hands of the receiver to be distributed among these lienholders was \$295.91, and as the landlord's lien, is greater than this sum, the landlord, as against the insurance company, is entitled to the whole of it, but, out of this fund as between the landlord and the attaching creditors, their claims must be first paid, and when paid the landlord is entitled to the remainder of the fund. A question is made about the costs taxed in this action, but this must be settled by the lower court.

The judgment is reversed for proceedings in conformity to this opinion.

DE WITT'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Oct. 30, 1906.)

1. TRIAL — INSTRUCTIONS — ABSTRACT LEGAL PRINCIPLES.

An instruction that, when plaintiff's intestate entered defendant's service as a brakeman, he assumed all the ordinary risks and hazards of that occupation, and if his injuries were the direct and natural result of some one

**2. MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—INSTRUCTIONS.**

Such instruction was not objectionable for failure to specifically point out of what the ordinary risks and hazards of a brakeman consisted.

**3. TRIAL—INSTRUCTIONS—MEMORANDA.**

In an action for injuries to a servant, the court charged that defendant might establish and enforce reasonable rules and regulations for the government of its employes in the management and operation of its trains. Underneath the instruction were the words "Rule 4" and "Rule 130." *Held*, that such words were mere memoranda, forming no part of the instruction, and therefore did not render the instruction objectionable as accentuating such rules, to the exclusion of others introduced in plaintiff's behalf.

**4. SAME.**

An instruction that if defendant's servant sustained the injuries complained of as the direct result of an accident, and not as a direct and natural result of defendant's negligence, the jury should find for defendant, was not objectionable as eliminating negligence from the jury's consideration and warranting them in finding for defendant if the injury was accidental, though the result of negligence.

Appeal from Circuit Court, Logan County.  
"Not to be officially reported."

Action by Earl De Witt's administrator against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

S. R. Crewdson and Proctor & Herdman, for appellant. Benjamin D. Warfield and Browder & Browder, for appellee.

**BARKER, J.** Earl De Witt was a brakeman upon one of appellee's freight trains, and was killed by falling, or jumping, from a car as the train was stopping at Diamond Springs Station, in Logan county, Ky. To recover damages for his death this action was instituted by his administrator, claiming that the accident was caused by the gross negligence of the engineer in unnecessarily applying the emergency brakes as the train drew near Diamond Springs Station, with the result that, from the unusual jar caused by the too sudden stoppage of the train, the decedent was thrown from the car to the ground, and in some manner not explained rolled, or fell, under the wheels, which severed his leg between the knee and the ankle, from the effects of which he in a few hours died. All negligence was denied by the appellee railroad, and contributory negligence on the part of the decedent pleaded. A denial of this affirmative matter completed the issues, and a trial resulted in a judgment for the defendant railroad. From the judgment overruling his motion for a new trial, the administrator is here on appeal.

The court gave some 10 or 12 instructions. Of these, 3 are especially complained of. They are as follows:

"A. The court instructs the jury that when

mentioned in the pleadings, he assumed all the ordinary risks and hazards of that employment or occupation; and, if they shall believe from the evidence that said De Witt's injuries complained of were the direct and natural result of some one or more of said risks or hazards, they must find for the defendant."

"E. The court instructs the jury that the defendant railroad company had the right to establish and enforce reasonable rules and regulations for the government of its employes in the management and operation of its trains. Rule 4-130."

"G. The court instructs the jury that if they shall believe from the evidence that the plaintiff's intestate sustained the injuries complained of as the direct and natural result of an accident, and not as the direct and natural result of the defendant's negligence, they must find for the defendant."

It is complained of instruction A that it presents a mere abstract principle of law, and is erroneous because it does not specifically point out to the jury what ordinary risks and hazards of the employment of a brakeman consist of. This very instruction was approved in *Ashland Coal & Iron Railway Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207. It was there said: "By the fourth instruction the jury were told that in undertaking to perform the services of tracklayer in the entry of defendant's mine plaintiff assumed all the risk ordinarily attending the performance of such services." This instruction the court approved because it gave the jury a fair, substantial, and correct view of the law as to that question. In *Louisville & Nashville Railroad Co. v. Bock*, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, on the subject in hand it was said: "Under the evidence the court should have told the jury that in entering appellant's service appellee assumed all the risks usually incidental to it, and that if he was caught and injured by reason of the track not being surfaced up, when it was in its usual condition, as it had been theretofore, appellant was not liable. \* \* \*" Substantially the same instruction was approved in *Reiser v. Southern Planing Mill & Lumber Company*, 114 Ky. 1, 69 S. W. 1085.

Instruction E is criticised for the reason that it selects rule 4 and rule 130, and accentuates them, to the exclusion of other rules of the company which were introduced by the plaintiff in his behalf. If appellant's construction of this instruction were correct, the deduction he draws would be sound; but it will be observed that the printed words "Rule 4-130," under the instruction, form no part of it. They are evidently mere memoranda, and could not have been construed by a sensible jury as constituting a part of the instruction, and therefore no in-

jury resulted to appellant from their presence. The attention of the court was not called to the words, and they were evidently overlooked by both court and counsel.

Appellant criticises instruction G because neither the words "unavoidable" or "inevitable" was used in connection with the word "accident"; it being contended that the use of the word "accident," without prefixing "unavoidable" or "inevitable," eliminated negligence from the consideration of the jury, and warranted them in finding for the defendant if the injury to the decedent was accidental, although the result of negligence. This view overlooks the latter part of the instruction. The court instructed the jury that if the accident complained of was the direct and natural result of an accident, and not as the direct and natural result of defendant's negligence, they must find for the defendant. Taken as a whole, the jury could not have understood that the defendant's negligence was eliminated from their consideration when they were plainly told that the accident must not be the result of defendant's negligence if they would find for it. It is not contended by appellant that the verdict was contrary to the weight of the evidence, or that the court committed any other errors than those before mentioned.

As we are of opinion that the complaints pointed out are unsubstantial, the judgment is affirmed.

#### GARTH v. STATE STREET BAPTIST CHURCH.

(Court of Appeals of Kentucky. Oct. 30, 1906.)

##### TRUSTS—ACCOUNTING—LIABILITY OF TRUSTEE.

A deed conveying land to a trustee recited that the grantor had executed and delivered to the trustee interest-bearing bonds, and that, for the purpose of securing the payment of the same, the conveyance was made to the trustee for the holders and owners of the bonds, "it being understood that such bonds are given for the purpose of a sale of them so as to realize" money for the grantor. *Held*, that the trustee must account to the grantor for the amount realized from the sale of the bonds.

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by W. E. Garth against the State Street Baptist Church. From a judgment for defendant, plaintiff appeals. Affirmed.

Wright & McElroy and T. W. Thomas, for appellant. Greene & VanWinkle, J. M. Wilkins, and Wilkins & Milliken, for appellee.

CARROLL, C. The trustees of the State Street Baptist Church in Bowling Green, desiring to rebuild their church that had been destroyed by fire, for the purpose of obtaining money, executed to appellant Garth a deed of trust on September 1, 1890. This deed conveyed to the trustee a lot in Bowling Green upon the following terms and conditions expressed in the deed: "Whereas, the parties of the first part (the trustees) have executed

and delivered to the second party (Garth) ten certain bonds of even date herewith, five for \$500. each, four for \$400. each, and one for \$525., all bearing interest at the rate of six per cent. per annum, \* \* \* Now, for the purpose of securing the payment of these bonds and interest thereon \* \* \* this conveyance is made to said Garth, trustee, for the holders and owners of said bonds \* \* \* and there shall be no personal liability on said Garth, trustee—it being understood that said bonds are given for the purpose of a sale of them so as to realize the money for the parties of the first part herein with which to pay for such building upon said lot now in course of erection," etc. Upon the execution of this deed, and its acceptance by the trustee, the bonds provided for were delivered to the trustee. The trustee testifies that he was employed by the Warren Deposit Bank to prepare the deed and bonds, and that he left the deed for record in the proper office and delivered the bonds to the cashier of the bank—the president of which was his father-in-law; that it was understood that the proceeds from the bonds when sold should be put on deposit in the bank to the credit of himself as trustee, and paid out on checks signed by him as trustee; that he had nothing to do with the sale of any bonds, and no interest individually in the transaction. The bonds were sold for their face value, \$4,625, but there was only deposited to the credit of the trustee as the proceeds of the sale \$3,700. The trustee subsequently gave orders on this fund in December 1899, \$2,000, in April 1900, \$1,000, and on May 31, 1900, \$1,700—in all \$4,700—but only \$4,500 of this \$4,700 was actually paid out for the use and benefit of the church, as only \$1,500 was paid by the bank on the check for \$1,700 given by the trustee. In September, 1900, the trustee discovered that he had paid out \$1,000 more than had been deposited to his credit, and to recover this sum with interest from September 1, 1900, he brought this action in ordinary against the church committee. The defendants, in an answer and counterclaim, averred that all of the bonds were disposed of by the trustee or his agents who realized for them \$4,625 but had only paid the church \$4,500, and they sought a judgment against the trustee for \$125. On motion of the defendants, the action was transferred to equity, and, on a hearing, both the petition and counterclaim were dismissed, and the trustee prosecutes this appeal.

The cashier of the bank seems to know but little about the transaction, except as shown by the records of the bank, but the president of the bank testifies that, before the deed of trust was executed, the church committee made a number of visits to him in an endeavor to get him to raise \$3,500 for them, and that, as a result of these negotiations, an arrangement was made by which bonds to the amount of \$4,625 were to be issued, for which

to receive \$3,500, and say that they were to get the amount for which the bonds sold. The church clerk was introduced as a witness for appellant, and produced the records kept by him, the first of which was a motion that the trustees be empowered to draw up such contracts and notes as would be necessary to secure \$3,500, which amount the trustees reported they could borrow by giving a note for \$4,625 at 6 per cent. for five years. The records are imperfectly kept—the only copy in the record being: "Report of Finance Committee. We can borrow \$3,500 by giving our notes for \$4,625 at 6 per cent. for 5 years, with interest to be paid semi-annually. Moved to accept the report of the committee. Moved that the trustees be empowered to draw up such contracts and notes as will be necessary to secure this \$3,500. Ross Call." He testified that the report of the committee was verbal, and that no record was kept of their acceptance or rejection of the report or of the motion authorizing the trustee to execute the contract, but he supposed they were approved, that the minute quoted above in full did not contain a full report. His records also showed that on May 31, 1900, the following entry was made: "Moved that the two trustees with the sinking fund committee see Mr. Garth and have the money due. Moved that Mr. Garth be ordered to transfer all balance due on \$4,500 loaned to sinking fund treasurer in person of S. J. Austin, James T. Wilson, Jr., and William C. Jackson. Carried." Asked why the figures \$4,500 were put in the motion above quoted, he replied that the understanding was that they were to get the \$4,500 for the \$4,625, and that the other \$125 was to be paid Mr. Garth for the loan.

There is no dispute about the facts that \$4,625 was realized from the sale of these bonds, and that only \$4,500 was paid to the church, and the only legal or fair inference that can be drawn from the deed of trust is that the trustee was to account for the full amount received from the sale of these bonds. It is evident that the trustee permitted the bank officers, especially his father-in-law, the president, to attend to the business, and that the trustee really did nothing except to draw his checks on the trust fund in his hand for the amounts mentioned. It is probable that when the question of obtaining the money was discussed between the church trustees and the president of the bank, some arrangement was made by which the bank was to receive all over \$3,500 realized from a sale of the bonds, but the evidence upon this question is conflicting and unsatisfactory. The church record throws little, if any, light upon the transaction, and the trustee concedes that there was put to his credit from the sale of these bonds \$3,700, when, according to the statements of the president of the bank, only \$3,500 should have been put

there is no way of arriving at what the real agreement between the church trustees and the officers of the bank was. This being so, this case must be determined by the provisions of the trust deed, and, looking to the conditions in it, there is no escape from the conclusion that the trustee must account to the church for the amount realized from the sale of the bonds. If the trustee has paid out more than was placed to his credit, his claim is against the bank and not against the church. It is unfortunate for the trustee that his confidence in the officers of the bank should involve him in this way, but having voluntarily assumed the duties of trustee it was his duty to exercise reasonable care in the management of the trust fund that came to his hands, and, failing to do this, the responsibility must fall upon him.

The judgment is affirmed.

#### OLAY v. CHENAULT.

(Court of Appeals of Kentucky. Oct. 23, 1906.)

##### 1. WILLS—CONSTRUCTION—ESTATE CREATED—VESTED EQUITABLE ESTATE—DEVESTING.

A will gave to a son, S., "as trustee, the fee simple" of certain land "upon the following trust, to wit: That he permit my son C. to use \* \* \* said tract of land during his natural life, and at his death to convey said estate to his children, but should my son C. die without issue, the land shall be conveyed to my son B." *Held*, to convey the naked legal title to S., a life use to C., and an equitable fee to C.'s children, subject to be divested by their death before that of their father.

##### 2. DEEDS — ESTATE CONVEYED — DEFEASIBLE FEE.

One purchasing an equitable fee, subject to be divested by the death of the grantor prior to that of the life tenant, takes subject to such contingency.

##### 3. ESTOPPEL—BY DEED—PARTITION.

Each of six children holding an equitable fee under a will, providing that on the death of their father, the life tenant, the land should be conveyed "to his children," but that, should their father die "without issue," the property should be deeded to another, conveyed to the others his rights in the others' one-sixth interest, so that each should hold free from all contingencies of the others. One of the children subsequently deeded his one-sixth interest, and died before the father. *Held*, that a child so conveying to the others was estopped from claiming any interest in the one-sixth interest deeded away by the child who died.

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by O. H. Chenault against Mary B. Clay. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. Tevis Cobb and F. W. H. Clay, for appellant. John T. Shelby, for appellee.

NUNN, J. In the year 1828, Gen. Green Clay, a resident of Madison county, Ky., made his last will and testament; so much of



which as is pertinent to a discussion of the issue involved on this appeal being as follows: "I give to me son, Sidney Payne Clay, as trustee, the fee simple of the tract of land on which I live, containing about 2,000 acres, \* \* \* upon the following trust, to wit: That he permit my son, Cassius Marcellus Clay, to use, occupy and enjoy said tract of land during his natural life, and at his death to convey said estate to his children. But should my son, Cassius, die without issue, the land shall be conveyed to my son, Brutus, if living," etc. The proceeds of the sale of an interest in 450 acres of the 2,000-acre tract named in the will is the subject of this controversy.

At the time of his death in 1903, Cassius Marcellus Clay left, surviving him, five children (the appellant, Mary B. Clay, being one of them); another child, Green Clay, having died without issue several years before. In the year 1876 the six children made and executed the following deed: "This indenture made this third day of January in the year 1876 between Green Clay, of the first part, Brutus J. Clay, Jr., of the second part, Mary C. Herrick, of the third part, James Bennett and Sallie Bennett, his wife, of the fourth part, Laura Clay, of the fifth part, and Annie Clay, of the sixth part, witnesseth: Whereas the above six parties are jointly entitled to a contingent remainder upon and after the life estate of Cassius M. Clay, of whom said six parties are the children, and each child (except James Bennett, the son-in-law) is entitled to an undivided sixth of said remainder in the tract of land containing three hundred and fifty acres, be the same more or less, situated in Madison county, Kentucky, on the waters of Jack's creek, being the tract of land on which said Cassius M. Clay now resides, and which was the homestead of General Green Clay, deceased, under whose will and testament said tract is held and owned, and the said six children desire to make the interest of each child in said remainder a vested and absolute interest of one-sixth each free from the contingent rights of each and all the other children therein: Now to carry said object into effect, and in consideration of the mutual grants and releases which each child by this conveyance receives from the other, each of said six parties do hereby grant, release and convey to each of the other five parties, all of his or her rights, interests and expectancies in and to each of five-sixths of said contingent remainder held by each of said five parties; so that each of said parties shall hold his or her undivided sixth in said remainder in said tract of land free of all rights or claims or contingencies of the other five parties. And each party doth warrant and defend against himself or herself and against claiming under them respectively, the rights, claims and contingencies herein granted, released and conveyed, to the respective grantees thereof." After this deed was made and recorded, Green Clay sold and conveyed

his one-sixth interest in the land to Louney Clay, by whom it was sold to the appellee, O. H. Chenault, in the year 1897. After the death of Cassius Marcellus Clay, the parties in interest, with the exception of the appellant, desired to make a sale of the land, but, on account of a disagreement between the appellee and the appellant (the latter claiming that Chenault had no interest therein, and that she was the owner of one-fifth of the land), were unable to do so, and they thereupon entered into the following agreement with the appellee: "Whereas O. H. Chenault, representing Louney Clay's interest in the tract of land known as 'White Hall,' that portion in possession of C. M. Clay at the time of his death, agrees by this instrument to unite with all of the five children or heirs, in making a general warrantee deed, to the aforesaid property when sold: Now we, Sally C. Bennett, B. J. Clay, Laura Clay and Ann C. Crenshaw, agree that the aforesaid O. H. Chenault shall have one-sixth portion of the proceeds of the aforesaid land, so far as we are concerned, leaving him and Mary B. Clay to litigate as to her and his interest, if necessary. The aforesaid S. C. Bennett, B. J. Clay, Laura Clay and A. C. Crenshaw are not to be made parties to any suit that may occur between Mary B. Clay, or her heirs, and O. H. Chenault and his heirs, and are not to be put to any expense on account of same. One-fifth of the proceeds of sale of land shall be paid M. B. Clay at the time of sale. Richmond, Ky., Sept. 22, 1903." This action was instituted by the appellee to recover of the appellant his part of the difference between one-fifth and one-sixth of the proceeds of the land, which it is alleged she received in excess of what she was legally entitled to, namely, \$933.50. Upon the trial of the case in the lower court, judgment was rendered in favor of the appellee, from which the appellant has appealed.

It is contended by the appellee that Green Clay took, under his grandfather's (Gen. Green Clay's) will, a vested remainder in the land, and therefore was authorized to sell it, and could convey a good title to the purchaser. In our opinion, by the will of Gen. Green Clay, the dry legal title to the land passed to the trustee, Sidney Payne Clay; the life estate, or use, to Cassius Marcellus Clay; and the equitable fee vested in the children of the latter as they came into being, subject to be divested, however, upon their death before that of their father, the life tenant. See the case of *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 481, 4 Am. St. Rep. 160, and the many authorities therein cited.

In view of this construction of the will, it follows that, when Green Clay conveyed a sixth interest in the land to Louney Clay, he held an interest therein which was the subject of a sale; but the purchaser took it subject to be deprived thereof in the event his vendor died before the life tenant, his father, which event actually happened, and, as appel-

from Louney Clay, his action to recover the fund sued for should be dismissed, unless the appellant, by her deed to Green Clay in 1876, is estopped from claiming and holding it. By the deed in question, she and her five brothers and sisters conveyed to each other, in consideration of mutual grants and releases, their rights or interests in the others' one-sixth interests, so that each should hold his or her one-sixth interest in the tract of land free from all rights or contingencies of the others, and each warranted the title of the others against himself or herself in the usual form. It is true, these children, by this deed or other instrument, did not, and could not, avoid or prevent the defeasance provided in the will of Gen. Green Clay; but, in our opinion, the appellant is estopped by this deed from claiming any interest in the one-sixth which she, together with the others, conveyed to her brother Green Clay, thereby giving him the power to sell and convey it so far as she was concerned, and forever relinquishing all claims thereto. Without this deed, the purchaser, Louney Clay, and his vendee, the appellant, would have lost the property, as Green Clay died before his father; but as the brothers and sisters (the appellant, as said before, being one of them) took the whole upon their father's death, and they having conveyed this interest when they had a title subject to defeasance, but afterwards acquired a complete title, the appellant is now estopped from asserting claim to it. 3 Washburn on Real Property, § 1929; Massie v. Sebastian, 4 Bibb, 436. In the cases of Sale v. Crutchfield, 8 Bush, 645, and Jackson v. Jackson, 58 S. W. 423, 597, 22 Ky. Law Rep. 536, it was held that a conveyance, by a contingent remainderman with warranty, passed the title as against him. If one may be estopped from claiming land by orally telling the purchaser to buy it, as has been held, certainly he should be estopped when, by his warranty deed, he solemnly holds out the grantor as having the power and right to sell and convey. Morrison's Ex'r v. Caldwell, 5 T. B. Mon. 435, 17 Am. Dec. 84; Beard v. Griggs, 1 J. J. Marsh. 27; Churchill v. Terrell, 1 Bush, 54.

For these reasons, the judgment of the lower court is affirmed.

#### STAFFORD et al. v. TARTER.

(Court of Appeals of Kentucky. Oct. 31, 1906.)

##### 1. HOMESTEAD — CONVEYANCE — MORTGAGE — CAPACITY OF PARTIES.

Where a husband and wife joined in a mortgage of their homestead, and the husband was of unsound mind at the time, the mortgage was unenforceable against either, as it required the joint act of both to convey the homestead.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 203-209.]

issue of insanity only when the witness details the facts on which such opinion is based.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2297.]

##### 3. SAME—ADMISSIONS AGAINST INTEREST.

In a suit to foreclose a mortgage, evidence of plaintiff that a few days before the mortgage was executed he thought one of the mortgagors was bordering on insanity was admissible as an admission against interest, though plaintiff did not testify to the facts on which such opinion was based.

##### 4. INSANE PERSONS.—CONVEYANCES — EVIDENCE OF INSANITY.

In a suit to foreclose a mortgage, evidence held to require a finding that one of the mortgagors was insane at the time the mortgage was executed.

Appeal from Circuit Court, Casey County.  
"Not to be officially reported."

Action by M. E. Tarter against Lucy J. Stafford and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

J. A. Violet and Codby & Montgomery, for appellants.

O'REAR, J. Appellant Lucy J. Stafford executed her note for \$100 to appellee as a lawyer's fee to defend her husband in the Casey circuit court under a felony charge. To secure the note she and her husband joined in a mortgage to appellee of 100 acres of land, said to be worth about \$200, and a 10 year old sorrel mare. The note was not paid at maturity. Appellant's husband, N. P. Stafford, was not tried in the Casey circuit court; at least, the record before us leaves the impression that he was not, for he was within a few weeks after his arrest upon the charge, and before a term of the Casey circuit court after the note and mortgage were executed, tried in the Casey county court under a charge of lunacy, and found by the verdict of a jury and judgment of the court to be a lunatic. This suit was brought to recover judgment against appellant Lucy J. Stafford, upon the note, and to subject the mortgaged premises. It does not clearly appear from the record whether the land belonged to N. P. Stafford or to his wife, or to both of them. They were occupying it as a homestead when the mortgage was executed. N. P. Stafford being a lunatic, a guardian ad litem defended this action for him. It was claimed for him, and by Mrs. Stafford for herself, that he was a lunatic and of unsound mind, so as not to understand the nature and effect of the transaction, when the mortgage was executed; that it was therefore not his act and deed; that because of said condition he did not waive, and therefore she could not waive, the homestead exemption in the land, allowed by law. It was also claimed by Mrs. Stafford that the note and mortgage were procured from her by fraud and misrepresentation, but we think

this claim falls down upon the proof. If N. P. Stafford was a lunatic when the mortgage was executed, it was necessarily not his act and deed. It was voidable, to say the least of it, and is avoided sufficiently by the plea of his guardian ad litem and the facts shown in this record.

We are satisfied from the evidence that the court should have found N. P. Stafford to have been of unsound mind when the mortgage was executed. These are the facts upon which we base this conclusion: About 10 years ago N. P. Stafford was found by the verdict of a jury and judgment of the Franklin county court to be a lunatic, and was confined in an asylum for a season under that judgment. It does not appear that he was discharged under an inquest held for that purpose, but was released. This would devolve upon appellee the burden of showing a removal of the disability. This we think was done. Appellant, herself, testified that after his discharge he went about his usual avocation for some years, as a doctor of medicine, as well as transacted other business. She further testified that for as much as a year before the charge under which he was arrested, and before the execution of the mortgage, he was again insane; was extremely nervous and apprehensive. At the Franklin county inquest it was found that N. P. Stafford had a brother who had been insane. The verdict of the jury in the Casey county inquest was returned January 27, 1903. The mortgage was executed December 10, 1902.

Appellee testified in his own behalf. He said: "I think Dr. Stafford's mind was sufficient at the time he signed the mortgage to understand and fully comprehend the full force and effect of the said mortgage." On cross-examination he said: "I assisted in the defense of Dr. Stafford at the December term, 1902, just a few days before the execution of the note and mortgage here sued on. At the time I defended Dr. Stafford I thought he was bordering on insanity." This witness did not profess to be a medical expert. Any person may testify as to his opinion concerning the mental condition of another, which mental condition is an issue to be determined, if he also state the facts upon which his opinion is based. *N. N. & M. V. Co. v. Wilson*, 16 Ky. Law Rep. 262; *Jones' Adm'r v. Perkins*, 5 B. Mon. 222; *Eldridge v. Wilson's Adm'r*, 4 Ky. Law Rep. 982. This witness, however, did not testify to the facts upon which his opinion was based. It was said in *Pannell v. Louisville Tobacco Warehouse Co.*, 118 Ky. 630, 68 S. W. 662, that the mere opinion of a witness, without the facts on which it is based, is of very little value, especially where the witness is by situation or interest biased and not impartial. While the effect of this rule would exclude or reduce to a minimum value the testimony of appellee as to Dr. Stafford's mental condition which was favorable to appellee, it would not militate against ap-

pellee's admissions against his own interest. A party may testify as to many matters against his interest, wherein he is not permitted to testify for himself. We do not perceive how appellee could state facts upon which he could base an opinion that Dr. Stafford was of sound mind at the date in issue without detailing some transaction with, or some act done or omitted to be done by, one who is insane when the evidence is offered to be given. This is forbidden by the Civil Code of Practice (section 606). The statement by appellee that when he defended Dr. Stafford, a few days before the mortgage was executed, he thought he was bordering on insanity, is a significant admission against the interest of the witness, and is to be accorded some weight as evidence. So is the fact that he took the wife's note instead of her husband's for the fee. Each was insolvent, so far as this record shows, and the mortgage was necessary to secure the fee in any event. Whether the property was his or hers, the joint mortgage would have secured his note as well as hers.

James Piles, a witness for appellee, testified: "I had known the defendant Stafford three or four years. Sometimes I thought he was crazy and had no sense, and sometimes I thought he was as mean as he could be. I don't know whether he had mind enough to understand the force and effect of a mortgage or not."

Dr. J. C. Dye, also a witness for appellee, testified: "My recollection is that the mind of Dr. Stafford was sufficient to understand the force and effect of a mortgage, so far as I was able to see and judge." This witness was the deputy clerk who took Dr. Stafford's acknowledgment to the mortgage. On cross-examination he said he was not testifying as an expert, and paid little or no attention to Dr. Stafford's condition when he took his acknowledgment; did not examine him on that point, and did not have his mind directed to it. Stafford was then in jail, and from all the witness said Stafford probably said nothing except to assent to his acknowledgment of the mortgage.

Simon Wesley, county court clerk, also a witness for appellee, said: "I have known N. P. Stafford for several years, and knew him at the time this mortgage was issued, and considered him crazy or a fool at all times; but I think he knew the force and effect of a mortgage."

This was all the evidence as to the condition of Dr. Stafford's mind. From this it is clear he was insane some years before this transaction, he was again insane a few weeks after the transaction, so indisputably found by a jury and judgment of a competent tribunal, and he was so unbalanced before the last finding that it was noticeable by every person but one who testified in the record; all concurring that he was insane to a greater or less degree.

In this equitable action, where the chan-

homestead of these poor people to pay a debt which the creditor probably had not earned, because he was prevented by the civil debt of his debtor from rendering the service he was to render which was the consideration of the note, a slight preponderance of evidence will be enough to support a judgment denying the foreclosure. Or, if he had earned the fee, the question of his right to enforce the mortgage would still depend upon its validity, which would be adjudged according to whether the mortgagor was sane when he made it—a fact to be determined upon the preponderance of the evidence in the record. When appellee saw that his client was “bordering on insanity,” as he puts it, some days before he took a mortgage on his client’s homestead, he should have been careful to see when the mortgage was taken that his client was fully competent to understand his act. He did not see to it, and does not call a witness who will say that Stafford was then clothed in sufficient mind to understand his act. This circumstance and all the evidence convince us—at least preponderate to the effect—that Dr. Stafford was then not in a contractual state of mind. The mortgage was not binding upon him, and was therefore not binding upon his wife, as it takes a valid joint mortgage by husband and wife to waive or to convey the homestead right in this state.

Judgment reversed, and cause remanded for a judgment and proceedings consistent herewith.

#### CHANEY et al. v. BEVINS et al.

(Court of Appeals of Kentucky. Nov. 1, 1906.)

##### 1. PARTITION—PLEADING—SHOWING TITLE.

The petition in an action to recover an interest in and for partition of land, stating merely that plaintiffs’ father died intestate 23 years before the bringing of the action, the owner of a half interest in the land, fails to show that plaintiffs have any interest therein, and so states no cause of action.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 152.]

##### 2. APPEAL—AFFIRMANCE.

Judgment for defendant in an action in which the petition states no cause of action will be affirmed, the defect being cured by nothing in the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4441.]

Appeal from Circuit Court, Pike County.

“Not to be officially reported.”

Action by Thomas Chaney and others against T. J. Bevins and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

Rosco Vanover, for appellants. Hazelrigg, Chenault & Hazelrigg, for appellees.

HOBSON, C. J. Appellants filed this suit in the Pike circuit court to recover a one-half interest in a tract of land and for a partition

It is insisted for appellees, who were defendants in the circuit court, that the judgment must be affirmed without regard to the merits of the case, because the petition fails to state facts constituting a cause of action. The petition, so far as material, is in these words: “The plaintiffs [naming them] say that they are the children, heirs at law, and real representatives of one John Chaney, deceased, who departed this life on the ——— day of ———, 18——, intestate, domiciled in Pike county, Ky., and that the said John Chaney, deceased, at the time of his death was the owner of an undivided one-half interest in the following described tract of land, situated in Pike county, Ky., on lower Pompey creek, and bounded as follows, to wit [Here follows description.]: Plaintiffs say that one Mandy G. Chaney [wife of the said John Chaney, deceased] was the owner of the other undivided one-half of said land at the time of the death of the said John Chaney, deceased, and that the said Mandy G. Chaney is the widow of the said John Chaney, deceased, and that she sold all her interest in said lands to the vendors of the defendants, T. J. Bevins and Mat Jackson Slone, and said defendants T. J. Bevins and Mat Jackson Slone are the owners of all interest of the said Mandy G. Chaney, which is an undivided one-half of said lands, and also the dower interest of the said Mandy G. Chaney, or a life estate in the other undivided one-half of said lands. Plaintiffs say that said lands were conveyed to the said John Chaney, deceased, and Mandy G. Chaney by Milton Adkins, Sr., and wife, Sarah Adkins, and is recorded in Deed Book J, page 449, Pike county court clerk’s office. An attested copy of said deed is filed herewith and made part of this petition, and is marked ‘Give ‘er up quick’ for identification. Plaintiffs say that they are unable to file the original deed from the said Milton Adkins, Sr., showing title in the said John Chaney, deceased, for one-half of said land. Plaintiffs say that the youngest of these plaintiffs, to wit, the plaintiff Manda Thacker, is more than 21 years old. [Here follows prayer for relief.]”

It will be observed that the petition nowhere shows that the plaintiffs are the owners of the land sued for. It simply charges that John Chaney died intestate in 18——, the owner of a one-half interest in the land; that the land was conveyed in January, 1874, to him and his wife, and that the plaintiffs are the children and heirs at law of John Chaney. For all that appears in the petition, the plaintiffs had no interest in the land in December, 1904, when they filed the suit. John Chaney died in the year 1881, and the suit was not brought for 23 years afterwards. The precise question was decided in *Howard v. Lock*, 22 S. W. 332, 15 Ky. Law Rep. 154. In that

case the court said: "In the first paragraph of their petition, the plaintiffs, appellants here, allege that they are the only children and heirs at law of John Higgins, who died in 1869 the owner in fee of a certain house and lot in Barbourville, Ky. \* \* \* Neither paragraph constitutes a cause of action. The first set up a state of case barely justifying at least a conclusion that if the ancestor died seized of the property, leaving the plaintiffs his heirs at law, it descended to them in 1869, and they were the owners of it. From no fact stated does it follow that they were the owners in 1892, when they brought this suit." The judgment in that case was affirmed upon the ground that the petition did not state a cause of action. It is on all fours with the case before us. By section 386 of the Civil Code of Practice, judgment shall be given for the party whom the pleadings entitle thereto, and, the circuit court having entered judgment for the defendants, the judgment of the circuit court cannot be disturbed; there being nothing in the record to cure the defect in the petition.

Judgment affirmed.

**LOUISVILLE & N. R. CO. v. WILLIAMSON.**  
(Court of Appeals of Kentucky. Oct. 30, 1906.)

**1. TRIAL—EXCLUSION OF EVIDENCE—OFFER FOLLOWING OBJECTION.**

A party cannot complain of the action of the court sustaining an objection to a question asked a witness on cross-examination, where he made no avowal as to what the answer of the witness would be, though the evidence was material.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 118, 119.]

**2. EVIDENCE—RES GESTÆ—DECLARATION OF SERVANT AFTER EVENT COMPLAINED OF—ADMISSIBILITY.**

In an action against a railway company for an assault committed by its conductor on a passenger, evidence of a conversation between the conductor and the passenger about three weeks thereafter is not a part of the res gestæ, and is incompetent against the carrier.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 302, 354.]

**3. TRIAL—OBJECTIONS TO EVIDENCE—REPETITION—NECESSITY.**

A party objecting to a question asked a witness, and excepting to the court overruling it, need not, to save his exception, renew the objection when the question is renewed.

**4. ASSAULT — CIVIL LIABILITY — EXCESSIVE DAMAGES.**

A conductor seized and searched a passenger. The passenger had surrendered his ticket, but the conductor subsequently asked him for a ticket. The passenger testified that the conductor cursed him, and the conductor testified that he was cursed by the passenger, who also made a motion as if to draw a pistol, and that thereupon the search was made. The conductor, on failing to find a pistol, slapped the passenger. *Held*, that a verdict for \$2,500 was excessive.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 55.]

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by Elijah Williamson against the Louisville & Nashville Railroad Company.

From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Benjamin D. Warfield, for appellant. B. B. Golden and James M. Gilbert, for appellee.

LASSING, J. Appellee was a passenger upon a train of appellant from Flat Creek, Ky., to Barbourville, Ky., having purchased his ticket at the former station entitling him to passage. He delivered his ticket to the conductor in charge of the train, and thereafter was again asked for his ticket by the conductor, and in a controversy growing out of this second demand for his ticket he charged that he was unlawfully, willfully, and maliciously seized, searched, assaulted, beat, and bruised, and disturbed and intimidated by the conductor and other employes of the train. Appellant admitted that the conductor and other employes did seize and search appellee, but alleged that at the time they did so appellee was using loud, boisterous, profane, and indecent language towards the conductor in the presence of the female and other passengers, and when the conductor requested him to desist from such conduct he made such demonstration as induced the conductor and other employes of the train to believe that he was about to draw a pistol and shoot the conductor, and to prevent this, and for no other purpose, they seized and searched him, but in so doing used no more force than was reasonably necessary for that purpose. Appellant denied that its employes acted with malice, or that they used any abusive or insulting language towards appellee. The affirmative matter in the answer was traversed of record. The case was tried before a jury, who returned a verdict for \$2,500 for appellee, and from that judgment predicated upon this verdict this appeal is taken.

Three grounds are relied upon for reversal, which will be noticed: (1) The exclusion of competent testimony. (2) The admission of incompetent testimony. (3) The damages are excessive. The proof shows that the ladies' coach, on the day upon which this difficulty occurred, was crowded, all the seats being taken, and some of the passengers were standing in the aisle and sitting on the arms of the seats. The conductor passed through and took up appellee's ticket, and later, the train having passed Artemus, he passed through the coach, and again called upon appellee for his ticket. Appellee told him that he had given him his ticket. The conductor told him that he got on at Artemus, or that "you gave me a ticket to Artemus." These are the only words which passengers who testified heard pass between appellee and the conductor. Appellee testified that the conductor cursed him, and the conductor testified that he was cursed by appellee. At this juncture the conductor charges that appellee made a motion as if to draw a pistol, and that he said to him, "Young man, you

have got a pistol; don't do that." And a claim agent, L. F. Debusk, who was on the train, testified that at this time he heard some one say, "Look out, he is going to shoot." Immediately upon charging appellee with having a pistol, the conductor seized him, and Debusk searched him and found no pistol. Thereupon the conductor released his hold upon appellee, and either struck him with his fist, or slapped him with his hand in which he held his ticket puncher, and appellee claims that the blow injured his face to such an extent that it pained him for a week or more. During the cross-examination of L. F. Debusk he was asked to describe the demonstration that appellee made, as though he was going to draw a weapon, and the plaintiff objected, and the court sustained the objection, and the defendant excepted; but, as defendant made no avowal as to what the answer would have been, it cannot complain of this ruling of the court, although the testimony may have been very material to appellant. In the absence of any avowal, the ruling of the trial court in refusing to permit the witness to answer this question furnishes appellant no grounds for reversal, even though the testimony was material and vitally necessary to its defense.

During the course of the examination appellee was asked this question: "I will ask you if you saw Mr. Worsham, the conductor, and had a conversation with him at any time after this?" The defendant objected, and the court overruled the objection, and the defendant excepted. The question was again repeated in this form: "I will ask you to state whether or not Mr. Worsham said to you that he was drinking on that day, and to just let it go, and not do anything about it, or something like that?" Appellee answered: "It was about three weeks, I suppose, to the best of my recollection. It seems as though I came to Barboursville. I was standing out between the coaches. I had given him my ticket. Just as I handed him my ticket he said, 'Ain't you the young fellow I had a racket with some time ago,' and I said, 'Yes; I suppose I am the one.' He said, 'Just let that go; I was drinking that day.' I said, 'I do not want to have anything to do with you at all,' and he went on, and that was all that was said." This conversation, occurring as it did about three weeks after the difficulty complained of, cannot be considered a part of the res gestæ, and, not being such, was wholly incompetent and prejudicial to appellant. It is a well-settled rule of law that the master is not chargeable with the declarations of its servants, unless they are made contemporaneously with the event complained of, or so soon thereafter as to amount in law to a part of the thing done. *L. & N. R. R. Co. v. Ellis' Adm'r*, 97 Ky. 330, 30 S. W. 979; *Southern Ry. Co. v. Louella Thurman* (decided January 10, 1906), 90 S. W. 240, 2 L. R. A. (N. S.) 1108; *L. C. R. R. Co. v. Wat-*

*son's Adm'r*, 117 Ky. 374, 78 S. W. 175; *Straight Creek Coal Co. v. Haney's Adm'r*, 87 S. W. 1114, 27 Ky. Law Rep. 1117; *I. C. R. R. Co. v. Winslow*, 84 S. W. 1175, 27 Ky. Law Rep. 329; *I. C. R. R. Co. v. Houchins*, 89 S. W. 530, 28 Ky. Law Rep. 503, 1 L. R. A. (N. S.) 375. In each of the foregoing cases this court held that conversations which took place a short time—in some of them only a few minutes—after the happening of the event complained of, were incompetent and prejudicial. In this case, as in the *Ellis* Case, the testimony was introduced as substantive evidence, and the jury no doubt regarded it as an acknowledgment on the part of the conductor that he was in the wrong. It doubtless influenced the jury in no small degree in making their verdict. This evidence might have been admitted for the purpose of contradicting the witness, after laying the grounds therefor, but, if admitted, the jury should have been told that it was admitted for this purpose only.

It may be urged by appellee that appellant should have objected again when the question was renewed, and should also have objected to the answer. This, however, is not the rule. When the question is asked and defendant objects, and the court overrules the objection and defendant excepts, and then the witness answers, the defendant (appellant) has fully protected his rights. The court having passed upon the question, and overruled defendant's objection, all that remained for defendant to do to fully protect its rights was to save an exception, which he did. The introduction of this testimony was, as we have said, clearly incompetent, and highly prejudicial to the rights of appellant.

We are of opinion that the verdict in this case was excessive, so much so, that we are constrained to believe that the jury must have been influenced to a large degree in arriving at their verdict by the admission of this incompetent testimony.

For the reasons given, the judgment is reversed, and remanded for further proceedings consistent with this opinion.

## KENTUCKY & I. BRIDGE & R. CO. v. NUTTALL.

(Court of Appeals of Kentucky. Oct. 30, 1906.)

### 1. TRIAL—IMPROPER REMARK OF COUNCIL—REBUKE.

Plaintiff's council, in an action by a railroad employé for personal injuries, told the jury that other employes testified against plaintiff as they did because "if they did not they would lose their jobs." The court properly told the lawyer, in the presence of the jury, that that was not a proper argument. *Held*, that defendant could not be said to be prejudiced by the improper remark.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 316.]

### 2. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action by a rear brakeman for injuries caused by jumping to avoid a following

train, which he claimed to have properly signaled, evidence held sufficient to take to the jury plaintiff's contention as to the signaling, and to support a verdict based thereon, although four other witnesses testified that no signals were given.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089, 1132.]

### 3. DAMAGES—PERSONAL INJURIES.

In an action by a railroad employé for alleged injuries to the foot, spinal system, back, and kidneys, conflicting evidence as to the extent of the injury held sufficient to support a verdict of \$2,500.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by W. B. Nuttall against the Kentucky & Indiana Bridge & Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Humphrey, Hines & Humphrey, for appellant. Daniel P. Young, for appellee.

LASSING, J. W. B. Nuttall was a rear brakeman on a train of about 28 cars which was moving from Youngstown at about Thirty-First street east to Eleventh street. He was on the car farthest from the engine. This track was on the south track of a double trestle, which track was some 4 or 5 feet from the north track. The train stopped, leaving the car upon which Nuttall was riding near the middle of the trestle. It was his duty when the train stopped to get off of the car on which he was riding, go back and flag any approaching train. He alleges that when his train stopped, he took a red light with which to signal, and a white light to find his way, it being in the nighttime, and went back 6 or 8 car lengths, when he discovered another train of cars approaching; that he thereupon signaled with his red lantern, and this signal not being heeded, he signaled with both lanterns, and hallooeed, in his effort to attract the attention of the crew of the oncoming train, but all to no purpose, and when the train was right on him; and to prevent being caught and crushed on the trestle, he jumped to the ground between the trestles. He says that the agents and servants of the appellant company in charge of the train upon which he was working, and also those in charge of the train which was approaching his train, because of their gross carelessness and negligence, compelled him to jump from the trestle in order to preserve his own life and limb; that, in jumping from the trestle, he suffered injury to his right foot, spinal system, back, and kidneys, which caused great pain and suffering, and has permanently impaired his ability to earn money.

Appellant's plea was a traverse and a plea of contributory negligence. Appellee in the trial stated substantially the facts as alleged in his pleadings and as above set out. Appellant proved by the three brakemen and the engineer of the train which followed

Nuttall's train, that they were on the lookout on their train, which consisted of 5 cars and an engine, the engine pushing the cars, and they saw nothing of Nuttall's train until they got within two or three car lengths of the train, when they saw some lights, and Nuttall either climbed or jumped from the rear car on the north side thereof just before the collision occurred. They prove that the track was practically straight at this point, and that there was nothing to obstruct their view. On the question of damage or injury, in addition to the statements made by Nuttall to the effect that he was seriously injured and suffered great pain, four doctors were introduced, three of whom, Drs. McKinney, Underwood, and Taylor, testified that they made a careful examination shortly after the accident happened, and that they found no evidence of any serious injury, although one of them, Dr. Underwood, says that 8 days after the accident appellee complained of his kidneys hurting him, and also of his bladder; that he treated him for 10 days. Dr. McKinney says that he found no evidence of any external injuries; that there was no discoloration; that he complained of pain in his head and back, and some pain in his feet; that he made no examination of any spinal injury; that there was some absence of knee reflexion at that time, which might be indicative of either injury or disease. The examination by these three doctors was confined to a short period following the injury in April, 1904. Another physician, Dr. Reynolds, who examined him in March, 1905, a short time before the trial, testified that he made an examination, and found appellee's pulse unnaturally rapid, breathing more frequent than natural, and sight defective, and suffering in his spinal column; that there were remains of blood clots on his eye near the retina, and that, from his examination, the condition of the patient indicated that the connecting points between the hip bones and the spinal column had been injured, and had injured his right eye, and that the injury causing this trouble was in the nature of a concussion, or some powerful jar. This, in substance, is the testimony. And the jury who tried the case, under what we conceive to be proper instructions, returned a verdict for \$2,500 for plaintiff, and judgment was rendered thereon, and the company appeals.

Several errors are assigned by appellant in its motion and grounds for a new trial, but two of which are urged for consideration in their brief: (1) That the verdict is not supported by the evidence. (2) Because of misconduct of one of counsel for appellee in the argument of the case. Appellant moved for a peremptory instruction at the close of appellee's testimony, and renewed his motion when all of the testimony offered by both sides was in. The court overruled both of said motions, and we think properly so, as

there was evidence tending to support appellee's contention. And this court has held that where there is any evidence, even though slight, the case should not be taken from the jury, but they should be left to judge of the weight thereof. Appellant insists that as appellee is unsupported in his testimony, and that appellant introduced four witnesses who testified positively against the statements of appellee, and then, in the face of this testimony, the jury returned a verdict for appellee, that this of itself is the strongest and best evidence that the verdict was secured or brought about through passion or prejudice, and is not supported by the testimony, and for that reason the case should be reversed, and a new trial granted. Appellant also urges that the case should be reversed because during the argument counsel for Nuttall told the jury that the four employes who testified against appellee had to swear as they were swearing, because "if they did not, they would lose their jobs." This was a line of argument which was improper, but we cannot say that appellant was prejudiced thereby, because the court promptly told the lawyer, in the presence of the jury, that that was not a proper argument, and the open rebuke to the lawyer before an intelligent jury could not be taken by them in any other light than that they were not to consider this statement.

In answer to appellant's contention that the great weight of the evidence is against the verdict, and that this case should be reversed on that ground, we must say that this was a matter which was properly submitted to the jury. They were the sole and exclusive judges of the weight to be given the testimony of each witness bearing on the question of negligence, and also on the extent of the injury, and our courts have held, by an almost unbroken line of decisions, that the verdict of a properly instructed jury will not be disturbed where there is any evidence to support it. As early as 1803 this court, in the case of *Duncan v. Finnyhorn & Wife*, 2 Ky. Dec. 362, held that "in an action of tort which sounds entirely in damages, there is no certain rule by which the measure thereof can be ascertained by a court, and is a sound reason why a court should not interfere either on account of excessive or insufficient damages. The jury is the constitutional tribunal to ascertain them." This same doctrine was reaffirmed in the case of the *L. & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; in this case the court says: "The

amount allowed seems large. It is so. The fact, however, that it appears high to us does not authorize a reversal. We are not acting as a jury, and it is only when it is glaringly excessive, and appears at first blush to have resulted from passion or prejudice, that we can interfere. The power should be sparingly exercised, and only in extreme cases. This is the policy of the law, and reasonably and necessarily so. It is difficult, indeed impossible, to measure with mathematical certainty the extent of some of the elements of compensatory damages. The law has confided the duty to the opinion of the jury as the best means of arriving at their extent, even approximately, and every verdict should be regarded *prima facie* as the result of the exercise of an honest judgment upon their part." And again in the case of the *L. & N. R. Co. v. Smith*, 84 S. W. 755, 27 Ky. Law Rep. 257, the court says: "It is only when there is no evidence to support the verdict, or when it is so flagrantly against the weight of the evidence as to indicate that it was superinduced by passion or prejudice upon the part of the jury, that the court will be authorized to set it aside in the absence of errors of law upon the part of the court occurring during the trial." The facts in this case are similar to the facts in the case of the *I. O. R. Co. v. Colly*, 86 S. W. 536, 27 Ky. Law Rep. 730. On that case the court said: "It is true that appellee stands alone in her testimony as to the manner in which her injuries were received. \* \* \* Appellee described with particularity the facts and circumstances connected with and leading to the accident. \* \* \* As to the character and extent of her injuries she was uncontradicted. Appellant introduced its trainmen, who testified that the coupling of the cars on the occasion in question was done in the usual way, and without force or violence. The jury were the triers of the facts, and they had the right to accept the testimony of appellee as to the truth of the matter, and reject that of appellant's witnesses. We cannot say that mere numerical superiority of witnesses on one side constitutes preponderance of proof, nor can we disturb the verdict as not being sustained by sufficient evidence."

Measured in the light of the rule in this case, conceding to the jury the right to believe the statement of appellee as true as to the manner in which the accident occurred, we are of opinion that the verdict should not be disturbed, and the judgment is affirmed.



## MEMORANDUM DECISIONS.

**COMMONWEALTH v. BISHOP, GIBSON & CO.** (Court of Appeals of Kentucky. Oct. 5, 1908.) Appeal from Circuit Court, Cumberland County. "Not to be officially reported." C. A. Bishop and others composing the firm of Bishop, Gibson & Co. were prosecuted for failing to pay a license tax, and the commonwealth appeals from a judgment of acquittal. Affirmed. N. B. Hays, C. H. Morris, A. A. Huddleton and C. R. Hicks, for the Commonwealth.

**NUNN, J.** The appellees, C. A. Bishop and J. W. Gibson, who compose the firm of Bishop, Gibson & Company, established in Cumberland county a sewing machine agency, and obtained a license and employed agents to represent them in the sale of the machines. They were indicted for failing to pay \$5 for each agent, who represented them in the sale of the machines. The lower court tried and acquitted them, and the commonwealth has appealed.

This court is now deprived of one member on account of sickness. The other members are equally divided on the question of affirmance or reversal. Therefore the judgment of the lower court is affirmed.

**ROSENFELD BROS. CO. v. COMMONWEALTH.** (Court of Appeals of Kentucky. Oct. 31, 1908.) Appeal from Circuit Court, Franklin County. "Not to be officially reported." Action by the commonwealth against Rosenfeld Bros. Company. Judgment for plaintiff, and defendant appeals. Affirmed. C. H. Shield and Gibson, Marshall & Gibson, for appellant. White & Ray and John W. Ray, for appellee.

**HOBSON, C. J.** The questions on this appeal are the same as in the case of Thompson v. Commonwealth, 94 S. W. 654, 29 Ky. Law Rep. 705, and for the reasons given in that case the judgment appealed from is affirmed.

Judgment affirmed.

**SMITH et al. v. COMBS.** (Court of Appeals of Kentucky. Sept. 20, 1906.) Appeal from Circuit Court, Knott County. "Not to be officially reported." Action by Spencer Combs against Sidney B. Smith and others. Judgment for plaintiff. Defendants appeal. Affirmed. H. H. Smith, S. J. Kilgore, B. P. Woorton, and Greene & VanWinkle, for appellants. J. J. C. Bach and B. F. Combs, for appellee.

**CARROLL, C.** The question involved in this action is whether appellants or appellee is the owner of a boundary of land from which timber was cut and carried away by appellants. Appellee was the plaintiff below, and claims the land under various conveyances running back to two patents issued in 1872 to Smith and Baum. The appellants rely chiefly on adverse possession of the land in controversy upon which they entered as vendees of G. A. Ashley. In 1872 two patents for 200 acres each were issued to Smith and Baum. Afterwards, S. C. Fairchild became the owner of a portion of the land covered by these patents, and in 1897 for a recited consideration of \$50 conveyed to the appellee 100 acres, and it is upon this boundary of land conveyed by Fairchild to appellee that the appellants are alleged to have entered and cut the timber. In 1887 G. A. Ashley obtained a patent for 50 acres of land, the boundary of which laps over on the Smith and Baum prior patents. In 1841 Nicholas Smith obtained a patent for 100 acres of land, and in 1847 a patent for 100 acres; and

the Smith and Baum junior patents lap over on both these patents to Smith. This information is obtained from the map made by Adam Campbell filed with the record.

It is the contention of the appellants that about 1850 one Frank Ashley bought the land covered by the Smith patents from Smith, and took possession of it as well as the land for which G. A. Ashley subsequently obtained a patent. There is no deed in the record conveying any land to Frank Ashley, but the evidence for the appellants tends to establish that Ashley from about 1850 until his death—35 or 40 years afterwards—was in possession of the Smith land, and the land patented by G. A. Ashley in 1887, and exercising acts of ownership over it. Upon the death of Frank Ashley, G. A. Ashley, his son, in the division of his land, became the owner of a portion of the lands claimed by him. The patent obtained by G. A. Ashley in 1887 embraces a part, if not all, of the land the appellants contend he inherited from his father Frank Ashley. This patent, however, being many years junior to the patents to Smith and Baum under which appellee claims, is not available to appellants in this controversy, and the only deeds in the record under which appellants claim is a deed made in 1887 by the children of Frank Ashley to Green Ashley, and a deed made in 1891 by Green Ashley to appellants. These deeds do not describe the number of acres conveyed to the respective vendees. The lower court adjudged that the appellee was the owner of and entitled to the possession of the 100 acre tract conveyed to him by Fairchild except such part of the same as was covered by the patent issued to Smith in 1841 and 5 acres that was held to be in the actual possession of the appellants at the time of the conveyance from Fairchild to appellee. The boundary of land from which the timber was cut is very imperfectly described. It is not indicated on the map and the evidence is uncertain and indefinite as to whether it lies within the boundary of the patent to Smith or within the boundary for which G. A. Ashley obtained a patent in 1887. The surveyor testified that the Green Ashley deed covered all or nearly all of the land in controversy, and that the Nicholas Smith and Green Ashley patents covered all or nearly all of the land in controversy. There is no map or other intelligible evidence in the record by which the lines of the boundary claimed by appellants can be located with any degree of certainty; nor do the lines of the deed made by Ashley to appellants correspond with the lines of the patent issued to Ashley. The witnesses for appellant were simply asked whether or not the lands claimed by the appellants included the lands in controversy and described in the petition, and they said it did. But, on the cross-examination of appellant, Sydney Smith, he was asked if he was acquainted with the boundary of land described in the petition and he said no; and also testified that he did not know anything of its location. Hiram Adams, another witness for appellant, testified that no person had ever lived on the land described in the petition and that he did not know the location of said land, but that a great part of all of it had been cleared and fenced for 12 years. John Smith, another witness for appellant, in his cross-examination said that he had never seen the lines of the tract of land described in the petition run, and could not definitely locate it, and that no person had ever lived on the land. This is a fair sample of the evidence for appellant. The evidence does not disclose either the number of acres or the

uous, actual adverse possession of the land described in the petition for such length of time as to give them a possessory title to it.

We have carefully considered this record, and have reached the conclusion that the judgment of the chancellor was substantially correct, and it is therefore affirmed.

**SOUSLEY v. PRATT FOOD CO.** (Court of Appeals of Kentucky. Oct. 9, 1906.) Appeal from Circuit Court, Fleming County. "Not to be officially reported." Action between Edward D. Sousley and the Pratt Food Company. From the judgment Sousley appeals. Affirmed by divided court. B. S. Grannis, J. B. Cumber, and R. J. Babbitt, for appellant. Charles I. Turber, amicus curiæ.

**PER CURIAM.** The court being advised the judgment herein is affirmed by an equal decision of the court.

**CANTRILL, J., not sitting.**

**BURKS v. STATE.** (Court of Criminal Appeals of Texas. Oct. 17, 1906.) Appeal from Cherokee County Court; R. L. Robinson, Judge. Jim Burks was convicted of violating the local option law, and he appeals. Affirmed. J. E. Yantis, Asst. Atty. Gen., for the State.

**HENDERSON, J.** Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal. The record contains neither statement of facts nor bill of exceptions. The charge of the court is applicable to a state of facts provable under the information. No error appears in the record, and the judgment is affirmed.

**DARDEN v. STATE.** (Court of Criminal Appeals of Texas. Oct. 17, 1906.) Appeal from Upshur County Court; M. B. Briggs, Judge. Jim Darden was convicted of violating the local option law, and he appeals. Affirmed. J. E. Yantis, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Conviction for violating the local option law. The record is before us without the evidence. There are no questions presented which require a revision. The judgment is affirmed.

**STRICKLAND v. STATE.** (Court of Criminal Appeals of Texas. Oct. 17, 1906.) Appeal from Sabine County Court; H. C. Maund, Judge. Noah Strickland was convicted of an assault, and he appeals. Affirmed. J. E. Yantis, Asst. Atty. Gen., for the State.

revision. The judgment is affirmed.

**CRIST v. BELL.** (Court of Civil Appeals of Texas. Oct. 17, 1906.) Appeal from District Court, Bowie County; P. A. Turner, Judge. Action by J. F. Crist against Mrs. Temple Bell. From a judgment for plaintiff for less than the relief demanded, he appeals. Affirmed. Hart, Mahaffey & Thomas, for appellant.

**EIDSON, J.** This action was brought in the court below by the appellant to determine the boundary line between his lands and those of appellee, and for rents or damages. The case was tried before the court without a jury, and judgment rendered for the appellant, but not for all the land he claimed; and, being dissatisfied with such judgment, he has appealed the case to this court. While there is some conflict in the evidence, we are of opinion that it sufficiently sustains the judgment of the court below. There was no error in the admission of the testimony complained of in appellant's second assignment of error. *Hurt v. Evans*, 49 Tex. 316; and *Evans v. Hurt*, 34 Tex. 111.

There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

**KELLEY ISLAND LIME & TRANSPORT CO. v. MASTERSON.** (Court of Civil Appeals of Texas. Oct. 11, 1906.) Appeal from District Court, Harris County; W. P. Hamblen, Judge. Action by the Kelley Island Lime & Transport Company against H. Masterson. From a judgment in favor of defendant, plaintiff appeals. Reversed and rendered. Hardy & Hardy and Ford, Stone & Ford, for appellant. H. & A. R. Masterson and Fisher & Fisher, for appellee.

**GILL, C. J.** At the last term of this court we certified to the Supreme Court the sole question in this case. The nature and result of the suit in the court below and the facts bearing upon the question certified were fully stated in the certificate, which is embodied in the opinion of the Supreme Court (93 S. W. 427) in answer to the question. The answers conclusively establish the liability of Masterson as a member of the firm of Downey & Company, his codefendant, and as the amount sued for is admitted to be a liability of that firm, nothing remains but to reverse the judgment of the court below, and here render judgment against Masterson for the amount claimed in plaintiff's petition, to wit, \$1,710.60, with legal interest from July 25, 1903. It is accordingly so ordered.

Reversed and rendered.



## ABANDONMENT.

Ground for divorce, see "Divorce," § 1.

*Of particular species of property or rights.*

See "Contracts," § 3; "Homestead," § 4.

Rights acquired by adverse possession, see "Adverse Possession," § 1.

## ABATEMENT AND REVIVAL.

Judgment as bar to another action, see "Judgment," § 6.

Revival of judgment, see "Judgment," § 9.

### § 1. Another action pending.

\*Where plaintiff bought land, relying on defendant's false representation of title, the pendency of a suit by third persons to recover a portion of the land *held* no bar to plaintiff's suit for a rescission.—*Olschewske v. King* (Tex. Civ. App.) 665.

## ABDUCTION.

See "Seduction."

## ABUTTING OWNERS.

Assessments for expenses of public improvements, see "Municipal Corporations," § 9.

Compensation for taking of or injury to lands or esements for public use, see "Eminent Domain," § 2.

Rights in streets in cities, see "Municipal Corporations," § 12.

## ACCEPTANCE.

Of dedication, see "Dedication," § 1.

Of goods sold in general, see "Sales," § 4.

Of goods sold within statute of frauds, see "Frauds, Statute of," § 2.

## ACCIDENT.

Cause of death, see "Death," § 1.

Ground for new trial, see "New Trial," § 2.

## ACCOMMODATION PAPER.

See "Bills and Notes."

## ACCORD AND SATISFACTION.

See "Payment."

## ACCOUNT.

See "Account, Action on"; "Account Stated."

Accounting by executor or administrator, see "Executors and Administrators," § 8.

Review of orders relating to accounting by executor as dependent on finality of determination, see "Appeal and Error," § 1.

## ACCOUNT, ACTION ON.

Where the whole of a running account is by agreement regarded as due on a certain date, it

\*Point annotated. See syllabus.

is proper in an action for the balance of the account to refuse to instruct that each item of the account is a separate contract.—*Nunn v. W. T. McKnight & Bro.* (Ark.) 193.

## ACCOUNT STATED.

\*Where an account is rendered and retained without objection for an unreasonable length of time, it becomes a stated account, and can only be assailed for fraud or mistake.—*Little & Hays Inv. Co. v. Pigg* (Ky.) 455.

\*The issue of the existence of a stated account *held* for the jury.—*Little & Hays Inv. Co. v. Pigg* (Ky.) 455.

## ACCRUAL.

Of right of action, see "Limitation of Actions," § 1.

## ACKNOWLEDGMENT.

Of indebtedness barred by limitation, see "Limitation of Actions," § 2.

Operation and effect of admissions as evidence, see "Evidence," § 5.

### § 1. Taking and certificate.

\*Where the county clerk, in taking an acknowledgment, exercises the diligence of a reasonably prudent person, he complies with the conditions of his bond.—*Commonwealth v. Johnson* (Ky.) 801.

\*Evidence that a deputy clerk took the acknowledgment of an impostor *held* to make a prima facie case of negligence against the clerk in an action on his official bond.—*Commonwealth v. Johnson* (Ky.) 801.

In an action on the official bond of a clerk for giving a false certificate of acknowledgment, evidence that the person whose acknowledgment was taken was introduced by a reputable business man *held* competent to show the clerk's diligence, and presenting a question for the jury.—*Commonwealth v. Johnson* (Ky.) 801.

A notary *held* not disqualified, by interest of a firm of which he was a member, to take an acknowledgment to a mechanic's lien contract.—*Roane v. Murphy* (Tex. Civ. App.) 782.

## ACTION.

Abatement, see "Abatement and Revival."

Accrual, see "Limitation of Actions," § 1.

Bar by former adjudication, see "Judgment," § 6.

Commencement within period of limitation, see "Limitation of Actions," § 1.

Counterclaim, see "Set-Off and Counterclaim."

Jurisdiction of courts, see "Courts."

Laches, see "Equity," § 2.

Limitation by statutes, see "Limitation of Actions."

Malicious actions, see "Malicious Prosecution."

Pendency of action, see "Abatement and Revival," § 1; "Lis Pendens."

Set-off, see "Set-Off and Counterclaim."

*Actions between parties in particular relations.*

See "Attorney and Client," § 2; "Landlord and Tenant," §§ 3, 5; "Master and Servant," §§ 2, 10-13; "Partnership," § 2.

Broker and client, see "Brokers," § 3.

Co-tenants, see "Partition," § 1.

*Actions by or against particular classes of persons.*

See "Carriers," §§ 2, 3, 5, 7, 9; "Counties," § 3; "Executors and Administrators," § 7; "Husband and Wife," § 5; "Infants," § 3; "Master and Servant," § 14; "Municipal Corporations," §§ 13, 15; "Notaries," § 2; "Partnership," § 3; "Principal and Agent," § 3; "Railroads," §§ 4-7; "Street Railroads," § 2; "Warehousemen," § 2.

Heirs or distributees, see "Descent and Distribution," § 2.

Insurance companies, see "Insurance," § 13.

Taxpayers, see "Municipal Corporations," § 14.

Telegraph companies, see "Telegraphs and Telephones," § 2.

*Actions relating to particular species of property or estates.*

Establishment and determination of rights to mortgaged chattels, see "Chattel Mortgages," § 2.

*Particular causes or grounds of action.*

See "Account Stated"; "Assault and Battery," § 1; "Bills and Notes," § 5; "False Imprisonment," § 1; "Forcible Entry and Detainer," § 1; "Insurance," §§ 13, 14; "Judgment," § 11; "Libel and Slander," § 2; "Malicious Prosecution," § 2; "Money Received"; "Negligence," § 4; "Taxation," § 3; "Trespass"; "Trover and Conversion," § 2; "Use and Occupation"; "Work and Labor."

Bonds in injunction proceedings, see "Injunction," § 3.

Bonds of notaries, see "Notaries."

Breach of contract, see "Contracts," § 5;

"Sales," §§ 7, 8; "Vendor and Purchaser," § 6.

Breach of contract for transportation of passengers, see "Carriers," § 5.

Breach of covenant, see "Covenants," § 3.

Compensation of agent, see "Principal and Agent," § 2.

Compensation of broker, see "Brokers," § 3.

Delay in transportation of goods, see "Carriers," § 2.

Delay in transportation of live stock, see "Carriers," § 3.

Delay in transmission of telegram, see "Telegraphs and Telephones," § 2.

Discharge from employment, see "Master and Servant," § 1.

Ejection of passenger, see "Carriers," § 9.

Enforcement of attorney's term for services, see "Attorney and Client," § 2.

Enforcement of landlord's term for rent, see "Landlord and Tenant," § 3.

Enticement of child, see "Parent and Child."

Fires caused by railroads, see "Railroads," § 7.

Foreclosure of vendor's lien, see "Vendor and Purchaser," § 5.

Injuries to animals on or near railroad tracks, see "Railroads," § 6.

Loss of or injury to goods, see "Carriers," § 2.

Loss of or injury to live stock, see "Carriers," § 3.

Personal injuries, see "Carriers," § 7; "Explosives"; "Highways," § 1; "Master and Servant," §§ 10-13; "Municipal Corporations," § 13; "Railroads," §§ 4, 5; "Street Railroads," § 2.

Price of goods, see "Sales," § 7.

Services, see "Master and Servant," § 2; "Work and Labor."

Wages, see "Master and Servant," § 2.

*Particular forms of action.*

See "Account, Action on"; "Ejectment"; "Replevin"; "Trespass," § 1; "Trespass to Try Title"; "Trover and Conversion."

*Particular forms of special relief.*

See "Divorce"; "Injunction"; "Interpleader"; "Partition," § 1; "Quieting Title"; "Specific Performance."

Accounting by executor or administrator, see "Executors and Administrators," § 8.

Admeasurement or assignment of dower, see "Dower," § 1.

Alimony, see "Divorce," § 3; "Husband and Wife," § 6.

Cancellation of written instrument, see "Cancellation of Instruments."

Determination of adverse claims to real property, see "Quieting Title."

Enforcement of special assessments for public improvements, see "Municipal Corporations," § 10.

Establishment of boundaries, see "Boundaries," § 2.

Establishment of will, see "Wills," § 2.

Foreclosure of mortgage, see "Mortgages," § 3.

Reformation of written instrument, see "Reformation of Instruments."

Removal of cloud on title, see "Quieting Title."

Restrain execution, see "Execution," § 1.

Separate maintenance of wife, see "Husband and Wife," § 6.

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 3.

Setting aside will, see "Wills," § 2.

*Particular proceedings in actions.*

See "Continuance"; "Costs"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Reference"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

Default, see "Judgment," § 2.

Revival of judgment, see "Judgment," § 9.

Verdict, see "Trial," § 13.

*Particular remedies in or incident to actions.*

See "Garnishment"; "Injunction"; "Tender."

Notice of pendency of action, see "Lis Pendens."

Stay of proceedings, see "Appeal and Error," § 5.

*Proceedings in exercise of special or limited jurisdictions.*

Criminal prosecutions, see "Criminal Law."

Suits in equity, see "Equity."

Suits in justices' courts, see "Justices of the Peace," § 1.

*Review of proceedings.*

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 2; "New Trial."

*§ 1. Grounds and conditions precedent.*

Action by a shipper against a carrier for injury to a shipment of live stock, *held* an action at law.—Cincinnati, N. O. & T. P. Ry. Co. v. Pendleton & Hudson (Ky.) 434.

*§ 2. Joinder, splitting, consolidation, and severance.*

Causes of action *held* properly joined, being on contract, and affecting all the parties.—Beckman Lumber Co. v. Kittrell (Ark.) 988.

\*Two causes of action *held* such that they could not properly be joined under Civ. Code Prac. § 83.—Dailey v. O'Brien (Ky.) 521.

The petition and amendment thereof for election of a passenger *held* to state but a single cause of action, so that motions to strike the amendment or require an election were properly refused.—Louisville & N. E. Co. v. Fowler (Ky.) 568.

\*Point annotated. See syllabus.

## ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.  
Effect on right to mandamus, see "Mandamus," § 1.

## ADJOINING LANDOWNERS.

See "Boundaries"; "Fences."

## ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," §§ 6, 7.

## ADJUSTMENT.

Of loss within insurance policy, see "Insurance," § 12.

## ADMEASUREMENT.

Of dower, see "Dower," § 1

## ADMINISTRATION.

Of estate of decedent, see "Executors and Administrators."  
Of estate of ward, see "Guardian and Ward," § 1.  
Of trust property, see "Trusts," § 2.

## ADMISSIONS.

As evidence in civil actions, see "Evidence," § 5.

## ADOPTION.

Of constitutional amendments, see "Constitutional Law," § 1.

## ADVANCEMENTS.

See "Descent and Distribution," § 2.

## ADVANCES.

By landlord to tenant, see "Landlord and Tenant," § 3.

## ADVERSE CLAIM.

To real property, see "Quieting Title."

## ADVERSE POSSESSION.

See "Limitation of Actions."

### § 1. Nature and requisites.

In trespass to try title, defendant holding under a donation deed from the state based on a sale had October 25, 1882, *held* to have title, in the absence of anything tending to impeach the deed.—Wade v. Goza (Ark.) 388.

\*Facts *held* not to show an abandonment destroying the continuity of adverse possession.—Bradbury v. Dumond (Ark.) 390.

\*Color of title is not necessary to give title by adverse possession, but is necessary to extend the title acquired beyond the actual possession.—Bradbury v. Dumond (Ark.) 390.

\*A tax deed *held* to constitute color of title.—Bradbury v. Dumond (Ark.) 390.

\*Point annotated. See syllabus.

possession *held* not continuous so as to give title by adverse possession.—Overton v. Overton (Ky.) 469.

\*An occasional cutting of timber from land claimed by defendants since 1877, but not shown to have been occupied by any person, was insufficient to invest them with title by adverse possession.—Auxier v. Herald (Ky.) 915.

### § 2. Operation and effect.

\*Color of title is not necessary to give title by adverse possession, but is necessary to extend the title acquired beyond the actual possession.—Bradbury v. Dumond (Ark.) 390.

\*Actual possession by a grantee in a tax deed of a part of the tract conveyed *held* to extend to the entire tract.—Jones v. Pond & Decker Mfg. Co. (Ark.) 756.

\*The principle that an owner in actual possession of a portion of land, claiming title to the whole, has the constructive possession of all the land, *held* not applicable where an intruder claims land against another.—Morris v. Jacks (Tex. Civ. App.) 637.

\*In trespass to try title plaintiff *held* to have had constructive possession of land within the true boundary lines of the survey only.—Davidson v. Equitable Securities Co. (Tex. Civ. App.) 787.

\*Possession of one claiming land under a deed duly registered, and who enters upon and improves or incloses a part of the land embraced in the boundaries specified in his deed, extends to all the land embraced in the true boundaries of such deed.—Davidson v. Equitable Securities Co. (Tex. Civ. App.) 787.

### § 3. Pleading, evidence, trial, and review.

\*In an action to recover land, a plea *held* sufficient to apprise plaintiff that defendant relied on seven years' adverse possession as a defense.—McKewen v. Allen (Ark.) 392.

In trespass to try title evidence *held* insufficient to show such possession or result in acquisition of title under the 5 or 10 years' statutes of limitation.—Mann v. Hossack (Tex. Civ. App.) 767.

## AFFIDAVITS.

See "Depositions."

*Particular proceedings or purposes.*

See "New Trial," § 3.

Appeal from justice's court, see "Justices of the Peace," § 2.

On challenge to juror, see "Jury" § 4.

An affidavit for appeal *held* good, though the notary does not certify when his term expires.—Brown Mfg. Co. v. Gilpin (Mo. App.) 669.

\*An affidavit for appeal, though made before a foreign notary, *held* efficacious.—Brown Mfg. Co. v. Gilpin (Mo. App.) 669.

## AFTER-ACQUIRED PROPERTY.

See "Mortgages," § 2.

## AGENCY.

See "Principal and Agent."

## AGGRAVATION.

Of damages, see "Damages," § 1.

**AGREEMENT.**

See "Contracts."

**AIDER BY VERDICT.**

In civil actions, see "Pleading," § 11.

**ALIENS.**

Removal of suits by or against aliens to United States court, see "Removal of Causes," § 1.

**ALIMONY.**

See "Divorce," § 3; "Husband and Wife," § 6.

**ALLOTMENT.**

Of dower, see "Dower," § 1.

**ALLOWANCE.**

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 4.

**ALTERATION.**

Of geographical or political divisions, see "Schools and School Districts," § 1.

**ALTERATION OF INSTRUMENTS.**

See "Reformation of Instruments."

**AMENDMENT.**

Of Constitution, see "Constitutional Law," § 1.  
Of statute, see "Statutes," § 3.

In particular remedies or special jurisdictions.

See "Criminal Law," § 18; "Parties," § 3; "Pleading," § 6; "Trial," § 14.

Record on appeal or writ of error, see "Criminal Law," § 23.

**AMOUNT IN CONTROVERSY.**

Jurisdictional amount, see "Courts," § 2.

**ANIMALS.**

See "Game."

Carriage of live stock, see "Carriers," § 3.

Fence laws, see "Fences."

Injuries from operation of railroads, see "Railroads," § 6.

Nature and form of action against carrier for injuries to shipment of live stock, see "Action," § 1.

\*A contract of pasturage held to bind the owner of the pasture to confine the cattle to the pasture either by a fence or by herders.—*Glassey v. Sligo Furnace Co.* (Mo. App.) 310.

\*The beating of a mule with an evil intent and without reasonable cause held willful and wanton.—*Allen v. State* (Tex. Cr. App.) 927.

**ANNULMENT.**

Of will, see "Wills," § 2.

**ANSWER.**

In pleading, see "Pleading," § 3.

\*Point annotated. See syllabus.

**APPEAL AND ERROR.**

See "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 4.

Costs, see "Costs," § 2.

Sufficiency of certificate of affidavit of appeal, see "Affidavits."

*Review of criminal prosecutions.*

See "Criminal Law," §§ 21-25; "Homicide," § 5.

**§ 1. Decisions reviewable.**

Under Rev. St. 1899, § 806, an order of the Circuit Court remanding a cause to the Justice Court under section 3951, held not final and appealable.—*Walker v. Walker* (Mo. App.) 418.

Probate order denying the motion of an administrator pendente lite to require a suspended executrix to make a settlement held appealable under Rev. St. 1899, § 278.—*Hanley v. Holton* (Mo. App.) 691.

\*Where, on a motion to dismiss an appeal from a probate order, the merits were submitted, a judgment sustaining the motion to dismiss the appeal held a determination of the merits.—*Hanley v. Holton* (Mo. App.) 691.

\*A judgment in an action accompanied by attachment not having disposed of all the issues and parties held not a final judgment, so as to support an appeal.—*Holley v. Duke* (Tex. Civ. App.) 1090.

**§ 2. Presentation and reservation in lower court of grounds of review.**

Where defendant did not object to certain state land certificates on the ground that the certificates were not the best evidence, he could not object thereto on appeal.—*Wade v. Goza* (Ark.) 388.

\*In an action for injuries to wife held that defendant could not raise certain objections to plaintiff's recovery for the first time on appeal.—*Little Rock Traction & Electric Co. v. Miller* (Ark.) 993.

That defendant did not ask an instruction on the measure of damages did not preclude it from objecting to an erroneous instruction given.—*South Covington & C. St. Ry. Co. v. Core* (Ky.) 562.

An objection to the competency of evidence, made for the first time in the appellate court, is unavailing.—*Duff v. Bailey* (Ky.) 577.

\*Rulings excepted to on trial are not reviewable unless presented on a motion for a new trial.—*Hatfield v. Adams* (Ky.) 583.

\*Evidence as to the admission of which no exception was taken cannot be complained of on appeal.—*Nelson v. Nelson* (Ky.) 794.

\*Appellant cannot complain of the giving or failure to give instructions where no objection was made by him to the instructions given or exceptions taken thereto.—*Thomas v. Strickler* (Ky.) 833.

\*Alleged misconduct of counsel will not be considered on appeal in the absence of objections or exceptions to the statements when made.—*Louisville & E. R. Co. v. Vincent* (Ky.) 898.

\*Where evidence was admitted without objection and no motion was made to strike it out, the adverse party cannot complain of it on appeal.—*Wald v. Wald* (Mo. App.) 302.

\*A ground of objection to the admissibility of evidence not made at the trial cannot be made on appeal.—*Glassey v. Sligo Furnace Co.* (Mo. App.) 310.

\*Objection to sufficiency of ordinance to constitute contract between parties held too late



to the appeal, and the court, served to the overruling of defendant's demurrer to the evidence and to the denial of its request to instruct for defendant.—*De Maet v. Fidelity Storage, Packing & Moving Co.* (Mo. App.) 1045.

Appellant cannot complain of an instruction correct so far as it goes where he requested no special charge correcting the supposed defects.—*International & G. N. R. Co. v. Wray* (Tex. Civ. App.) 74.

The statute of frauds cannot be, for the first time, invoked on appeal.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 93.

### § 3. Parties.

\*Appeal by abutting owner in action to enforce lien for local improvement, held to be dismissed as to town against which the petition was dismissed below.—*Wolf v. Pierce* (Ky.) 903.

\*Under the facts an appeal held dismissible as to one of appellees.—*City of Covington v. Whitney* (Ky.) 907.

### § 4. Requisites and proceedings for transfer of cause.

A bond for appeal signed merely "M. Co., M., Treas.," held binding on the corporation.—*Brown Mfg. Co. v. Gilpin* (Mo. App.) 669.

Acts 1903, p. 98, c. 58, held not to modify Acts 1897, p. 312, c. 131, relating to appeals from the Court of Chancery Appeals, the purpose of the act being to modify Shannon's Code, §§ 4732-4736.—*Brosnan v. Lancaster* (Tenn.) 958.

Under Acts 1897, p. 312, c. 131, an appeal from a decree of the Court of Chancery Appeals held taken too late.—*Brosnan v. Lancaster* (Tenn.) 958.

\*The Court of Chancery Appeals can withhold the entry of a decree so that, during the consideration of a petition for rehearing or for an additional finding of facts, the statutory limitation of appeal may not run, or if entered make an order withdrawing it, and then suspend re-entry until such a petition has been disposed of.—*Brosnan v. Lancaster* (Tenn.) 958.

Acts 1903, p. 98, c. 58, held not to extend the period of appeal from the decree of the Court of Chancery Appeals, in case of a filing of a petition therein for an additional finding of facts.—*Brosnan v. Lancaster* (Tenn.) 958.

### § 5. Supersedeas or stay of proceedings.

Where after the dismissal of a suit under Civ. Code Prac. § 439, to subject administrator's fees deposited in a bank to the payment of his debts, an appeal was taken and supersedeas issued on which the judgment was reversed, the bank was not liable for refusing pending such appeal to pay the entire deposit to such administrator.—*National Bank of Lancaster v. Johnson's Adm'r* (Ky.) 433.

### § 6. Record and proceedings not in record.

Where the bill of exceptions in another suit was not embodied in the transcript of the record in the suit at bar, it could not be considered on appeal.—*Wade v. Goza* (Ark.) 388.

An objection that the verdict was grossly excessive would not be reviewed on appeal where appellant did not abstract the testimony on such issue.—*St. Louis, I. M. & S. Ry. Co. v. Evans* (Ark.) 616.

\*The refusal to permit a witness to testify cannot be reviewed, where there is no showing of what he would have stated.—*Thomas v. Robinson* (Ky.) 459.

\*Point annotated. See syllabus.

v. Kansas City (Mo. Sup.) 1023.

\*A contract filed with the petition as an exhibit, and expressly referred to therein, held not a part thereof, and so not a part of the record proper on appeal.—*Majors v. Maxwell* (Mo. App.) 731.

\*Where all the evidence in an action for injuries on a defective street was not abstracted, whether the evidence was sufficient to show notice to the city of the defect could not be reviewed.—*Keithley v. City of Independence* (Mo. App.) 733.

A bill of exceptions held insufficient to authorize review on appeal of an order sustaining motions for a new trial and in arrest of judgment.—*Kupke v. United Railways Co.* (Mo. App.) 1034.

The court on reviewing assignments of error cannot go beyond the statement of facts for the evidence.—*Rabb v. Texas Loan & Investment Co.* (Tex. Civ. App.) 77.

### § 7. Assignment of errors.

A request that a cross-assignment of error should be considered in case the court for any reason remanded the case, held a waiver of such assignment, the judgment having been modified and affirmed.—*Houston Ice & Brewing Co. v. Nicolini* (Tex. Civ. App.) 84.

Where neither proposition under an assignment of error presents the question of variance between the pleading and the proof, a consideration of the question of variance is unauthorized.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 93.

A proposition under an assignment of error held not appropriate, and the error will not be reviewed on appeal.—*McAllen v. Raphael* (Tex. Civ. App.) 760.

Where exceptions to a pleading are raised by special demurrers, the question is whether the matters attacked are properly pleaded, and an assignment that the court erred in its rulings must be followed by a proposition dealing with that question.—*McAllen v. Raphael* (Tex. Civ. App.) 760.

### § 8. Briefs.

Assignments of error held not briefed as prescribed by Court of Civil Appeals Rules 29-31 (67 S. W. xvi) and are not reviewable on appeal.—*McAllen v. Raphael* (Tex. Civ. App.) 760.

An assignment of error cannot be considered where as briefed the proposition subjoined to it deals with more than one subject.—*McAllen v. Raphael* (Tex. Civ. App.) 760.

### § 9. Dismissal, withdrawal, or abandonment.

\*A cause dismissed on appeal owing to the state of the record.—*Inks v. Brakebill* (Mo. App.) 220.

\*The fact that an abstract of the record filed on appeal under Appellate Court Rule No. 15 (67 S. W. vi) is imperfect, is no ground for dismissing the appeal.—*Inks v. Brakebill* (Mo. App.) 220.

### § 10. Review—Parties entitled to allege error.

\*A cross-appeal only brings up for review questions decided in favor of appellant or any co-appellee against the appellee praying the cross-appeal, as provided by Kirby's Dig. § 1225.—*Wade v. Goza* (Ark.) 388.



\*Matters consented to may not be complained of on appeal.—*Smith v. Sisters of Good Shepherd of Louisville* (Ky.) 549.

\*In an action for injuries, defendant *held* estopped to complain that the court failed to define the issues on plaintiff's part.—*Hines v. Kansas City* (Mo. App.) 672.

\*Where there was no controversy between appellant and the trustees of a dissolved corporation, and no appeal bond was filed by appellee or such trustees, a cross-assignment that the trustees' plea of privilege was erroneously sustained, *held* not reviewable.—*Houston Ice & Brewing Co. v. Nicolini* (Tex. Civ. App.) 84.

#### § 11. — Amendments, additional proofs, and trial of cause anew.

\*Under Kirby's Dig. § 144, and succeeding sections, *held* that an appeal to the Supreme Court in probate matters, where there was a reference to an auditor, is not to be treated as a chancery appeal, so as to authorize a trial de novo.—*Matthews v. W. F. Taylor Co.* (Ark.) 134.

#### § 12. — Presumptions.

\*On appeal, *held* not presumable that other instructions were given than those appearing in the bill of exceptions.—*Bourland v. McKnight & Bro.* (Ark.) 179.

\*The court on appeal in a suit for the settlement of a partnership *held* not authorized to disturb the judgment where the account books of the partnership produced in the lower court were not brought up on appeal.—*Combs v. Combs* (Ky.) 589.

\*It will be presumed, where the court in a civil case, submitted to it on the law and evidence, acts without hearing argument of counsel, that none was necessary.—*Warner v. Close* (Mo. App.) 491.

Where, in an action against a stockholder of a dissolved banking corporation, the evidence is conflicting as to defendant being a director, the court on appeal must assume, in the absence of findings, that the trial court found for defendant on such issue.—*Daugherty v. Poundstone* (Mo. App.) 728.

\*In the absence of the evidence a contract *held* presumed to authorize the findings and decree.—*Majors v. Maxwell* (Mo. App.) 731.

#### § 13. — Discretion of lower court.

\*The refusal to grant a continuance on the ground of the absence of a witness *held* reasonable, and not reviewable on appeal.—*Bratt v. Sparks* (Ark.) 1057.

\*The Supreme Court will not reverse for refusing a continuance unless an arbitrary abuse of discretion to the prejudice of the moving party is shown.—*Bratt v. Sparks* (Ark.) 1057.

\*Under the circumstances, an interference with the trial court's discretion by the allowance of an amendment, *held* proper.—*Hackett v. Van Frank* (Mo. App.) 247.

\*The burden of showing an abuse of discretion by the court *held* to be on one attacking a ruling refusing amendments to an answer.—*Lipscomb v. Perry* (Tex. Sup.) 1069.

#### § 14. — Questions of fact, verdicts, and findings.

\*Finding of trial court on conflicting evidence *held* binding on appeal.—*National Cooperage & Woodware Co. v. A. L. Aydelott & Co.* (Ark.) 359; *Girdner v. Hampton* (Ky.) 453.

A verdict based on conflicting evidence is not reviewable on appeal.—*Cohankus Mfg. Co. v. Rogers' Guardian* (Ky.) 437; *Louisville & A. R. Co. v. Davis* (Ky.) 533; *South Covington &*

*C. St. Ry. Co. v. Cox* (Ky.) 562; *Bader v. Strother* (Mo. App.) 248.

The rule as to sufficiency of the evidence to support a verdict stated.—*Waters-Pierce Oil Co. v. Knisel* (Ark.) 342; *Same v. Parker* (Ark.) 353.

\*A verdict supported by legally sufficient evidence, will not be interfered with on appeal.—*Shackleford v. Williams* (Ark.) 350.

\*Where the evidence is undisputed and it is a mere question of its effect and construction the findings of the circuit court are not binding on appeal.—*Bromley v. Atwood* (Ark.) 356.

\*Error in permitting certain argument to the jury *held* not prejudicial.—*Monte Ne Ry. Co. v. Phillips* (Ark.) 1060.

The court on appeal will not disturb the chancellor's findings on conflicting evidence.—*Taylor v. Industrial Mut. Deposit Co.'s Receiver* (Ky.) 462.

\*The exclusion of evidence offered by the defeated party after the submission of the case does not warrant a reversal where it would not have changed the result.—*Taylor v. Industrial Mut. Deposit Co.'s Receiver* (Ky.) 462.

A finding by the court will not be disturbed on appeal if there is any evidence to support it.—*Wilson v. Johnson's Adm'r* (Ky.) 529.

A verdict will not be interfered with on appeal, unless it is flagrantly against the evidence.—*Lexington Ry. Co. v. Herring* (Ky.) 558.

The finding of the chancellor, where the evidence is conflicting and the mind is left in doubt as to the truth, will not be disturbed on appeal.—*Combs v. Combs* (Ky.) 589.

The finding of the facts by the court on a trial without a jury is entitled to the same force as a verdict, and will not be disturbed unless against the evidence.—*Commonwealth v. Johnson* (Ky.) 801.

Where there is evidence tending to support the verdict, it will not be disturbed on appeal, though the weight of the evidence is against it.—*Holcomb-Lobb Co. v. Kaufman* (Ky.) 813.

\*Findings by court *held* entitled to same weight as verdict.—*Whitworth v. Pool* (Ky.) 880.

\*The judgment of the chancellor on a question of fact will not be disturbed, in case of doubt, but will not be followed when against a preponderance of the evidence.—*Deatley v. Tolle* (Ky.) 920.

\*The appellate court in a suit for divorce will defer to the finding of the trial court.—*Wald v. Wald* (Mo. App.) 302.

Where, in an action against a carrier for injuries to fruit, the evidence was sufficient to present an issue of fact, a verdict justified by the evidence will not be disturbed on appeal.—*St. Louis Southwestern Ry. Co. of Texas v. Wester* (Tex. Civ. App.) 769.

#### § 15. — Harmless error in general.

In an action for failure to convey land, error in computing damages *held* not prejudicial to defendant.—*Whitworth v. Pool* (Ky.) 880.

\*Where the proper result was reached, errors in the admission of evidence and in instructions are harmless.—*San Jacinto Oil Co. v. Culbertson* (Tex. Civ. App.) 110.

\*Plaintiff, in trespass to try title, was not prejudiced by an erroneous instruction, where he was not under the undisputed facts, entitled to recover against defendant.—*Morris v. Jacks* (Tex. Civ. App.) 637.

\*It is the duty of the appellate court to reverse for error plainly appearing, unless it can

\*Point annotated. See syllabus.

§ 16. — **Harmless error as to pleading.**  
Sustaining a demurrer treating it as a motion to make more specific, *held* harmless.—Cook v. Jones (Ark.) 620.

The error in denominating a petition filed by an attorney under Ky. St. 1903, § 107, a cross-petition, *held* not prejudicial (section 96, Civ. Code Prac.).—Proctor Coal Co. v. Tye & Denham (Ky.) 512.

\*Ruling on demurrer *held* harmless error.—Whitworth v. Pool (Ky.) 880.

§ 17. — **Harmless error in admission of evidence.**

The admission of evidence tending to establish an undisputed fact is not prejudicial.—Waters-Pierce Oil Co. v. Burrows (Ark.) 336.

In an action for personal injuries alleged to have been caused by negligence in putting gasoline in a tank in a private lighting system, certain evidence *held* incompetent but not prejudicial.—Waters-Pierce Oil Co. v. Burrows (Ark.) 336.

\*Admission of evidence as to damages *held* harmless where excluding such evidence the verdict was not excessive.—Western Coal & Mining Co. v. Honaker (Ark.) 361.

Admission of a receipt of a person not a party *held* harmless in view of other evidence.—Walnut Ridge Mercantile Co. v. Cohn (Ark.) 413.

\*In an action for the balance of the purchase price of land conveyed, admission of certain evidence *held* not prejudicial.—Bratt v. Sparks (Ark.) 1057.

Failure to attack the bona fides of a chattel mortgage under which an interpleader claimed *held* to render harmless error in admitting evidence as to the consideration of the mortgage.—Rice-Stix Dry Goods Co. v. Sally (Mo. Sup.) 1030.

In a suit for divorce *held* presumed that the court did not consider incompetent evidence in view of its rulings.—Wald v. Wald (Mo. App.) 302.

The admission of certain evidence *held* not prejudicial.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

§ 18. — **Harmless error in exclusion of evidence.**

\*The exclusion of evidence is not prejudicial where the court later permitted the same witness to testify fully as to the subject of the inquiry.—Holcomb-Lobb Co. v. Kaufman (Ky.) 813.

The exclusion of a part of an answer of a witness *held* not prejudicial.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

The error in excluding evidence is cured where the same evidence is admitted without objection.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

\*Plaintiff, in trespass to try title, was not prejudiced by the exclusion of deeds to his vendors, where his claim of five years' limitation was not predicated on such deeds.—Morris v. Jacks (Tex. Civ. App.) 637.

§ 19. — **Harmless error in instructions to jury.**

The giving of an erroneous instruction as to maintaining fences required by Rev. St. 1899, § 1105, in an action against a railway company for the killing of animals, *held* harmless.—Clem v. Quincey, O. & K. C. R. Co. (Mo. App.) 226.

\*Point annotated. See syllabus.

Any error in instructions not defining negligence *held* harmless, the care resting on defendant, the absence of which was negligence, having been defined.—Rattan v. Central Electric Ry. Co. (Mo. App.) 735.

In an action for commissions on a contract of employment, an instruction submitting the construction of the contract to the jury *held* not prejudicial to defendant.—Houston Ice & Brewing Co. v. Nicolini (Tex. Civ. App.) 84.

\*In an action against connecting carriers for depreciation in the weight of cattle shipped, caused by delay, an erroneous instruction as to the measure of damages *held* prejudicial.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1087.

§ 20. — **Decisions of intermediate courts.**

\*On appeal from a judgment of the circuit court fixing an amount due a jailer for feeding prisoners, *held* that the judgment of the circuit court on conflicting evidence will not be disturbed.—Marion County v. Estes (Ark.) 165.

On appeal from an order dismissing a probate appeal to the circuit court on the merits, the Court of Appeals is required to review the merits under Rev. St. 1899, § 865.—Hanley v. Holton (Mo. App.) 691.

§ 21. — **Subsequent appeals.**

\*The decision of the appellate court will be followed on a subsequent appeal where the record supports the conclusion reached on the prior appeal.—Malone's Committee v. Lebus (Ky.) 519.

\*Where, on a second appeal, the evidence is substantially the same as on the first appeal, a previous ruling as to the sufficiency of the evidence to go to the jury, will be treated as res judicata.—Barrie v. St. Louis Transit Co. (Mo. App.) 233.

§ 22. **Determination and disposition of cause.**

\*Where, on appeal or writ of error, a cause is reversed and remanded for a new trial, the case stands as if no action had been taken below.—Hartford Fire Ins. Co. v. Enoch (Ark.) 393.

\*The rule of the law of the case *held* inapplicable to questions of fact.—Hartford Fire Ins. Co. v. Enoch (Ark.) 393.

\*Where a judgment for plaintiff in an action on a policy was reversed and the cause remanded because the evidence was insufficient to show waiver of a condition, such judgment was not res judicata of such issue on a retrial on materially different evidence.—Hartford Fire Ins. Co. v. Enoch (Ark.) 393.

\*In view of appellant's failure to provide a proper abstract, as required by Rule 9 of the Supreme Court, *held*, that the decree would be affirmed.—Houghton v. Mosely (Ark.) 1066.

\*The decision on a former appeal is the law of the case on a retrial.—Hocker v. Louisville & N. R. Co. (Ky.) 526.

\*Where plaintiff's petition was sufficient only for the recovery of nominal damages, plaintiff, on remand after reversal of a judgment for defendant, might have leave to amend.—Shepherd v. Gambill (Ky.) 1104.

\*A judgment on appeal *held* to end the litigation, so that, on filing of mandate below, rights arising after the judgment of the trial court could not be considered.—Penn Lubricat-

ing Co. v. Bay State Petroleum Co. (Ky.) 1118; Same v. Backer, *Id.*

\*Judgment for defendant will be affirmed, the petition stating no cause of action.—Chaney v. Bevins (Ky.) 1129.

\*A decree will be modified on appeal at the request of respondent, admitting error therein.—Majors v. Maxwell (Mo. App.) 731.

\*Where it does not conclusively appear that the case was fully developed in the trial court, the court on appeal instead of rendering judgment must remand the cause for another trial.—Allen v. Anderson & Anderson (Tex. Civ. App.) 54.

\*On appeal appellant's brief *held* so insufficient that the judgment would be affirmed.—Pipkin v. Hayward Lumber Co. (Tex. Civ. App.) 635.

Where the trial court errs in rendering judgment in a cause tried without a jury, the appellate court will render the proper judgment.—Davidson v. Equitable Securities Co. (Tex. Civ. App.) 787.

\*Where there are no assignments of errors in the record, a judgment will be affirmed.—Renshaw v. Brennand (Tex. Civ. App.) 1099.

## APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

## APPLICATION.

For judgment by default, see "Judgment," § 2.

## APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

Of judge, see "Judges," § 1.

Of officers in general, see "Officers," § 1.

## APPROPRIATION.

For payment of municipal debts, see "Municipal Corporations," § 14.

## ARBITRATION AND AWARD.

See "Reference."

### § 1. Submission.

An award rendered by an ecclesiastical court as arbitrator *held* not enforceable in the civil courts.—Poggenborg v. Conniff (Ky.) 547.

## ARGUMENT OF COUNSEL.

See "Criminal Law," § 11; "Trial," § 3.

## ARRAIGNMENT.

See "Criminal Law," § 5.

## ARREST.

See "Bail."

Illegal arrest, see "False Imprisonment."

## ASSAULT AND BATTERY.

### § 1. Civil liability.

\*A verdict in an action for an assault by a conductor on a passenger *held* excessive.—Louisville & N. R. Co. v. Williamson (Ky.) 1130.

\*Point annotated. See syllabus.

## ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 8.

Of damages, see "Damages," § 5.

Of expenses of public improvements, see "Municipal Corporations," §§ 9, 10.

Of loss on insured, see "Insurance," §§ 7, 14.

Of tax, see "Taxation," § 2.

## ASSETS.

Of estate of decedent, see "Executors and Administrators," § 2.

## ASSIGNMENT OF ERRORS.

See "Appeal and Error," §§ 7, 8.

## ASSIGNMENTS.

Admeasurement or assignment of dower, see "Dower," § 1.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

Of insurance, see "Insurance," § 4.

Revival of judgment in name of assignee, see "Judgment," § 9.

### § 1. Requisites and validity.

\*Prior to the Negotiable Instruments Law (Acts 1904, p. 250, § 189) a check drawn by a depositor on his bank deposit operated as a pro tanto appropriation of the deposit as against one asserting a junior lien on the fund.—Boswell v. Citizens' Sav. Bank (Ky.) 797.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

### § 1. Construction and operation in general.

A conveyance by a devisee acquiring an estate, subject to be defeated on his death without leaving issue, in trust for his creditors *held* to vest the fee simple title in the trustee on the devisee's death leaving a son.—Whalin v. Bailcy (Ky.) 1105.

## ASSOCIATIONS.

See "Building and Loan Associations."

## ASSUMPSIT. ACTION OF.

See "Account Stated"; "Money Received"; "Use and Occupation"; "Work and Labor."

## ASSUMPTION.

Of risk by employé, see "Master and Servant," § 8.

## ATTACHMENT.

See "Execution"; "Garnishment."

Exemptions, see "Exemptions"; "Homestead."

Review of judgment in action accompanied by attachment as dependent on finality of determination, see "Appeal and Error," § 1.

## ATTENDANCE.

Of juror, see "Jury," § 3.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.  
Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 11.  
Attorneys in fact, see "Principal and Agent." Competency as witnesses, see "Witnesses," § 1.  
Harmless error in argument of counsel, see "Appeal and Error," § 15.  
Objections to conduct of counsel at trial, for purpose of review, see "Appeal and Error," § 2.  
Provisions for attorneys' fees in note, see "Bills and Notes," § 2.

#### § 1. Duties and liabilities of attorney to client.

\*An attorney of a judgment creditor purchasing the land of the debtor at the execution sale purchases for the benefit of the creditor and his beneficiary.—*Malone's Committee v. Lebus* (Ky.) 519.

#### § 2. Compensation and lien of attorney.

\*Under Ky. St. 1903, § 107, *held*, that plaintiff and defendant could not by a compromise of the litigation deprive plaintiff's attorney of his fee except under certain circumstances.—*Proctor Coal Co. v. Tye & Denham* (Ky.) 512.

On a petition by an attorney under Ky. St. 1903, § 107, to recover his fee from defendant after a settlement between the parties, *held* not necessary for him to make plaintiff a party.—*Proctor Coal Co. v. Tye & Denham* (Ky.) 512.

\*Under Ky. St. 1903, § 107, *held*, that where the parties to an action settle it without the knowledge or consent of plaintiff's attorney he may either institute an independent action against defendant to recover his fee or proceed against him by pleading filed in the original action, if the same be pending.—*Proctor Coal Co. v. Tye & Denham* (Ky.) 512.

\*Under Ky. St. 1903, § 107, *held*, that plaintiff's attorney after secret settlement between the parties was entitled to prosecute an action against defendant for the recovery of a reasonable fee.—*Proctor Coal Co. v. Tye & Denham* (Ky.) 512.

Under Ky. St. 1903, § 107, *held* not necessary that a petition by an attorney against defendant to recover his fee after a settlement between the parties should allege bad faith.—*Proctor Coal Co. v. Tye & Denham* (Ky.) 512.

A note given for attorney's services, of no value to the client *held* without consideration.—*Buckler v. Robinson* (Ky.) 1110.

### AUTHORITY.

Of agent, see "Principal and Agent," § 3.  
Of broker, see "Brokers," § 1.

### BAIL.

#### § 1. In criminal prosecutions.

\*The court, in setting aside a forfeiture of a bail bond in a criminal case, *held* to have properly exercised its discretion within Cr. Code Prac. § 98.—*Commonwealth v. Hillis* (Ky.) 873.

A judgment *held* in effect a judgment remitting the sum specified in a bond in a criminal case, within Cr. Code Prac. § 98, authorizing the court to remit the sum specified in a bail bond.—*Commonwealth v. Hillis* (Ky.) 873.

\*Point annotated. See syllabus.

wealth v. Hillis (Ky.) 873.

\*Cr. Code Prac. § 96, relating to the forfeiture of bail bonds, *held* to refer only to discharge of the forfeiture of the bond during the term at which it was taken.—*Commonwealth v. Hillis* (Ky.) 873.

### BAILMENT.

Embezzlement or larceny by bailee, see "Embezzlement."

*Particular species of bailments and bailments incident to particular occupations.*

See "Carriers," § 3.

Carriage of goods, see "Carriers," § 2.

Storage of goods, see "Warehousemen."

\*Where money, belonging to intestate, was entrusted to defendant who deposited the same in her own name in a trust company, it was not essential to the establishment of a bailment that it should have been agreed or contemplated that the original money deposited should be returned.—*Knapp v. Knapp* (Mo. App.) 295.

### BALLOTS.

See "Elections," § 3.

### BANKRUPTCY.

See "Assignments for Benefit of Creditors."

Right of holders of note to recover from indorsers where trustee in bankruptcy has recovered payment made to him by maker, see "Bills and Notes," § 4.

#### § 1. Rights, remedies, and discharge of bankrupt.

On payment of a bankrupt's proved debts, any surplus of property *held* to revert to him.—*Wade v. Goza* (Ark.) 388.

### BANKS AND BANKING.

Rights as to bills of lading in general, see "Carriers," § 2.

#### § 1. Banking corporations and associations.

Under Ky. St. 1903, §§ 548, 596, and 598, where the directors of a bank innocently declared a dividend while the bank was insolvent, they were individually liable to creditors for the amount of such dividend, but not for the existing and subsequent debts of the bank.—*City of Franklin v. Caldwell* (Ky.) 605.

\*The trustees of a dissolved banking corporation cannot maintain a suit against a stockholder to recover dividends which should have been paid on a judgment, and obtained by a depositor for the amount of a deposit paid by the disbursing officers on unauthorized checks, until they have exhausted their remedy against such officers and their sureties.—*Daugherty v. Poundstone* (Mo. App.) 728.

Where the petition in an action by trustees of a dissolved banking corporation against a stockholder failed to allege that defendant was a trustee, his liability cannot be predicated on his breach of duty as such.—*Daugherty v. Poundstone* (Mo. App.) 728.

\*The directors of a dissolved banking corporation are not personally responsible for loss to the bank by the negligence of the disbursing



officers in paying unauthorized checks.—*Daugherty v. Poundstone* (Mo. App.) 728.

## § 2. Functions and dealings.

A lease of a building by a bank *held* not ultra vires.—*Lechenger v. Merchants' Nat. Bank* (Tex. Civ. App.) 638.

A person not a party to an executed lease by a bank cannot question its validity as ultra vires.—*Lechenger v. Merchants' Nat. Bank* (Tex. Civ. App.) 638.

\*The institution by a bank of a suit based on a lease executed by its vice president, being a ratification of his act, his authority to execute it cannot be assailed in the suit.—*Lechenger v. Merchants' Nat. Bank* (Tex. Civ. App.) 638.

## § 3. National banks.

\*That a transfer of a bill of lading to a national bank constituted a sale would not entitle the purchaser to recover against the bank for deficiency in the quality of the property, the transaction being ultra vires under Rev. St. U. S. § 5136 [U. S. Comp. St. 1901, p. 3455].—*Lewis Leonhardt & Co. v. W. H. Small & Co.* (Tenn.) 1051.

## BAR.

Of action by former adjudication, see "Judgment," § 6.

## BASTARDS.

### § 1. Property.

\*Under Gen. St. c. 31, § 5, *held* bastards could not inherit from their legitimate half-brothers.—*Overton v. Overton* (Ky.) 469.

## BATTERY.

See "Assault and Battery."

## BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance, see "Insurance," § 14.

## BEQUESTS.

See "Wills."

## BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

## BETTING.

See "Gaming."

## BIAS.

Of juror, see "Jury," § 4.

Of witness, see "Witnesses," § 3.

## BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

## BILL OF EXCHANGE.

See "Bills and Notes."

## BILL OF LADING.

See "Carriers," §§ 2, 3.

## BILLS AND NOTES.

Validity of note given to pay gambling debt, see "Gaming," § 1.

## § 1. Requisites and validity.

A note executed for a specified sum which the maker received from the payee, is not without consideration.—*Taylor v. Industrial Mut. Deposit Co.'s Receiver* (Ky.) 402.

## § 2. Construction and operation.

\*A note *held* not to show that it is signed by one as surety, so as to make it demurrable on the ground that as to a surety it was barred by limitations.—*Scott v. Bales* (Ky.) 528.

\*A cross-bill claiming an allowance for the amount due on certain notes for attorney's fees filed after maturity of the notes, *held* a suit brought thereon entitling defendant to attorney's fees.—*Houston Ice & Brewing Co. v. Nicolini* (Tex. Civ. App.) 84.

## § 3. Negotiability and transfer.

\*Checks are negotiable instruments both at common law and under the express provisions of Ky. St. 1903, § 478.—*Boswell v. Citizens' Sav. Bank* (Ky.) 797.

## § 4. Rights and liabilities on indorsement or transfer.

\*That a note is transferred by indorsement without recourse does not deprive the indorsee of his rights as an innocent purchaser.—*Neely v. Black* (Ark.) 984.

\*Those indorsing a note at the time of its execution by the maker, and for the same consideration, *held* liable to be sued on the maker's default, without any proceedings having been taken against him.—*Jones v. Bank of Pine Bluff* (Ark.) 1090.

\*Where payment to holder of a note was recovered from him by the makers' trustee in bankruptcy and the holder failed to file the note as a claim against the bankrupt's estate, it could recover from the indorsers an amount equal to the value of the note less the dividends of bankrupt's estate.—*Second Nat. Bank v. Prewett* (Tenn.) 334.

Payment of note by the makers, which was immediately recovered from the holder by the makers' trustee in bankruptcy, *held* insufficient to discharge the indorsers.—*Second Nat. Bank v. Prewett* (Tenn.) 334.

## § 5. Actions.

That indorsee of note procured its purchase through vendee of property mortgaged to secure note *held* no defense to action against maker, the only defense being payment.—*Neely v. Black* (Ark.) 984.

\*The petition in an action on a note *held* to sufficiently aver its execution by defendants.—*Scott v. Bales* (Ky.) 528.

\*Under Ky. St. 1903, § 470, subsec. 7, a note *held* to imply a consideration.—*Doty v. Dickey* (Ky.) 544.

## BOARD OF HEALTH.

See "Health," § 1.

## BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 4.

Of goods, see "Sales," § 5.

Of land, see "Vendor and Purchaser," § 4.

## BONDS.

Liability of officer on bond for negligent taking of acknowledgment, see "Acknowledgment," § 1.

Municipal bonds, see "Municipal Corporations," § 14.

Sureties on bonds, see "Principal and Surety."

\*Point annotated. See syllabus.

See "Appeal and Error," § 4; "Bail"; "Injunction," § 3.

## BOUNDARIES.

See "Fences."

Of school district, see "Schools and School Districts," § 1.

### § 1. Description.

\*Under the facts *held* that the call for courses and distances in a patent would prevail over the call for a stake as the terminus of a line.—*Mathews v. Pursifull* (Ky.) 803.

Where the call for distances in a senior survey includes land in a junior survey and there is nothing to limit the force of the call the call controls.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

Where the bearing trees called for in a senior survey had disappeared, a claimant under a junior survey was entitled to show the location of the trees.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

The field notes of a junior survey cannot be resorted to for the purpose of creating an ambiguity in the calls of a senior survey.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

Field notes of a surveyor *held* not evidence as to the location of a corner with the bearings.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

Where the field notes of a surveyor concerning the location of bearing trees in another survey are inconsistent they are no evidence of the location of the trees.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

### § 2. Evidence, ascertainment, and establishment.

\*Where bearing trees called for in a survey have disappeared, it will be presumed that the trees had been at the distances called for in the survey.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

\*One claiming under a junior survey seeking to change the construction of a senior survey *held* required to show that the bearing trees called for in the senior survey were not at the place fixed by the distances called for.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

A general statement by a district surveyor that a certain survey is free from conflicts without giving any facts, is not competent evidence in determining the boundaries of another survey.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

\*Field notes of a surveyor not shown to be dead, admitted in evidence without objection, must be given effect as evidence.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

On the issue of the location of a boundary between senior and junior surveys, lost bearing trees called for in the senior survey *held* not located and the distances called for therein control.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

In trespass to try title, evidence examined and *held* to show that the boundary line of a survey was located as claimed by defendants.—*David-*

\*Point annotated. See syllabus.

Of condition, see "Insurance," §§ 6, 7.  
Of contract, see "Contracts," § 4; "Sales," § 4;  
"Vendor and Purchaser," § 3.  
Of covenant, see "Covenants," § 2; "Insurance," § 7.  
Of warranty, see "Insurance," §§ 6, 7; "Sales," § 6.

## BREACH OF THE PEACE.

See "Disorderly Conduct."

## BREWERIES.

As public nuisance, see "Nuisance," § 1.

## BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 8.

## BROKERS.

See "Principal and Agent."

Computation of interest in action for commissions, see "Interest," § 2.  
Insurance brokers, see "Insurance," § 2.

### § 1. Employment and authority.

A finding that a broker in purchasing stock for a customer had no authority to do so thereby relieving the customer from liability for loss, *held* warranted.—*Little & Hays Inv. Co. v. Pigg* (Ky.) 455.

### § 2. Compensation and lien.

A broker employed to procure a purchaser of land, *held* entitled to recover his commission notwithstanding the owner's cancellation of the sale.—*Boyson v. Frink* (Ark.) 1056.

\*A broker employed to procure a purchaser, must to recover his commission, furnish a customer able and willing to comply with the proposed sale.—*Boyson v. Frink* (Ark.) 1056.

An agreement between plaintiff and a landowner *held* to have created the former the latter's agent to effect a sale of the land.—*Young v. Ruhwedel* (Mo. App.) 228.

\*Rev. St. 1899, § 3418, *held* not applicable to an oral contract whereby a broker is employed to sell land as between principal and broker.—*Young v. Ruhwedel* (Mo. App.) 228.

Notwithstanding Rev. St. 1899, § 3418, a production by a broker of a written contract for a sale of the land *held* equivalent to a production of the purchaser.—*Young v. Ruhwedel* (Mo. App.) 228.

An objection to the ability of a purchaser procured by a broker to perform according to the terms imposed by the landowner *held* not obviated by an offer of payment made by the broker.—*Young v. Ruhwedel* (Mo. App.) 228.

A broker employed to find a purchaser for land *held* entitled to his commission out of the first payment made by the purchaser.—*Young v. Ruhwedel* (Mo. App.) 228.

\*A broker employed to procure a purchaser of real estate *held* not entitled to his commission.—*Mercantile Trust Co. v. Niggeman* (Mo. App.) 293.

\*A broker *held* entitled to his commission, notwithstanding Laws 1903, p. 161, prohibiting a person from offering for sale real property without the written consent of the owner there-

of.—*Mercantile Trust Co. v. Niggeman* (Mo. App.) 293.

\*An owner *held* to have ratified her agent's acts with respect to procuring a purchaser of her property.—*Mercantile Trust Co. v. Niggeman* (Mo. App.) 293.

The rights of a third person employed by a broker to procure a purchaser of land determined. *Ewart v. Young* (Mo. App.) 420.

\*Where a price made to a broker for the sale of land was subject to change, but no change was made until after a sale, a subsequent change *held* ineffective to bar the broker's right to commissions.—*Warren Commission & Investment Co. v. Hull Real Estate Co.* (Mo. App.) 1038.

\*Where the owner of property ratified the employment of plaintiff by its broker to sell certain property plaintiff was entitled to look to the owner for commissions.—*Warren Commission & Investment Co. v. Hull Real Estate Co.* (Mo. App.) 1038.

Facts *held* to establish a broker's employment to sell certain property so as to entitle it to commissions.—*Warren Commission & Investment Co. v. Hull Real Estate Co.* (Mo. App.) 1038.

\*Statutes requiring an occupation tax by real estate brokers *held* not to render the non-payment of such tax by a broker a defense in an action for commissions earned.—*J. B. Watkins Land Mortgage Co. v. Thetford* (Tex. Civ. App.) 72.

\*A real estate broker *held* not entitled to commissions from the owner on a sale in which he assisted other agents under an agreement with them for a division of their commission.—*J. B. Watkins Land Mortgage Co. v. Thetford* (Tex. Civ. App.) 72.

\*A broker employed to procure an exchange *held* to earn his commission on the parties agreeing on the terms of an exchange.—*Davidson v. Wills* (Tex. Civ. App.) 634.

The amount of compensation earned by a broker in procuring an exchange of land for a stock of merchandise, determined.—*Davidson v. Wills* (Tex. Civ. App.) 634.

\*A broker employed to procure an exchange of land for a stock of merchandise for a commission on the trade, *held* entitled to a commission on the value of the land received in exchange.—*Davidson v. Wills* (Tex. Civ. App.) 634.

### § 3. Actions for compensation.

A husband who employed a broker to find a purchaser for the homestead could not on performance by the broker escape liability for failure to perform because of the fact that the wife refused to sign the deed.—*Young v. Ruhwedel* (Mo. App.) 228.

In an action by a broker to recover on a contract whereby he was employed to find a purchaser for defendant's land, the burden is on plaintiff to show that the purchaser was not only willing to buy on the terms proposed, but able to perform.—*Young v. Ruhwedel* (Mo. App.) 228.

In an action against a landowner by a broker for failure to perform the contract with a purchaser produced by plaintiff, the measure of damages *held* the amount of commission earned and lost.—*Young v. Ruhwedel* (Mo. App.) 228.

A sale by a real estate broker *held* to preclude the vendor from setting up as against the broker's claim for commission, the want of authority of its agent to employ such broker.—*J. B. Watkins Land Mortgage Co. v. Thetford* (Tex. Civ. App.) 72.

\*A contract with a purchaser for the sale of real estate *held* to estop the seller from setting up the financial irresponsibility of such purchaser in an action by the broker for his commission.—*J. B. Watkins Land Mortgage Co. v. Thetford* (Tex. Civ. App.) 72.

In an action by a real estate broker for his commission for securing a purchaser an instruction *held* properly refused as ignoring plaintiff's theory that his services were the efficient cause of the sale.—*J. B. Watkins Land Mortgage Co. v. Thetford* (Tex. Civ. App.) 72.

In an action by a real estate broker for his commission for securing a purchaser, evidence examined and *held* to require the submission to the jury of the question whether the broker did not act merely as a subagent of other brokers.—*J. B. Watkins Land Mortgage Co. v. Thetford* (Tex. Civ. App.) 72.

## BUILDING AND LOAN ASSOCIATIONS.

A transaction between a building association and an individual, as disclosed by the contract between them, *held* not usurious.—*Rabb v. Texas Loan & Investment Co.* (Tex. Civ. App.) 77.

## BURDEN OF PROOF.

In criminal prosecutions, see "Homicide," § 3.

## BURGLARY.

### § 1. Offenses and responsibility therefor.

\*A chicken house is within Kirby's Dig. § 1603-1606, making it burglary to enter a house or other building, etc.—*Gunter v. State* (Ark.) 181.

### § 2. Prosecution and punishment.

Evidence *held* not to sustain a charge of burglary under Kirby's Dig. §§ 1603-1606.—*Gunter v. State* (Ark.) 181.

\*The inference that may be drawn from possession of all or part of the stolen property on a prosecution for burglary stated.—*Gunter v. State* (Ark.) 181.

\*On a prosecution for burglary, under Acts 1899, p. 318, c. 178, *held* that the indictment must allege that the house or room burglarized was occupied and actually used at the time of the offense as a place of residence.—*Jones v. State* (Tex. Cr. App.) 44.

\*An indictment charging nighttime burglary should charge not only that the house burglarized was a private residence, but was occupied and actually used at the time of the offense as a place of residence.—*Johnson v. State* (Tex. Cr. App.) 45.

\*On a prosecution for burglary, where a purse stolen was found at defendant's house, an instruction that if defendant was in possession of the purse and gave no explanation, it was a circumstance against him, was erroneous.—*Johnson v. State* (Tex. Cr. App.) 45.

On a prosecution for burglary *held* error not to charge on defendant's affirmative defense that he had purchased certain property claimed to have been stolen.—*Johnson v. State* (Tex. Cr. App.) 45.

## CALENDARS.

Computation of time, see "Time."

## CALLS.

In surveys, see "Boundaries," § 1.

\*Point annotated. See syllabus.

## CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Pendency of other action as bar to action for rescission of contract, see "Abatement and Revival," § 1.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

*Grounds for cancellation or rescission of particular instruments.*

Certificates of corporate stock, see "Corporations," § 1.

Contracts for sale of goods, see "Sales," § 3.

Contracts for sale of realty, see "Vendor and Purchaser," § 2.

Insurance policy, see "Insurance," § 5.

### § 1. Proceedings and relief.

\*A grantee, in an action for the cancellation of a deed on the ground of fraud, *held* estopped from complaining of the insufficiency of the petition in failing to allege a tender.—*May v. May* (Ky.) 840.

\*A judgment setting aside a deed on the ground of fraud *held* to sufficiently protect the rights of the grantee.—*May v. May* (Ky.) 840.

## CANDIDATES.

For office, see "Elections," § 2.

## CANVASS OF VOTES.

See "Elections," § 4.

## CARNAL KNOWLEDGE.

See "Rape."

## CARRIERS.

Contradiction of witness in action for injuries to passenger, see "Witnesses," § 3.

Harmless error in instructions in action for injuries to cattle en route, see "Appeal and Error," § 19.

Joinder of causes of actions in action against, see "Action," § 2.

Nature and form of action against, see "Action," § 1.

Review of verdict in action for injuries in appeal, see "Appeal and Error," § 14.

### § 1. Control and regulation of common carriers.

Under *Sayles' Ann. Civ. St. 1897*, art. 4575, in an action against a carrier for extortion *held* that an unintentional extortion must be pleaded and proved by defendant.—*St. Louis Southwestern Ry. Co. of Texas v. Rutherford* (Tex. Civ. App.) 73.

The act of a carrier in charging for the use of a car prior to giving the shipper the use thereof, for the 48 hours allowed by law for unloading it, *held* extortion under *Sayles' Ann. Civ. St. 1897*, art. 4573.—*St. Louis Southwestern Ry. Co. of Texas v. Rutherford* (Tex. Civ. App.) 73.

### § 2. Carriage of goods.

\*A carrier's liability begins when it receives freight for immediate shipment and is not dependent upon the issuance of the bill of lading.—*Garner v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 187.

In an action for the destruction of goods delivered to a carrier, evidence examined and *held* to show that the property was received for immediate shipment though a bill of lading

had not been issued.—*Garner v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 187.

\*An initial carrier failing to deliver a shipment to the connecting carrier agreed on, *held* liable for the act of the connecting carrier selected by it.—*Cincinnati, N. O. & T. P. Ry. Co. v. Pendleton & Hudson* (Ky.) 434.

\*The measure of damages in an action against the initial carrier failing to deliver the shipment to the connecting carrier agreed on, determined.—*Cincinnati, N. O. & T. P. Ry. Co. v. Pendleton & Hudson* (Ky.) 434.

\*An initial carrier limiting its liability to its own line, has the burden of showing that it duly carried a shipment to the end of its line and turned it over to the connecting carrier.—*Illinois Cent. R. Co. v. Stevens* (Ky.) 888.

In an action against a carrier for loss of goods, evidence *held* to contradict a receipt and to sustain a finding that a portion of the goods receipted for were never delivered by the carrier.—*Strawn v. Missouri, K. & T. Ry. Co.* (Mo. App.) 488.

\*The measure of damages for a carrier's negligent delay in transporting property, determined.—*Hardin v. Missouri Pac. Ry. Co.* (Mo. App.) 681.

The failure to give to a carrier a notice of damages to a shipment as required by the bill of lading *held* not to defeat a recovery.—*Hardin v. Missouri Pac. Ry. Co.* (Mo. App.) 681.

\*A carrier contracting to carry a shipment to its destination, beyond its line, *held* liable for damages from negligent delay.—*Hardin v. Missouri Pac. Ry. Co.* (Mo. App.) 681.

\*The contract of affreightment disclosing no consideration for the agreement limiting the carrier's liability for loss of the goods *held* that the agreement fails for lack of consideration.—*Meyers v. Missouri, K. & T. Ry. Co.* (Mo. App.) 737.

Where a contract of affreightment in the case of an interstate shipment, expressed no consideration for the agreement limiting the carrier's liability *held* that it may not be shown that there was a reduced rate, without showing that such rate was filed with the interstate commerce commission, and was duly posted.—*Meyers v. Missouri, K. & T. Ry. Co.* (Mo. App.) 737.

\*A contract of affreightment *held* not a joint contract of the carrier making it, and of the connecting carrier.—*Meyers v. Missouri, K. & T. Ry. Co.* (Mo. App.) 737.

The petition against a connecting carrier for loss of goods shipped *held* not to show a joint contract of the initial carrier and the connecting carrier.—*Meyers v. Missouri, K. & T. Ry. Co.* (Mo. App.) 737.

Evidence *held* to tend to show that a receipt for goods was regularly issued by a connecting carrier, and so to make the receipt admissible in an action by the shipper against the connecting carrier for loss of the goods.—*Meyers v. Missouri, K. & T. Ry. Co.* (Mo. App.) 737.

Whether the presumption from a receipt that a connecting carrier received goods was overcome *held* a question for the jury.—*Meyers v. Missouri, K. & T. Ry. Co.* (Mo. App.) 737.

Bank to which drafts and bills of lading attached thereto were transferred, *held* not to have purchased the property so as to render them liable to the final purchaser for defects in quality.—*Lewis Leonhardt & Co. v. W. H. Small & Co.* (Tenn.) 1051.

Indorsement by national bank on bills of lading *held* not to render it liable for deficiency in goods covered by other bills of lading trans-

\*Point annotated. See syllabus.



ferred to the bank at the same time.—*Lewis Leonhardt & Co. v. W. H. Small & Co. (Tenn.)* 1051.

In an action for injuries to fruit, an allegation in the plea of the initial carrier seeking to recover over against the connecting carrier, *held* sufficient to justify evidence that when shipments were transferred in transit an entry would be made on the waybill, showing the number and initials of the cars from which and to which the transfer was made.—*St. Louis Southwestern Ry. Co. of Texas v. Wester (Tex. Civ. App.)* 769.

In an action for damages to a car load of peaches, an instruction given on the subject of notice of the transfer of the peaches from one car to another, *held* to sufficiently cover a requested charge on the same issue.—*St. Louis Southwestern Ry. Co. of Texas v. Wester (Tex. Civ. App.)* 769.

### § 3. Carriage of live stock.

Provision in a bill of lading for notice of claim for damages to live stock "covered by this contract," *held* not to apply to damages for failure to furnish a car in time.—*St. Louis Southwestern Ry. Co. v. McNeil (Ark.)* 163.

\*Where a carrier failed to carry a shipment of live stock within a reasonable time and failed to exercise reasonable care, the shipper was entitled to recover the damages resulting from the delay and from the negligent care.—*Cincinnati, N. O. & T. P. Ry. Co. v. Pendleton & Hudson (Ky.)* 434.

In an action against a carrier for injury to a shipment of live stock, the question of a mistake in filling out the contract of shipment *held* for the jury.—*Cincinnati, N. O. & T. P. Ry. Co. v. Pendleton & Hudson (Ky.)* 434.

In an action against an initial carrier for injuries to a shipment of hogs, a finding that the hogs had not been properly cared for by the initial carrier *held* warranted.—*Illinois Cent. R. Co. v. Stevens (Ky.)* 888.

\*In an action against an initial carrier for negligence in the transportation of stock, the question as to its liability for injuries *held* for the jury.—*Illinois Cent. R. Co. v. Stevens (Ky.)* 888.

\*The measure of damages, in an action against a carrier for injuries to colts while in transit, determined.—*Cincinnati, N. O. & T. P. R. Co. v. Logan & Hundley (Ky.)* 910; Same v. Hundley, *Id.*

In an action against a carrier for injury to colts while in transit, certain evidence *held* admissible on the issue of the value of the colts at the point of destination.—*Cincinnati, N. O. & T. P. R. Co. v. Logan & Hundley (Ky.)* 910; Same v. Hundley, *Id.*

In an action against a carrier for injury to colts while in transit, certain evidence *held* admissible on the issue of damages.—*Cincinnati, N. O. & T. P. R. Co. v. Logan & Hundley (Ky.)* 910; Same v. Hundley, *Id.*

A shipper of stock suing a carrier for injury to it while in transit *held* not limited to the amount of the damage apparent when delivered to him at the end of the carrier's line.—*Cincinnati, N. O. & T. P. R. Co. v. Logan & Hundley (Ky.)* 910; Same v. Hundley, *Id.*

A carrier *held* liable for refusal to receive an animal offered for transportation.—*Knight v. Quincy, O. & K. C. R. Co. (Mo. App.)* 716.

In an action for injuries to cattle shipped, exclusion of a paragraph of plaintiff's original petition alleging injuries by another carrier, *held* not error.—*Missouri, K. & T. Ry. Co. v. Garrett (Tex. Civ. App.)* 53.

In an action for injuries to cattle shipped, which were shown to have had a market value at destination, evidence as to what plaintiff paid for them *held* immaterial.—*Missouri, K. & T. Ry. Co. v. Garrett (Tex. Civ. App.)* 53.

A paragraph of a charge *held* not objectionable in directing a verdict for defendant in case the jury found the defendant was not guilty of the negligence charged.—*Missouri, K. & T. Ry. Co. v. Garrett (Tex. Civ. App.)* 53.

In an action against a carrier by a shipper of horses, an allegation of rough handling *held* not sufficient to admit proof of a defective car.—*Texas & P. Ry. Co. v. Stewart (Tex. Civ. App.)* 106.

\*In an action against a carrier for delay in the transportation of horses, the measure of damages determined.—*Texas & P. Ry. Co. v. Stewart (Tex. Civ. App.)* 106.

\*In an action against a carrier for delay in transporting horses an instruction on the measure of damages *held* erroneous.—*Texas & P. Ry. Co. v. Stewart (Tex. Civ. App.)* 106.

\*An instruction that if plaintiff's cattle were injured en route to market, but the jury were unable to determine which, if either of the connecting carriers caused the injury, the last carrier would be liable, was erroneous.—*Texas & P. Ry. Co. v. Bailey (Tex. Civ. App.)* 1089.

### § 4. Carriage of passengers—Relation between carrier and passenger.

\*A carrier owes no duty to a passenger until she has actually become such by either getting on or attempting to get on the car after it had stopped to permit her to board it.—*Lexington Ry. Co. v. Herring (Ky.)* 553.

### § 5. — Performance of contract of transportation.

In an action against a carrier, facts *held* insufficient to establish an actionable breach of defendant's contract of carriage.—*Dryden v. St. Louis Transit Co. (Mo. App.)* 1044.

### § 6. — Personal injuries.

\*The sudden starting of a street car after the speed had been slackened on signal of a passenger *held* negligence.—*Little Rock Ry. & Electric Co. v. Doyle (Ark.)* 353.

\*A carrier *held* not liable for death of an intoxicated passenger on the ground that it had failed to properly care for him.—*Thixton's Ex'r v. Illinois Cent. R. Co. (Ky.)* 543.

\*Where the servants of a street railway company saw plaintiff attempting to alight when the car stopped at a switch, it was their duty not to start the car until plaintiff had reached the street.—*South Covington & C. St. Ry. Co. v. Core (Ky.)* 562.

\*An instruction *held* erroneous as requiring train employes to observe whether the condition of a passenger is such that she needs assistance in alighting from the car.—*Illinois Cent. R. Co. v. Cruse (Ky.)* 821.

Under Ky. St. 1903, §§ 795-800, imposing on railroads the duty of furnishing separate compartments for white and colored passengers, defendant railroad *held* not exempt from liability for injuries to a passenger during a difficulty between defendant's conductor and a colored passenger riding in the white passengers' coach by reason of a custom permitting negroes to ride there when their own compartment was crowded.—*Louisville & E. R. Co. v. Vincent (Ky.)* 898.

Under Ky. St. 1903, §§ 795-800, imposing on railroads the duty of furnishing separate compartments for white and colored passengers, defendant railroad *held* liable for injuries to plaintiff during an altercation between defend-

\*Point annotated. See syllabus.

ant's conductor and a negro passenger occupying a seat in the coach reserved for white passengers.—*Louisville & E. R. Co. v. Vincent* (Ky.) 898.

\*It is negligence, in the operation of a passenger train, to suddenly and violently move it forward without notice to the passengers alighting from it.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

\*A carrier *held* liable for injuries to a passenger owing to the starting of the car while she was alighting, though the car had stopped at a place other than that prescribed by a city ordinance.—*Parks v. St. Louis Transit Co.* (Mo. App.) 426.

\*The conductor of a street car *held* under obligation to detain the car until a passenger had alighted, irrespective of the reason for the stop.—*Parks v. St. Louis Transit Co.* (Mo. App.) 426.

\*In an action for injuries to a passenger on a street car in a collision, evidence *held* to establish gross negligence on the part of the carrier.—*Goodloe v. Metropolitan St. Ry. Co.* (Mo. App.) 482.

\*It is the duty of a street car conductor before giving the signal to start to know that no one is getting either on or off and the fact that he was busy within the body of the car was no excuse for his failure to perform such duty.—*Hurley v. Metropolitan St. Ry. Co.* (Mo. App.) 714.

Evidence *held* sufficient to authorize a finding that the accident to a passenger was caused by her heel catching on a piece of metal projecting from the car step.—*Rattan v. Central Electric Ry. Co.* (Mo. App.) 735.

\*In action against carrier, instruction that it was the duty of carrier's servants to exercise such care as would reasonably insure safety of passengers in view of their physical condition *held* proper.—*Gulf, C. & S. F. Ry. Co. v. Coopwood* (Tex. Civ. App.) 102.

#### § 7. — Actions for personal injuries.

Evidence *held* to support finding that injury to passenger caused by bumping of car against passenger coach was due to negligence of defendant's employes.—*St. Louis, I. M. & S. Ry. Co. v. Billingsley* (Ark.) 357.

In an action for injuries to a passenger while attempting to board a street car, evidence that defendant's cars stopped at other points on the line than the place indicated by a sign in question, *held* admissible.—*Lexington Ry. Co. v. Herring* (Ky.) 558.

In an action for injuries to a passenger while attempting to board a street car at a point other than a regular stopping place, evidence concerning the propriety and necessity of stopping the cars at regular places indicated by signs, *held* inadmissible.—*Lexington Ry. Co. v. Herring* (Ky.) 558.

\*An instruction *held* to impose too great a duty on a carrier as to lighting steps and platform when passengers alighted.—*Illinois Cent. R. Co. v. Cruise* (Ky.) 821.

\*That a car was derailed *held* to throw on carrier burden of proof that accident could not have been prevented by the highest degree of care.—*Louisville St. Ry. Co. v. Brownfield* (Ky.) 912.

Evidence *held* to present question for the jury as to whether the carrier was guilty of gross negligence, so as to authorize exemplary damages.—*Louisville St. Ry. Co. v. Brownfield* (Ky.) 912.

In an action for injuries to a passenger an instruction *held* to preclude recovery if plaintiff fell from the train at another place than the alleged place of the accident.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

In an action for injuries to a passenger an instruction *held* to sufficiently define the term "negligently."—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

In an action for injuries to a passenger evidence *held* sufficient to go to the jury on the question of the time when plaintiff was discovered on the track at a place distant from the place of the alleged accident.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

In an action for injuries to a passenger evidence *held* sufficient to go to the jury on the question as to whether the train gave the lurch alleged.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

In an accident for injuries to a passenger evidence of plaintiff's intoxication, contrary to his testimony, *held* not necessarily incompatible with his credibility as a witness.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

In an action for injuries to a passenger evidence *held* sufficient to go to the jury on the question of the time when the accident occurred.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

\*In an action against a street railway by a passenger, for injuries received through being struck by a missile thrown by a bystander, no presumption of negligence on the part of defendant arises from the mere fact of the injury.—*Woas v. St. Louis Transit Co.* (Mo. Sup.) 1017.

In an action against a street railway by a passenger, for injuries received through being struck by a missile thrown by a bystander, evidence as to former acts of violence under similar circumstances, *held* inadmissible.—*Woas v. St. Louis Transit Co.* (Mo. Sup.) 1017.

In an action against a street railway by a passenger for injuries received through being struck by a missile thrown by a bystander, evidence *held* insufficient to take to the jury the question of defendant's negligence.—*Woas v. St. Louis Transit Co.* (Mo. Sup.) 1017.

In an action against a carrier for injuries to a passenger owing to the starting of a street car while she was alighting, an instruction *held* not erroneous as omitting an essential element of recovery.—*Parks v. St. Louis Transit Co.* (Mo. App.) 426.

\*Proof of an injury to a passenger by a collision *held* sufficient to raise a presumption of negligence which was conclusive against the carrier in the absence of rebutting evidence.—*Goodloe v. Metropolitan St. Ry. Co.* (Mo. App.) 482.

In an action for injuries to a passenger while alighting from a street car a request to charge *held* misleading and properly modified.—*Hurley v. Metropolitan St. Ry. Co.* (Mo. App.) 714.

\*Injury to a passenger from her heel catching on a piece of metal projecting from the car step *held* to make a prima facie case of negligence, putting the burden on the carrier of disproving it.—*Rattan v. Central Electric Ry. Co.* (Mo. App.) 735.

In an action for wrongful treatment of passengers, evidence that after leaving train they were compelled to drive to three different places before they could secure lodging *held* admissible.—*Gulf, C. & S. F. Ry. Co. v. Coopwood* (Tex. Civ. App.) 102.

\*Point annotated. See syllabus.

\*In an action by a passenger for injuries sustained in alighting from a train, plaintiff's petition considered and *held* sufficient as against a demurrer.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

In an action by a passenger for injuries, the petition *held* not insufficient because the facts alleged were immaterial and irrelevant, and no facts were stated showing any failure of the conductor to plaintiff.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

In an action by a passenger for injuries sustained in alighting from a train, the evidence considered and *held* to sustain a finding that the injury was the result of defendant's negligence and that plaintiff was not negligent.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

In an action by a passenger for injuries an instruction predicated defendant's liability on the negligence of its servants in failing to assist her to alight, *held* not erroneous.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

### § 8. — Contributory negligence of person injured.

Woman passenger injured while getting a drink of water *held* not guilty of contributory negligence as a matter of law.—*St. Louis I. M. & S. Ry. Co. v. Billingsley* (Ark.) 357.

\*Whether a passenger alighting from a moving street car is guilty of contributory negligence, *held* for the jury.—*Ford v. Paducah City Ry.* (Ky.) 441.

\*It is, in general, not negligence per se for a passenger to attempt to board or alight from a moving street car.—*Lexington Ry. Co. v. Herring* (Ky.) 558.

\*In an action for injuries to a street car passenger, evidence that plaintiff had been frequently seen to get off and on street cars while in motion, *held* inadmissible to prove her habit in such respect.—*Lexington Ry. Co. v. Herring* (Ky.) 558.

\*A passenger on a street car *held* guilty of contributory negligence in persisting in alighting after a car had started.—*South Covington & C. St. Ry. Co. v. Core* (Ky.) 562.

\*That a passenger alighting from a train is drunk does not per se constitute contributory negligence.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

Where there was no evidence of contributory negligence, any error in leaving to the jury to determine what was contributory negligence *held* to have been against the plaintiff rather than defendant.—*Louisville & N. R. Co. v. Deason* (Ky.) 1115.

A passenger *held* not guilty of contributory negligence in boarding a street car on the side away from the curb.—*Costello v. St. Louis Transit Co.* (Mo. App.) 425.

\*A street car passenger injured in a collision *held* not guilty of contributory negligence in standing in the vestibule in compliance with a rule requiring users of tobacco to occupy such position, instead of seating himself in the car.—*Goodloe v. Metropolitan St. Ry. Co.* (Mo. App.) 482.

\*A passenger on a street car *held* entitled to assume that the conductor would not start the car while a passenger was in the act of alighting, though the conductor had his arm raised to the bell cord.—*Hurley v. Metropolitan St. Ry. Co.* (Mo. App.) 714.

\*In an action for injuries to a passenger on a street car by the premature starting of the car,

plaintiff *held* to have used all reasonable despatch in alighting.—*Hurley v. Metropolitan St. Ry. Co.* (Mo. App.) 714.

\*In an action for injuries to a passenger on a street car while attempting to alight, an instruction *held* not objectionable as eliminating the question of plaintiff's contributory negligence.—*Hurley v. Metropolitan St. Ry. Co.* (Mo. App.) 714.

In an action by a passenger injured while alighting from a train, evidence *held* sufficient to support a finding that the porter who directed plaintiff to alight had authority so to do.—*Texas & P. Ry. Co. v. Whiteley* (Tex. Civ. App.) 109.

\*The act of a passenger in alighting in the nighttime from a train which was still in motion, was not negligence per se.—*Texas & P. Ry. Co. v. Whiteley* (Tex. Civ. App.) 109.

In an action against a railroad company by a passenger for injuries received while alighting from a train, a certain instruction *held* not prejudicial to defendant.—*Texas & P. Ry. Co. v. Whiteley* (Tex. Civ. App.) 109.

Evidence, in an action for injury to a passenger, *held* insufficient to raise the question of contributory negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Gammage* (Tex. Civ. App.) 645.

### § 9. — Ejection of passengers and intruders.

\*Compensatory damages for the manner of ejecting a passenger defined.—*Louisville & N. R. Co. v. Fowler* (Ky.) 568.

An instruction on the right of a passenger to recover for the manner of his ejection *held* confusing and misleading.—*Louisville & N. R. Co. v. Fowler* (Ky.) 568.

\*In an action for wrongfully ejecting plaintiff from defendant's train, an instruction on the measure of damages *held* proper.—*Williams v. St. Louis, M. & S. E. R. Co.* (Mo. App.) 307.

\*In an action for wrongfully ejecting plaintiff from defendant's train, evidence *held* to warrant the assessment of punitive damages.—*Williams v. St. Louis, M. & S. E. R. Co.* (Mo. App.) 307.

\*In an action for wrongful ejection from defendant's train, it was not error to fail to instruct that the use of profane and vulgar language, in the presence of ladies on board a railroad car, was misconduct.—*Williams v. St. Louis, M. & S. E. R. Co.* (Mo. App.) 307.

In an action for wrongfully ejecting plaintiff from a train, an instruction on defendant's duty to protect its passengers and of the right of the train conductor to enforce such protection, *held* sufficient.—*Williams v. St. Louis, M. & S. E. R. Co.* (Mo. App.) 307.

## CARRYING WEAPONS.

See "Weapons."

## CASE ON APPEAL.

Necessity for purpose of review, see "Appeal and Error," § 6.

## CATTLE.

See "Animals."

## CAUSE OF ACTION.

See "Action."

\*Point annotated. See syllabus.

**CERTIFICATE.**

Objections to state land certificates as evidence for purpose of review, see "Appeal and Error," § 2.  
 Of acknowledgment of written instrument, see "Acknowledgment," § 1.  
 Of corporate stock, see "Corporations," § 1.  
 Of officer taking affidavit, see "Affidavits."

**CERTIORARI.**

Review of criminal cases, see "Criminal Law," § 21.

**CHALLENGE.**

To juror, see "Jury," § 4.

**CHAMPERTY AND MAINTENANCE.**

\*A contract by which plaintiff agreed to take up W.'s cause against defendant, employ lawyers, get evidence at his own expense, and conduct the litigation, *held* void for maintenance.—Phelps v. Manicke (Mo. App.) 221.

**CHANGE OF VENUE.**

Of criminal prosecutions, see "Criminal Law," § 2.

**CHARACTER.**

Of accused in criminal prosecutions, see "Criminal Law," § 6.  
 Of witness, see "Witnesses," § 3.

**CHARGE.**

To jury in civil actions, see "Trial," §§ 5-11.  
 To jury, in criminal prosecutions, see "Criminal Law," § 13; "Homicide," § 4.

**CHARGES.**

By carrier, see "Carriers," § 1.  
 Water charges, see "Waters and Water Courses," § 2.

**CHARITIES.****§ 1. Creation, existence, and validity.**

\*A corporation *held* a charitable trust.—Fordyce & McKee v. Woman's Christian Nat. Library Ass'n (Ark.) 155.

**§ 2. Construction, administration, and enforcement.**

\*The property of a charitable trust cannot be sold under execution issued on a judgment rendered for the nonfeasance, misfeasance or malfeasance of its agents or trustees.—Fordyce & McKee v. Woman's Christian Nat. Library Ass'n (Ark.) 155.

A judgment against a charitable corporation *held* not conclusive on the question of the liability of its property to seizure under it.—Fordyce & McKee v. Woman's Christian Nat. Library Ass'n (Ark.) 155.

Kirby's Dig. § 943, *held* not to prevent a charitable corporation from maintaining that its property is exempt from execution issued under a judgment rendered against it.—Fordyce & McKee v. Woman's Christian Nat. Library Ass'n (Ark.) 155.

\*Point annotated. See syllabus.

**CHATTEL MORTGAGES.****§ 1. Requisites and validity.**

\*One employed to raise a crop on another's land, for one-half of the crop, has a right to mortgage his interest therein.—Bourland v. McKnight & Bro. (Ark.) 179.

**§ 2. Construction and operation.**

A mortgage of a crop *held* not entitled to assert that his lien was superior to one of the landlord for rent.—Bowles' Ex'r v. Jones (Ky.) 1121.

\*The lien of an attachment has priority over an unrecorded mortgage of which the attaching creditor had no notice when the debt was created.—Bowles' Ex'r v. Jones (Ky.) 1121.

On an interplea claiming under a prior chattel mortgage property attached by plaintiff, evidence *held* sufficient to take to the jury the question of an actual delivery of the property to the interpleader.—Rice-Stix Dry Goods Co. v. Sally (Mo. Sup.) 1030.

An interpleader claiming under an unrecorded chattel mortgage property, seized on attachment *held* required to prove actual delivery, as stipulated in Rev. St. 1899, § 3404.—Rice-Stix Dry Goods Co. v. Sally (Mo. Sup.) 1030.

In an action between an interpleader claiming under a chattel mortgage, and plaintiff seizing the property under attachment, the evidence *held* to require no instruction as to the interpleader's alleged fraud.—Rice-Stix Dry Goods Co. v. Sally (Mo. Sup.) 1030.

Where the answer to an interplea which claims under a prior chattel mortgage property attached by plaintiff is only a general denial, no instruction need be given as to fraud in the giving of the mortgage.—Rice-Stix Dry Goods Co. v. Sally (Mo. Sup.) 1030.

**CHEAT.**

See "Fraud."

**CHECKS.**

See "Bills and Notes."

**CHILDREN.**

See "Bastards"; "Guardian and Ward"; "Infants"; "Parent and Child."

**CHOSE IN ACTION.**

Assignment, see "Assignments."

**CITIES.**

See "Municipal Corporations."

**CITIZENS.**

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," § 1. Privileges and immunities, see "Constitutional Law," § 4.

**CIVIL RIGHTS**

See "Constitutional Law," § 4.

**CLAIM AND DELIVERY.**

See "Replevin."

**CLAIMS.**

Against estate of decedent, see "Executors and Administrators," § 5.  
To property levied on, see "Execution," § 2.

**CLASS LEGISLATION.**

See "Constitutional Law," § 4.

**CLERKS OF COURTS.**

Taking of acknowledgments, see "Acknowledgment," § 1.

Acts 1905, p. 596, dividing Union County into two judicial districts, *held* not void by reason of section 16 (page 601) on the ground that it is an infringement on the rights of citizens of the eastern district to a separate county clerk who is ex-officio clerk of the probate court.—*Pryor v. Murphy* (Ark.) 445.

Under Ky. St. 1903, § 457, the words "his services" in section 3515 referring to the services of a police justice in cities of the fourth class *held* to import "their services" so as to authorize an allowance for the services of the judge and his deputy clerk appointed under section 3514.—*Greenleaf v. Woods* (Ky.) 458.

Where a judge of a police court of a city of the fourth class appointed a deputy clerk as authorized by Ky. St. 1903, §§ 3514, 3515, the city had power by ordinance to fix the clerk's compensation.—*Greenleaf v. Woods* (Ky.) 458.

**CLOUD ON TITLE.**

See "Quieting Title."

**COHABITATION.**

See "Marriage."

**COLLATERAL AGREEMENT.**

Parol evidence, see "Evidence," § 9.

**COLLATERAL ATTACK.**

On judgment, see "Judgment," § 4.

**COLLECTION.**

Of estate of decedent, see "Executors and Administrators," § 3.  
Of taxes, see "Taxation," § 3.

**COLOR OF TITLE.**

To sustain adverse possession, see "Adverse Possession."

**COMBINATIONS.**

See "Monopolies," § 1.

**COMITY.**

Between courts, see "Courts," § 5.

**COMMERCE.**

Carriage of goods and passengers, see "Carriers."

**§ 1. Power to regulate in general.**

Under the act of Congress known as the "Lacey Act" (Kirby's Dig. § 3620), prohibiting

\*Point annotated. See syllabus.

the transportation of game beyond the state *held* unconstitutional though equally applying to game killed without the state.—*Wells Fargo Express Co. v. State* (Ark.) 189.

**§ 2. Subjects of regulation.**

\*The sale of pictures and picture frames by an agent acting for his principal in another state, where the pictures were manufactured and shipped to the purchaser, *held* interstate commerce, and not within Acts 1906, p. 202, imposing a license tax on picture solicitors, etc.—*Commonwealth v. Baldwin* (Ky.) 914.

**§ 3. Means and methods of regulation.**

Act March 13, 1905 (Gen. Laws 1905, p. 29, c. 25) § 1, regulating the venue of suits against connecting lines of railway, *held* a proper exercise of the state's police power, and not invalid as to interstate carriers, as imposing a burden on them not imposed on commerce within the state.—*St. Louis Southwestern Ry. Co. of Texas v. Wester* (Tex. Civ. App.) 769.

**COMMERCIAL PAPER.**

See "Bills and Notes."

**COMMISSION.**

To take testimony, see "Depositions."

**COMMISSIONS.**

Of broker, see "Brokers," §§ 2, 3.  
Of trustee, see "Trusts," § 4.

**COMMON CARRIERS.**

See "Carriers."

**COMMON SCHOOLS.**

See "Schools and School Districts," § 1.

**COMPENSATION.**

Agent, see "Principal and Agent," § 2.  
Attorney, see "Attorney and Client," § 2.  
Broker, see "Brokers," §§ 2, 3.  
For property taken for public use, see "Eminent Domain," § 2.  
For services, see "Master and Servant," § 2.  
Trustee, see "Trusts," § 4.

Of particular classes of officers or other persons.

See "Clerks of Courts."

Health officers, see "Health," § 1.

**COMPETENCY.**

Of evidence in criminal prosecution, see "Criminal Law," § 6.  
Of experts as witnesses, see "Evidence," § 10.  
Of juror, see "Jury," § 4.  
Of witnesses in general, see "Witnesses," § 1.

**COMPLAINT.**

In civil actions, see "Pleading," § 2.  
In criminal prosecutions, see "Criminal Law," § 4; "Indictment and Information."

**COMPROMISE AND SETTLEMENT.**

See "Payment."

Effect of settlement between parties in lieu of attorney, see "Attorney and Client," § 2.

## COMPUTATION.

Of interest, see "Interest," § 2.  
Of period of limitation, see "Limitation of Actions," § 1.  
Of time, see "Time."

## CONCEALED WEAPONS.

See "Weapons."

## CONCLUSION.

Of witness, see "Evidence," § 10.

## CONCURRENT JURISDICTION.

Of courts, see "Courts," § 5.

## CONDEMNATION.

Taking property for public use, see "Eminent Domain."

## CONDITIONS.

In insurance policies, see "Insurance," §§ 6, 7.  
Precedent to equitable relief against judgment, see "Judgment," § 3.

## CONFESSION.

Admissibility in evidence, see "Criminal Law," § 6.

## CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

## CONNECTING CARRIERS.

See "Carriers," §§ 2, 3.

## CONSIDERATION.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.  
Of contract, see "Contracts," § 1.

## CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

## CONSTABLES.

See "Sheriffs and Constables."

## CONSTITUTIONAL LAW.

*Provisions relating to particular subjects.*

See "Commerce," § 1; "Eminent Domain," §§ 1, 2; "Jury," § 1; "Licenses," § 1.  
Enactment and validity of statutes, see "Statutes," § 1.  
Subjects and titles of statutes, see "Statutes," § 2.

### § 1. Establishment and amendment of constitutions.

Whether a constitutional amendment had been adopted or not as provided by Kirby's Dig. §§ 716, 717, 718, and 2852 *held* a judicial question reviewable by the courts.—*Rice v. Palmer* (Ark.) 396.

Under Kirby's Dig. § 718, a constitutional amendment in order to be adopted must re-

ceive a majority of the votes of all the electors voting at the election and not a mere majority of the votes of the electors voting on the proposition.—*Rice v. Palmer* (Ark.) 396.

\*Kirby's Dig. §§ 716-718 in confining the evidence as to whether an amendment of the Constitution has been adopted to returns sent to the Speaker of the House *held* not to contravene Const. art. 19, § 22.—*St. Louis South Western Ry. Co. v. Kavanaugh* (Ark.) 409.

### § 2. Construction, operation, and enforcement of constitutional provisions.

\*The constitutionality of a statute will not be determined when the decision can be rested on some other ground.—*Martin v. State* (Ark.) 372.

### § 3. Retrospective and ex post facto laws.

Laws Twenty-Ninth Legislature (Gen. Laws 1905, p. 116, c. 83, § 1) together with Rev. St. 1895, arts. 1113, 1114, permitting a judge of the district court to make an order in vacation for a special term at which to sentence one convicted of crime, *held* not ex post facto as to one whose conviction antedated the passage of the law.—*Ex parte Boys* (Tex. Cr. App.) 1079.

### § 4. Privileges or immunities, and class legislation.

\*A statute which selects particular individuals from a class, and imposes on them special obligations from which others in the same class are exempt, is invalid.—*Caven v. Coleman* (Tex. Civ. App.) 774.

Act twenty-fifth Legislature (Laws 1897, p. 236, c. 163) relating to the appointment by cities of a board for the examination of plumbers *held* not invalid as creating a discrimination against individual plumbers not members of a firm.—*Caven v. Coleman* (Tex. Civ. App.) 774.

## CONSTRUCTIVE POSSESSION.

See "Adverse Possession," § 2.

## CONTEST.

Of election, see "Elections," § 5.  
Of will, see "Wills," § 2.

## CONTINGENT REMAINDERS.

Creation, see "Wills," § 3.

## CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 7.

Review of discretion of court as to allowance of, see "Appeal and Error," § 13.

\*Where a continuance was denied with the understanding that the affidavit might be read as the deposition of the absent witnesses it was not error for the court to permit the affidavit to be read over an objection that the statements contained therein were indefinite and vague.—*Holcomb-Lobb Co. v. Kaufman* (Ky.) 813.

## CONTRACTS.

Acknowledgment, see "Acknowledgment," § 1.  
Agreements within statute of frauds, see "Frauds, Statute of."  
Assignment, see "Assignments."  
Cancellation, see "Cancellation of Instruments."  
Operation and effect of champerty, see "Champerty and Maintenance."

\*Point annotated. See syllabus.

Operation and effect of customs or usages, see "Customs and Usages."

Operation and effect of gaming laws, see "Gaming," § 1.

Parol or extrinsic evidence, see "Evidence," § 9.  
Pendency of other action as bar to action for rescission of contract, see "Abatement and Revival," § 1.

Reformation, see "Reformation of Instruments."

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

#### *Contracts of particular classes of persons.*

See "Carriers," §§ 2, 3, 5; "Corporations," § 3;  
"Husband and Wife," § 2; "Infants," § 2;  
"Landlord and Tenant"; "Master and Servant"; "Municipal Corporations," §§ 4, 7;  
"Principal and Agent"; "Principal and Surety"; "Vendor and Purchaser"; "Warehousemen."

Married women, see "Husband and Wife," § 8.

#### *Contracts relating to particular subjects.*

See "Interest"; "Mines and Minerals," § 1.  
Pasturage of animals, see "Animals."  
Transportation of goods, see "Carriers," § 2.  
Transportation of passengers, see "Carriers," § 5.

#### *Particular classes of express contracts.*

See "Bailment"; "Bills and Notes"; "Covenants"; "Exchange of Property"; "Insurance"; "Partnership."

Agency, see "Principal and Agent."

Bills of lading, see "Carriers," §§ 2, 3.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Sales of goods, see "Sales."

Sales of realty, see "Vendor and Purchaser."

Stipulations in actions, see "Stipulations."

Submission to arbitration, see "Arbitration and Award," § 1.

Suretyship, see "Principal and Surety."

#### *Particular classes of implied contracts.*

See "Account Stated"; "Money Received"; "Use and Occupation"; "Work and Labor."

#### *Particular modes of discharging contracts.*

See "Payment."

#### **§ 1. Requisites and validity.**

\*Love and affection *held* sufficient consideration to uphold either executed or executory contracts between parent and child.—Doty v. Dickey (Ky.) 544.

\*A contract superseding a prior one between the parties *held* to have a sufficient consideration.—Proctor Coal Co. v. Strunk (Ky.) 603.

Evidence *held* insufficient to show that execution of a contract was procured by fraud.—Proctor Coal Co. v. Strunk (Ky.) 603.

A note executed by defendant to induce plaintiff to refrain from carrying out a contract with another, which was void for maintenance, *held* without consideration.—Phelps v. Manicke (Mo. App.) 221.

A contract whereby plaintiff was to act as a landowner's agent in effecting a sale of the land *held* not without the consideration moving to the landowner.—Young v. Ruhwedel (Mo. App.) 228.

\*A provision in a fire policy relating to the submission to arbitration of the amount of a loss, *held* reasonable and enforceable.—Stevens v. Norwich Union Fire Ins. Co. (Mo. App.) 684.

Where an agreement on the terms of a contract has been reached by the parties, and there is no evidence that the same is not to become ef-

fective until reduced to writing, a breach of it by either party supports an action for damages.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

An agreement *held* not without consideration on the ground that nothing had been done thereunder save that called for by former obligations.—McKinley v. Wilson (Tex. Civ. App.) 112.

An agreement by a grantee to reconvey *held* supported by a sufficient consideration.—McAllen v. Raphael (Tex. Civ. App.) 760.

#### **§ 2. Construction and operation.**

\*Where extrinsic evidence is introduced to aid in the construction of a written contract, it was not error for the court to submit the construction thereof to the jury.—Johnson v. Smothers (Ark.) 386.

#### **§ 3. Rescission and abandonment.**

\*Defendant's breach of a contract for hauling logs, *held* to justify the abandonment thereof by plaintiff.—Fletcher v. Verser (Ark.) 384.

#### **§ 4. Performance or breach.**

\*Where defendant informed plaintiff that he would not carry out a contract to enter into a partnership, plaintiff was absolved from making a tender in order to entitle him to recover for defendant's breach.—Hobbs v. Ray (Ky.) 580.

#### **§ 5. Actions for breach.**

\*In an action on a contract for hauling logs, an instruction *held* misleading.—Fletcher v. Verser (Ark.) 384.

In an action on a contract for hauling logs, an instruction *held* not misleading.—Fletcher v. Verser (Ark.) 384.

In an action for advancements under a contract for the purchase of ties, an instruction *held* not objectionable for failure to require a delivery of the ties "on the bank of the Tennessee river."—Holcomb-Lobb Co. v. Kaufman (Ky.) 813.

In an action for refusal to permit plaintiff to carry out a contract for grading and clearing at a specified price, evidence *held* not to be at variance with the petition.—Jefferson & N. W. Ry. Co. v. Dreeson (Tex. Civ. App.) 63.

In an action on contract, failure of defendant to plead a breach by plaintiff in failing to perform in time, *held* to preclude it from taking advantage of such a breach.—Jefferson & N. W. Ry. Co. v. Dreeson (Tex. Civ. App.) 63.

Pleadings in an action based on a refusal to permit plaintiff to carry out a contract for grading and clearing at a specified price *held* to raise no issue as to whether the work was to be done in a specified time.—Jefferson & N. W. Ry. Co. v. Dreeson (Tex. Civ. App.) 63.

## CONTRADICTION.

Of witness, see "Witnesses," § 3.

## CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.

Of passenger, see "Carriers," § 8.

Of person injured at railroad crossing, see "Railroads," § 4.

Of person injured by street railroad, see "Street Railroads," § 2.

Of person injured on railroad track, see "Railroads," § 5.

Of person whose property has been injured by construction of railroad, see "Railroads," § 2.

Of servant, see "Master and Servant," §§ 3, 9.

\*Point annotated. See syllabus.

Of traveler on highway, see "Municipal Corporations," § 13.

## CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

## CONVEYANCES.

Contracts to convey, see "Vendor and Purchaser," § 8.

Description of boundaries in general, see "Boundaries," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

*Conveyances by or to particular classes of persons.*

See "Infants," § 1; "Insane Persons," § 2.

*Conveyances of particular species of, or estates or interests in, property.*

See "Homestead," § 2.

*Particular classes of conveyances.*

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

## CORPORATIONS.

Right to sue for libel, see "Libel and Slander," § 2.

Taxation of corporations and corporate property, see "Taxation," § 2.

*Particular classes of corporations.*

See "Building and Loan Associations"; "Municipal Corporations"; "Railroads"; "Street Railroads."

Banks, see "Banks and Banking," § 1.

Insurance companies, see "Insurance."

Telegraph and telephone companies, see "Telegraphs and Telephones."

Water companies, see "Waters and Water Courses," § 2.

### § 1. Capital, stock, and dividends.

In an action to compel a corporation to issue a certificate of stock, a finding that the certificate had been canceled with the consent of the holder *held* warranted.—*Dupoyster v. First Nat. Bank* (Ky.) 830.

### § 2. Officers and agents.

Where a trustee of a corporation accepted a conveyance of certain of its real estate and sold the same at a profit, he, being solvent, was solely responsible to the stockholders for the amount of such profit.—*Noe v. Headley* (Mo. App.) 309.

### § 3. Corporate powers and liabilities.

\*A corporation *held* bound to carry out a contract known to the corporators and by which the corporation property was in part secured.—*Carter v. Gray* (Ark.) 377.

\*In the absence of evidence, *held* it would not be presumed that the general manager of a corporation was without authority to make the contract he executed for it.—*Walnut Ridge Mercantile Co. v. Cohn* (Ark.) 413.

Ky. St. 1903, § 576, *held* not to require a corporation to place the word "incorporated" under the corporate name printed on the labels of goods which it manufactures and sells.—*Jung Brewing Co. v. Commonwealth* (Ky.) 476.

\*Point annotated. See syllabus.

### § 4. Reincorporation and reorganization.

\*The liability of a national bank assuming the liabilities of a state bank toward a holder of a certificate of stock in the state bank determined.—*Dupoyster v. First Nat. Bank* (Ky.) 830.

\*Where a new corporation without fraud purchased from the trustees of a dissolved corporation a portion of its assets, it took the same free from any liability of the old corporation for debts to employees.—*Houston Ice & Brewing Co. v. Nicolini* (Tex. Civ. App.) 84.

In the absence of allegations that assets of value of a dissolved corporation had been transferred by the trustees of the dissolved corporation to a new corporation, the latter *held* not chargeable with debts of the old corporation.—*Houston Ice & Brewing Co. v. Nicolini* (Tex. Civ. App.) 84.

### § 5. Dissolution and forfeiture of franchise.

Where a corporation was dissolved by judicial decree an employee's right of action for services was against such trustees.—*Houston Ice & Brewing Co. v. Nicolini* (Tex. Civ. App.) 84.

## CORRECTION.

Of irregularities and errors at trial, see "Criminal Law," § 18; "Trial," § 14.

Of record on appeal or writ of error, see "Criminal Law," § 23.

## COSTS.

In partition, see "Partition," §

### § 1. Nature, grounds, and extent of right in general.

\*In a suit to restrain the enforcement of an ordinance whereby a city contracted for a water supply *held* no abuse of discretion to award all costs to defendants.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

\*Under Ky. St. 1903, § 889, in a suit for damages and to restrain the further removal of timber from lands alleged to belong to plaintiff, he having failed to show title, defendant *held* entitled to costs.—*Le Moyne v. Anderson* (Ky.) 843.

### § 2. On appeal or error, and on new trial or motion therefor.

\*In an action against a railway company for killing an animal, an appeal *held* taken for delay merely, warranting the infliction of the statutory penalty.—*Kansas City Southern Ry. Co. v. Edwards* (Ark.) 1061.

\*Where the transcript on appeal contains pleas and bills of exception not made the basis of any assignments of error, appellants should be charged with the cost thereof.—*Missouri, K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 1087.

## CO-TENANCY.

See "Tenancy in Common."

## COUNCIL.

See "Municipal Corporations," § 2.

## COUNTERCLAIM.

See "Set-off and Counterclaim."

## COUNTERFEITING.

See "Forgery."



## COUNTIES.

See "Municipal Corporations."

Mandamus to county court, see "Mandamus," § 2.

### § 1. Government and officers.

Under Ky. St. 1903, § 978, a health officer, having claimed \$500 per year for his services, and been allowed \$100 by the fiscal court, *held* entitled to appeal to the county court from such allowance.—Butler County v. Gardner (Ky.) 582.

### § 2. Fiscal management, public debt, securities, and taxation.

\*Under Acts 1905, p. 412, an order requiring the deposit of county funds in a certain bank without a compliance with the provisions of the statute, *held* void.—Martin v. State (Ark.) 372.

Kirby's Dig. § 1500 *held* not to prevent appropriation for county purposes in any year of other funds of the county in addition to 90 per cent. of the taxes levied for the year.—Kerwin v. Caldwell (Ark.) 1058.

An appropriation for building and maintaining a county hospital *held* to include power to buy a site therefor.—Kerwin v. Caldwell (Ark.) 1058.

### § 3. Actions.

The county judge, acting as the county court, *held* to have power to authorize action by the county attorney to recover funds unlawfully appropriated by the fiscal court, it declining to authorize the action.—Hopkins County v. Givens (Ky.) 819.

## COUNTY BOARD.

See "Counties," § 1.

## COURSES AND DISTANCES.

See "Boundaries," § 1.

## COURTS.

Clerks, see "Clerks of Courts."

Judges, see "Judges."

Justices' courts, see "Justices of the Peace."

Province of court and jury, see "Trial," §§ 5-11.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

### § 1. Establishment, organization, and procedure in general.

\*Under Const. art. 5, § 7, providing that the Legislature may authorize the holding of special terms of court, or the holding of more than two terms in any county the Legislature could authorize the judge to fix the date of these terms.—Ex parte Boyd (Tex. Cr. App.) 1079.

Acts Twenty-ninth Legislature (Gen. Laws 1905, p. 116, c. 83, § 1) *held* to repeal Rev. St. 1895, arts. 1113, 1114, so that the judge of the district court might make a valid order in vacation for a special term.—Ex parte Boyd (Tex. Cr. App.) 1079.

Under Acts Twenty-ninth Legislature, *held* proper for a judge making an order in vacation for a special term to comply with the provisions for notice contained in Rev. St. 1895, art. 1115.—Ex parte Boyd (Tex. Cr. App.) 1079.

### § 2. Courts of general original jurisdiction.

\*In an action against a carrier under Rev. St. 1899, § 1140, attorney's fee recoverable by plaintiff *held* not open to consideration as a part of the demand in order to bring the cause

within the jurisdiction of the circuit court under section 1674.—Knight v. Quincy, O. & K. C. R. Co. (Mo. App.) 716.

In an action against a carrier for refusal to transport an animal offered by plaintiff for shipment an amendment of the petition in order to bring the action within the jurisdiction of the circuit court *held* properly allowed and sufficient to confer jurisdiction (Rev. St. 1899, §§ 1082, 1140).—Knight v. Quincy, O. & K. C. R. Co. (Mo. App.) 716.

\*The district court *held* without jurisdiction of a garnishment proceeding in which \$7.75 was attached.—Meek v. Houston Ice & Brewing Co. (Tex. Civ. App.) 937.

### § 3. Courts of probate jurisdiction.

\*The probate court *held* without jurisdiction to allow a claim against a decedent's estate where the allowance required the exercise of equity jurisdiction to set aside a contract made between claimant and decedent.—Ivrie v. Ewing (Mo. App.) 481.

### § 4. Courts of appellate jurisdiction.

Under Civ. Code Prac. tit. 8, c. 5, § 298; tit. 16, §§ 700, 721, 724-731; tit. 18, and Ky. St. 1903, § 950, an appeal does not lie directly to the Court of Appeals from an order of the quarterly court appointing a receiver.—Brown v. Crump & Field (Ky.) 1112.

Proceeding for injunction to restrain the sale of land under execution against another than plaintiff *held* not a case involving land title within Const. 1875, art. 6, § 12, defining jurisdiction of the Supreme Court.—Payne v. Davies County Sav. Ass'n (Mo. Sup.) 1016.

If, on appeal from proceedings to open a highway, the contest concerns the right to take private property, the title to real estate is so far involved that the jurisdiction of the appeal is in the Supreme Court.—State ex rel. Galbraith v. McCutchan (Mo. App.) 251.

Where a prosecution for peddling without a license involved a consideration of the revenue laws of the state and the interstate commerce clause of the federal Constitution, jurisdiction of an appeal therein *held* in the Supreme Court.—State v. Looney (Mo. App.) 316.

### § 5. Concurrent and conflicting jurisdiction, and comity.

\*Civ. Code Prac. § 285, providing that an injunction to stay proceedings on a judgment shall not be granted in any court other than that in which the judgment was rendered, *held* not to apply where the one seeking the injunction was not a party to the judgment.—Robinson v. Carlton (Ky.) 549.

## COVENANTS.

In insurance policies, see "Insurance," § 7.

### § 1. Construction and operation.

Grantee *held* entitled to maintain an action for breach of a covenant of seisin because of his grantor's lack of title to a portion of the land conveyed.—Foster v. Byrd (Mo. App.) 224.

### § 2. Performance or breach.

An action *held* one not on the general covenant of warranty, requiring eviction before action, but one on a special covenant to refund, on the basis of the price of \$5,000 for 624 acres, if the vendees make a survey and find a shortage.—Holt v. Mynhier's Adm'x (Ky.) 477.

### § 3. Actions for breach.

An action *held* one on covenant and so governed, not by the 5 years statute of limitations, but by the 15 years statute.—Holt v. Mynhier's Adm'x (Ky.) 477.

\*Point annotated. See syllabus.

Of witness, see "Witnesses," § 3.

## CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Of devisees or legatees, see "Wills," § 4.  
Subrogation to rights of creditor, see "Subrogation."

## CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

## CRIMINAL LAW.

Bail, see "Bail," § 1.

Extradition of persons accused, see "Extradition."

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

*Offenses by particular classes of persons.*

See "Corporations," § 3.

Physician for sale of morphine, see "Poisons."

*Particular offenses.*

See "Burglary"; "Disorderly Conduct"; "Embezzlement"; "Forgery"; "Gaming," § 2; "Homicide"; "Larceny"; "Nuisance," § 1; "Perjury"; "Rape"; "Receiving Stolen Goods"; "Robbery"; "Seduction," § 1.

Breaking or destroying fence, see "Fences."

Carrying weapons, see "Weapons."

Cruelty to animals, see "Animals."

Obstruction of streets, see "Municipal Corporations," § 12.

Sale of morphine, see "Poisons."

Violations of liquor laws, see "Intoxicating Liquors," §§ 4, 5.

Violations of municipal ordinances, see "Municipal Corporations," § 11.

### § 1. Nature and elements of crime and defenses in general.

\*Where the owner of mules, to detect a thief, employed a detective to encourage the thief's design, and the act was consummated, it was theft, provided such owner or his agent did not induce the original intent.—Crowder v. State (Tex. Cr. App.) 934.

### § 2. Venue.

\*Where deceased was shot and fatally wounded in one county and died in another, accused was properly charged with the killing in the latter county.—Britton v. Commonwealth (Ky.) 556.

\*The court in its discretion held entitled to grant a change of venue after the denial of the application where events occurring subsequent to the denial justify the granting of the motion, notwithstanding Ky. St. 1903, § 1118.—Fletcher v. Commonwealth (Ky.) 855.

That the court in which an indictment was pending refused to transfer it to another county, to which it was afterwards transferred, on the ground that prejudice existed there, is not proof that the court of the latter county erred in refusing at a later term to transfer it to a third county.—Moore v. State (Tex. Cr. App.) 321.

\*Point annotated. See syllabus.

The procedure provided by Code Crim. Proc. art. 475 held not to apply to the retraversing of a cause venue in which has been erroneously changed.—Moore v. State (Tex. Cr. App.) 321.

The court which changed the venue of a cause held to acquire jurisdiction on retraversing to it of the cause.—Moore v. State (Tex. Cr. App.) 321.

### § 3. Former jeopardy.

\*A plea of former conviction which was set aside on defendant's motion, a nol. pros. being then entered, held not good.—Floyd v. State (Ark.) 125.

\*A plea on a prosecution for robbery of a former conviction of petit larceny founded on the same facts held good.—Floyd v. State (Ark.) 125.

\*Under Cr. Code Prac. § 178, the dismissal of an indictment on demurrer is no bar to a further prosecution, unless dismissed for an objection to form or substance taken at the trial, or for variance, or because the indictment contains matter which is a legal defense or a bar to the indictment.—Commonwealth v. Bray (Ky.) 522.

\*Under Const. § 13, and Cr. Code Prac. § 178, an acquittal held a bar to a subsequent prosecution.—Drake v. Commonwealth (Ky.) 580.

The granting of a motion on behalf of accused to discharge the jury and continue the case, because of his physical inability to proceed, does not operate as an acquittal.—Sacra v. Commonwealth (Ky.) 858.

\*A prosecution for unlawfully carrying a pistol held not barred by a former acquittal of a charge of assault with intent to murder.—Woodroe v. State (Tex. Cr. App.) 30.

### § 4. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

\*Under Const. art. 5, § 12, where a criminal charge is prosecuted before a justice based on a complaint it must commence with the words "in the name and by the authority of the state of Texas" (Code Civ. Proc. 1895, arts. 256, 257, and 438).—Ex parte Jackson (Tex. Cr. App.) 924.

### § 5. Arraignment and pleas, and nolle prosequi or discontinuance.

\*An order as to the arraignment of accused, held in conformity with Cr. Code Prac. § 155, relating to arraignment, as defined by section 154.—Bischoff v. Commonwealth (Ky.) 538.

\*A plea of former jeopardy in the same tribunal may be relied on without presenting any formal plea.—Riggs v. State (Tex. Cr. App.) 25.

\*An arraignment during the progress of the trial and while the jury was being impaneled held sufficient.—Mays v. State (Tex. Cr. App.) 329.

### § 6. Evidence.

\*On a prosecution for housebreaking, certain evidence held competent as bearing on the question of motive.—Commonwealth v. Everson (Ky.) 400.

\*The exception to the rule that on a trial for crime evidence of another crime is inadmissible covers the cases where the commission of other offenses shows the intent or guilty knowledge of accused, or where the two crimes are so interwoven that one cannot be proved without the production of the facts constituting the

evidence of the other.—*Raymond v. Commonwealth* (Ky.) 515.

\*On a trial for burning a barn, evidence that a dwelling house was burned a month before *held* inadmissible because collateral.—*Raymond v. Commonwealth* (Ky.) 515.

Where, on a trial for homicide, the evidence showed a conspiracy between several persons to commit the crime, evidence that articles found near the dead body were the property of one of such persons was admissible.—*Bull v. Commonwealth* (Ky.) 817.

On a trial for homicide, certain evidence *held* competent as corroborative evidence.—*Bull v. Commonwealth* (Ky.) 817.

Where, on a trial for homicide, the proof showed a conspiracy between several persons to commit it, evidence that one of the several men in a wagon driving towards the place where the body of decedent was found was one of such persons was admissible.—*Bull v. Commonwealth* (Ky.) 817.

In a prosecution for rape, books and papers found on the ground after the commission of the offense were admissible as *res gestæ*.—*Fletcher v. Commonwealth* (Ky.) 855.

\*In a prosecution for rape, books and papers found at the scene of the crime and admitted by defendant to belong to him, were properly admitted against him.—*Lyon v. Commonwealth* (Ky.) 857.

\*Statements made by other parties to the crime in defendant's presence and at a time and under circumstances naturally calling for a response from him, *held* admissible against him.—*Lyon v. Commonwealth* (Ky.) 857.

\*Conversation between defendant and another which occurred immediately after killing should have been admitted.—*Pratt v. State* (Tex. Cr. App.) 8.

\*Evidence that other parties than defendant were placed in such relation to prosecutor that they might have been the guilty parties *held* admissible.—*Chancey v. State* (Tex. Cr. App.) 12.

It was proper not to permit the sheriff to testify that he received information that would have caused him to arrest one other than prosecutor.—*Chancey v. State* (Tex. Cr. App.) 12.

\*On a prosecution for robbery, it was proper to sustain an objection to a question to a witness as to what he told the officers as to how much money defendant ought to have.—*Chancey v. State* (Tex. Cr. App.) 12.

\*In a prosecution for burglary certain evidence of another offense *held* not admissible.—*Jordan v. State* (Tex. Cr. App.) 35.

Evidence *held* not insufficient for identification of defendant as the person guilty of the robbery.—*Walker v. State* (Tex. Cr. App.) 35.

In prosecution for theft of a steer which had been killed by defendant, testimony of defendant's father-in-law as to finding of its ears with his mark on them *held* not objectionable as self-serving act of defendant.—*Hazlett v. State* (Tex. Cr. App.) 36.

In a prosecution for fence cutting, evidence that the day after the offense was committed accused's codefendant, after being arrested, attempted to throw away a pair of wire nippers, *held* admissible against accused.—*Henderson v. State* (Tex. Cr. App.) 37.

\*On a prosecution for burglary *held* error to admit evidence that defendant, when arrested and before he was warned, was discovered trying to get rid of a pin and watch, the fruit of

former crimes.—*Johnson v. State* (Tex. Cr. App.) 45.

\*Evidence of an exclamation of deceased a few minutes after he was shot, and while he was in great agony, *held* admissible, the idea of a concocted story being precluded.—*Moore v. State* (Tex. Cr. App.) 321.

Permitting a question to be asked in a homicide case *held* not error as allowing the state to prove the good character of deceased.—*Moore v. State* (Tex. Cr. App.) 321.

\*Under Code Cr. Proc. 1895, art. 790, a confession of accused charged with homicide for the purpose of robbery is admissible though procured by improper means where from his statement the property taken from decedent was found.—*Jones v. State* (Tex. Cr. App.) 930.

#### § 7. Time of trial and continuance.

\*An application for a continuance on the ground of the absence of a witness *held* properly denied for failure to show diligence.—*Harper v. State* (Ark.) 1003.

\*The refusal to grant a continuance on the ground of the absence of a witness who would impeach a state's witness *held* not error where no proper foundation for impeachment was laid.—*Harper v. State* (Ark.) 1003.

\*An application for a continuance in a homicide case on the ground of the absence of a witness who would testify to threats made by decedent *held* properly denied for failing to show that the threats had been communicated to accused.—*Harper v. State* (Ark.) 1003.

\*It is not error to refuse a continuance on the ground of the absence of a witness whose testimony is merely cumulative.—*Harper v. State* (Ark.) 1003.

Where pending trial accused was attacked by a mob and so shot as to be physically unable to properly present his defense, the denial of his application for a continuance was ground for a new trial.—*Sacra v. Commonwealth* (Ky.) 85.

\*The showing of diligence on an application for a second continuance for an absent witness *held* insufficient.—*Moore v. State* (Tex. Cr. App.) 321.

\*Mere statement that continuance was desired to examine into case and ascertain what testimony could be procured *held* not sufficient showing of ground therefor.—*Moore v. State* (Tex. Cr. App.) 327.

#### § 8. Trial—Course and conduct of trial in general.

\*A remark of the trial court *held* reversible error as reflecting on the testimony of accused.—*Chancey v. State* (Tex. Cr. App.) 12.

#### § 9. — Reception of evidence.

\*An attorney, is not subject to the rule requiring the separation of witnesses during the trial.—*Bischoff v. Commonwealth* (Ky.) 538.

#### § 10. — Objections to evidence, motions to strike out, and exceptions.

\*An accused seeking to avail himself of any error in the admission of evidence *held* required to show that he objected and excepted to the ruling admitting the evidence at the time it was offered.—*Day v. Commonwealth* (Ky.) 510.

#### § 11. — Arguments and conduct of counsel.

On a trial for homicide, an argument of the prosecuting attorney *held* not ground for reversal.—*Harper v. State* (Ark.) 1003.

\*In a prosecution for violation of the local option law, instructions of the court *held* to have cured any error resulting from improper

\*Point annotated. See syllabus.

...of the attorney in his closing argument, while objectionable, held not reversible error.—*Mays v. State* (Tex. Cr. App.) 329.

\*On a trial for homicide, language of the county attorney held not error as alluding to accused's failure to testify.—*Jones v. State* (Tex. Cr. App.) 930.

**§ 12. — Province of court and jury in general.**

\*On a prosecution for larceny an instruction held not erroneous as assuming facts in issue.—*Castevens v. State* (Ark.) 150.

In a prosecution for theft of a steer, charge held erroneous as assumption of fact by the court.—*Hazlett v. State* (Tex. Cr. App.) 36.

A charge held not on the weight of evidence.—*Chancey v. State* (Tex. Cr. App.) 12; *Navarro v. State* (Tex. Cr. App.) 932.

**§ 13. — Necessity, requisites, and sufficiency of instructions.**

\*An instruction in the language of Kirby's Dig. §§ 1560, 1561, 1563, as to aiding and abetting another in the commission of a felony held not erroneous.—*Burnett v. State* (Ark.) 1007.

\*An instruction in a criminal case held more favorable to accused than it should have been.—*Day v. Commonwealth* (Ky.) 508.

An instruction on a trial for violating the local option law with respect to the punishment held favorable to accused.—*Day v. Commonwealth* (Ky.) 508.

An instruction in a criminal case held not erroneous because of the use of a certain word.—*Day v. Commonwealth* (Ky.) 510.

Under Ky. St. 1903, § 1377, an instruction authorizing the jury on finding accused guilty to impose the hard-labor sentence, held erroneous as interfering with the discretion conferred on the jury.—*Day v. Commonwealth* (Ky.) 510.

On a trial for homicide, an instruction authorizing a conviction held not open to a certain objection in view of another instruction.—*Bull v. Commonwealth* (Ky.) 817.

In a criminal prosecution in which the court submitted only one count of the indictment, an instruction relative to the duties of the jury if unable to ascertain of which of the crimes charged defendant was guilty held properly refused.—*Manovitch v. State* (Tex. Cr. App.) 1.

\*Whenever necessary to charge in regard to effect of impeaching testimony, held that jury should be told that evidence must be used for purpose of affecting credibility of witnesses whose evidence is sought to be impeached.—*Pratt v. State* (Tex. Cr. App.) 8.

An instruction on circumstantial evidence held not objectionable for failure to require that it exclude every reasonable hypothesis consistent with defendant's innocence.—*Henderson v. State* (Tex. Cr. App.) 37.

Where a jury were charged on circumstantial evidence, it was immaterial that the court failed to state that the case was one in which circumstantial evidence was relied on for a conviction.—*Henderson v. State* (Tex. Cr. App.) 37.

\*Charge on circumstantial evidence held not required, under evidence.—*Moore v. State* (Tex. Cr. App.) 327.

\*In a prosecution for fence breaking, an instruction held objectionable as based on facts

...of additional instructions asked by accused is not error, where the instructions given covered the case.—*Richardson v. State* (Ark.) 752.

\*It is not error to refuse instructions embodied in those given.—*Burnett v. State* (Ark.) 1007.

\*It is not error to refuse an instruction sufficiently covered by the instructions given.—*Allen v. State* (Tex. Cr. App.) 927.

**§ 15. — Objections to instructions or refusal thereof, and exceptions.**

\*Where the court, in an instruction, uses the language of a statute, which is reasonably clear, accused, if not satisfied, must point out any defect by a specific objection.—*Burnett v. State* (Ark.) 1007.

**§ 16. — Custody, conduct, and deliberations of jury.**

\*Discussion of accused's reputation and the pendency of other cases against him by the jury after their retirement held such misconduct as vitiated their verdict of conviction.—*Kegans v. State* (Tex. Cr. App.) 16.

\*A verdict in a criminal prosecution held invalid as based on a lottery.—*Brookman v. State* (Tex. Cr. App.) 928.

**§ 17. — Verdict.**

\*The insertion of the word "confinement" by the court in a verdict, assessing punishment, held not to vitiate the verdict.—*McMahan v. State* (Tex. Cr. App.) 17.

**§ 18. — Waiver and correction of irregularities and errors.**

The error in the admission of evidence in a criminal case held not cured by the instructions.—*Raymond v. Commonwealth* (Ky.) 515.

**§ 19. Motions for new trial and in arrest.**

Remarks of jurors during a view of the scene of the homicide held not prejudicial or ground for a new trial.—*Daughtry v. State* (Ark.) 748.

\*Refusal to grant a continuance is not ground for a new trial unless the court abused its discretion.—*Harper v. State* (Ark.) 1003.

\*Newly discovered evidence which is merely cumulative is no ground for a new trial.—*Hamilton v. Commonwealth* (Ky.) 833.

\*Comments by jurors on failure of defendant to testify held ground for new trial.—*Woolley v. State* (Tex. Cr. App.) 27.

**§ 20. Judgment, sentence, and final commitment.**

Recitals in a judgment held not to show it was entered on Sunday.—*Moore v. State* (Tex. Cr. App.) 321.

**§ 21. Appeal and error, and certiorari — Form of remedy, jurisdiction, and right of review.**

\*Where the punishment assessed was within the statutory limits for the offense charged, the excessiveness thereof could not be reviewed on certiorari.—*Phillips v. State* (Ark.) 742.

\*Certiorari cannot be used as a substitute for appeal except where the right of appeal has been unavoidably lost through no fault of petitioner.—*Phillips v. State* (Ark.) 742.

Under the express provisions of Cr. Code Prac. § 281, the overruling of a motion to quash an indictment is not reviewable on appeal.—*Fletcher v. Commonwealth* (Ky.) 855.

\*Point annotated. See syllabus.

## § 22. — Presentation and reservation in lower court of grounds of review.

\*In the absence of a request for written instructions and an exception to the giving of an oral form of verdict of acquittal, alleged error in that regard *held* not reviewable on appeal.—*Richardson v. State* (Ark.) 752.

\*Misconduct of assistant counsel for prosecution *held* not to be considered on appeal in the absence of rulings by trial court on objections thereto.—*Stinson v. Commonwealth* (Ky.) 463.

\*Rulings as to comments of commonwealth's attorney not set up on motion for new trial *held* not to be considered on appeal.—*Stinson v. Commonwealth* (Ky.) 463.

An objection to the jury *held* not open to consideration where no objection was made below.—*Day v. Commonwealth* (Ky.) 508.

\*Where no exception was taken to the statements of the prosecuting attorney in the presence of the jury, the making of the statements was no ground for reversal.—*Day v. Commonwealth* (Ky.) 508.

\*Under Cr. Code Prac. § 281, an accused *held* not entitled to complain on appeal that jurors had heard similar cases against him tried.—*Day v. Commonwealth* (Ky.) 510.

\*Where, on a trial for homicide, accused did not except to the failure of the clerk to state to the jury accused's plea, as required by Cr. Code Prac. § 219, the court, on appeal, could not reverse a conviction therefor.—*Bischoff v. Commonwealth* (Ky.) 538.

An affidavit showing prejudice of jurors against accused only filed with the motion for a new trial was too late to avail accused on appeal from the conviction.—*Hamilton v. Commonwealth* (Ky.) 833.

\*Where accused neither objected to the argument of the prosecuting attorney nor asked the court to exclude it, the error in permitting the argument was not reviewable on appeal.—*Sweat v. Commonwealth* (Ky.) 843.

The failure of the court to give a certain charge *held* not ground for reversal where accused in his motion for a new trial did not complain of the failure to instruct on the law of the case.—*Sweat v. Commonwealth* (Ky.) 843.

\*Questions relating to arguments of counsel *held* not reviewable in absence of objections in trial court.—*McIntosh v. Commonwealth* (Ky.) 917.

\*Before accused could complain of being compelled to proceed in the absence of certain jurors who had been summoned, he must have asked for a postponement.—*Mays v. State* (Tex. Cr. App.) 329.

## § 23. — Record and proceedings not in record.

\*An objection that the punishment imposed was excessive could not be reviewed on appeal in the absence of a bill of exceptions preserving and authenticating the evidence.—*Phillips v. State* (Ark.) 742.

An affidavit of counsel for accused, filed on the motion for a new trial, *held* insufficient to supply an omission in the record.—*Bischoff v. Commonwealth* (Ky.) 538.

The objection to the admission of evidence *held* not reviewable on appeal, in the absence of a showing that the objection was passed on or that the court's failure to do so was excepted to.—*Bischoff v. Commonwealth* (Ky.) 538.

\*Correctness of court's ruling on motion to discharge panel *held* not to be reviewed where

bill of exceptions fails to state that it contains all the evidence.—*Ransom v. State* (Tenn.) 953.

An entry of an order on the docket granting time after the term to file a statement of facts in a criminal case is sufficient without its being carried forward into the minutes.—*Anderson v. State* (Tex. Cr. App.) 34.

A showing of diligence *held* insufficient to save a statement of facts in a criminal case not filed within the time allowed.—*Anderson v. State* (Tex. Cr. App.) 34.

Without a statement of fact, the denial of accused's application for a continuance and objections to the court's charge cannot be reviewed.—*Anderson v. State* (Tex. Cr. App.) 34.

A bill of exceptions is insufficient to raise a question as to the admission of evidence where it contains no statement of any ground of exception.—*Hirsch v. State* (Tex. Cr. App.) 40.

\*To authorize review on appeal of the action of the court in changing the venue *held* that a bill of exceptions must be reserved in the county from which the venue was changed.—*Moore v. State* (Tex. Cr. App.) 321.

\*Overruling of motion for continuance cannot be considered in absence of bill of exceptions.—*Moore v. State* (Tex. Cr. App.) 327.

A bill of exceptions to the overruling of accused's challenge to a juror *held* insufficient for failure to show that accused exhausted his peremptory challenges or how another juror whom he was compelled to accept was objectionable.—*Mays v. State* (Tex. Cr. App.) 329.

\*Sufficiency of evidence and the giving of special charge *held* not reviewable, in absence of bill of exceptions, statement of facts, or assignments of error.—*Cochran v. State* (Tex. Cr. App.) 924.

\*A statement of facts *held* not entitled to consideration because filed too late.—*Walker v. State* (Tex. Cr. App.) 927.

\*A bill of exceptions and a statement of facts in a criminal case presented too late *held* not entitled to consideration on appeal.—*Garrett v. State* (Tex. Cr. App.) 928.

\*The error in admitting the confession of accused on the ground that the same was extorted by unfair means will not be reviewed unless presented by a bill of exceptions.—*Jones v. State* (Tex. Cr. App.) 930.

\*A statement of facts though filed after the 20 days allowed, will be considered on appeal, when duly presented for approval.—*McKenzie v. State* (Tex. Cr. App.) 932.

\*Where the record on appeal is without a statement of facts or bill of exceptions, questions presented in the motion for a new trial as to the sufficiency of the evidence, will not be revised.—*Crawford v. State* (Tex. Cr. App.) 1085.

## § 24. — Review.

\*An error in admission of hearsay evidence *held* harmless under Kirby's Dig. §§ 2229, 2605.—*Castevens v. State* (Ark.) 150.

\*Where the giving of an oral instruction requested by accused was harmless, it was not ground for reversal though a request was made for written instructions.—*Richardson v. State* (Ark.) 752.

The refusal of the court to compel the prosecuting attorney to elect on which count in an indictment he would proceed *held* not error.—*Harper v. State* (Ark.) 1003.

\*An error on a trial for homicide in submitting a lower degree of homicide than war-

\*Point annotated. See syllabus.

The court on appeal is not authorized to reverse a judgment in a criminal case where there is any evidence to sustain it.—Illinois Cent. R. Co. v. Commonwealth (Ky.) 467.

\*In the absence of a showing that jurors had formed an opinion as to the merits of the case, the presumption is that they were properly qualified before being accepted.—Day v. Commonwealth (Ky.) 510.

One on trial for crime cannot complain of an instruction more favorable to him than it should have been.—Day v. Commonwealth (Ky.) 510.

A verdict on conflicting evidence on the issue of the insanity of accused *held* conclusive on appeal.—Bischoff v. Commonwealth (Ky.) 538.

\*The erroneous admission of evidence subsequently excluded by the court as incompetent, *held* not prejudicial.—Bischoff v. Commonwealth (Ky.) 538.

In a prosecution for murder the admission of evidence that accused had previously killed a man in another state *held* prejudicial within Crim. Code Prac. § 340, though it was expressly limited to its effect on accused's credibility as a witness.—Britton v. Commonwealth (Ky.) 556.

\*Where there is any evidence to sustain a conviction it will not be disturbed on appeal on the ground that it was contrary to the evidence.—Hamilton v. Commonwealth (Ky.) 833.

\*The denial of a change of venue in a criminal case will not be reversed on appeal, unless it appears that the trial judge abused his discretion.—Fletcher v. Commonwealth (Ky.) 855; Lyon v. Same (Ky.) 857.

\*The Supreme Court will not reverse conviction where there is any evidence to prove the defendant's guilt.—McIntosh v. Commonwealth (Ky.) 917.

Refusal to require the state to elect which count of an indictment it will proceed upon cannot be complained of where the court makes the election by submitting only one count to the jury.—Manovitch v. State (Tex. Cr. App.) 1.

\*Certain leading questions *held* not cause for reversal.—Manovitch v. State (Tex. Cr. App.) 1.

Where in a prosecution for violating the local option law it was clear that the sale was made, the failure to properly define the term "sale" in the charge was not reversible error.—Stephens v. State (Tex. Cr. App.) 7.

\*On a trial for homicide accused *held* not entitled to complain of an instruction submitting the issue of manslaughter.—Pinson v. State (Tex. Cr. App.) 23.

On a prosecution for the violation of the local option law certain testimony *held* not prejudicial to defendant.—Riggs v. State (Tex. Cr. App.) 25.

\*The admission of certain evidence, if erroneous, *held* harmless in view of the count of the indictment under which conviction was had.—Deisher v. State (Tex. Cr. App.) 28.

The exclusion of certain examination of jurors *held* not erroneous.—Woodroe v. State (Tex. Cr. App.) 30.

Any error in the admission of evidence as to a conceded fact *held* harmless.—Woodroe v. State (Tex. Cr. App.) 30.

Where accused was indicted in two counts, one for cutting prosecutor's fence and one for cutting a part of prosecutor's fence, he was not

\*An indictment for an assault or deceased on defendant *held* admissible in a homicide case to show motive.—Moore v. State (Tex. Cr. App.) 321.

\*Allowing a question *held* not prejudicial where it was answered in the negative.—Moore v. State (Tex. Cr. App.) 321.

That enough facts were developed to sustain ruling of court that witness was of sufficient intelligence to understand obligation of oath *held* presumed.—Moore v. State (Tex. Cr. App.) 327.

## § 25. — Determination and disposition of cause.

\*Where a verdict in a criminal prosecution is in proper form, and the circuit court has rendered an erroneous judgment, the Supreme Court on appeal by defendant will render the proper judgment.—Cowan v. State (Tenn.) 973.

## CROPS.

Renting on shares, see "Landlord and Tenant," § 5.

Right of tenant to mortgage, see "Chattel Mortgages."

## CROSS-ASSIGNMENT OF ERROR.

See "Appeal and Error," § 7.

## CROSS-EXAMINATION.

See "Witnesses," § 2.

## CROSSINGS.

Accidents at crossings, see "Railroads," § 4.

## CRUELTY.

Ground for divorce, see "Divorce," § 1.

## CUMULATIVE EVIDENCE.

Ground for new trial, see "New Trial," § 2.

## CURTESY.

See "Dower."

## CUSTODY.

Of child, see "Guardian and Ward," § 1.

Of jury, see "Criminal Law," § 16; "Trial," § 12.

## CUSTOMS AND USAGES.

\*Under Kirby's Dig. § 527, custom of compress company of treating receipts for cotton as made to bearer *held* not to justify delivery of cotton to holder of receipts issued in the name of another person than the one named in the receipts issued for the cotton in question.—Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co. (Ark.) 997.

\*Custom of compress company *held* not to justify it in delivering cotton to holder of receipts who did not own them, even in the absence of statute.—Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co. (Ark.) 997.

\*Point annotated. See syllabus.

## DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.  
Harmless error in computation, of damages, see "Appeal and Error," § 15.  
Objections to rulings relating to, for purpose of review, see "Appeal and Error," § 2.

### *Damages for particular injuries.*

See "Assault and Battery," § 1.

Breach of contract for sale of goods, see "Sales," §§ 7, 8.

Breach of contract for sale of land, see "Vendor and Purchaser," § 6.

Delay in transportation of goods, see "Carriers," § 2.

Delay in transportation of live stock, see "Carriers," § 3.

Ejection of passenger, see "Carriers," § 9.

Injuries caused by public improvements, see "Municipal Corporations," § 8.

Loss of or injury to live stock, see "Carriers," § 3.

Personal injuries, see "Master and Servant," § 12.

### § 1. Grounds and subjects of compensatory damages.

\*A servant of a railroad held not entitled to recover for pain and suffering caused by delay in furnishing him transportation to the master's hospital.—St. Louis S. W. Ry. Co. v. Reagan (Ark.) 168.

Damages for breach of contract to furnish lumber to dress to the capacity of the mill held not limitable to what it would be had defendants furnished a certain kind only, in which case some of the machines would not be used.—Beekman Lumber Co. v. Kittrell (Ark.) 988.

\*Loss of profits held recoverable for breach of contract.—Beekman Lumber Co. v. Kittrell (Ark.) 988.

\*Under the facts held defendants could not complain that plaintiff had done nothing to lessen the injury from their breach of contract.—Beekman Lumber Co. v. Kittrell (Ark.) 988.

\*In an action for injuries to plaintiff by a defect in a city sidewalk, evidence that she had suffered falling of the womb since the accident, held admissible.—Hines v. Kansas City (Mo. App.) 672.

\*The doctrine as to the effect of securing other remunerative employment held not applicable to a breach of a contract for specified work at a fixed price.—Jefferson & N. W. Ry. Co. v. Dreeson (Tex. Civ. App.) 63.

\*In action against carrier, plaintiff held entitled to recover for her mental suffering caused by wrongful treatment of her daughter.—Gulf, C. & S. F. Ry. Co. v. Coopwood (Tex. Civ. App.) 102.

### § 2. Exemplary damages.

\*Gross negligence alone held not to justify the infliction of punitive damages.—Harris Lumber Co. v. Morris (Ark.) 1067.

### § 3. Measure of damages.

\*In an action for personal injuries, an instruction that plaintiff, if entitled to recover, should be allowed compensation for pain and suffering, mental and physical, and any further sum as would compensate her for the loss of her foot, etc. held error.—Lexington Ry. Co. v. Herring (Ky.) 558.

### § 4. Inadequate and excessive damages.

\*A verdict in a personal injury action held not excessive.—Louisville & A. R. Co. v. Davis (Ky.) 533.

\*In an action against a railroad for injuries to a passenger a verdict for \$2,250 held not excessive.—Louisville & E. R. Co. v. Vincent (Ky.) 898.

\*In action for injuries to a passenger, award of \$5,100 damages held not excessive.—Louisville St. Ry. Co. v. Brownfield (Ky.) 912.

\*In an action for wrongfully ejecting plaintiff from defendant's train, a verdict of \$400 as compensatory damages and \$150 as punitive damages held not excessive or indicative of passion or prejudice.—Williams v. St. Louis, M. & S. E. R. Co. (Mo. App.) 307.

\*In an action for injuries to a passenger on a street car, a verdict for \$1,500 held not excessive.—Goodloe v. Metropolitan St. Ry. Co. (Mo. App.) 482.

\*In an action for injuries to plaintiff, a verdict in his favor for \$5,000 held not so excessive as to indicate passion and prejudice.—Commercial Telephone Co. v. Davis (Tex. Civ. App.) 939.

### § 5. Pleading, evidence, and assessment.

Evidence held sufficient to go to the jury on the question of whether injury to a minor child would diminish his earning capacity after reaching his majority.—Western Coal & Mining Co. v. Honaker (Ark.) 361.

\*Evidence in action by a parent for loss from injury to his child, as to loss of time by the parent, held proper.—Western Coal & Mining Co. v. Honaker (Ark.) 361.

In an action for injuries to a passenger, measure of damages determined.—South Covington & O. St. Ry. Co. v. Core (Ky.) 562.

In an action by a railroad employé for personal injuries conflicting evidence as to the extent thereof held sufficient to support a verdict of \$2,500.—Kentucky & I. Bridge & R. Co. v. Nuttall (Ky.) 1131.

In an action by a married woman for injuries, an instruction that plaintiff was entitled to damages for physical inconvenience was not erroneous as authorizing an allowance for time lost from household duties.—Costello v. St. Louis Transit Co. (Mo. App.) 425.

In an action for injuries an instruction authorizing damages for physical inconvenience held proper.—Costello v. St. Louis Transit Co. (Mo. App.) 425.

A petition held to sufficiently present the issue of plaintiff's total disability to earn money in the future as a result of his injury.—Goodloe v. Metropolitan St. Ry. Co. (Mo. App.) 482.

An instruction held not erroneous as allowing double damages.—International & G. N. R. Co. v. Wray (Tex. Civ. App.) 74.

\*In a suit for personal injuries plaintiff held not entitled to recover for debts owing by him for medicines and medical attention.—Texas Short Line Ry. Co. v. Patton (Tex. Civ. App.) 774.

## DEATH.

Caused by defective condition of demised premises, see "Landlord and Tenant," § 2.  
Presumption as to manner of death, see "Evidence," § 2.

### § 1. Actions for causing death.

A railroad held liable under the statute for death caused by the negligence of its servants, though the servant intentionally does the act which is the proximate cause of death.—Galveston, H. & S. A. Ry. Co. v. Currie (Tex. Sup.) 1073.

\*Point annotated. See syllabus.

## DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

## DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."  
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

## DECEIT.

See "Fraud."

## DECLARATION.

In pleading, see "Pleading," § 2.

## DECLARATIONS.

As evidence in civil actions, see "Evidence," § 6.  
As evidence in criminal prosecutions, see "Criminal Law," § 6.  
Dying declarations, see "Homicide," § 3.

## DEDICATION.

### § 1. Nature and requisites

\*The platting of land and the selling of lots according to the recorded plat *held* a dedication and acceptance of the streets shown thereon.—City of Tyler v. Boyette (Tex. Civ. App.) 935.

## DEEDS.

Acknowledgment of execution, see "Acknowledgment."  
Admissions by grantor, see "Evidence," § 5.  
As color of title, see "Adverse Possession."  
Cancellation, see "Cancellation of Instruments."  
Covenants in deeds, see "Covenants."  
Description of boundaries in general, see "Boundaries," § 1.  
Estoppel by deed, see "Estoppel," § 1.  
In fraud of creditors, see "Fraudulent Conveyances."  
In trust, see "Trusts," § 1.  
Parol or extrinsic evidence, see "Evidence," § 9.  
Reformation, see "Reformation of Instruments."

*Deeds by or to particular classes of persons.*  
See "Infants," § 1; "Insane Persons," § 2.

*Deeds of particular species of, or estates or interest in, property.*  
See "Homestead," § 2.

### Particular classes of deeds.

Of trust, see "Mortgages."

### § 1. Requisites and validity.

\*A deed *held* properly set aside for the fraud of the grantee in inducing its execution.—May v. May (Ky.) 840.

A deed to certain land *held* not to indicate an intention to convey all of the land conveyed to the grantor by a former deed.—Schaffer v. Heidenheimer (Tex. Civ. App.) 61.

\*A person may execute a deed by requesting another to sign his name thereto, or, when an-

\*Point annotated. See syllabus.

### § 2. Construction and operation.

\*A deed construed, and *held* that, on the death of the life tenant, the remainder vested in the remaindermen.—May v. May (Ky.) 840.

\*A deed *held* not a testamentary disposition, but a present grant with reservation of life estate in the grantor.—Ecklar's Adm'r v. Robinson (Ky.) 845.

\*Deed construed and *held* to give the grantees a life estate under Ky. St. § 2345, and not an estate tail to be converted by section 2342 into a fee.—Jones v. Carlin (Ky.) 885.

One purchasing an equitable fee subject to be divested by the death of the grantor prior to that of the life tenant takes subject to such contingency.—Clay v. Chenault (Ky.) 1125.

Where defendant covenanted to convey an indefeasible seisin of an entire quarter section, a recital in the description that the contract contained 160 acres more or less *held* not a covenant to convey that quantity of land, or an agreement between the parties restricting the grant to such quantity of land.—Foster v. Byrd (Mo. App.) 224.

In an action for breach of a covenant of seisin and warranty, evidence *held* to sustain a finding against defendant's contention of a mutual mistake in the deed.—Foster v. Byrd (Mo. App.) 224.

### § 3. Pleading and evidence.

In a suit by the heirs of a decedent to set aside a deed executed by her, on the ground of lack of mental capacity, evidence *held* to sustain a finding that decedent was of sound mind.—Spicer v. Holbrook (Ky.) 571.

## DEFAMATION.

See "Libel and Slander."

## DEFAULT.

Judgment by, see "Judgment," § 2.

## DEFICIENCY.

On foreclosure of mortgage, see "Mortgages," § 3.

## DELAY.

In transmission of telegram, see "Telegraphs and Telephones," § 2.  
In transportation or delivery of goods by carrier, see "Carriers," § 2.  
In transportation or delivery of live stock by carrier, see "Carriers," § 3.  
Laches, see "Equity," § 2.

## DELEGATION OF POWER.

To control sale of intoxicating liquors, see "Intoxicating Liquors," § 1.

## DELIVERY.

Of goods sold, see "Sales," § 4.  
Of goods to carrier, see "Carriers," § 2.

## DEMURRER.

In pleading, see "Pleading," § 5.  
To evidence, see "Trial," § 4.  
To indictment, see "Indictment and Information," § 3.



## DENIALS.

In pleading, see "Pleading," § 3.

## DEPOSITIONS.

See "Affidavits"; "Witnesses."

\*A general objection to a deposition *held* not sufficient to charge the court with error in overruling it, though there was hearsay in an answer.—*Jarvis v. Andrews* (Ark.) 1064.

\*The refusal of the trial judge to order the filing of the deposition of a party given in his own behalf *held* not error.—*Little & Hays Inv. Co. v. Pigg* (Ky.) 455.

\*Where the depositions of witnesses were taken under a single commission each signing at the conclusion of his answers, and the notary affixing a separate certificate, a motion to quash was properly overruled.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

Where the style of a case appeared in the body of a commission to take a deposition, that it was not indorsed with the number and style of the case and marked issued by the officer, was not cause for quashing the deposition.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

\*That depositions were not in fact taken on the day specified in the notice, *held* no ground for quashing the same.—*Missouri, K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 1087.

## DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Homestead," § 3; "Wills."

Inheritance by, from, or through bastards, see "Bastards," § 1.

Limitation of action by heirs to recover homestead, see "Limitation of Actions," § 1.

### § 1. Persons entitled and their respective shares.

*Kirby's Dig.* § 2709, fixing dower in personalty at one-half in certain cases, *held* not applicable where decedent leaves a grandson.—*Britton v. Oldham* (Ark.) 1066.

### § 2. Rights and liabilities of heirs and distributees.

\*Children cannot be heard to say that a gift from their deceased father to his wife was in fraud of their rights, where the property was his absolutely.—*Doty v. Dickey* (Ky.) 544.

\*The circumstances under which the heirs of a decedent may maintain an action to recover a share of his personal estate determined.—*Nelson v. Nelson* (Ky.) 794.

\*In an action by the heirs of a decedent to recover a share of decedent's personal estate after refusal of the personal representative to sue, *held*, that he must be made a party defendant.—*Nelson v. Nelson* (Ky.) 794.

\*Where a deed was made to a wife by direction of her husband, he voluntarily having paid part of the purchase money, it is presumably an advancement or gift to the wife.—*Nelson v. Nelson* (Ky.) 794.

An action by an heir of a remainderman to establish her interest as heir, etc., prior to the death of the life tenant and before the falling in of the outstanding freehold, was premature.—*Buckler v. Robinson* (Ky.) 1110.

A father in making gifts among his children *held* not guilty of fraud for failing to credit a

\*Point annotated. See syllabus.

child indebted to him with a payment.—*McGregor v. Overton's Ex'rs* (Ky.) 1114.

\*A gift of money by intestate to her son exceeding his distributive share in her estate *held* an advancement.—*Morrison v. Morrison* (Tex. Civ. App.) 100.

## DESCRIPTION.

Names of individuals, see "Names."

Of property conveyed, see "Boundaries," § 1;

"Deeds," §§ 1, 2.

Of property mortgaged, see "Mortgages," § 2.

## DESERTION.

Ground for divorce, see "Divorce," § 1.

## DETINUE.

See "Replevin."

## DEVISES.

See "Wills."

## DIRECTING VERDICT.

In civil actions, see "Trial," § 4.

## DISABILITIES.

*Particular classes of persons.*

See "Insane Persons," § 1.

Married women, see "Husband and Wife," § 3.

## DISCHARGE.

From employment, see "Master and Servant," § 1.

From liability as surety, see "Principal and Surety," § 1.

Of indorser of note, see "Bills and Notes," § 4.

Of judgment, see "Judgment," § 10.

## DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

## DISCRETION OF COURT.

Cross-examination of witnesses, see "Witnesses," § 2.

Grant or refusal of new trial, see "New Trial," § 1.

Review in civil actions, see "Appeal and Error," § 13.

Review in criminal prosecutions, see "Criminal Law," § 24.

## DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 9.

Judgment of dismissal as bar to subsequent action, see "Judgment," § 6.

Review of rulings as dependent on finality of determination, see "Appeal and Error," § 1.

### § 1. Voluntary.

\*An order striking an action from the docket *held* to preclude reinstatement after the expiration of the term.—*Wilson's Adm'r v. De Loach* (Ky.) 514.

\*Liability of a city and plumbing contractor, for injuries sustained by a defect in a city street, caused by the contractor, *held* not joint so as to preclude plaintiff from dismissing as to such contractor without affecting her rights

## DISQUALIFICATION.

Under Pen. Code 1895, art. 334, indictment alleging that accused displayed a gun near a private house, without alleging that the gun was a deadly weapon, *held* insufficient to support a conviction.—*Jones v. State* (Tex. Cr. App.) 29.

\*In prosecution for disturbing the peace, court *held* required to instruct that to convict jury must believe that accused not only cursed and swore near a private residence, but did so in a manner calculated to disturb the inhabitants.—*Jones v. State* (Tex. Cr. App.) 29.

## DISQUALIFICATION.

Of judge, see "Judges," § 4.

## DISSOLUTION.

Of corporation, see "Corporations," § 5.

Of school districts, see "Schools and School Districts," § 1.

## DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

Of proceeds of property fraudulently conveyed, see "Fraudulent Conveyances," § 8.

## DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

## DIVORCE.

Harmless error in admission of evidence in action for divorce, see "Appeal and Error," § 17.

Review of finding in action for divorce, see "Appeal and Error," § 14.

Separate maintenance, see "Husband and Wife," § 6.

### § 1. Grounds.

\*Absence of a husband for five years, ostensibly to find employment, without notice to the wife of other purpose, *held* not to authorize a divorce.—*Stevens v. Stevens* (Ky.) 811.

\*Evidence *held* to warrant a divorce on the ground of abandonment.—*Klein v. Klein* (Ky.) 848.

In divorce by a husband certain facts *held* not to show that he had been willing that the wife should leave him.—*Klein v. Klein* (Ky.) 848.

\*Abandonment of a girl wife by her youthful husband *held* to require a divorce.—*Cain v. Cain* (Ky.) 1113.

A party to a suit for divorce *held* entitled to a decree on establishing the statutory ground relied on by convincing proof.—*Wald v. Wald* (Mo. App.) 302.

\*A wife *held* entitled to a decree of divorce.—*Wald v. Wald* (Mo. App.) 302.

### § 2. Jurisdiction, proceedings, and relief.

\*Notwithstanding Kirby's Dig. § 2678, in a suit for divorce evidence as to defendant's adultery with a co-respondent after the commencement of a suit, *held* admissible.—*Spurlock v. Spurlock* (Ark.) 753.

\*Point annotated. See syllabus.

## § 3. Alimony, allowances, and disposition of property.

\*A judgment allowing suit money and alimony pending suit for divorce *held* a final judgment for purposes of appeal.—*Shirey v. Shirey* (Ark.) 164.

\*On a divorce in favor of a husband, it appearing that the wife had conducted a hotel which constituted the homestead, *held*, that she could not be charged with rent.—*Spurlock v. Spurlock* (Ark.) 753.

\*On divorce in favor of a husband, *held*, that the wife was entitled to be subrogated to the rights of the mortgagee in a mortgage on the homestead removed by the wife with her own earnings (Kirby's Dig. § 5214).—*Spurlock v. Spurlock* (Ark.) 753.

\*Kirby's Dig. § 2681, in relation to the disposition of property on the granting of a divorce to a husband, construed, and the property embraced determined.—*Spurlock v. Spurlock* (Ark.) 753.

In a suit by a wife for maintenance of herself and children, the court had no authority to declare a conveyance made by the husband for an inadequate consideration, void, except as against the wife (Ky. St. 1903, § 2126).—*Zumbiel v. Zumbiel* (Ky.) 542.

\*Under the facts *held* that a conveyance by a husband was void under Ky. St. 1903, § 2126, as in fraud of his wife's rights.—*Zumbiel v. Zumbiel* (Ky.) 542.

## DOCUMENTS.

As evidence in civil actions, see "Evidence," § 8.

## DOMICILE.

Of parties as affecting venue, see "Venue," § 1.

## DONATIONS.

See "Gifts."

Deed of donation as color of title, see "Adverse Possession," § 1.

## DOWER.

Limitation of action to recover possession of dower, see "Limitation of Actions," § 1.

### § 1. Rights and remedies of widow.

A conveyance of land by a widow carrying with it an equitable transfer to the grantee of her unassigned dower right does not postpone the heirs' right of entry.—*Griffin v. Dunn* (Ark.) 190.

\*A conveyance of land by a widow carries with it an equitable transfer to the grantee of her unassigned dower right.—*Griffin v. Dunn* (Ark.) 190.

The right of a widow to claim dower in land which has not been assigned may be asserted after her abandonment of the homestead.—*Griffin v. Dunn* (Ark.) 190.

A wife's absence from the land of her deceased husband, does not bar a suit to have dower and homestead allotted to her out of it.—*Bartee v. Edmunds* (Ky.) 535.

\*In an action by a widow for allotment of dower the petition *held* sufficient, though it did not allege that the decedent was "seised and

possession" of the land.—*Bartee v. Edmunds* (Ky.) 535.

Where, in an action by a widow for allotment of dower, she fails to file the title papers of the decedent with her petition, as required by Code Civ. Prac. § 499, it is not ground for demurrer.—*Bartee v. Edmunds* (Ky.) 535.

A judgment appointing commissioners to allot dower under Civ. Code Prac. § 499, subd. 4, held not insufficient for failing to direct that they be sworn.—*Bartee v. Edmunds* (Ky.) 535.

## DRAINS.

In cities, see "Municipal Corporations," § 13. Limitation of action for obstruction of ditch, see "Limitation of Actions," § 1.

## DRUGGISTS.

See "Poisons."

## DUPLICITY.

In indictment, see "Indictment and Information," § 2.

## DYING DECLARATIONS.

See "Homicide," § 3.

## EASEMENTS.

See "Dedication"; "Highways."

### § 1. Extent of right, use, and obstruction.

Where a water company obstructed a way which it had agreed to open, in consideration of a conveyance to it of a strip for a water main, equity held authorized to adjust the rights by requiring the company to pay damages to the grantors.—*Bell v. Louisville Water Co.* (Ky.) 572.

## EJECTION.

Of passenger, see "Carriers," § 9.

## EJECTMENT.

See "Trespass to Try Title."

### § 1. Pleading and evidence.

\*The answer in ejectment denying in general terms that plaintiff is the owner of, and entitled to possession of, the land, held sufficient.—*Cook v. Ziff Colored Masonic Lodge*, No. 119 (Ark.) 618; *Same v. Slay* (Ark.) 620; *Same v. Hunter*, *Id.*; *Same v. Williams* (Ark.) 622.

## ELECTION.

Between causes of action, see "Action," § 2. Between counts in indictment, see "Indictment and Information," § 2.

## ELECTIONS.

Submission of question of local option to popular vote, see "Intoxicating Liquors," § 2.

### § 1. Ordering or calling election, and notice.

Under Ky. St. 1903, § 1506a, subsec. 5, and section 3658, a city election in a city of the fifth class held invalid.—*Rice v. Mountz* (Ky.) 887.

Notices of a local option election, posted for the length of time required by the local option

law, held not objectionable because not posted for the time required by the Terrell Election Law, Gen. Laws 28th Leg. 1903, p. 133, c. 101.—*Parks v. State* (Tex. Cr. App.) 323.

### § 2. Nominations and primary elections.

Under Ky. St. 1903, § 1453, held not necessary that the petition nominating an independent candidate shall describe either a party title or principle.—*Eversole v. Holliday* (Ky.) 590.

\*A petition nominating an independent candidate for an office held to comply with Ky. St. 1903, § 1453, requiring a petition to designate the device by which a candidate shall be designated on the ballot.—*Eversole v. Holliday* (Ky.) 590.

The certificate given by the chairman of a nominating convention of a district under Laws 1905, p. 550, § 120, held conclusive.—*Mays v. Cobb* (Tex. Sup.) 1079.

### § 3. Ballots.

A regular party nominee held not entitled under the statute to complain of the position of an opposing independent candidate on the ballot.—*Eversole v. Holliday* (Ky.) 590.

A candidate for a county office held entitled to have his name on the ballot by petition without complying with Ky. St. 1903, § 1454, relating to candidates nominated by party and by petition.—*Eversole v. Holliday* (Ky.) 590.

A person held entitled to get on a ticket as a candidate for office by petition.—*Eversole v. Holliday* (Ky.) 590.

Under Ky. St. 1903, §§ 3658, 3659, 1453, held, that if a voting precinct only includes the territory of a municipality of the fifth class the ballots may contain the names of candidates for county and municipal officers, but if the precinct includes persons outside of the municipal territory there must be separate ballots.—*Rice v. Mountz* (Ky.) 887.

### § 4. Count of votes, returns, and canvass.

\*Election officers held to have the right to correct their returns, without obtaining consent.—*McEuen v. Cary* (Ky.) 850.

\*A certificate of votes cast held to have less weight than otherwise on a contest where the election officers violated the law by drinking intoxicants at the election.—*McEuen v. Cary* (Ky.) 850.

### § 5. Contests.

\*That contestant had the custody of election returns, as was his duty, held to raise no presumption that he tampered with the ballots.—*McEuen v. Cary* (Ky.) 850.

A reference to the statute regulating election contests, contained in an exception to amendments to an answer in an election contest, could only have invoked the ordinary rules for civil cases made applicable by such statute.—*Lipscomb v. Perry* (Tex. Sup.) 1069.

In an election contest, a reference to a particular law in an exception to amendments to an answer held not to preclude the contestant or the court from relying on other rules of law.—*Lipscomb v. Perry* (Tex. Sup.) 1069.

\*The sustaining of exceptions to new matter contained in an amended answer in an election contest held not an abuse of the court's discretion.—*Lipscomb v. Perry* (Tex. Sup.) 1069.

\*The allowance of amendments introducing new matter, to an answer in an election contest, held to be in the discretion of the court.—*Lipscomb v. Perry* (Tex. Sup.) 1069.

\*Point annotated. See syllabus.

## ELEVATORS.

See "Negligence," § 1.

## EMBEZZLEMENT.

\*An indictment for the embezzlement *held* to have properly alleged the ownership of the money.—*Manovitch v. State* (Tex. Cr. App.) 1.

In a prosecution for embezzlement *held* not error to admit testimony as to the taking by defendant of a sum of money other than that upon the taking of which the indictment was founded, nor to refuse instructions limiting the effect of the testimony as to the taking of this further sum.—*Manovitch v. State* (Tex. Cr. App.) 1.

In a prosecution for embezzlement certain testimony *held* admissible.—*Manovitch v. State* (Tex. Cr. App.) 1.

\*In a prosecution for embezzlement certain evidence tending to connect defendant with the offense *held* admissible.—*Manovitch v. State* (Tex. Cr. App.) 1.

## EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," §§ 5-10.

## § 1. Nature, extent, and delegation of power.

Act March 15, 1906, art. 2, § 10, relating to taxation of credits on assignment, *held* not a taking of private property without just compensation.—*Shrader v. Semonin* (Ky.) 904; *Kentucky Title Co. v. Same*, *Id.*

## § 2. Compensation.

\*Subsequent purchaser of land, some of which has been taken for a railroad right of way under the railroad's power of eminent domain, *held* not entitled to recover damages therefor provided there has been an actual taking of the property.—*Little Rock & Ft. S. Ry. Co. v. Greer* (Ark.) 129.

\*Under Const. art. 2, § 22, Kirby's Dig. § 2899, the owner of land taken for a railroad right of way is entitled to compensation for all present and prospective damages caused by the construction of the road.—*Little Rock & Ft. S. Ry. Co. v. Greer* (Ark.) 129.

\*Where a plaintiff acquired title to the center of the street on which defendant railroad's tracks were laid, plaintiff was entitled to recover damages sustained by a reconstruction of the track consisting of a building of an embankment in the street, etc.—*Little Rock & Ft. S. Ry. Co. v. Greer* (Ark.) 129.

Acts 1905, p. 596, dividing Union county into two judicial districts *held* not unconstitutional on the ground that section 4 (page 597) authorizes a taking of private property for public use without compensation.—*Pryor v. Murphy* (Ark.) 445.

\*An owner *held* not benefited by a proposed street essential to authorize the assessment of benefits in proceedings for the condemnation of his land therefor.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

\*In a proceeding to condemn a right of way through a brick-making plant, the jury *held* properly permitted to allow the depreciation in the value of the plant caused by its being specially exposed to fire because of its location with reference to the railroad different from other property in the same neighborhood.—

*St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (Mo. Sup.) 1011.

\*In proceedings to condemn land for a railroad right of way, benefits accruing to defendant in common with other landowners in the vicinity of the road, parts of whose lands were not taken, and from the opening up of a new country, *held* not proper subjects for consideration.—*St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (Mo. Sup.) 1011.

\*In proceedings to condemn a railroad right of way through defendant's brick-making plant, an instruction that defendant, to obtain a switch, would either have to obtain the consent of the railroad company or convince the railroad commissioners that it was necessary, and bear the cost of maintaining it, *held* proper.—*St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (Mo. Sup.) 1011.

## § 3. Proceedings to take property and assess compensation.

In a proceeding to condemn land for a street, a motion by the owner of the land sought to be taken *held* to sufficiently raise the issue whether the proceeding to condemn was for a private use.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

In a proceeding to condemn land for the extension of a street terminating at the boundary of an owner's land, evidence that the land sought to be taken is for the use of an individual and not for the purpose of establishing a street for public use is admissible.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

Where the extending of a street is but a part of a general scheme, the scheme may be shown by contemporaneous ordinances or by the best evidence of which the fact is susceptible.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

Where the extending of a street is but a part of a general scheme, the court should know what the scheme is in order to appreciate the value of the particular extension.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

In a proceeding under an ordinance to condemn land for the extension of a street, evidence of a contemporaneous ordinance for the widening of another street *held* admissible.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

In a proceeding to condemn land for a street, the issue whether the proceeding was one to condemn land for a private individual *held* required to be determined by the court.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

In a proceeding under an ordinance to condemn land for the extension of a street, the court *held* required to withhold final judgment until a judgment is reached in proceedings to condemn land for the widening of another street.—*In re Twenty-First St.* (Mo. Sup.) 201; *Kansas City v. Hyde, Id.*; *In re Oak St.* (Mo. Sup.) 206; *Kansas City v. Hyde, Id.*

In a proceeding to condemn a railroad right of way through a brick-making plant, evidence that the railroad company had offered to give defendant the clay excavated from the land in the construction of the road and that

\*Point annotated. See syllabus.

defendant had declined it was properly excluded.—*St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (Mo. Sup.) 1011.

In a proceeding to condemn land for a railroad right of way, an instruction that the jury could consider the hindrance of the railway if any, to the extension or enlargement of defendant's plant *held proper*.—*St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (Mo. Sup.) 1011.

## EMPLOYÉS.

See "Master and Servant."

## ENTICEMENT.

Of child, see "Parent and Child."

## ENTRAPMENT.

See "Criminal Law," § 1.

## ENTRY, WRIT OF.

See "Ejectment."

## EQUITABLE ASSIGNMENTS.

See "Assignments," § 1.

## EQUITABLE ESTOPPEL.

See "Estoppel," § 2.

## EQUITY.

Equitable assignments, see "Assignments," § 1.  
Equitable estoppel, see "Estoppel," § 2.  
Relief against judgment, see "Judgment," § 3.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See "Cancellation of Instruments"; "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Partition," § 1; "Quieting Title"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

### § 1. Jurisdiction, principles, and maxims.

\*Remaindermen and trustees representing them *held* not entitled to maintain a suit in equity, but to be limited to an action at law, where the life tenant conveyed a right of way which was built on.—*Crawford v. Board of Directors of St. Francis Levee Dist.* (Ark.) 143.

Where no motion to transfer an action at law brought in equity was made, the right to object to the jurisdiction of equity to hear the cause was waived.—*Harris v. Umsted* (Ark.) 146.

### § 2. Laches and stale demands.

\*The rights of grantors conveying land to a water company in consideration of an agreement made by the company *held* not barred by laches.—*Bell v. Louisville Water Co.* (Ky.) 572.

### § 3. Parties and process.

In an action to recover money fraudulently procured by defendant from plaintiff, certain parties *held* not necessary parties defendant.—*Heath v. Schroer* (Mo. App.) 313.

## ERROR, WRIT OF.

See "Appeal and Error."

## ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.  
Of railroads, see "Railroads," § 2; "Street Railroads," § 1.  
Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.  
Of will, see "Wills," § 2.

## ESTATES.

See "Dower."

Created by deed, see "Deeds," § 2.  
Created by will, see "Wills," § 3.  
Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."  
Estates for years, see "Landlord and Tenant."  
Tenancy in common, see "Tenancy in Common."

## ESTOPPEL.

By acts of agent, see "Principal and Agent," § 3.  
By judgment, see "Judgment," §§ 6, 7.  
Of married woman, see "Husband and Wife," § 3.  
To allege error on appeal, see "Appeal and Error," § 10.  
To avoid or forfeit insurance policy, see "Insurance," § 8.  
To contest will, see "Wills," § 2.

### § 1. By deed.

A remote grantee *held* not entitled to question the title of his remote vendor.—*Malone's Committee v. Lebus* (Ky.) 519.

A conveyance among children each holding a one-sixth interest subject to be divested by the prior death of their father *held* to estop them from claiming any interest in the share of a child who died prior to the father.—*Clay v. Chenault* (Ky.) 1125.

### § 2. Equitable estoppel.

A grantee who took back the deed asserted that he had not accepted it, and had the grantor make a deed to another, *held* estopped to assert he had accepted the deed.—*Ames v. Ames* (Ark.) 144.

In an action to cancel a vendor's lien on plaintiff's land, the extent to which defendant might assert an equitable creditor's lien, determined.—*McKinley v. Wilson* (Tex. Civ. App.) 112.

## EVIDENCE.

See "Affidavits"; "Depositions"; "Witnesses."  
Admissibility of evidence under pleading, see "Pleading," § 10.  
Applicability of instructions to evidence, see "Trial," § 8.  
Newly discovered evidence ground for new trial, see "New Trial," § 2.  
Questions of fact for jury, see "Trial," § 4.  
Reception at trial, see "Criminal Law," § 9; "Trial," § 2.

### As to particular facts or issues.

See "Acknowledgment," § 1; "Adverse Possession," § 3; "Boundaries," § 2; "Damages," § 5; "Deeds," § 3; "Fraudulent Conveyances," § 3; "Marriage"; "Partnership," § 1.  
Contributory negligence of person injured, see "Carriers," § 8.  
Creation of relation of master and servant, see "Master and Servant," § 1.  
Defense of statute of frauds, see "Frauds, Statute of," § 5.  
Employment of brokers, see "Brokers," § 1.  
Existence of agency, see "Principal and Agent," § 1.

\*Point annotated. See syllabus.

Right to take land under power of eminent domain, see "Eminent Domain," § 3.  
Sale of intoxicating liquors, see "Intoxicating Liquors," § 4.  
Undue influence in procuring making of will, see "Wills," § 1.  
Want of probable cause, see "Malicious Prosecution," § 2.

*In actions by or against particular classes of persons.*

See "Carriers," §§ 2, 3, 5, 7; "Infants," § 3; "Master and Servant," § 11; "Municipal Corporations," § 13; "Notaries," "Partnership," § 3; "Railroads," §§ 4-7; "Street Railroads," § 2; "Telegraphs and Telephones," § 2; "Warehousemen."

*In particular civil actions or proceedings.*

See "Divorce," § 2; "False Imprisonment," § 1; "Libel and Slander," § 2; "Malicious Prosecutions," § 2; "Money Received"; "Negligence," § 4; "Quieting Title," § 1; "Reformation of Instruments," § 2; "Replevin," § 2; "Trespass," § 1; "Trespass to Try Title," § 2.  
For breach of contract for transportation of passengers, see "Carriers," § 5.  
For breach of contract of employment, see "Master and Servant," § 1.  
For breach of contract of sale, see "Sales," § 8.  
For compensation of broker, see "Brokers," § 3.  
For delay in transmission of telegram, see "Telegraphs and Telephones," § 2.  
Foreclosure, see "Mortgages," § 3.  
Foreclosure of vendor's lien, see "Vendor and Purchaser," § 5.  
For enticement of child, see "Parent and Child."  
For fires caused by railroad, see "Railroads," § 7.  
For injuries to animals on or near railroad tracks, see "Railroads," § 6.  
For loss of or injury to goods, see "Carriers," § 2.  
For loss of or injury to live stock, see "Carriers," § 3.  
For loss or destruction of goods, see "Carriers," § 2.  
For personal injuries, see "Carriers," § 7; "Explosives"; "Highways," § 1; "Master and Servant," § 11; "Municipal Corporations," § 13; "Railroads," §§ 4, 5; "Street Railroads," § 2.  
For separate maintenance, see "Husband and Wife," § 6.  
For services, see "Work and Labor."  
On bill or note, see "Bills and Notes," § 5.  
On bond of notary, see "Notaries."  
On insurance policies, see "Insurance," §§ 13, 14.  
Probate proceedings, see "Wills," § 2.  
To determine rights to mortgaged chattels, see "Chattel Mortgages," § 2.  
To enforce special assessments for public improvements, see "Municipal Corporations," § 10.  
To establish boundaries, see "Boundaries," § 2.

*In criminal prosecutions.*

See "Burglary," § 2; "Criminal Law," § 6; "Embezzlement"; "Forgery"; "Homicide," § 3; "Larceny," § 2; "Perjury," § 2; "Robbery."  
Violation of liquor laws, see "Intoxicating Liquors," § 5.

*Review and procedure thereon in appellate courts.*

Exceptions to, for purpose of review, see "Appeal and Error," § 2.

and Error," § 18.  
Objections to for purpose of review, see "Appeal and Error," § 2.  
Review on appeal or writ of error, see "Appeal and Error," §§ 6, 14; "Criminal Law," § 24; "Homicide," § 5.

**§ 1. Judicial notice.**

\*State courts cannot take judicial notice of municipal ordinances and regulations.—Town of Canton v. Madden (Mo. App.) 699.

\*One desiring to avail himself of a foreign statute held required to introduce it in evidence and incorporate it in the record.—Smith v. Aultman (Mo. App.) 1034.

**§ 2. Presumptions.**

Where death is self-inflicted, it is presumed to have been accidental unless the contrary is made to appear.—Grand Lodge A. O. U. W. v. Banister (Ark.) 742.

\*Where a survey was actually made and the field notes recorded and a patent subsequently issued by the proper authorities, it must be presumed that the surveyor's action was regular.—Waterhouse v. Corbett (Tex. Civ. App.) 651.

**§ 3. Relevancy, materiality, and competency in general.**

\*A letter dictated by defendant's general manager in the course of negotiations for a sale by it to plaintiff, though signed in a name other than that of him or defendant, held admissible as part of the res gestæ in an action for breach of the contract.—Walnut Ridge Mercantile Co. v. Cohn (Ark.) 413.

\*Where a lessee of a railroad was bound independent of the lease to keep a drain by its embankment open, the provisions of the lease as to such duty, were immaterial.—Chicago, R. I. & P. Ry. Co. v. McCutchen (Ark.) 1054.

\*In an action against a railroad company for an assault committed by its conductor on a passenger, evidence of a conversation between the conductor and the passenger held not a part of the res gestæ.—Louisville & N. R. Co. v. Williamson (Ky.) 1130.

\*In an action for the conversion of mules, evidence of what was paid for the mules 11 months before they were converted, was no evidence of their value at the time of the conversion.—Grant v. Hathaway (Mo. App.) 417.

In action against carrier, evidence that while carrier's servants were carrying plaintiff's daughter to baggage car a stranger told them not to put her in the baggage car held admissible as res gestæ.—Gulf, C. & S. F. Ry. Co. v. Coopwood (Tex. Civ. App.) 102.

\*On an issue as to a servant's contributory negligence in violating a railway company's rule, evidence that he had habitually violated the company's rules and that accident had resulted therefrom held inadmissible.—Missouri, K. & T. Ry. Co. of Texas v. Parrott (Tex. Civ. App.) 950.

\*That the time to which certain testimony offered related was nine months prior to the date of the accident only affected the weight of the testimony, and not its competency.—Missouri, K. & T. Ry. Co. of Texas v. Parrott (Tex. Civ. App.) 950.

**§ 4. Best and secondary evidence.**

\*Under Rev. St. c. 35, § 4, a copy of the copy of a record of a cause filed in the office of the clerk of the Court of Appeals held admissible in evidence.—Smith v. Gowdy (Ky.) 566.

\*Point annotated. See syllabus.

\*A foundation for the introduction of secondary evidence *held* insufficient.—*Hardin v. Missouri Pac. Ry. Co.* (Mo. App.) 681.

\*Secondary evidence of the contents of the writing *held* admissible.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 93.

\*Evidence by plaintiff's mother that plaintiff had been offered a certain sum per week, was properly excluded, where the offer was made by letter, the letter being the best evidence.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

#### § 5. Admissions.

\*A declaration by a grantor in a deed *held* inadmissible.—*Foster v. Beldler* (Ark.) 175.

\*In an action for injuries to an employé, statements by a fellow servant to the employé *held* admissible as against the fellow servant; but not as against the employer.—*Cooper's Adm'r v. Oscar Daniels Co.* (Ky.) 1100.

Plaintiff's statement in a suit to foreclose a mortgage that a few days before it was executed he believed the male grantor was bordering on insanity *held* admissible as an admission against interest, without the facts on which it was based.—*Stafford v. Tarter* (Ky.) 1127.

\*A question asked of defendant's right of way agent as a witness in condemnation proceedings, calling for a conversation between him and defendant's president concerning a switch *held* properly disallowed as calling for what was said in an effort to compromise.—*St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (Mo. Sup.) 1011.

#### § 6. Declarations.

\*Receipts executed by one not a party to the action *held* not admissible, without evidence of his death or absence from the jurisdiction of the court.—*Walnut Ridge Mercantile Co. v. Cohn* (Ark.) 413.

\*Entries of the birth of a person copied on the fly leaf of a different Bible from that in which they were originally entered *held* inadmissible.—*Bryant v. McKinney* (Ky.) 809.

\*The declaration of a surveyor, since deceased, in a position to know the fact which the declaration concerns, is admissible.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

\*The declaration of a surveyor since deceased may be expressed in field notes of a junior survey.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

A declaration of a surveyor, since deceased, must, to have effect as evidence of a boundary, possess the elements of certainty.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.) 64.

#### § 7. Hearsay.

Certain evidence *held* inadmissible as hearsay.—*Allen v. Anderson & Anderson* (Tex. Civ. App.) 54.

A statement of a witness based upon information received from some source *held* hearsay.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 93.

\*Evidence by plaintiff's mother that plaintiff was offered certain employment by telephone before her injury, was admissible over objection that it was hearsay, where the witness was called up by telephone by the person making the offer.—*St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 653.

\*A letter and telegram of plaintiff's agent at the point of destination of certain cattle shipped, *held* incompetent to prove the market value of the cattle at the time stated therein.—*Missouri,*

*K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 1087.

#### § 8. Documentary evidence.

In an action for commissions under an employment contract, a statement of plaintiff's commissions claimed to have been mailed to his employer, a corporation, or to its officers after dissolution, *held* admissible.—*Houston Ice & Brewing Co. v. Nicolini* (Tex. Civ. App.) 84.

\*The genuineness of a writing may be proved by indirect or circumstantial evidence.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 93.

Certain facts *held* to sufficiently establish the genuineness of a private writing.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 93.

An instrument shown to be genuine as a matter of law.—*McAllen v. Raphael* (Tex. Civ. App.) 760.

#### § 9. Parol or extrinsic evidence affecting writings.

Certain parol evidence *held* not inadmissible as contradicting a written instrument.—*Mayo v. Mayo* (Ark.) 165.

Parol testimony is admissible on the issue whether or not a legacy or devise was intended to forgive a debt due from the legatee or devisee.—*Bromley v. Atwood* (Ark.) 356.

\*In an action on a note, certain evidence *held* inadmissible as contradicting a written instrument.—*Tillar v. Wilson* (Ark.) 381.

In proceeding by commonwealth to assess omitted property, parol proof *held* admissible to show property to which assessment lists referred.—*Commonwealth v. American Tobacco Co.* (Ky.) 466.

\*In the absence of fraud or mutual mistake, *held* that it could not be shown by parol that an assignment by the beneficiary of his interest in a life policy to the insured was limited to any particular purpose.—*Doty v. Dickey*, (Ky.) 544.

\*It was not error for the court to refuse to permit a witness who gave a receipt to testify that it was given for a purpose other than that stated therein.—*Holcomb-Lobb Co. v. Kaufman* (Ky.) 813.

Declarations of a grantor as to the property conveyed *held* insufficient to contradict a deed.—*Auxier v. Herald* (Ky.) 915.

\*In an action on a contract with a city to macadamize a street, parol evidence *held* admissible to show the conditions surrounding the parties when the contract was made.—*City of Versailles v. Brown* (Ky.) 1108.

\*A receipt for goods delivered by a carrier *held* open to explanation or contradiction by parol or other competent evidence.—*Strawn v. Missouri, K. & T. Ry. Co.* (Mo. App.) 488.

\*In an action against a carrier, certain testimony on the part of plaintiff *held* not contradictory of the written contract of shipment.—*Texas & P. Ry. Co. v. Stewart* (Tex. Civ. App.) 106.

\*As between the original parties to a transaction, parol evidence that some of the parties were sureties *held* admissible.—*Western Bank & Trust Co. v. Gibbs* (Tex. Civ. App.) 947.

\*Where a railroad subscription authorized location of depot at any point within a specified territory, parol evidence was inadmissible in the absence of proof of mistake to establish an agreement to locate it on a specified lot.—*Williams v. Dallas, C. & S. W. Ry. Co.* (Tex. Civ. App.) 1099.

\*Point annotated. See syllabus.

**§ 10. Opinion evidence.**

\*In an action against a street railroad for injuries to a cow, certain testimony as to the speed of the car *held* properly admitted.—*Little Rock Traction & Electric Co. v. Hicks* (Ark.) 385.

\*An answer of a witness to a question calling for statements made by plaintiff, that her statements would indicate that the car from which she was attempting to alight when injured had stopped, *held* objectionable as a conclusion and as not responsive.—*South Covington & C. St. Ry. Co. v. Core* (Ky.) 562.

\*A nonexpert is entitled to give his opinion as to the mental condition of another on the issue of insanity only when the witness details the facts on which such opinion is based.—*Stafford v. Tarter* (Ky.) 1127.

\*Witnesses experienced in the business of brick making, with general knowledge of the value of a plant similar to that of defendant, *held* competent to testify as to its value and to the damages sustained by the condemnation of a railroad right of way through the same.—*St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (Mo. Sup.) 1011.

\*In an action for injuries to a servant by his foot being caught between the floor of an elevator and strips nailed on the floor beams, evidence of an expert that the strips were unnecessary and dangerous, etc., *held* not objectionable.—*Obermeyer v. F. H. Logeman Chair Mfg. Co.* (Mo. App.) 673.

A statement of a witness based on information deduced from the witness' knowledge of the character of an agent's employment *held* incompetent.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 98.

\*A statement by a witness *held* objectionable as a conclusion of the witness.—*International Harvester Co. v. Campbell* (Tex. Civ. App.) 93.

\*Testimony that certain horses compared favorably with others *held* admissible.—*Texas & P. Ry. Co. v. Stewart* (Tex. Civ. App.) 106.

\*A witness' answer to a question *held* inadmissible as being the opinion of the witness.—*Dupree & McCutchan v. Texas & P. Ry. Co.* (Tex. Civ. App.) 647.

\*In an action for death of a person while lying on defendant's railroad track, evidence as to the distance within which witnesses had seen trains similar to that by which decedent was struck stop at the place in question was admissible.—*Texas & P. Ry. Co. v. Brannon* (Tex. Civ. App.) 1095.

**§ 11. Weight and sufficiency.**

Where concurrence in point of time of deceased's alleged injury and the fact that she took to her bed and died shortly thereafter *held* insufficient to warrant the inference that the death was the result of the injury.—*De Maet v. Fidelity Storage, Packing & Moving Co.* (Mo. App.) 1045.

Where plaintiff's own evidence demonstrates that the alleged fact on which he predicates a right of action cannot exist, the testimony of one witness that it did exist was no substantial evidence thereof.—*De Maet v. Fidelity Storage, Packing & Moving Co.* (Mo. App.) 1045.

**EXAMINATION.**

Of witnesses as to competency, see "Witnesses," § 1.

Of witnesses in general, see "Witnesses," § 2.

\*Point annotated. See syllabus.

**EXCEPTIONS.**

Necessity for purpose of review, see "Appeal and Error," §§ 2, 6; "Criminal Law," § 23. Taking exceptions at trial, see "Criminal Law," §§ 10, 15; "Trial," §§ 2, 10.

**EXCEPTIONS, BILL OF.****§ 1. Settlement, signing, and filing.**

\*Under Civ. Code Prac. § 334, the court has no power to extend the time for the signing of a bill of exceptions beyond 60 days from final judgment.—*Zehe's Adm'r v. City of Louisville* (Ky.) 918.

\*Under Ky. St. 1903, § 1019a, and article 8, where the record was taken by an official court reporter, it was proper for the court to refuse to sign a bystander's bill of exceptions which was incorrect.—*Zehe's Adm'r v. City of Louisville* (Ky.) 918.

**EXCESSIVE DAMAGES.**

See "Damages," § 4.

**EXCHANGE OF PROPERTY.**

\*For breach of an express warranty against incumbrances in an exchange of personal property, the remedy in the absence of fraud or concealment is a suit for damages, and not replevin.—*Mason v. Bohannon* (Ark.) 181.

**EXCISE.**

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

**EXCUSABLE HOMICIDE.**

See "Homicide," § 2.

**EXECUTION.**

See "Garnishment."

Exemptions, see "Exemptions"; "Homestead." In actions by or against charitable institution, see "Charities," § 2.

**§ 1. Stay, quashing, vacating, and relief against execution.**

\*The circumstances under which injunction will lie to restrain the sale of land under execution determined.—*Robinson v. Carlton* (Ky.) 549.

\*A petition to enjoin the sale of petitioner's land under execution *held* sufficient.—*Robinson v. Carlton* (Ky.) 549.

**§ 2. Claims by third persons.**

Where, on a trial of the right of property levied on, claimant was defeated, it was error to omit to adjudge the value of the use of the property so that claimant might return the property with costs and damages as authorized by Rev. St. 1895, art. 4845.—*Teague v. Ryan* (Tex. Civ. App.) 938.

**EXECUTORS AND ADMINISTRATORS.**

See "Descent and Distribution"; "Wills."

Courts of probate, see "Courts," § 3.

Joinder of causes of action in administration suit, see "Action," § 8.

Judgment in action by as bar to other action, see "Judgment," § 7.

Review of orders in probate proceedings as dependent on finality of determination, see "Appeal and Error," § 1.



Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 1.

### § 1. Appointment, qualification, and tenure.

\*Under Pasch. Dig. arts. 1284, 1371, a wife acting as independent executrix *held* entitled to make a conveyance in which her husband joins, in satisfaction of an obligation incurred by her testator.—McAllen v. Raphael (Tex. Civ. App.) 760.

\*In view of Sayles' Ann. Civ. St. 1897, art. 2020, touching the removal of administrators from the state, neither a nonresident widow nor son is entitled to letters of administration under article 1914, giving such persons in general terms the right to such letters.—Stevens v. Cameron (Tex. Civ. App.) 1086.

\*Disqualification by nonresidence to act as an administrator *held* to prevent a widow and son from renouncing in favor of a third person, as provided for by Sayles' Ann. Civ. St. 1897, art. 1916.—Stevens v. Cameron (Tex. Civ. App.) 1086.

### § 2. Assets, appraisal, and inventory.

Certain proceeds of the sale of personality of a decedent *held* to belong as exempt property to his infant children as against a claim by the administrator.—Pinson v. Sanders (Ky.) 444.

Under the pension laws, the infant children of a deceased widow of a pensioner *held* entitled to the accrued pension due her at her death as against her administrator.—Pinson v. Sanders (Ky.) 444.

### § 3. Collection and management of estate.

\*An executor having reasonable cause to appeal from an order denying probate of a will *held* entitled to his necessary reasonable counsel fees and costs both at the trial and on appeal, to be paid out of the estate.—Gardner v. Moss (Ky.) 461.

### § 4. Allowances to surviving wife, husband, or children.

\*Under the express provisions of Kirby's Dig. § 2704, a widow is entitled to hold possession of the dwelling house and farm thereto attached until her dower is assigned.—Griffin v. Dunn (Ark.) 190.

\*Under Kirby's Dig. § 2704, authorizing a widow to hold possession of the dwelling house and farm thereto attached until assignment of her dower, the right so given is a personal privilege and not an estate in the land which cannot be transferred to another.—Griffin v. Dunn (Ark.) 190.

\*The acceptance by a widow of a bequest under her husband's will with a provision that it shall be in lieu of dower does not destroy her right to the allowance given her by Rev. St. 1899, § 107.—Ellis v. Ellis (Mo. App.) 260.

### § 5. Allowance and payment of claims.

\*A claim against decedent founded on fraud *held* barred by the statute of nonclaim, so that it could not be asserted against his heirs to whom distribution was made.—Planters' Mut. Ins. Co. v. Nelson (Ark.) 123.

Under Kirby's Dig. §§ 115, 118, 123, *held* that, where a claim was properly authenticated when presented to an executor and subsequently assigned, it was not necessary for the assignee to verify it.—Collier v. Trice (Ark.) 174.

Under Kirby's Dig. § 6000, *held* not necessary that an assignor of a note of a decedent should be made a party to proceedings for its collection from the estate.—Collier v. Trice (Ark.) 174.

\*The allowance of a demand against a decedent's estate, unappealed from, *held*, in general, a final judgment, conclusive of the validity of the claim on final settlement.—Ivie v. Ewing (Mo. App.) 481.

### § 6. Sales and conveyances under order of court.

Delay on the part of an executor and creditors in subjecting the lands of the estate of the testator to the payment of debts *held* not to deprive them of the right to subject the lands to the payment of the debts.—Mayo v. Mayo (Ark.) 165.

\*Creditors, executors, and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights are barred.—Mayo v. Mayo (Ark.) 165.

\*The probate court is without jurisdiction to order a sale of the homestead of a decedent.—Griffin v. Dunn (Ark.) 190.

### § 7. Actions.

In an action by an administrator for the conversion of property belonging to his decedent, failure to prove an allegation that decedent left a will was not fatal.—Grant v. Hathaway (Mo. App.) 417.

### § 8. Accounting and settlement.

Ky. St. 1903, §§ 3855, 3857, 3858, *held* mandatory, so that executors are not entitled to settle decedent's estate without compliance therewith, notwithstanding the presentation of receipt from devisees showing settlement of estate to their satisfaction.—Dant's Ex'rs v. Cooper (Ky.) 451.

\*Where an executrix never received any portion of her intestate's estate as executrix and never filed an inventory, an administrator pendente lite, appointed under Rev. St. 1890, § 13, *held* not entitled to maintain a proceeding to compel her to account under sections 47 and 48.—Hanley v. Holton (Mo. App.) 691.

## EXEMPLARY DAMAGES.

See "Damages," § 2.

## EXEMPTIONS.

See "Homestead."

### § 1. Nature and extent.

\*The wife of a minor child of a debtor deserting them and leaving the state can claim his personal property exemptions.—Hoskins v. Fayetteville Grocery Co. (Ark.) 195.

\*Where a debt due from a foreign corporation having an office and an agent in the state for labor performed in another state is garnished in the state, the exemption laws of the state and not of the foreign state apply.—Stone v. Drake (Ark.) 197.

## EXHIBITS.

Annexed to pleading, see "Pleading," § 8.

## EXPERT TESTIMONY.

In civil actions, see "Evidence," § 10.

## EXPLOSIVES.

In an action for negligence, certain testimony *held* not prejudicial to defendant.—Waters-Pierce Oil Co. v. Burrows (Ark.) 338.

In an action for personal injuries caused by an explosion of gasoline, certain evidence *held*

\*Point annotated. See syllabus.

competent on the question of negligence.—*Waters-Pierce Oil Co. v. Burrows* (Ark.) 336.

\*A company engaged in selling and delivering gasoline is required to use ordinary care in transferring the gasoline into the tank connected with a private lighting system, and if it fails to do so, it is liable for any injury which is the direct result of such want of care.—*Waters-Pierce Oil Co. v. Knisel* (Ark.) 342; *Same v. Parker* (Ark.) 353.

In an action for injuries caused by an explosion of gasoline, evidence held insufficient to show that the gasoline escaped from the tank because of the negligence of defendant in using a defective funnel in filling the tank.—*Waters-Pierce Oil Co. v. Knisel* (Ark.) 342; *Same v. Parker* (Ark.) 353.

## EX POST FACTO LAWS.

Constitutional restrictions, see "Constitutional Law," § 3.

## EXTORTION.

By carriers, see "Carriers," § 1.

## EXTRADITION.

### § 1. Interstate.

\*A fugitive arrested in a sister state, and brought into Kentucky under a requisition for a specified crime, may be tried for another offense.—*Taylor v. Commonwealth* (Ky.) 440.

## FACTORS.

See "Brokers"; "Principal and Agent."

## FALSE IMPRISONMENT.

See "Malicious Prosecution."

### § 1. Civil liability.

A conviction shows probable cause for the prosecution and the prosecutor is not liable for false arrest and imprisonment under a valid process calling for the arrest of accused for failure to satisfy the judgment of conviction.—*Steinbergen v. Miller* (Ky.) 1101.

\*Under Const. §§ 139, 140; Ky. St. 1903, §§ 1050, 4354; and Cr. Code Prac. § 13, subsecs. 5, 6—one charged with obstructing a passway may be tried before the officer holding the commission of county judge, and a capias issued for his arrest and imprisonment on his failure to satisfy the judgment of conviction is valid.—*Steinbergen v. Miller* (Ky.) 1101.

\*In an action for false arrest and imprisonment, the burden is on plaintiff to prove malice and want of probable cause.—*Steinbergen v. Miller* (Ky.) 1101.

## FALSE SWEARING.

See "Perjury."

## FEEES.

Of attorney, see "Attorney and Client," § 2.

## FELLOW SERVANTS.

See "Master and Servant," § 7.

## FENCES.

\*Accused held not guilty of fence breaking.—*Giddings v. State* (Tex. Cr. App.) 926.

\*Point annotated. See syllabus.

\*Pen. Code 1895, art. 794, making it an offense to break the fence of another without his consent, held not applicable to the removal of a fence unlawfully joined to that of defendant's.—*McNeely v. State* (Tex. Cr. App.) 1083.

Rev. St. 1895, art. 2501, prohibiting the removal of fences in certain cases without prior notice held not applicable, where prosecutor's fence was joined to the defendant's without the latter's consent.—*McNeely v. State* (Tex. Cr. App.) 1083.

## FIELD NOTES.

See "Boundaries," § 1.

## FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

## FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 14; "Criminal Law," § 24; "Homicide," § 5.

Special findings by jury, see "Trial," § 18.

## FIRE INSURANCE.

See "Insurance."

## FIRES.

Caused by operation of railroad, see "Railroads," § 7.

## FISH.

See "Game."

## FORCIBLE DEFILEMENT.

See "Rape."

## FORCIBLE ENTRY AND DETAINER.

Recovery of demised premises, see "Landlord and Tenant," § 4.

### § 1. Civil liability.

\*Under terms of lease from purchaser to vendor, vendor held not guilty of forcible detainer in refusing to surrender possession.—*Campbell v. Miracle* (Ky.) 452.

## FORECLOSURE.

Of mortgage, see "Mortgages," § 3.

## FOREIGN JUDGMENTS.

See "Judgment," § 8.

## FORFEITURES.

Of bail bond, see "Bail," § 1.

Of insurance, see "Insurance," §§ 7, 14.

## FORGERY.

\*One executing an order on a bank in the name of another, held guilty of forgery, though he believed that the other would pay the order and not prosecute him.—*Rose v. State* (Ark.) 998.

On a prosecution for forgery, the evidence held not to warrant a requested instruction.—*Rose v. State* (Ark.) 998.

## FORMER ADJUDICATION.

See "Judgment," §§ 6, 7.

## FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 3.

## FORMS OF ACTION.

See "Ejectment"; "Replevin"; "Trespass," § 1; "Trove and Conversion."

## FORNICATION.

See "Seduction," § 1.

## FRANCHISES.

Grant by municipality, see "Municipal Corporations," §§ 5-10.

Of banks, see "Banks and Banking," § 2.

## FRAUD.

See "Fraudulent Conveyances."

In particular classes of conveyances, contracts, transactions, or proceedings.

See "Acknowledgment," § 1; "Deeds," § 1; "Insurance," § 6.

### § 1. Deception constituting fraud, and liability therefor.

In an action for fraudulently securing an assignment of a judgment, evidence held to sustain a finding for plaintiff.—Heath v. Schroer (Mo. App.) 313.

## FRAUDS, STATUTE OF.

Presentation of issue of in lower court for purpose of renewal, see "Appeal and Error," § 2.

### § 1. Real property and estates and interests therein.

Conveyance of share of devisee in decedent's real property, describing it as all his interest in the estate, held sufficient within statute of frauds.—Thompson's Ex'rs v. Stiltz (Ky.) 884.

Under the statute of frauds applying to "contracts for the sale of lands," an agreement to release a vendor's lien need not be in writing.—McKinley v. Wilson (Tex. Civ. App.) 112.

### § 2. Sales of goods.

\*Under Kirby's Dig. § 3856, delivery and acceptance of part of goods sold, and payment therefor, held to take the contract out of the statute of frauds, though it was not expressly referred to at the time.—Walnut Ridge Mercantile Co. v. Cohn (Ark.) 413.

\*Contract for the construction of a specific article according to the plans of another held a contract for work and labor rather than a sale within the statute of frauds.—Moore v. Camden Marble & Granite Works (Ark.) 1063.

### § 3. Requisites and sufficiency of writing.

A contract held to sufficiently comply with the statute of frauds in description of land.—Whitworth v. Pool (Ky.) 880.

Evidence held to show that a wife had authority to sign her husband's name to a contract governed by the statute of frauds.—Whitworth v. Pool (Ky.) 880.

Where a wife signed her husband's name to a contract, governed by the statute of frauds, his subsequent offer to deliver a deed, though it

was defective, held evidence of her authority.—Whitworth v. Pool (Ky.) 880.

\*An agent, having authority to sign his principal's name to a contract governed by the statute of frauds, need not indicate that the signature is by the agent.—Whitworth v. Pool (Ky.) 880.

\*Under the statute of frauds, authority of an agent to make an executory contract for the sale of land should be in writing.—Whitworth v. Pool (Ky.) 880.

### § 4. Operation and effect of statute.

\*Under Ky. St. 1903, § 470, a purchaser of real estate under a parol contract held not entitled to specific performance, though he has paid the purchase price.—Lucas v. McGuire (Ky.) 867.

The provision of the statute of frauds that no action shall be brought, etc., applying to those who interpose an oral contract respecting lands as an affirmative defense, a defendant in possession of premises cannot interpose a verbal lease of five years in defense of his possession.—Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.) 638.

In trespass to try title, where defendant claimed the premises under a verbal lease, certain facts considered and held inadequate to take such lease out of the operation of the statute of frauds.—Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.) 638.

### § 5. Pleading, evidence, trial, and review.

\*In a suit at law or in equity affected by the statute of frauds, the declaration or bill will be sufficient, if it allege a contract generally, without stating whether it is in writing or not.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

\*The defense of the statute of frauds must be specifically interposed.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

\*A failure to object to parol evidence proving the contract relied on to constitute a cause of action operates as a waiver of the statute of frauds, not specially pleaded.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

While a general denial is sufficient to let in the defense of the statute of frauds, defendant is obliged to make his defense good by objecting to parol evidence, sought to prove the contract sued on.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

In an action for breach of a contract of employment, the defense of the statute of frauds held not raised by a request for a peremptory instruction for defendant.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

\*Under the allegations of a complaint, held presumable that an agreement to release a vendor's lien was in writing.—McKinley v. Wilson (Tex. Civ. App.) 112.

## FRAUDULENT CONVEYANCES.

### § 1. Transfers and transactions invalid.

\*Creditors cannot complain of the sale of exempt personal property by the debtor or his wife whom he has deserted.—Hoskins v. Fayetteville Grocery Co. (Ark.) 195.

\*A transaction held fraudulent as against a creditor of an insolvent debtor.—Porter v. Hart County Deposit Bank & Trust Co. (Ky.) 832.

\*Under Ky. St. 1903, §§ 1903, 1907, a conveyance by a husband to his wife held not void as against a creditor.—Peyton v. Webb (Ky.) 839.

\*Point annotated. See syllabus.

## § 2. Rights and liabilities of parties and purchasers.

\*A conveyance will not be held fraudulent as to the grantee on the mere fact that his grantor acquired the property conveyed through a fraudulent conveyance.—*Wilson v. Parke* (Mo. App.) 244.

\*That intestate deposited certain funds with defendant for the purpose of defrauding his creditors, but did not divest himself of title to the fund, *held* no defense to an action by his administratrix to recover the fund.—*Knapp v. Knapp* (Mo. App.) 295.

## § 3. Remedies of creditors and purchasers.

\*In an action to set aside a conveyance of personalty as in fraud of creditors, evidence examined and *held* not to show participation of vendee in the fraud.—*Hoskins v. Fayetteville Grocery Co.* (Ark.) 195.

\*One who was not a creditor of a husband at the time he purchased bank stock in the name of his wife *held* not thereafter entitled to claim that the transaction was fraudulent as against the husband's creditors.—*Boldrick v. Mills* (Ky.) 524.

\*Where a conveyance is set aside for fraud as against a creditor the grantee *held* not entitled as against the creditor to recover back that which he paid.—*Porter v. Hart County Deposit Bank & Trust Co.* (Ky.) 832.

\*A purchase of property for a valuable consideration is presumed to be bona fide until the contrary is shown by direct evidence or proof of facts from which fraud may be reasonably inferred.—*Wilson v. Parke* (Mo. App.) 244.

## FUGITIVE FROM JUSTICE.

See "Extradition."

## FUNDS.

County funds, see "Counties," § 2.

## GAME.

Regulation of transportation, see "Commerce," § 1.

The Legislature has power to make the receipt of game for shipment by a common carrier an offense irrespective of the carrier's knowledge or intent.—*Wells Fargo Express Co. v. State* (Ark.) 189.

That an express company had no knowledge that packages supposed to contain furs delivered to it for shipment beyond the state in fact contained game *held* no defense to a prosecution against such express company for a violation of Kirby's Dig. § 3620.—*Wells Fargo Express Co. v. State* (Ark.) 189.

Under Laws 1905, pp. 158, 168, 170, §§ 50, 54, 57, and 64, *held*, that one may not hunt in the county of his residence without a license.—*State v. Kooch* (Mo. App.) 721.

## GAMING.

### § 1. Gambling contracts and transactions.

\*A note *held* not invalid because of the illegality of a gambling transaction, but supported by an independent valuable consideration.—*Stewart v. Hutchinson* (Mo. App.) 253.

\*A note to secure a balance found to be due the payee therein from the maker on a settlement of joint speculations on the rise and fall of the future market value of a commodity

\*Point annotated. See syllabus.

is void under Rev. St. 1899, §§ 2337-2342.—*Stewart v. Hutchinson* (Mo. App.) 253.

\*Rev. St. 1899, §§ 2337-2342, construed, and *held* to make an obligation arising out of option transactions void in the hands of a person who is a party thereto.—*Stewart v. Hutchinson* (Mo. App.) 253.

### § 2. Criminal responsibility.

\*Though a private residence is commonly resorted to for gaming, it is a private residence within Pen. Code 1895, art. 388, relative to gaming.—*Thompson v. State* (Tex. Cr. App.) 1085.

## GARNISHMENT.

See "Execution."

Exemptions, see "Exemptions."

### § 1. Persons and property subject to garnishment.

A debt due from a foreign railroad corporation which, however, has a line and an agent in this state, for labor performed in another state, may be subjected to garnishment here.—*Stone v. Drake* (Ark.) 197.

Where a check was drawn merely to transfer the drawer's fund from one bank to another, it did not operate as an appropriation of the funds in the drawee bank prior to payment as against a garnishing creditor of the drawer.—*Boswell v. Citizens' Sav. Bank* (Ky.) 797.

Debts evidenced by bank checks are not subject to garnishment, if the check is actually discounted for value in due course by an innocent purchaser, although it may not be discounted until after service of the writ.—*Boswell v. Citizens' Sav. Bank* (Ky.) 797.

### § 2. Lien of garnishment and liability of garnishee.

Under Kirby's Dig. § 358, garnishment proceedings seeking to reach a surplus on mortgage sale *held* to have precedence of an assignment by the mortgagor.—*Green v. Robertson* (Ark.) 138.

Under Civ. Code Prac. §§ 203, 223, and 224, a writ of garnishment *held* not to cover indebtedness other than the capital stock of corporation which accrued after the service of the writ.—*Boswell v. Citizens' Sav. Bank* (Ky.) 797.

### § 3. Proceedings to support or enforce.

Where the record in garnishment proceedings was not corrected with reference to the name of the defendant until after the garnishee had appeared, answered, and been discharged, the garnishee was not bound to notice such correction, unless a new writ was served on it.—*Boswell v. Citizens' Sav. Bank* (Ky.) 797.

Plaintiff in garnishment proceedings *held* not entitled to judgment on the garnishee's answer.—*Trammell v. Ullman, Lewis & Co.* (Tex. Civ. App.) 648.

\*A bill in a suit to set aside a judgment against a garnishee, erroneously rendered on his answer, *held* demurrable.—*Trammell v. Ullman, Lewis & Co.* (Tex. Civ. App.) 648.

A court of chancery will not intervene and set aside a judgment against a garnishee, except on facts showing the clearest and strongest reasons for its action.—*Trammell v. Ullman, Lewis & Co.* (Tex. Civ. App.) 648.

## GIFTS.

Charitable gifts, see "Charities."

Of intoxicating liquors, see "Intoxicating Liquors," § 4.

### § 3. Rights of surviving husband, wife, children, or heirs.

\*An attempt by a widow to alienate the homestead is ineffectual and operates as an abandonment of the homestead claim.—*Griffin v. Dunn* (Ark.) 190.

\*Ky. St. 1903, § 1707, relating to homestead rights, construed and held to give to infant children of a deceased owner the right to occupy the homestead during their minority.—*Potter v. Redmon's Guardian* (Ky.) 529.

\*A widow cannot claim a homestead in the deceased husband's home place if she has removed from the property and lived elsewhere after a second marriage.—*Nelson v. Nelson* (Ky.) 794.

### § 4. Abandonment, waiver, or forfeiture.

\*Facts held not to show abandonment of a homestead.—*Gazzola v. Savage* (Ark.) 981.

## HOMICIDE.

Impeachment of witness in prosecution for, see "Witnesses," § 3.

Leading questions to witnesses in prosecution for, see "Witnesses," § 2.

### § 1. Manslaughter.

\*In a prosecution for homicide, facts held sufficient to raise the issue of manslaughter.—*Arnwine v. State* (Tex. Cr. App.) 4.

\*The act of deceased's brother in jerking defendant from his horse in a public road held to constitute adequate cause for an altercation resulting in the death of both deceased and the brother.—*Arnwine v. State* (Tex. Cr. App.) 4.

\*One who kills another on account of insulting conduct toward the slayer's wife, his mind being enraged beyond cool reflection, held guilty of manslaughter.—*Mitchell v. State* (Tex. Cr. App.) 43.

### § 2. Excusable or justifiable homicide.

\*Where deceased made an assault on defendant and reached for a rifle to shoot him when deceased's brother joined in the attack, defendant's right of self-defense was complete as against both regardless of any previous difficulty between them.—*Arnwine v. State* (Tex. Cr. App.) 4.

\*That defendant had formerly made up his mind to kill deceased held not to eliminate right of self-defense.—*Pratt v. State* (Tex. Cr. App.) 8.

\*Under Pen. Code 1895, art. 713, circumstances under which one would be justified in killing another who had made threats against his life, determined.—*Mitchell v. State* (Tex. Cr. App.) 43.

### § 3. Evidence.

\*On a prosecution for murder, the evidence held sufficient to sustain a verdict of murder in the first degree.—*Beene v. State* (Ark.) 151.

On a prosecution for homicide, evidence held to sustain a conviction of murder in the second degree.—*Traylor v. State* (Ark.) 505; *Richardson v. State* (Ark.) 752.

\*On a trial for homicide, the evidence held to show that the person alleged to have been murdered was dead.—*Bull v. Commonwealth* (Ky.) 817.

On a trial for homicide, evidence held to justify a conviction of murder.—*Bull v. Commonwealth* (Ky.) 817.

On a trial for homicide defended on the ground of self-defense, refusal to exclude certain evidence held not erroneous as the same

could not justify or excuse the killing.—*Hopper v. Commonwealth* (Ky.) 838.

Evidence, on a trial for murder, held to support a conviction.—*Hopper v. Commonwealth* (Ky.) 838.

In a prosecution for homicide, evidence held to sustain a conviction and insufficient to sustain the theory of self-defense.—*Ransom v. State* (Tenn.) 953.

\*Where as a part of deceased's dying declaration he made a statement which materially detracted from the weight thereof, it was error for the court to eliminate such statement and permit the rest of the declaration to go to the jury.—*Arnwine v. State* (Tex. Cr. App.) 4.

\*Burden of proving falsity of defendant's statements that he acted in self-defense held to have been on state.—*Pratt v. State* (Tex. Cr. App.) 8.

\*State having proved that defendant had threatened to kill deceased, held that defendant should have been allowed to testify that he had no such intent when he made threats.—*Pratt v. State* (Tex. Cr. App.) 8.

\*Evidence as to defendant's physical and mental condition held improperly excluded.—*Pratt v. State* (Tex. Cr. App.) 8.

In a prosecution for homicide, evidence held to show that the deceased was killed by a knife which was a deadly weapon.—*Armstrong v. State* (Tex. Cr. App.) 15.

Evidence on a trial for homicide held to support a finding of murder in the second degree.—*Pinson v. State* (Tex. Cr. App.) 23.

\*Evidence held properly admitted as tending to show threats against deceased.—*McKinney v. State* (Tex. Cr. App.) 48.

\*On a prosecution for murder, certain evidence as to the sale of a pistol held competent.—*McKinney v. State* (Tex. Cr. App.) 48.

\*Certain evidence held properly admitted as res gestæ.—*McKinney v. State* (Tex. Cr. App.) 48.

In a prosecution for homicide facts held sufficient to raise the issue of manslaughter.—*Mitchell v. State* (Tex. Cr. App.) 929.

Pen. Code 1895, art. 713, held not to authorize the state to prove deceased's reputation prior to attack thereon by defendant on proof of threats made by deceased against defendant not shown to have been communicated.—*Arnwine v. State* (Tex. Cr. App.) 4.

### § 4. Trial.

\*Under an indictment charging defendant with aiding and abetting others in the killing of deceased, a certain instruction held misleading under the evidence.—*Landrum v. Commonwealth* (Ky.) 587.

\*On a trial for homicide, an instruction on self-defense held properly refused under the evidence.—*Hopper v. Commonwealth* (Ky.) 838.

On a trial for homicide, an instruction on self-defense held sufficiently favorable to accused under the evidence.—*Hopper v. Commonwealth* (Ky.) 838.

\*Under evidence in prosecution for homicide, court held required to instruct as to excuse of defense of defendant's brother.—*McIntosh v. Commonwealth* (Ky.) 917.

In a prosecution for homicide, an instruction held erroneous as improperly stating the law of threats as bearing on the right of self-defense.—*Arnwine v. State* (Tex. Cr. App.) 4.

Instruction as to apprehension of danger necessary to justify self-defense held erroneous.—*Pratt v. State* (Tex. Cr. App.) 8.

\*Point annotated. See syllabus.

In a prosecution for homicide, omission to submit the issue of cooling time *held* not error.—*Armstrong v. State* (Tex. Cr. App.) 15.

\*In a prosecution for homicide, omission to charge the law relating to threats *held* not error.—*Armstrong v. State* (Tex. Cr. App.) 15.

Defendant *held* not entitled to object that the court's charge on manslaughter was too restrictive, as confining the jury on the issue of provocation to deceased's acts at the time of the difficulty, excluding any previous assault.—*Armstrong v. State* (Tex. Cr. App.) 15.

On a trial for homicide, an instruction on self-defense *held* not open to the objection that it failed to sufficiently state the law as to reasonable appearances of danger.—*Pinson v. State* (Tex. Cr. App.) 23.

\*In view of the evidence, *held* that under Pen. Code 1895, art. 717, an instruction submitting the question of intent should have been given in a homicide case.—*Williams v. State* (Tex. Cr. App.) 42.

\*Under Pen. Code 1895, art. 718, an instruction on self-defense in view of threats *held* erroneous as practically shifting the burden of proof.—*Mitchell v. State* (Tex. Cr. App.) 43.

\*On a prosecution for murder, *held* proper to give a charge predicated on the proposition of defendant voluntarily engaging in a combat, knowing that it might or probably would result in death or serious bodily harm to his adversary.—*McKinney v. State* (Tex. Cr. App.) 48.

A requested instruction *held* properly refused as not warranted by the evidence.—*McKinney v. State* (Tex. Cr. App.) 48.

\*An instruction on self-defense in a homicide case *held* proper.—*Moore v. State* (Tex. Cr. App.) 321.

\*In a prosecution for homicide, facts *held* insufficient to require a charge on manslaughter.—*Mays v. State* (Tex. Cr. App.) 329.

Evidence *held* to show an assault on defendant by deceased justifying an instruction as to adequate cause.—*Mitchell v. State* (Tex. Cr. App.) 929.

\*On a trial for homicide an instruction *held* not erroneous for failing to state what constitutes excusable or mitigating circumstances.—*Jones v. State* (Tex. Cr. App.) 930.

\*On a trial for homicide, an instruction *held* not objectionable as failing to define adequate cause.—*Thomas v. State* (Tex. Cr. App.) 930.

\*On a trial for homicide an instruction *held* to define malice aforethought.—*Jones v. State* (Tex. Cr. App.) 930.

The facts on a trial for homicide *held* not to call for a charge on either murder in the second degree or manslaughter.—*McKenzie v. State* (Tex. Cr. App.) 932.

An instruction on a trial for homicide in the language of Pen. Code 1895, art. 717, *held* not objectionable as militating against the presumption of innocence.—*McKenzie v. State* (Tex. Cr. App.) 932.

\*On a prosecution for murder, *held* proper to submit the issue of murder in the first degree, and to refuse to submit manslaughter.—*Washington v. State* (Tex. Cr. App.) 1084.

## § 5. Appeal and error.

\*On a prosecution for murder, an erroneous instruction *held* harmless, in view of another instruction and the verdict.—*Beene v. State* (Ark.) 151.

\*Evidence sufficient to go to the jury in a homicide case *held* sufficient to prevent reversal

on the ground of the verdict being against the weight of evidence.—*Lewis v. Commonwealth* (Ky.) 478.

## § 6. Sentence and punishment.

\*On a prosecution for murder *held* that under the evidence a sentence to 15 years in the penitentiary was excessive by 10 years.—*Traylor v. State* (Ark.) 505.

## HORSE RAILROADS.

See "Street Railroads."

## HOUSEBREAKING.

See "Burglary."

## HOUSEHOLDERS.

Qualifications of jurors. see "Jury," § 2.

## HUSBAND AND WIFE.

See "Divorce"; "Dower"; "Marriage."

Competency as witnesses, see "Witnesses," § 1. Issues presented in lower court in action for injuries to wife, for purpose of review, see "Appeal and Error," § 2.

Rights of survivor, see "Descent and Distribution," § 1; "Executors and Administrators," § 4; "Homestead," § 3.

### § 1. Mutual rights, duties, and liabilities.

\*A husband, prior to the act of 1894, *held* entitled to waive his right to his wife's personality and permit her to control the same as her separate estate.—*Boldrick v. Mills* (Ky.) 524.

\*It is the duty of the wife to accept such residence as the husband may select without unwarranted parsimony or stubbornness on his part.—*Klein v. Klein* (Ky.) 843.

### § 2. Conveyances, contracts, and other transactions between husband and wife.

\*A contract between a husband and wife is absolutely void.—*Spurlock v. Spurlock* (Ark.) 753.

### § 3. Disabilities and privileges of coverture.

Prior to the Married Woman's Act (Ky. St. 1894, p. 773), an assignment by a married woman, joined by her husband of her interest in a life policy as beneficiary therein, was valid.—*Doty v. Dickey* (Ky.) 544.

\*Estoppels *held* to bind married women.—*Smith v. Sisters of Good Shepherd of Louisville* (Ky.) 549.

### § 4. Wife's separate estate.

A transaction between a father and a daughter *held* by reason of Ky. St. 1903, § 2128, subject to attack by the daughter alone and her husband could not in his own name set the same aside.—*McGregor v. Overton's Ex'rs* (Ky.) 1114.

### § 5. Actions.

\*A husband having refused to join his wife in a suit to restrain the sale of her separate property by the husband's creditor, the wife *held* entitled to maintain such suit alone.—*Western Bank & Trust Co. v. Gibbs* (Tex. Civ. App.) 947.

### § 6. Separation and separate maintenance.

In an action by a wife for support and maintenance for herself and children, evidence considered, and *held* sufficient to have justified the wife in separating from her husband.—*Kurz v. Kurz* (Mo. App.) 242.

\*Point annotated. See syllabus.

Cureton v. Cureton (Tenn.) 608.

\*A court of equity *held* to have inherent power to grant a wife a separate maintenance out of her husband's estate, where she is forced to withdraw from his home for his fault.—Cureton v. Cureton (Tenn.) 608.

\*In a suit by a wife for separate maintenance only, it was immaterial that the bill stated facts which would have justified a divorce for cruel and inhuman treatment under Shannon's Code, § 4202.—Cureton v. Cureton (Tenn.) 608.

In a suit for separate maintenance, the wife *held* to have been properly awarded the custody of two minor children, proper provision being made to enable the husband to visit them.—Cureton v. Cureton (Tenn.) 608.

\*A decree for separate maintenance should require payments by the husband only until a reconciliation could be effected and until he should have returned to his marital duties.—Cureton v. Cureton (Tenn.) 608.

Where, in a suit for separate maintenance, the custody of minor children was awarded to the mother, a provision in the decree authorizing the husband to take the children out of the state on executing a proper bond *held* erroneous.—Cureton v. Cureton (Tenn.) 608.

## ILLEGITIMATE CHILDREN.

See "Bastards."

## IMPEACHMENT.

Of witness, see "Witnesses," § 3.

## IMPLIED CONTRACTS.

See "Account Stated"; "Money Received"; "Use and Occupation"; "Work and Labor."

## IMPRISONMENT.

See "Bail"; "False Imprisonment."  
Habeas corpus, see "Habeas Corpus."

## IMPROVEMENTS.

Liens, see "Mechanics' Liens."  
Public improvements, see "Municipal Corporations," §§ 5-10.

## IMPUTED NEGLIGENCE.

See "Negligence," § 3.

## INADEQUATE DAMAGES.

See "Damages," § 4.

## INCOMPETENT PERSONS.

See "Insane Persons."

## INCUMBRANCES.

On homestead, see "Homestead," § 2.

## INDEMNITY.

See "Principal and Surety."

## INDICTMENT AND INFORMATION.

See "Grand Jury."

*Against particular classes of persons.*

Physicians for sale of morphine, see "Poisons."

*For particular offenses.*

See "Burglary," § 2; "Disorderly Conduct"; "Embezzlement"; "Nuisance," § 1; "Perjury," § 2.

Sale of morphine, see "Poisons."

Violation of liquor laws, see "Intoxicating Liquors," § 5.

### § 1. Requisites and sufficiency of accusation.

The omission of the word "there" from the expression "then and there" in the charging part of an indictment, *held* not to render the same defective.—Manovitch v. State (Tex. Cr. App.) 1.

\*It is not necessary that each count of an indictment shall commence "in the name and by the authority of the state," or conclude "against the peace and dignity of the state."—Manovitch v. State (Tex. Cr. App.) 1.

While each count of an indictment must in the charging part thereof distinctly charge an offense, the formal allegations may be supplied by reference to the beginning of the indictment.—Manovitch v. State (Tex. Cr. App.) 1.

\*Where the first count of an indictment is referred to in the other counts and is afterwards dismissed, it may still be looked to to supply the date and venue of the offense.—Manovitch v. State (Tex. Cr. App.) 1.

### § 2. Joinder of parties, offenses, and counts, duplicity, and election.

\*An indictment charging in one count that defendant shot C. and in another that C. was shot by others and that accused was present aiding and abetting them, etc., *held* to state but a single offense so that the state was not required to elect.—Britton v. Commonwealth (Ky.) 556.

An indictment, as amended, *held* to properly charge the single offense of selling petroleum at retail through the county by means of wagons without a license.—Standard Oil Co. v. Commonwealth (Ky.) 596.

### § 3. Motion to quash or dismiss, and demurrer.

On sustaining a demurrer to an indictment *held* no abuse of discretion for the trial court to refuse to resubmit the case to the grand jury [Cr. Code Prac. § 170].—Commonwealth v. Bray (Ky.) 522.

\*Objection to indictment on account of exclusion of colored jurors from grand jury on account of race, *held* not to be raised by motion to quash but by plea in abatement.—Ransom v. State (Tenn.) 953.

### § 4. Issues, proof, and variance.

\*The indictment having alleged the robbery was committed on a person to the grand jury unknown, *held* the state must introduce evidence thereof.—Floyd v. State (Ark.) 125.

## INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 4.

\*Point annotated. See syllabus.

\*An agreement of an insurance agent that the policy issued by defendant should hold good until the agent could procure insured a policy in another company, *held* binding on defendant.—*Citizens' Ins. Co. v. Henderson Elevator Co. (Ky.)* 601.

### § 3. The contract in general.

\*The bond of a surety company indemnifying an employer against default of an employé is to be most strongly construed against the surety.—*American Bonding Co. of Baltimore v. Morrow (Ark.)* 613.

The liability on a bond indemnifying an employer against default of an employé *held* limited for the whole period covered by the bond and renewals to the amount specified in the bond.—*American Bonding Co. of Baltimore v. Morrow (Ark.)* 613.

Ky. St. 1903, § 656, *held* not to apply to a note given by an insured for money borrowed from the insurer pursuant to the terms of the policy.—*Jagoe v. Aetna Life Ins. Co. (Ky.)* 598.

### § 4. Assignment or other transfer of policy.

\*An assignment by the beneficiary in a life policy to the insured is valid, though it is not indorsed on the policy.—*Doty v. Dickey (Ky.)* 544.

### § 5. Cancellation, surrender, abandonment, or rescission of policy.

\*Facts *held* to show cancellation of a fire policy.—*Citizens' Ins. Co. v. Henderson Elevator Co. (Ky.)* 601.

### § 6. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Certain facts *held* not to show breach of warranty in application by bank for bond indemnifying against default of cashier.—*American Bonding Co. of Baltimore v. Morrow (Ark.)* 613.

\*Where the statements in an application for a life policy are made warranties, it is essential to the validity of the policy that the statements are true.—*National Life Ins. Co. v. Reppond (Tex. Civ. App.)* 778.

\*A stipulation in an application for a life policy *held* not to modify the warranty and make the answers of the insured mere representations.—*National Life Ins. Co. v. Reppond (Tex. Civ. App.)* 778.

\*Where a life policy made the statements in the application warranties, and insured did not give the name of the physician who had treated him within five years when answering the question calling on him to give the name and address of each physician consulted during the past five years, there was a misstatement avoiding the policy.—*National Life Ins. Co. v. Reppond (Tex. Civ. App.)* 778.

\*The answer of an applicant for life insurance to questions in an application *held* not to give notice to the insurer that any other physician than those mentioned in the application had treated the applicant, and the policy was nonenforceable in view of the application making the applicant's statements warranties.—*National Life Ins. Co. v. Reppond (Tex. Civ. App.)* 778.

### § 7. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Examinations of a cashier's book made by a bank *held* sufficient under warranty on application for a bond indemnifying against his default.

\*Point annotated. See syllabus.

inconsistent with the terms of the policy within Ky. St. 1903, § 656.—*Jagoe v. Aetna Life Ins. Co. (Ky.)* 598.

A life policy construed and *held* to give to the insured one of three options, of an extended insurance, or a paid-up policy, or a loan from the insurer.—*Jagoe v. Aetna Life Ins. Co. (Ky.)* 598.

Under Laws N. Y. 1892, p. 1869, c. 690, § 88, the share of a policy lapsed for nonpayment of premiums, after having been in force for 3 years, must be applied to the purchase of extended insurance unless the policy holder has elected to take paid-up insurance therefor.—*United States Life Ins. Co. v. Spinks (Ky.)* 889.

In Laws N. Y. 1892, p. 1869, c. 690, § 88, the words "dividend additions" refer to that part of the premium charged which was loaded onto the premium in excess of its share of expenses and losses, and such addition and the earnings thereon which constitute the surplus, must be applied in buying extended insurance for lapsed policies.—*United States Life Ins. Co. v. Spinks (Ky.)* 889.

Unless insurance companies keep accurate accounts with their policy holders as classes, no presumption will be indulged in the complainant's favor in valuing and applying surplus or "dividend additions" to lapsing policies.—*United States Life Ins. Co. v. Spinks (Ky.)* 889.

Statement of rights under a life policy, and a note given by insured to the insurer, as collateral security for which the policy was assigned, relative to the amount of paid-up insurance to which insured was entitled on lapse of the original policy.—*Penn Mut. Life Ins. Co. v. Barnett's Adm'r (Ky.)* 1120.

\*Failure to substantially comply with the iron-safe clause does not avoid the policy, but precludes recovery.—*Johnson v. Mercantile Town Mut. Fire Ins. Co. (Mo. App.)* 697.

\*Evidence *held* not to show a compliance with the "iron-safe clause" of a fire policy.—*Johnson v. Mercantile Town Mut. Fire Ins. Co. (Mo. App.)* 697.

Where insured gave notes for a portion of the premium and did not die until after tender of payment on notice of the maturity of the notes no forfeiture was incurred.—*Kavanaugh v. Security Trust & Life Ins. Co. (Tenn.)* 499.

\*In the absence of statute or the express term in a policy making the mailing of a notice of premium maturity sufficient it must appear that the communication was received, before default can operate as a forfeiture.—*Kavanaugh v. Security Trust & Life Ins. Co. (Tenn.)* 499.

\*The failure to pay a premium note *held* to avoid a life policy.—*National Life Ins. Co. v. Reppond (Tex. Civ. App.)* 778.

A life policy *held* void for the failure of the insured to pay certain notes given to the agent in settlement of the premium.—*National Life Ins. Co. v. Reppond (Tex. Civ. App.)* 778.

### § 8. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

\*That an agent of an insurance company employed to procure insurance waived the falsity of answers in an application for insurance, may be proved by parol.—*People's Fire Ins. Co. v. Goynes (Ark.)* 365; *Same v. Bird, Id.*; *Same v. H. J. Freeland & Bro., Id.*



\*An insurance company *held* estopped by the conduct of its agent from availing itself of false answers to a material question in an application for insurance.—*People's Fire Ins. Co. v. Goynes* (Ark.) 365; *Same v. Bird, Id.*; *Same v. H. J. Freeland & Bro., Id.*

\*In an action on a policy, facts *held* to sustain a finding that a condition that the policy should be void if insured's interest was other than a sole and unconditional ownership was waived.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 393.

\*In an action on a policy, an instruction that the requirement of additional proofs of loss would not preclude the insurer from relying on a breach of a condition in the policy requiring sole and unconditional ownership, *held* properly refused.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 393.

An insurer through its agent has power to waive forfeiture of a policy.—*Home Ins. Co. of New York v. Ballew* (Ky.) 878.

\*Local agent of a fire insurance company *held* to have power to waive provisions of the policy.—*Rudd v. American Guarantee Fund Mut. Fire Ins. Co.* (Mo. App.) 237.

The iron-safe clause in a fire policy *held* to have been waived.—*Rudd v. American Guarantee Fund Mut. Fire Ins. Co.* (Mo. App.) 237.

\*The adjustment of a loss under a fire policy waives a forfeiture for previous violation of a condition of the policy.—*Rudd v. American Guarantee Fund Mut. Fire Ins. Co.* (Mo. App.) 237.

An agreement entered into between insured in a fire policy and an adjuster *held* not to prevent a final adjustment and promise to pay the loss from operating as an estoppel on the company.—*Rudd v. American Guarantee Fund Mut. Fire Ins. Co.* (Mo. App.) 237.

\*A life policy *held* in force by reinstatement.—*Wichman v. Metropolitan Life Ins. Co.* (Mo. App.) 695.

#### § 9. Risks and causes of loss.

Facts *held* not to show liability on a policy whereby a bank was insured against damage to its vault, furniture, etc., by any person attempting to make an entry into the vault.—*Mt. Eden Bank v. Ocean Accident & Guarantee Co.* (Ky.) 450.

#### § 10. Extent of loss and liability of insurer.

\*What constitutes a total loss of a building within Rev. St. 1899, § 7969, relating to recovery for total loss to property insured, determined.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

A loss of household goods insured *held* only partial, requiring in case of disagreement as to the amount of the loss, submission of the same to appraisement as required by the policy.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

\*Rev. St. 1899, § 7970, *held* to operate to fix the value of property insured at the time of the issuance of the policy, and to prevent the insurer to thereafter say that at that time it was not of the value mentioned.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

#### § 11. Notice and proof of loss.

\*Insured having attempted in good faith to furnish proofs of loss within the stipulated time, the insurer is bound to promptly notify insured of its objections thereto.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 393.

\*Point annotated. See syllabus.

#### § 12. Adjustment of loss.

\*A fire policy containing stipulations with respect to appraisement of a loss in case of a disagreement as to the amount thereof, construed and *held* to make an appraisal a condition precedent to a right of action on the policy.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

\*Under Rev. St. 1899, § 7969, the measure of an insured's loss on a building totally destroyed *held* to be the amount of the policy, and there could be no disagreement as to the amount within a stipulation calling for an arbitration on disagreement.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

#### § 13. Actions on policies.

\*In an action on a fire policy interest was allowed only from the date the policy was made payable and not from the date of the fire.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 393.

\*Where insured, though not the absolute owner, had an insurable interest in the property an instruction that he could not in any event recover insurance on property which he did not own, was properly refused.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 393.

An instruction that insured could not recover unless he was the absolute and unconditional owner of the property, was properly modified by adding the clause unless such condition was waived.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 393.

Facts *held* sufficient to warrant a finding that insurer had waived payment of premiums on the day specified.—*Home Ins. Co. of New York v. Ballew* (Ky.) 878.

In an action on a fire policy, an instruction as to estoppel to assert a forfeiture for noncompliance with the iron-safe clause *held* improper because disregarding certain evidence.—*Rudd v. American Guarantee Fund Mut. Fire Ins. Co.* (Mo. App.) 237.

A finding in an action on a fire policy *held* to settle that the building destroyed was a total loss, so that the measure of damages was as fixed by Rev. St. 1899, § 7969, the amount of the policy.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

In an action on a fire policy, the insurer *held* not entitled to complain of the failure to sufficiently charge as to what constitutes a total loss.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

In an action on a fire policy, a finding of a total loss within Rev. St. 1899, § 7969 and not a partial loss within section 7971, *held* warranted.—*Stevens v. Norwich Union Fire Ins. Co.* (Mo. App.) 684.

In an action on a fire policy, the burden *held* on plaintiff to show compliance with the iron-safe clause.—*Johnson v. Mercantile Town Mut. Fire Ins. Co.* (Mo. App.) 697.

#### § 14. Mutual benefit insurance.

\*In an action on an insurance certificate, the burden of proof that insured committed suicide *held* on the defendant.—*Grand Lodge A. O. U. W. v. Banister* (Ark.) 742.

In an action on a benefit certificate, evidence *held* sufficient to sustain a finding that insured died from accidental shooting, and that he did not commit suicide.—*Grand Lodge A. O. U. W. v. Banister* (Ark.) 742.

In an action on an insurance certificate, the verdict of a coroner's jury finding that insured committed suicide, was not sufficient to establish a prima facie case of death from suicide.—*Grand Lodge A. O. U. W. v. Banister* (Ark.) 742.

Certain facts *held* not to show the reinstatement of a suspended member of a mutual benefit society.—*Warner v. Modern Woodmen of America* (Mo. App.) 222.

Under a by-law of a mutual benefit society a suspended member is not reinstated until he has submitted a truthful health certificate for approval to the head physician.—*Warner v. Modern Woodmen of America* (Mo. App.) 222.

In an action on a benefit certificate, a requested charge on the issue of deceased changing his employment without the consent of the insurer *held* covered by instructions given.—*Hardister v. Supreme Order of Married Men's League of America* (Mo. App.) 316.

\*Where a life policy entitled the beneficiary to an assessment not exceeding a specified amount, and, in an action thereon, there was no evidence as to what an assessment would produce, the beneficiary was entitled to the face of the policy.—*Hicks v. Northwestern Aid Ass'n* (Tenn.) 962.

\*Where a policy provided that the rates should not be increased except on the happening of an unexpected emergency, the burden of proof was on the defendant seeking to sustain increased rates to show that the emergency had in fact occurred.—*Hicks v. Northwestern Aid Ass'n* (Tenn.) 962.

A life insurance company *held* not entitled to increase the premium rate of existing insurance except on the occurrence of an emergency whereby the mortuary and reserve funds should become exhausted.—*Hicks v. Northwestern Aid Ass'n* (Tenn.) 962.

An insurance company *held* not entitled to change its contract with insured without his consent merely to facilitate the reorganization of its business on a more satisfactory basis.—*Hicks v. Northwestern Aid Ass'n* (Tenn.) 962.

A tender of a contract rate of insurance *held* waived by the act of the insurer in insisting on a payment of a new and higher rate.—*Hicks v. Northwestern Aid Ass'n* (Tenn.) 962.

Where an insurance company illegally attempted to increase the rates on existing policies, the holders were not bound to pay, but the beneficiaries on the maturity of the policies were entitled to recover their full face value, less premiums unpaid at the lawful or contract rate.—*Hicks v. Northwestern Aid Ass'n* (Tenn.) 962.

\*A beneficiary in a mutual benefit certificate *held* to have died the owner of a vested interest in the certificate, so that the fund accruing on the death of the member passed to her distributees.—*Simms v. Randall* (Tenn.) 971.

## INTENT.

Element of larceny, see "Larceny," §§ 1, 2.  
Fraudulent, see "Fraudulent Conveyances," § 1.

## INTEREST.

Effect as to credibility of witness, see "Witnesses," § 3.  
Recovery of interest in action on insurance policy, see "Insurance," § 13.

### § 1. Rights and liabilities in general.

\*In an action between bank and another to determine the right to certain cotton, where the proceeds thereof were deposited in the bank, interest on the deposit *held* recoverable from the bank only from the date of judgment.—*Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co.* (Ark.) 997.

### § 2. Time and computation.

A broker in a suit for commissions not having made demand before suit brought *held* only

entitled to interest from the date of the suit.—*Warren Commission & Investment Co. v. Hull Real Estate Co.* (Mo. App.) 1088.

## INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.

## INTERPLEADER.

### § 1. Right to interpleader.

In a suit on a note, defendant *held* not neutral between plaintiffs and the administrator of plaintiffs' indorser, and not entitled to maintain a bill of interpleader.—*Greene v. Davis* (Mo. App.) 318.

## INTERROGATORIES.

To jury, see "Trial," § 13.  
To witnesses, see "Depositions."

## INTERSTATE COMMERCE.

Regulation, see "Commerce."

## INTERSTATE EXTRADITION.

See "Extradition," § 1.

## INTESTACY.

See "Descent and Distribution."

## INTOXICATING LIQUORS.

Brewery as public nuisance, see "Nuisances," § 1.

Cross-examination of witnesses in prosecution for violation of liquor law, see "Witnesses," § 2.

Interest and bias of witness in prosecution for violation of liquor laws, see "Witnesses," § 3.

### § 1. Power to control traffic.

\*A city has no power to adopt an ordinance making it unlawful for the keeper of a dramshop, defined by Rev. St. 1890, § 2090, to allow women to enter the dramshop and obtain liquor.—*City of Joplin v. Jacobs* (Mo. App.) 219.

The right of a city of the second class to license dramshops to sell liquors on Sunday under Rev. St. 1890, § 5508, *held* not abrogated by Dramshop Act 1891 (Laws 1891, p. 128), nor by Laws 1903, p. 169, amending Rev. St. 1890, § 2097.—*State v. Kessells* (Mo. App.) 494.

\*Under Rev. St. 1890, § 5508, subds. 17, 21, a city of the second class *held* authorized to pass an ordinance authorizing the sale of liquors on Sunday, which operated to suspend within the city the application of Rev. St. 1890, § 3011.—*State v. Kessells* (Mo. App.) 494.

### § 2. Local option.

\*Publication on four successive weeks of an order, putting the local option law in operation in a newspaper designated by the county judge under Sayles' Rev. Civ. St. art. 3391, *held* a condition precedent to the operation of the law.—*Chenoweth v. State* (Tex. Cr. App.) 19.

\*Publication for three times in a certain paper and once in another paper of an order putting a local option law in force in a county *held* an insufficient publication within Sayles' Rev. Civ. St. art. 3391.—*Chenoweth v. State* (Tex. Cr. App.) 19.

That a county judge subsequently certified the adoption of local option in a county based in part on a voluntary publication of the local option order in a certain newspaper *held* not a

\*Point annotated. See syllabus.

**§ 2. Special or substitute judges.**

\*The regular district judge alone has power to create a special term.—*McAllen v. Raphael* (Tex. Civ. App.) 760.

**§ 3. Rights, powers, duties, and liabilities.**

That a suit filed in the district court of the one district was tried there by the judge of another district *held* of no consequence.—*Rabb v. Texas Loan & Investment Co.* (Tex. Civ. App.) 77.

**§ 4. Disqualification to act.**

\*That the regular district judge appeared to some extent as one of the counsel for the successful party *held* no ground for the reversal of a correct judgment.—*McAllen v. Raphael* (Tex. Civ. App.) 760.

**JUDGMENT.**

Effect as curing defects in pleadings, see "Pleading," § 11.

*In actions by or against particular classes of persons.*

See "Infants," § 3.

Charitable institutions, see "Charities," § 2.

*In particular civil actions or proceedings.*

See "Cancellation of Instruments," § 1; "Garnishment," § 3.

Condemnation proceedings, see "Eminent Domain," § 3.

For admeasurement or assignment of dower, see "Dower," § 1.

Foreclosure, see "Mortgages," § 4.

For separate maintenance, see "Husband and Wife," § 6.

On appeal or writ of error, see "Appeal and Error," § 22.

Personal judgment for deficiency on foreclosure, see "Mortgages," § 3.

To enforce special assessments for public improvements, see "Municipal Corporations," § 10.

*In criminal prosecutions.*

See "Criminal Law," § 20; "Homicide," § 6.

*Review.*

Review in general, see "Appeal and Error."

Review as dependent on finality of determination, see "Appeal and Error," § 1.

**§ 1. Nature and essentials in general.**

\*Where in an action on a policy of insurance insurer did not ask for a recovery of an unpaid premium, it was not error for the court not to deduct such premium from plaintiff's recovery.—*Home Ins. Co. of New York v. Ballew* (Ky.) 878.

**§ 2. By default.**

The rendering of judgment in a certain amount by default against defendant *held* error. *Kirby's Dig.* §§ 6111, 6188.—*Ozark Ins. Co. v. Leatherwood* (Ark.) 374.

\*The granting of further time for the filing of an answer *held* discretionary with the trial court, under *Kirby's Dig.* §§ 6111 and 6188.—*Ozark Ins. Co. v. Leatherwood* (Ark.) 374.

\*A petition to set aside a default judgment *held* filed too late under Rev. St. 1899, § 777.—*Bader v. Jones* (Mo. App.) 305.

**§ 3. Equitable relief.**

\*Defendant, against whom a judgment was taken, *held* entitled to an injunction restraining enforcement of execution and to a new trial.—*Kirk v. Gover* (Ky.) 824.

\*One seeking to restrain enforcement of execution based on a judgment against him *held* not entitled to equitable relief against the

judgment until he had paid a portion thereof as against which he admitted he had no defense.—*Kirk v. Gover* (Ky.) 824.

**§ 4. Collateral attack.**

Evidence *held* not to show that a judgment set up in bar to an action was procured by fraud.—*Smith v. Gowdy* (Ky.) 566.

\*The presumption that a sufficient affidavit was filed to authorize the issuance of a citation by publication is on collateral attack rebuttable, unless rebutting it involves a contradiction of the record.—*Stoneman v. Bilby* (Tex. Civ. App.) 50.

In view of the recitals of a judgment foreclosing delinquent taxes and the record, the presumption that a proper affidavit was filed to render a citation by publication proper *held* overcome.—*Stoneman v. Bilby* (Tex. Civ. App.) 50.

\*An attack on a judgment *held* collateral though the parties to the two suits in different courts were the same.—*Parker v. W. L. Moody & Co.* (Tex. Civ. App.) 650.

**§ 5. Construction and operation in general.**

\*Under Rev. St. 1899, § 672, a judgment reciting that an appeal was dismissed *held* not conclusive that the case was not disposed of on its merits.—*Hanley v. Holton* (Mo. App.) 691.

**§ 6. Merger and bar of causes of action and defenses.**

\*Judgment for injuries caused by filling of ditch under railroad embankment, *held* not a bar to another action for a subsequent filling of the same ditch.—*Chicago, R. I. & P. Ry. Co. v. McCutchen* (Ark.) 1054.

\*An order striking an action from the docket without trial, *held* no bar to a subsequent action.—*Potter v. Redmon's Guardian* (Ky.) 529.

\*A judgment of dismissal *held* a bar to a subsequent action.—*Smith v. Gowdy* (Ky.) 566.

\*A judgment on a fire policy in favor of plaintiff *held* no bar to a subsequent proceeding by insurer to recover an unpaid premium.—*Home Ins. Co. of New York v. Ballew* (Ky.) 878.

\*Where plaintiff bought land, relying on defendant's representation of title which was false, plaintiff's failure to demand a rescission in a suit by third persons to establish their title *held* no bar to a subsequent suit for such relief.—*Olschewske v. King* (Tex. Civ. App.) 665.

**§ 7. Conclusiveness of adjudication.**

That a vendee permitted a third person to obtain judgment by default for possession *held* not prejudicial to the vendor in an action to foreclose vendor's lien notes.—*Bradbury v. Dumond* (Ark.) 390.

\*A decision in a suit between a city and a light company, *held* a decision that the city must pay the franchise taxes imposed on the company pursuant to laws subsequently enacted.—*Board of Councilmen of City of Frankfort v. Capital Gas & Electric Light Co.* (Ky.) 870.

A judgment for a depositor in an action against trustees of a dissolved banking corporation to which the cashier was a party, *held* res judicata of the question of the cashier's negligence in a subsequent suit by the trustees to recover of a stockholder a dividend to satisfy such judgment.—*Daugherty v. Poundstone* (Mo. App.) 728.

A certain judgment *held* not a bar to an action to cancel a vendor's lien on lands.—*McKinley v. Wilson* (Tex. Civ. App.) 112.

\*Point annotated. See syllabus.

\*Where an administrator prosecuted an unsuccessful appeal from an order setting aside a homestead to the widow under Rev. St. 1895, art. 2255, a decision on appeal was conclusive against decedent's minor heirs and precluded the administrator as their guardian from subsequently reviewing the same order by certiorari under article 332.—*In re Pearce* (Tex. Civ. App.) 1004.

#### § 8. Foreign judgments.

\*A judgment against defendant in divorce for a sum of money as alimony held unenforceable in another state.—*Downs v. Downs' Adm'r* (Ky.) 536.

#### § 9. Suspension, enforcement, and revival.

\*A judgment cannot be revived in the name of an assignee.—*Strother v. Hilliker* (Mo. App.) 482.

#### § 10. Payment, satisfaction, merger, and discharge.

\*The attachment of an attorney's lien to a judgment after the judgment debtor had perfected a right of offset of a judgment held by him, held not to defeat such offset granted by Kirby's Dig. § 4457.—*Park v. Hutchinson* (Ark.) 751.

#### § 11. Actions on judgments.

\*The statute of limitations as it existed when a judgment was rendered is applicable to an action thereon.—*Gaar, Scott & Co. v. Black* (Mo. App.) 683.

\*In an action on a judgment, pleas of general denial, payment, and that the judgment was compromised and defendant released, held not inconsistent.—*Gaar, Scott & Co. v. Black* (Mo. App.) 683.

### JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

### JUDICIAL SALES.

Of land for nonpayment of tax, see "Taxation," § 4.  
Of property of decedent, see "Executors and Administrators," § 6.

### JURISDICTION.

Amount in controversy, see "Courts," § 2.  
Want of ground for collateral attack in judgment, see "Judgment," § 4.

*Jurisdiction of particular actions or proceedings.*

See "Mandamus," § 3.

*Special jurisdictions and jurisdictions of particular classes of courts.*

See "Equity," § 1.

Appellate jurisdiction, see "Criminal Law," § 21.

Particular courts, see "Courts."

### JURY.

See "Grand Jury."

Custody and conduct, see "Criminal Law," § 16; "Trial," § 12.

Instructions in civil actions, see "Trial," §§ 5-11.

Instructions in criminal prosecutions, see "Criminal Law," § 13; "Homicide," § 4.

Questions for jury in civil actions, see "Trial," § 4.

Questions for jury in criminal prosecutions, see "Criminal Law," § 12; "Homicide," § 4.

\*Point annotated. See syllabus.

Right to jury trial on reference, see "Reference," § 1.

Taking case or question from jury at trial, see "Trial," § 4.

Verdict in civil actions, see "Trial," § 13.

Verdict in criminal prosecutions, see "Criminal Law," § 17.

#### § 1. Right to trial by jury.

\*Const. art. 1, § 6, declaring that the right of trial by jury shall remain inviolate, only protects the right to trial by jury as it existed at common law.—*Marler v. Wear* (Tenn.) 447.

\*Under Shannon's Code, § 5336, whether the trial of issues in mandamus proceedings shall be by jury is within the discretion of the trial judge.—*Marler v. Wear* (Tenn.) 447.

#### § 2. Qualifications of jurors and exemptions.

\*Where a juror owned and controlled a room, he was qualified as a householder.—*Mays v. State* (Tex. Cr. App.) 329.

#### § 3. Summoning, attendance, discharge, and compensation.

That many of the jurors were friends and acquaintances of defendant furnished no grounds for exception by plaintiff.—*Soper v. Crutcher* (Ky.) 907.

\*Gen. Laws 29th Leg. p. 17, c. 14, amending Code Cr. Proc. 1895, art. 647a, held not to apply to talesmen summoned to serve in a capital case whom the sheriff was authorized to summon according to his own selection under article 649.—*Mays v. State* (Tex. Cr. App.) 329.

#### § 4. Competency of jurors, challenges, and objections.

\*Under Kirby's Dig. §§ 4536, 4540, all the defendants in a civil case held entitled in the aggregate to only three peremptory challenges.—*Waters-Pierce Oil Co. v. Burrows* (Ark.) 336.

\*That a juror formed or expressed an opinion concerning the guilt or innocence of accused based on newspaper reports did not disqualify him.—*Daughtry v. State* (Ark.) 748.

In an action for injuries to an employe held not error to permit his counsel to ask jurors as to their connection with the accident insurance business.—*Dow Wire Works Co. v. Morgan* (Ky.) 530.

\*Affidavits held insufficient to sustain a motion to discharge the panel on the ground that colored men were excluded from the jury on account of their race.—*Ransom v. State* (Tenn.) 953.

\*A motion to quash a venire on the ground that colored persons were excluded from the jury list because of their race, is not sustained by the affidavit of the defendant alone, verifying the motion to quash.—*Rivers v. State* (Tenn.) 956.

In a prosecution for unlawfully carrying a pistol, held, that there was no error in refusing to allow the jurors to be examined as to whether they knew anything about the facts of a former case.—*Woodroe v. State* (Tex. Cr. App.) 30.

### JUSTICES OF THE PEACE.

Appealability of order remanding cause to justice court, see "Appeal and Error," § 1.

#### § 1. Procedure in civil cases.

\*A statement for so much due on settlement does not wholly fail to state a cause of action.—*Warner v. Close* (Mo. App.) 491.

\*Defects in plaintiff's statement held waived by defendant going to trial without insisting

\*A judgment on appeal from a justice *held* void for want of jurisdiction.—Little Rock Traction & Electric Co. v. Hicks (Ark.) 385.

An appellee in an appeal from a justice who fails to move for a sufficient affidavit for appeal, or for the dismissal thereof, as authorized by Rev. St. 1899, § 4072, waives the defect in the affidavit, and the circuit court has jurisdiction.—Bader v. Jones (Mo. App.) 305.

\*Under Rev. St. 1899, §§ 4071, 4072, a defective affidavit on appeal from a justice *held* to confer jurisdiction on the circuit court on the justice transmitting the papers as prescribed by section 4064, notwithstanding section 4062.—Bader v. Jones (Mo. App.) 305.

An affidavit for appeal made by officer of a corporation *held* to show he made the application for the corporation, and therefore to be sufficient.—Brown Mfg. Co. v. Gilpin (Mo. App.) 669.

## KIDNAPPING.

Enticement of child, see "Parent and Child."

## KNOWLEDGE.

Of defects, see "Master and Servant," § 4.

## LACHES.

Effect in equity, see "Equity," § 2; "Specific Performance," § 2.

## LANDLORD AND TENANT.

See "Use and Occupation."

Lease by bank, see "Banks and Banking," § 2.  
Mining leases, see "Mines and Minerals," § 1.  
Right of tenant to mortgage crop, see "Chattel Mortgages."

### § 1. Creation and existence of the relation.

Reservation of rent is not essential to the creation of the relation of landlord and tenant.—Alexander v. Gardner (Ky.) 818.

\*A conveyance of standing timber to be removed within three years *held* not a license, but a lease.—Alexander v. Gardner (Ky.) 818.

### § 2. Premises, and enjoyment and use thereof.

\*Landlord *held* liable for death of child of tenant occupying flat from dangerous condition of closet only if, under contract, closet was for common use of tenants.—Hess v. Hinkson's Adm'r (Ky.) 436.

### § 3. Rent and advances.

Certain supplies furnished by a landlord to a tenant *held* within Kirby's Dig. § 5033, giving a landlord a lien for necessary supplies.—Earl Bros. & Co. v. Malone (Ark.) 1062.

The method in which a fund should be distributed between the landlord and various persons having liens on a crop from a sale of which the fund resulted, determined.—Bowles' Ex'r v. Jones (Ky.) 1121.

\*In an action by a landlord to recover the value of a portion of the crop sold by his tenant before payment of the rent, an instruction that defendant must have known that the corn was raised on premises rented from plaintiff in order to entitle plaintiff to recover *held* erroneous.—King v. Rowlett (Mo. App.) 493.

\*Point annotated. See syllabus.

tenant.—King v. Rowlett (Mo. App.) 493.

\*Landlord *held* not required to apply proceeds of cotton received from tenant to payment of claim for which he held lien against property levied on by third person.—Cadenhead v. Rogers & Bro. (Tex. Civ. App.) 952.

In action by landlord against third person for value of cotton on which he held a lien for supplies to tenant, allegation as to application of proceeds of bales of cotton received from the tenant *held* sufficient.—Cadenhead v. Rogers & Bro. (Tex. Civ. App.) 952.

### § 4. Re-entry and recovery of possession by landlord.

\*Where a conveyance of standing timber was in effect a lease, the grantee on termination of his rights could be ejected by a writ of forcible detainer.—Alexander v. Gardner (Ky.) 818.

### § 5. Renting on shares.

\*A contract *held* not to have created the relation of landlord and tenant.—Bourland v. McKnight & Bro. (Ark.) 179.

In an action for money received against a landowner, *held* a question for the jury whether certain advances by defendant to one working his land were within the contract for advances.—Bourland v. McKnight & Bro. (Ark.) 179.

Under Kirby's Dig. §§ 5032, 5033, landlords' liens *held* not to include damages for negligent cultivation, as against the intervening rights of a third party.—Few v. Mitchell (Ark.) 983.

## LANDS.

See "Public Lands."

## LARCENY.

See "Embezzlement"; "Receiving Stolen Goods"; "Robbery."

### § 1. Offenses and responsibility therefor.

\*Evidence that defendant resold lumber which he had previously sold to another and that buyer hauled it away *held* insufficient to sustain conviction of larceny in absence of evidence to connect defendant with the carrying away of the lumber.—Henderson v. State (Ark.) 359.

\*Where defendant aided in taking a box of goods and appropriated a part of its contents to his own use, he was guilty of the larceny of the whole.—Foster v. Commonwealth (Ky.) 544.

\*Where accused took money from prosecutor's person under what he believed was a previous direction to do so, and did not form an intent to steal the money until later, he was not guilty of theft.—McMahan v. State (Tex. Cr. App.) 17.

\*On a prosecution for theft under Pen. Code 1805, art. 877, *held* error to refuse to instruct on defendant's defense.—Simpson v. State (Tex. Cr. App.) 925.

### § 2. Prosecution and punishment.

Evidence *held* sufficient to show intent to steal.—Thrash v. State (Ark.) 360.

In a prosecution for larceny, evidence *held* to sustain a finding that either defendant or R. took the goods in accordance with a prearranged agreement and that the goods were

thereafter divided between them.—*Foster v. Commonwealth* (Ky.) 544.

In a prosecution for larceny from the person, a requested instruction that, if defendant took the money from prosecutor's person as he believed prosecutor had previously directed him to do in case of his excessive intoxication, they should acquit, was improperly refused.—*McMahan v. State* (Tex. Cr. App.) 17.

In a prosecution for larceny from the person, an instruction on defendant's liability for the taking of money from prosecutor's person without his consent *held* erroneous as too restrictive.—*McMahan v. State* (Tex. Cr. App.) 17.

Under evidence in prosecution for theft of a steer, court *held* required to charge on law applicable to mistake.—*Hazlett v. State* (Tex. Cr. App.) 36.

On a prosecution for theft under Pen. Code 1895, art. 877, defendant being charged with having converted a gun left with him to be repaired, *held* error to permit the prosecutor to testify that he would have left the money to have paid the repairs if defendant had told him to.—*Simpson v. State* (Tex. Cr. App.) 925.

In a prosecution under Pen. Code 1895, art. 877, making fraudulent conversion of property under bailment theft, evidence considered and *held* not to sustain a conviction but to show that the property was kept openly under a claim of right.—*Simpson v. State* (Tex. Cr. App.) 925.

In a prosecution for theft of mules, evidence *held* sufficient to sustain a conviction.—*Crowder v. State* (Tex. Cr. App.) 934.

## LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 21.

## LEADING QUESTIONS.

To witnesses, see "Witnesses," § 2.

## LEASES.

See "Landlord and Tenant."

## LEGACIES.

See "Wills."

## LETTERS PATENT.

For public lands, see "Public Lands," § 1.

## LEVEES.

Acts 1905, p. 543, providing for the assessment of railroads and railroad property situated within the boundaries of certain levee districts, *held* not applicable to Redford levee district of Desha county.—*Redford Levee Dist. v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 117.

Under Acts 1891, p. 173, §§ 14, 15, creating the Redford levee district, as amended by Acts 1893, p. 253, Acts 1893, p. 319, creating the Desha levee district, and Acts 1905, pp. 543, 544, §§ 1, 2, providing for the assessment of railroads, etc., situated within certain levee districts, an assessment of railroad property *held* void and unenforceable.—*Redford Levee Dist. v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 117.

\*Under Kirby's Dig. § 6873, and Act Feb. 15, 1893, p. 29, § 7, unsurveyed land in St. Francis levee district *held* liable to levee taxes.—*Buckner v. Sugg* (Ark.) 184.

\*Point annotated. See syllabus.

## LIBEL AND SLANDER.

### § 1. Words and acts actionable, and liability therefor.

\*A writing charging that plaintiff was a second-hand dealer, did inferior work, ran a scab establishment and did not employ a mechanic *held* libelous per se.—*Pennsylvania Iron Works Co. v. Henry Voght Mach. Co.* (Ky.) 551.

### § 2. Actions.

\*A corporation may sue for libel on it as distinct from libel on its individual members.—*Pennsylvania Iron Works Co. v. Henry Voght Mach. Co.* (Ky.) 551.

\*Where words spoken concerning a corporation's business were libelous per se the jury was entitled to award punitive damages.—*Pennsylvania Iron Works Co. v. Henry Voght Mach. Co.* (Ky.) 551.

## LICENSES.

For mining, see "Mines and Minerals," § 1.

### § 1. For occupations and privileges.

\*Act Twenty-Fifth Legislature (Laws 1897, p. 236, c. 163), relating to the appointment by cities of boards for the examination of plumbers, *held* valid as within the police power of the state.—*Caven v. Coleman* (Tex. Civ. App.) 774.

### § 2. In respect of real property.

It is not necessary to the validity of an agreement giving a right of occupation of land, that it be recorded.—*Denton v. Cumberland Telephone & Telegraph Co.* (Ky.) 1112.

## LIENS.

*Liens acquired by particular remedies or proceedings.*

See "Garnishment," § 2.

*Particular classes of liens.*

See "Attorney and Client," § 2; "Mechanics' Liens."

Landlord's lien for rent, see "Landlord and Tenant," § 3.

Mortgage, see "Chattel Mortgages," § 2.

On crops raised on shares, see "Landlord and Tenant," § 5.

Vendor's lien on lands sold, see "Vendor and Purchaser," § 5.

## LIFE ESTATES.

See "Dower."

Creation by deed, see "Deeds," § 2.

## LIFE INSURANCE.

See "Insurance."

## LIMITATION OF ACTIONS.

See "Adverse Possession."

Laches, see "Equity," § 2.

*Particular actions or proceedings.*

See "Specific Performance," § 2.

For breach of covenants, see "Covenants," § 3.

On judgment, see "Judgment," § 11.

### § 1. Computation of period of limitation.

\*The statute of limitations does not run against a cause of action in favor of heirs for recovery of the homestead during occupancy by the widow.—*Griffin v. Dunn* (Ark.) 190.

subsequent to an unlawful sale thereof by the administrator.—Griffin v. Dunn (Ark.) 190.

On the abandonment of a homestead by a widow through an ineffectual attempt at alienation thereof, the right of action of the heirs *held* to become complete and the statute of limitations to begin to run against it.—Griffin v. Dunn (Ark.) 190.

In trespass to try title, limitations should be reckoned from the date of the deeds under which the parties in possession claim title until the beginning of the suit for possession.—Wade v. Goza (Ark.) 388.

\*Limitations for obstruction of a ditch by dirt falling from railroad embankment *held* not to run from date of construction of embankment but from date of the falling of the dirt.—Chicago, R. I. & P. Ry. Co. v. McCutchen (Ark.) 1054.

Until dower has been allotted to a widow, limitations do not run against her cause of action to recover the possession of the same.—Bartee v. Edmunds (Ky.) 535.

## **§ 2. Acknowledgment, new promise, and part payment.**

\*The crediting of the proceeds of certain property upon a debt *held* a part payment, interrupting the running of the statute of limitations.—Nunn v. W. T. McKnight & Bro. (Ark.) 193.

\*The balance due on an account stated is one debt, and payment thereon interrupts the running of the statute of limitations as to all the items included in the statement.—Nunn v. W. T. McKnight & Bro. (Ark.) 193.

In an action against the estate of a deceased executor, evidence *held* sufficient to warrant a judgment for plaintiff.—Hendrix's Adm'x v. Hendrix (Ky.) 921.

\*An acknowledgment *held* sufficient to take the claim out of the statute of limitations.—Hendrix's Adm'x v. Hendrix (Ky.) 921.

## **§ 3. Pleading, evidence, trial, and review.**

In an action on an account, a requested instruction relative to the question of limitations *held* properly refused.—Nunn v. W. T. McKnight & Bro. (Ark.) 193.

## **LIMITATION OF LIABILITY.**

Of carrier, see "Carriers," § 2.

## **LIQUOR SELLING.**

See "Intoxicating Liquors."

## **LIS PENDENS.**

Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

Statute regarding lis pendens *held* to have no application to the rights of holders of equitable assignment of share of devisee in decedent's realty as against prior creditors of assignor.—Thompson's Ex'rs v. Stiltz (Ky.) 884.

## **LIVE STOCK.**

Carriage of, see "Carriers," § 3.

Injuries from operation of railroads, see "Railroads," § 6.

## **LOCAL OPTION.**

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 2.

## **LOCATION.**

Of railroads, see "Railroads," § 1.

## **LOGS AND LOGGING.**

Cutting timber as element of adverse possession, see "Adverse Possession," § 1.

## **LUNATICS.**

See "Insane Persons."

## **MACHINERY.**

Liability of employer for defects, see "Master and Servant," § 4.

## **MAINTENANCE.**

See "Champerly and Maintenance."

## **MALICE.**

See "Malicious Prosecution," § 1.

## **MALICIOUS PROSECUTION.**

See "False Imprisonment."

### **§ 1. Malice.**

\*Where a plaintiff, in an action for malicious prosecution, has given evidence establishing a want of probable cause for the prosecution, malice on the part of the prosecutor will be inferred.—Jones v. Louisville & N. R. Co. (Ky.) 793.

### **§ 2. Actions.**

\*One suing for malicious prosecution after acquittal on a trial under an indictment *held* required to establish a want of probable cause for the prosecution.—Jones v. Louisville & N. R. Co. (Ky.) 793.

The presumption arising from an indictment that prosecutor had reasonable grounds for instituting a criminal prosecution *held* overcome by proof in an action for malicious prosecution.—Jones v. Louisville & N. R. Co. (Ky.) 793.

## **MANDAMUS.**

Right to trial by jury, see "Jury," § 1.

### **§ 1. Nature and grounds in general.**

\*Law *held* to afford no adequate remedy precluding mandamus in the case of a refusal to enter judgment on an alleged invalid verdict affecting the title of land.—Texas Tram & Lumber Co. v. Hightower (Tex. Sup.) 1071.

### **§ 2. Subjects and purposes of relief.**

\*Mandamus *held* properly granted to compel a county court clerk of one of the counties of a judicial district to print a certain person's name on the official ballot as a candidate for office of commonwealth's attorney.—Robinson v. McCandless (Ky.) 877.

\*The discretion of the county court in refusing to open a road after certain proceedings therefor had been had *held* not controllable by

\*Point annotated. See syllabus.

mandamus.—State ex rel. Galbraith v. McCutchan (Mo. App.) 251.

\*Mandamus held to lie to compel the council of a city to perform a ministerial act.—Caven v. Coleman (Tex. Civ. App.) 774.

\*Mandamus will lie to compel a city council to appoint a board for the examination of plumbers as required by Act Twenty-Fifth Legislature (Laws 1897, p. 236, c. 163), notwithstanding the provisions of the charter of the city subsequently enacted.—Caven v. Coleman (Tex. Civ. App.) 774.

### § 3. Jurisdiction, proceedings, and relief.

\*A petition for mandamus to compel a council to appoint an examining board of plumbers as required by Act Twenty-Fifth Legislature (Laws 1897, p. 236, c. 163) held sufficient to authorize a hearing of the case on the merits.—Caven v. Coleman (Tex. Civ. App.) 774.

## MANDATE.

See "Mandamus."

To lower court or decision on appeal or writ of error, see "Appeal and Error," § 22.

## MANSLAUGHTER.

See "Homicide," § 1.

## MARRIAGE.

See "Divorce"; "Husband and Wife."

\*Marriage may be proved by evidence of cohabitation as husband and wife.—Bartee v. Edmunds (Ky.) 535.

## MARRIED WOMEN.

See "Husband and Wife."

## MASTER AND SERVANT.

See "Work and Labor."

Applicability of instructions to evidence in action for injuries to servant, see "Trial," § 8. Challenge to juror in action for injuries to servant, see "Jury," § 4.

Harmless error in instructions in action on contract of employment, see "Appeal and Error," § 19.

### § 1. The relation.

Where plaintiff was wrongfully deprived of the right to comply with a contract for services, the burden was on him, to allege and prove that after reasonable effort he failed to find other employment.—Shepherd v. Gambill (Ky.) 1104.

\*The fact that damages suffered by discharge in violation of a contract for personal services might have been reduced by obtaining other employment is a matter of defense to be shown by the employer.—Jefferson & N. W. Ry. Co. v. Dreeson (Tex. Civ. App.) 63.

\*Where a person who has been employed under a written contract continues in the same service after the expiration of the contract by lapse of time, such continuation of service is presumed to be on the same terms as those embraced in the written contract.—Houston Ice & Brewing Co. v. Nicolini (Tex. Civ. App.) 84.

A rule of a corporation relating to applications for employment held not to prevent it from employing an employé without regard thereto.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

In an action for breach of contract of employment, certain evidence held inadmissible.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

In an action for breach of contract of employment, certain evidence held inadmissible on the issue of the existence of the contract.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

A petition for breach of contract of employment held good as against a general demurrer.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

### § 2. Services and compensation.

An instruction with reference to the construction of a contract sued on held not objectionable as misleading and confusing.—Houston Ice & Brewing Co. v. Nicolini (Tex. Civ. App.) 84.

In an action for commissions on a contract of employment, an instruction concerning the intention of the parties in making the contract, etc., held not objectionable as making the construction of the written contract of controlling effect.—Houston Ice & Brewing Co. v. Nicolini (Tex. Civ. App.) 84.

In an action on an employment contract against a certain corporation, an instruction that it was for the jury to determine whether plaintiff was entitled to commissions after the termination of the original contract, and before the dissolution of the original corporation, held not error.—Houston Ice & Brewing Co. v. Nicolini (Tex. Civ. App.) 84.

In an action for commissions on an employment contract, an instruction that plaintiff could not recover in the absence of an express contract made after the expiration of his original contract held properly refused.—Houston Ice & Brewing Co. v. Nicolini (Tex. Civ. App.) 84.

### § 3. Master's liability for injuries to servant—Nature and extent in general.

\*Where plaintiff had given up his purpose of going to a closet when he was injured, while standing between two cars, he was not entitled to recover on the theory that defendant had located the closet beyond the tracks.—Hocker v. Louisville & N. R. Co. (Ky.) 526.

\*A master held not liable for injuries to a servant.—Hatfield v. Adams (Ky.) 583.

\*Negligence of defendant in constructing an elevator well, and not the act of plaintiff's fellow servant in stepping on plaintiff's foot, held the proximate cause of plaintiff's injury.—Obermeyer v. F. H. Logeman Chair Mfg. Co. (Mo. App.) 673.

\*Defendant having placed plaintiff to work at a steam candy roller, in violation of Rev. St. 1899, § 6434, assumed all the risks of the danger to plaintiff.—Nairn v. National Biscuit Co. (Mo. App.) 679.

\*The act of a master in requiring plaintiff, a minor, to operate a steam candy roller, in violation of Rev. St. 1899, § 6434, held negligence.—Nairn v. National Biscuit Co. (Mo. App.) 679.

\*The statute providing precautions to be taken by trainmen to prevent accidents to persons on the track held not to apply to an employé on the track; but the company's liability for his injury depends on the rules of the common law.—Cincinnati, N. O. & T. P. R. Co. v. Holland (Tenn.) 758.

### § 4. — Tools, machinery, appliances, and places for work.

\*A master must exercise care in furnishing a reasonably safe place for a servant to work in

\*Point annotated. See syllabus.



and to exercise ordinary care in repairing it.—*St. Louis, I. M. & S. Ry. Co. v. Andrews* (Ark.) 183.

\*In an action by an employé for injuries sustained while descending a ladder, a certain fact *held* not to warrant a finding that employer was negligent in failing to discover defects in the ladder.—*St. Louis, I. M. & S. Ry. Co. v. Andrews* (Ark.) 183.

\*An instruction in an action for injuries to an employé *held* erroneous because making the employer an absolute insurer of the employé's safety.—*Harris Lumber Co. v. Morris* (Ark.) 1067.

\*An employer *held* required to maintain appliances in a reasonably safe condition with such protection as will make them reasonably safe.—*Dow Wire Works Co. v. Morgan* (Ky.) 530.

\*The statute requiring inspection of coal mines in order to determine the presence of gas does not apply to mines that do not generate gas.—*McKinnon v. Western Coal & Mining Co.* (Mo. App.) 485.

The protection of Rev. St. 1899, § 8822, requiring mine operators to furnish props, *held* to extend to miners who work at a fixed price per bushel.—*McKinnon v. Western Coal & Mining Co.* (Mo. App.) 485.

\*Rev. St. 1899, § 8822, *held* to require a mining company to keep on hand a sufficient supply of props to be sent to miners without unnecessary delay, on request.—*McKinnon v. Western Coal & Mining Co.* (Mo. App.) 485.

\*The master is only required to exercise reasonable care to discover defects in the places provided for the servant to work, and the burden is on the servant to show a negligent breach of such duty.—*Kremer v. Eagle Mfg. Co.* (Mo. App.) 726.

\*A master must use ordinary care to furnish for his servants safe tools, and is responsible for the proximate consequences of his failure to do so.—*Ham v. Hayward Lumber Co.* (Tex. Civ. App.) 938.

#### § 5. — Methods of work, rules, and orders.

Failure to maintain a flagman at the point where torpedoes had been set, to protect the rear end of a train, *held* not negligence justifying a recovery for injuries to a trackman by the explosion of a torpedo by a hand car on which he was riding.—*Murphy v. Galveston, H. & N. Ry. Co.* (Tex. Civ. App.) 940.

#### § 6. — Warning and instructing servant.

\*Where an inexperienced youth is employed to operate a dangerous machine, his master is bound to instruct him as to his duties and to warn him of the danger.—*Cohankus Mfg. Co. v. Rogers' Guardian* (Ky.) 437.

#### § 7. — Fellow servants.

\*An engineer in charge of an engine used to raise girders in a building and an employé placing such girders in position *held* fellow servants.—*Cooper's Adm'r v. Oscar Daniels Co.* (Ky.) 1100.

\*The owner of a mine *held* not liable for injuries to a miner by reason of the negligence of the certificated mine foreman in the performance of duties imposed by Acts 1903, c. 237, regulating the operation of mines.—*Sale Creek Coal & Coke Co. v. Priddy* (Tenn.) 610.

#### § 8. — Risks assumed by servant.

\*In an action for injuries to a servant the danger *held* not an incident of the employment.—*Louisville & N. R. Co. v. Metcalf* (Ky.) 525.

\*In an action for injuries to an employé, an instruction as to assumption of risk, *held* proper.—*Dow Wire Works Co. v. Morgan* (Ky.) 530.

\*An employé operating a circular rip saw, *held* not to assume the risk as a matter of law.—*Dow Wire Works Co. v. Morgan* (Ky.) 530.

\*A servant *held* to assume the risk if defects are not remedied in reasonable time after promise.—*Parker v. Drakesboro Coal, Coke & Mining Co.* (Ky.) 575.

\*In an action for injuries to an employé an instruction *held* erroneous as depriving the employé of a right to recover if he exercised the care a man of ordinary prudence would have exercised.—*Cooper's Adm'r v. Oscar Daniels Co.* (Ky.) 1100.

\*Where defendant provided an unsafe elevator well, a servant *held* not to have assumed the risk of injury therefrom.—*Obermeyer v. F. H. Logeman Chair Mfg. Co.* (Mo. App.) 673.

#### § 9. — Contributory negligence of servant.

\*Plaintiff *held* not guilty of such contributory negligence as would preclude a recovery; his master being guilty of negligence in employing plaintiff at the work in question, in violation of Rev. St. 1899, § 6434.—*Nairn v. National Biscuit Co.* (Mo. App.) 679.

\*An employé *held* entitled to assume that the master had exercised reasonable care to discover defects and to repair them.—*Kremer v. Eagle Mfg. Co.* (Mo. App.) 726.

\*Where an employé had no knowledge of a particular defect in a floor, and it did not appear that such way was inherently more dangerous than that afforded by the main passageway, he cannot be *held* negligent in voluntarily choosing an obviously dangerous course in preference to a safer one.—*Kremer v. Eagle Mfg. Co.* (Mo. App.) 726.

\*In an action for injuries to a servant of a railway company, the fact that plaintiff violated one of the railway company's rules did not constitute negligence per se.—*Missouri, K. & T. Ry. Co. of Texas v. Parrott* (Tex. Civ. App.) 950.

#### § 10. — Pleading in actions for injuries.

Evidence *held* responsive to the allegations of the complaint as to the negligence causing the accident.—*Western Coal & Mining Co. v. Honaker* (Ark.) 361.

\*A petition in action by servant *held* demurrable.—*Parker v. Drakesboro Coal, Coke & Mining Co.* (Ky.) 575.

#### § 11 — Evidence in actions for injuries.

\*An employé suing for a personal injury *held* required to prove negligence on the part of the master.—*St. Louis, I. M. & S. Ry. Co. v. Andrews* (Ark.) 183.

In an action for an injury received by an employé in consequence of the breaking of a ladder, a finding that the employer was negligent *held* not warranted.—*St. Louis, I. M. & S. Ry. Co. v. Andrews* (Ark.) 183.

Evidence, in an action for death of an employé in a coal mine from an explosion of gas, *held* to authorize a finding that deceased was not negligent.—*Western Coal & Mining Co. v. Douglass* (Ark.) 904.

The mere fact that a freight train stopped suddenly, whereby a brakeman in the caboose was thrown against the front end thereof and injured, was insufficient to warrant a recovery

\*Point annotated. See syllabus.

from the railroad.—*Groves v. Louisville & N. R. Co. (Ky.)* 439.

\*In an action for injuries to an employé while operating a saw certain evidence held admissible as showing a failure to make it reasonably safe.—*Dow Wire Works Co. v. Morgan (Ky.)* 530.

Where a witness for plaintiff had operated a machine near the defective place at which plaintiff was injured, his testimony as to a defective place near the place of the injury was admissible, though he had only hearsay knowledge of the location of the defective place that caused the injury.—*Kremer v. Eagle Mfg. Co. (Mo. App.)* 726.

In an action for injuries to a railroad trackman by the explosion of a torpedo, a railroad rule held immaterial and irrelevant to the issues.—*Murphy v. Galveston, H. & N. Ry. Co. (Tex. Civ. App.)* 940.

#### § 12. — Damages in actions for injuries.

\*A servant held not entitled to recover punitive damages for an injury.—*Covington & C. Bridge Co. v. Lillard (Ky.)* 538.

#### § 13. — Trial of actions for injuries.

\*Whether the furnishing by a railroad company to employé for moving ties of a hand car with a defective brake was negligence held a question for the jury.—*Choctaw, O. & G. R. Co. v. Stroble (Ark.)* 116.

\*A servant held not guilty of contributory negligence as a matter of law.—*Louisville & N. R. Co. v. Metcalf (Ky.)* 525.

In an action for injuries to an employé an instruction held erroneous as contrary to the principle that the master must exercise reasonable care to furnish safe appliances.—*Cooper's Adm'r v. Oscar Daniels Co. (Ky.)* 1100.

In an action for injuries to a brakeman an instruction that he assumed all the ordinary risks of his employment held not objectionable for failure to point out of what such risks consisted.—*De Witt's Adm'r v. Louisville & N. R. Co. (Ky.)* 1122.

\*In an action by a rear brakeman for injuries by jumping to avoid a following train, evidence held sufficient to support a verdict for plaintiff.—*Kentucky & I. Bridge & R. Co. v. Nuttall (Ky.)* 1131.

An erroneous instruction held not cured by another instruction.—*McKinnon v. Western Coal & Mining Co. (Mo. App.)* 485.

\*A minor held not guilty of contributory negligence as a matter of law in continuing to work, notwithstanding his master's failure to furnish props.—*McKinnon v. Western Coal & Mining Co. (Mo. App.)* 485.

\*In an action for injuries to a servant in an elevator, evidence held to require submission of the question of negligent construction to the jury.—*Obermeyer v. F. H. Logeman Chair Mfg. Co. (Mo. App.)* 673.

\*A minor servant injured in an elevator held not guilty of contributory negligence as a matter of law.—*Obermeyer v. F. H. Logeman Chair Mfg. Co. (Mo. App.)* 673.

\*In an action for injuries to an employé, held a question for the jury whether defendant was negligent in failing to discover a defect in time to have repaired it by the use of reasonable diligence.—*Kremer v. Eagle Mfg. Co. (Mo. App.)* 726.

\*In an action by an employé for injuries sustained in falling on a defective floor, whether the plaintiff was guilty of negligence in failing

to observe the defect was a question for the jury.—*Kremer v. Eagle Mfg. Co. (Mo. App.)* 726.

\*A servant held not guilty of contributory negligence.—*International & G. N. R. Co. v. Wray (Tex. Civ. App.)* 74.

\*An act done by a servant in obedience to an order of his foreman held not negligence, unless the danger of obeying the order was so obvious that no prudent man would have undertaken it.—*International & G. N. R. Co. v. Wray (Tex. Civ. App.)* 74.

In an action for injuries to a servant, an instruction on contributory negligence held ample and correct.—*International & G. N. R. Co. v. Wray (Tex. Civ. App.)* 74.

\*In an action for injury to an employé, the question of negligence held for the jury.—*Ham v. Hayward Lumber Co. (Tex. Civ. App.)* 938.

\*In an action for injuries received by an employé, the question whether the employer should not have taken further precautions held for the jury.—*Choctaw, O. & T. Ry. Co. v. McLaughlin (Tex. Civ. App.)* 1091.

#### § 14. Liabilities for injuries to third persons.

\*Where injuries to plaintiffs' farm lands resulted from the construction of defendant's right of way, the burden of proof that the injuries resulted from the acts of an independent contractor was on the railroad company.—*St. Louis, I. M. & S. Ry. Co. v. Davenport (Ark.)* 994.

\*A servant of a railroad company, in charge of its water stations and appliances guilty of mere nonfeasance, held not liable for injuries to a brakeman because of his being struck by the pipe of a waterspout, which was placed too near the track.—*Dudley v. Illinois Cent. R. Co. (Ky.)* 835.

\*An employé of a subcontractor engaged in the construction of a railroad track injured in consequence of being struck by a construction train held entitled to recover from the railway company for the injuries received.—*Choctaw, O. & T. Ry. Co. v. McLaughlin (Tex. Civ. App.)* 1091.

### MATERIALITY.

Of evidence in civil actions, see "Evidence," § 3. Of evidence in criminal prosecution, see "Criminal Law," § 6.

### MEASURE OF DAMAGES.

See "Damages," § 3.

Objections to rulings on, for purpose of review, see "Appeal and Error," § 2.

### MECHANICS' LIENS.

Acknowledgment of mechanic's lien contract, see "Acknowledgment," § 1.

#### § 1. Right to lien.

Facts held to establish a substantial completion of a building contract, precluding the owners from asserting the invalidity of certain mechanic's lien notes executed to a trustee for the contractors, on the ground that the contract was abandoned, and the work completed under a different arrangement.—*Roane v. Murphy (Tex. Civ. App.)* 782.

### MEDICINES.

See "Poisons."

\*Point annotated. See syllabus.

## MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 3.

## MENTAL SUFFERING.

As element of damages, see "Damages," §§ 1, 3.  
As element of recovery in action for negligent transmission of telegram, see "Telegraphs and Telephones," § 2.

## MERGER.

Of cause of action in judgment, see "Judgment," § 6.

## MESSAGES.

See "Telegraphs and Telephones," § 2.

## MINES AND MINERALS.

Care required of master, see "Master and Servant," § 4.

### § 1. Title, conveyances, and contracts.

A lessor in a lease to explore for oil and gas by drilling a well cannot recover damages for the lessee's failure to drill a well, without showing that there was oil and gas in the territory to be developed.—*Duff v. Bailey* (Ky.) 577.

Evidence held to show that it was the intention of the parties that the contract sued on should be superseded by one they subsequently executed.—*Proctor Coal Co. v. Strunk* (Ky.) 603.

## MINORS.

See "Infants."

## MISREPRESENTATION.

See "Fraud."

By insured, see "Insurance," § 6.

## MISTAKE.

Ground for reformation of instrument, see "Reformation of Instruments," § 1.

## MITIGATION.

Of damages, see "Damages," § 1.

## MODIFICATION.

Of judgment or order on appeal, see "Appeal and Error," § 22; "Criminal Law," § 25.

## MONEY RECEIVED.

In an action by a client to recover money paid to defendant as his attorney to satisfy a judgment, evidence held to support a verdict for plaintiff.—*Shackleford v. Williams* (Ark.) 350.

## MONOPOLIES.

Grants of privileges or immunities, see "Constitutional Law," § 4.

### § 1. Trusts and other combinations in restraint of trade.

Act. Jan. 23, 1905 (Acts 1905, p. 6, § 7), providing for the punishment of pools, trusts, and conspiracies to control prices, held not to make failure of a corporation to file an an-

swer under oath to written inquiry required by such section an offense.—*State v. International Harvester Co.* (Ark.) 119.

## MORPHINE.

See "Poisons."

## MORTGAGES.

Of personal property, see "Chattel Mortgages."

### § 1. Requisites and validity.

\*In the absence of an allegation of fraud or mistake, parol evidence is inadmissible to show that a deed conveying absolute title was to operate as a mortgage.—*Crockett's Guardian v. Waller* (Ky.) 860.

Parol evidence held admissible to show that an instrument in form an absolute conveyance was a mortgage merely, in view of the fact that it did not contain the entire agreement.—*Crockett's Guardian v. Waller* (Ky.) 860.

\*Facts held to show that an absolute deed and a separate agreement to reconvey amounted to a conditional sale, and not a mortgage.—*Goodbar & Co. v. Bloom* (Tex. Civ. App.) 657.

\*Where an absolute deed is claimed to be a mortgage, the burden is on claimant to prove with clearness and certainty that the instrument was intended by both parties as a mortgage.—*Goodbar & Co. v. Bloom* (Tex. Civ. App.) 657.

### § 2. Construction and operation.

\*A deed of trust of the property of a manufacturing corporation held to cover subsequently acquired heavy machinery and a boiler firmly set in the ground and used as a part of the manufacturing plant.—*McClung, Buffat & Buckwell v. Quincy Carriage & Wagon Co.* (Tenn.) 960.

### § 3. Foreclosure by action.

\*Purchaser of note held entitled to enforce it by foreclosure of mortgage against purchaser of property, or by suit against maker.—*Neely v. Black* (Ark.) 984.

Evidence in an action to foreclose a mortgage held not to establish the defense that the note had been previously settled.—*Taylor v. Industrial Mut. Deposit Co.'s Receiver* (Ky.) 462.

\*A judgment foreclosing a mortgage cannot require a purchaser of the mortgaged premises, not assuming the debt, to pay the debt.—*Rabb v. Texas Loan & Investment Co.* (Tex. Civ. App.) 77.

### § 4. Redemption.

\*A judgment adjudging that an instrument was executed for the purpose of security only, and requiring a conveyance on the payment by the debtor, held not bad for failing to fix the time for the payment.—*Crockett's Guardian v. Waller* (Ky.) 860.

## MOTIONS.

Relating to pleadings, see "Pleading," § 9.

For particular purposes or relief.

Continuance in civil actions, see "Continuance."  
Direction of verdict in civil actions, see "Trial," § 4.

New trial in civil actions, see "New Trial," § 3.  
New trial in criminal prosecutions, see "Criminal Law," § 19.

Opening or setting aside default judgment, see "Judgment," § 2.

Presentation of objections for review, see "Appeal and Error," § 2.

Quashing indictment or information, see "Indictment and Information," § 3.

\*Point annotated. See syllabus.

## MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Mandamus, see "Mandamus," § 2.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Presentation of issue relating to sufficiency of ordinance in lower court for purpose of review, see "Appeal and Error," § 2.

Proper parties on appeal in action to enforce lien for local improvements, see "Appeal and Error," § 3.

Review of evidence on appeal in action for injuries caused by defective street, see "Appeal and Error," § 6.

Street railroads, see "Street Railroads."

Water supply, see "Waters and Water Courses," § 2.

### § 1. Governmental powers and functions in general.

\*A city council held to have no authority to delegate to the city attorney discretionary authority to employ an assistant and fix his compensation.—City of Bowling Green v. Gaines (Ky.) 852.

### § 2. Proceedings of council or other governing body.

An ordinance held sufficiently authenticated under Kirby's Dig. § 5473.—Lackey v. Fayetteville Water Co. (Ark.) 622.

\*Certain invalid provisions of an ordinance whereby a city contracted for a water supply held no ground for restraining the enforcement of the ordinance.—Lackey v. Fayetteville Water Co. (Ark.) 622.

Where the records of a city council are read and signed, the records constitute the only evidence of the action taken by the council.—Town of Mt. Pleasant v. Eversole (Ky.) 478.

A person injuriously affected by a municipal ordinance held entitled to attack its validity by proof that it was procured through fraud.—In re Twenty-First St. (Mo. Sup.) 201; Kansas City v. Hyde, Id.; In re Oak St. (Mo. Sup.) 206; Kansas City v. Hyde, Id.

### § 3. Officers, agents, and employes.

\*Mandamus will lie to compel a city council to appoint a board for the examination of plumbers as required by Acts Twenty-fifth Legislature (Laws 1897, p. 236, c. 163) notwithstanding the provisions of the charter of the city subsequently enacted.—Caven v. Coleman (Tex. Civ. App.) 774.

### § 4. Contracts in general.

Acts on behalf of the president of a corporation contracting with a city for a municipal water supply held not to show fraud.—Lackey v. Fayetteville Water Co. (Ark.) 622.

Where a city ordinance contracting for a municipal water supply shows on its face that it is unreasonable and oppressive, and indicates that it was passed in the interest of the grantee of the franchise, it will be set aside.—Lackey v. Fayetteville Water Co. (Ark.) 622.

\*A city ordinance under which a corporation is to supply water to a city constitutes a contract.—Lackey v. Fayetteville Water Co. (Ark.) 622.

\*An agreement by a city to pay the taxes imposed on a light company held invalid as an attempt to exempt property from taxation, in violation of Const. §§ 170-174.—Board of Councilmen of City of Frankfort v. Capital Gas & Electric Light Co. (Ky.) 870.

\*Where a light company furnished to a city public lighting in consideration of a void

agreement of the city to pay the taxes levied against the company, the company was entitled to recover on a quantum meruit.—Board of Councilmen of City of Frankfort v. Capital Gas & Electric Light Co. (Ky.) 870.

A conveyance of land to a city for a street, the city agreeing to grade and macadamize the same within two years, held only to require the city to macadamize a strip along the center of the street of a width according to custom.—City of Versailles v. Brown (Ky.) 1108.

### § 5. Public improvements—Power to make improvements or grant aid therefor.

\*Under the express provisions of Kirby's Dig. §§ 5442-5448, a city has authority to contract with any person for the construction and operation of a plant for supplying water to the city.—Lackey v. Fayetteville Water Co. (Ark.) 622.

\*A city council has authority to establish streets for the purpose of public highways, but not for the use of a private individual.—In re Twenty-First St. (Mo. Sup.) 201; Kansas City v. Hyde, Id.; In re Oak St. (Mo. Sup.) 206; Kansas City v. Hyde, Id.

### § 6. — Preliminary proceedings and ordinances or resolutions.

\*The word "street" in an ordinance ordering a street to be improved at the cost of abutting property means the entire width of the public way and includes the sidewalk.—Morton v. Sullivan (Ky.) 807.

Under an ordinance and contract for a street improvement and in view of the custom of the city engineer, the carriageway of a street held properly made 50 feet in width exclusive of the curbing.—Otter v. Barber Asphalt Pav. Co. (Ky.) 862.

\*An ordinance providing for the curbing of a street held to provide for the curbing according to the grade previously established.—City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.

### § 7. — Contracts.

\*Owners of property abutting on a street improved held not chargeable with the cost of keeping the street in repair during the time specified in the specifications under which the improvement was made.—Morton v. Sullivan (Ky.) 807.

\*Under Rev. St. 1899, §§ 5989, 5992, a contract for the construction of a sidewalk held unauthorized, and a special assessment for the improvement could not be upheld.—City of Elsberry v. Black (Mo. App.) 256, 257.

\*A street-paving contract with a city, construed in connection with a general ordinance, held to require completion of the work within the time specified by the contract.—City of Springfield ex rel. Gilsonite Const. Co. v. Schmook (Mo. App.) 257.

\*Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, held to confer on cities of the fourth class the power to designate the method for the doing of the work of street improvements.—City of Excelsior Springs, to Use of McCormick v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.

### § 8. — Damages.

\*In an action for damages to an abutting owner for changes in the street grade, under Shannon's Code § 1988, plaintiff can recover the actual damages sustained less the incidental benefits.—Acker v. City of Knoxville (Tenn.) 973.

\*In an action by an abutting owner for damages by a change in a street grade, under Shan-

\*Point annotated. See syllabus.

non's Code § 1988, no recovery could be had for inconvenience sustained during the progress of the work.—*Acker v. City of Knoxville (Tenn.) 973.*

\*In an action for damages for the change of a street grade, evidence as to the cost of a rock wall made necessary, the possible impairment of the right of ingress and egress, the freedom of the property from dust and dirt, and the rental value thereof, *held* admissible.—*Acker v. City of Knoxville (Tenn.) 973.*

\*In an action for injuries to an abutting property owner by changes in a street grade, the measure of his damages is the difference between the market value of his property just before the grading and just after.—*Acker v. City of Knoxville (Tenn.) 973.*

In an action by abutting property owners to recover damages for change in the grade of a street, an instruction precluding a recovery under certain circumstances for injuries to water pipes, laid in the street *held* not prejudicial to plaintiffs.—*Acker v. City of Knoxville (Tenn.) 973.*

### § 9. — Assessments for benefits, and special taxes.

\*The owners of property abutting on a street improved pursuant to a municipal ordinance who are made chargeable for the improvement are properly chargeable with the cost of grading the street so far as is necessary to construct the improvement.—*Morton v. Sullivan (Ky.) 807.*

Ky. St. 1908, § 3706, *held* to authorize the board of trustees of a town to impose the cost of a street improvement including intersections and crossings on the abutting property owners.—*Morton v. Sullivan (Ky.) 807.*

\*The owner of a lot may be compelled to pay his share of the cost of a street improvement though he receives no particular benefit, unless the cost is equal or greater than the value of the property.—*Otter v. Barber Asphalt Pav. Co. (Ky.) 862.*

\*When an ordinance directing a public improvement provides for its completion within a certain time and the prescribed time is exceeded, tax bills for such improvement cannot be collected.—*City of Springfield ex rel. Gilsonite Const. Co. v. Schmook (Mo. App.) 257.*

\*Under Scheme and Charter of St. Louis, art. 6, §§ 24, 25 (Rev. St. 1899, p. 2513), the lien of a tax bill for improvements *held* not to arise until the tax bills are delivered as designated in the charter.—*Mercantile Trust Co. v. Niggeman (Mo. App.) 293.*

Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, relating to cities of the fourth class, *held* to authorize a city of that class to issue special tax bills to pay for the cost of curbing a street.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

\*Where in the levy of an assessment for a street improvement the law has been ignored, the assessment is void.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

\*An ordinance of a city of the fourth class adopted pursuant to Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, relating to a street improvement, *held* not complied with, rendering special tax bills issued in payment of the work invalid.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

Special tax bills issued in payment of a street improvement *held* not invalid because the contract for the work authorized the city engineer to extend the time for the completion thereof.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

\*Under the statute one assailing the validity of a special tax bill issued for a street improvement *held* required to establish the fact relied on.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

\*The presumption of the validity of special tax bills *held* to cast on the party assailing them the burden of showing irregularity.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

Special tax bills issued in payment of a street improvement *held* not void because of the mistake made in the ordinance and contract in naming a point at which the improvement should begin.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

Special tax bills issued in payment of a street improvement *held* not invalid because the contract requires the contractor to pay the engineering expenses of the city engineer who received a salary.—*City of Excelsior Springs, to Use of McCormick, v. Ettenson (Mo. App.) 701; Same v. Mississippi Valley Trust Co. (Mo. App.) 707.*

### § 10. — Enforcement of assessments and special taxes.

\*A contractor, under contract for a street improvement, *held* by virtue of ordinances entitled to make the municipality a party defendant in an action against the property owners for the taxes imposed on them for the payment of the improvement.—*Morton v. Sullivan (Ky.) 807.*

A contractor, under contract for a street improvement, *held* by virtue of the ordinances entitled to sue the owners of the property abutting on the street for taxes imposed on them for the payment of the improvement.—*Morton v. Sullivan (Ky.) 807.*

Under Ky. St. 1908, § 3706, the court *held* authorized to correct excessive assessments for street improvements.—*Morton v. Sullivan (Ky.) 807.*

In an action to enforce an assessment for a street improvement, the fact that defendant owned other property behind the property involved, and had no outlet for such property except over that involved, *held* immaterial.—*Otter v. Barber Asphalt Pav. Co. (Ky.) 862.*

On an issue as to the value of property sold in proceedings to enforce an assessment for a street improvement the fact that the property on sale brought only the debt and costs, *held* not to conclusively show its value at such sum.—*Otter v. Barber Asphalt Pav. Co. (Ky.) 862.*

Whether a paving contractor was excused from completing within the specified time a paving contract with a city by reason of the weather *held* an issue of fact for the court.—*City of Springfield ex rel. Gilsonite Const. Co. v. Schmook (Mo. App.) 257.*

### § 11. Police power and regulations.

\*Under Rev. St. 1899, § 5508, subds. 17, 21, a city of the second class *held* authorized to pass an ordinance authorizing the sale of liquors on Sunday, which operated to suspend within the city the application of Rev.

\*Point annotated. See syllabus.

St. 1890, § 3011.—*State v. Kessells* (Mo. App.) 494.

Where defendant was charged with violating an ordinance regulating the discharge of firearms which provided no penalty, and no penal ordinance was offered in evidence, defendant was properly discharged.—*Town of Canton v. Madden* (Mo. App.) 699.

## § 12. Use and regulation of public places, property, and works.

\*A railway held criminally liable for maintaining a nuisance caused by obstructing a street.—*Illinois Cent. R. Co. v. Commonwealth* (Ky.) 467.

\*The use of the streets and alleys of a city to carry the poles, lines, and wires necessary to the operation of a telephone exchange is a legal use.—*City of Lancaster v. Briggs* (Mo. App.) 314.

\*Use of streets for telephone system held subject to right of city to impose money charge as condition to such use.—*City of Lancaster v. Briggs* (Mo. App.) 314.

Under ordinance granting telephone franchise, city held entitled to recover percentage of receipts from local system when operated in connection with long-distance telephone.—*City of Lancaster v. Briggs* (Mo. App.) 314.

\*A city held not liable to an abutter of a street because of permission granted to a railroad company to build its line along the street beyond the line of the abutter's property.—*Acker v. City of Knoxville* (Tenn.) 973.

## § 13. Torts.

A city held not bound to guard a creek at the mouth of a sewer so as to render the bed of the creek at that point safe for use as a ford.—*Zehe's Adm'r v. City of Louisville* (Ky.) 918.

In an action against a city for death of plaintiff's intestate, who was drowned in a hole at the mouth of a sewer, a petition failing to allege notice to the city of the dangerous condition, etc., held fatally defective.—*Zehe's Adm'r v. City of Louisville* (Ky.) 918.

An instruction to find for plaintiff in an action for injuries received by reason of a defective sidewalk held not defective as failing to require a finding that plaintiff was thrown down.—*Elliott v. Kansas City* (Mo. Sup.) 1023.

\*A pedestrian injured by a defective sidewalk held guilty of contributory negligence.—*Diamond v. Kansas City* (Mo. App.) 492.

\*In an action for injuries to a pedestrian by a defective sidewalk, evidence that there were boards not nailed held admissible.—*Hines v. Kansas City* (Mo. App.) 672.

\*Evidence that a member of the city council passed a defect in a street several times a day, held some evidence of notice to the city.—*Keithley v. City of Independence* (Mo. App.) 733.

In an action for injuries resulting from a defect in a street, a notice by the city to a plumbing company, which opened the excavation, held admissible as against the city.—*Keithley v. City of Independence* (Mo. App.) 733.

\*In a common-law action for injuries to a traveler by a defect in a city street, an instruction requiring excavations in streets to be guarded by lights and barriers, held error.—*Keithley v. City of Independence* (Mo. App.) 733.

In an action for injuries on a defective city street, evidence held to require submission of the question of plaintiff's contributory negligence to the jury.—*Keithley v. City of Independence* (Mo. App.) 733.

\*Point annotated. See syllabus.

## § 14. Fiscal management, public debt, securities, and taxation.

An ordinance whereby a city contracted for water supply held not violative of Const. art. 16, § 1, prohibiting city from issuing interest-bearing evidences of indebtedness.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

\*The courts will inquire at the suit of a taxpayer as to whether there has been any actual or intentional fraud in the passage of an ordinance contracting for a municipal water supply.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

A suit to restrain the enforcement of an ordinance whereby a city contracted for a water supply held not maintainable, on the ground that the contract required the water company to construct a dam, and that it would result in flooding lands whereby the city would be liable in damages.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

In a suit to restrain the enforcement of an ordinance whereby a city contracted for a municipal water supply it would be presumed, in the absence of evidence that the council made a proper investigation to determine what would be the reasonable value of hydrant rentals.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

Under Ky. St. 1903, §§ 3677, 3687, the board of trustees held only authorized to provide that the marshal or a tax collector shall collect the taxes.—*Town of Mt. Pleasant v. Eversole* (Ky.) 478.

An ordinance of a town imposing a property and a poll tax held to sufficiently specify the purpose for which the same is levied within Const. § 180.—*Town of Mt. Pleasant v. Eversole* (Ky.) 478.

Too much interest held allowed under Act February 15, 1888 (Acts 1888, p. 255, c. 158) in an action to enforce a tax.—*Pfirman v. District of Clifton* (Ky.) 810.

In an action to enforce a tax, the petition making out a prima facie case, held in the absence of proof by defendant in support of the denial of the answers, it was proper to take as true the allegations of the petition in respect to the validity of ordinances and tax bills.—*Pfirman v. District of Clifton* (Ky.) 810.

\*A private waterworks company as a taxpayer held entitled to institute suit to restrain the diversion or misappropriation of funds raised by a city by taxation to a municipal waterworks plant.—*Owensboro Waterworks Co. v. City of Owensboro* (Ky.) 867.

Where prior to the issuance of water bonds a city collected a fund to pay interest thereon, and to create a sinking fund for their ultimate redemption, which was used for general municipal expenses, the city had no right to replace such sinking fund out of the amount realized from a sale of the bonds.—*Owensboro Waterworks Co. v. City of Owensboro* (Ky.) 867.

Where a city was authorized to sell water bonds to the extent of \$200,000 the city had no power to antedate the bonds and in that way realize more than they were worth on the day of the sale.—*Owensboro Waterworks Co. v. City of Owensboro* (Ky.) 867.

Where a city on the sale of water bonds received in excess of the face of the bonds \$3,172.60 for interest coupons attached, such sum should be deducted from the water bond fund and set apart to be applied to the payment of the coupons left attached to the bonds when sold.—*Owensboro Waterworks Co. v. City of Owensboro* (Ky.) 867.

Where bonds were issued by a city for the construction of a water plant, money taken from the general fund of the city for the sale of the bonds could not be deducted from their proceeds when sold.—*Owensboro Water-works Co. v. City of Owensboro (Ky.)* 867.

### § 15. Actions.

\*Under Ky. St. 1903, § 3660, a town of the sixth class may in its own name sue and appeal from an adverse decision.—*Town of Mt. Pleasant v. Eversole (Ky.)* 478.

## MUTUAL BENEFIT INSURANCE.

See "Insurance," § 14.

## MUTUAL INSURANCE COMPANIES.

See "Insurance," § 1.

## NAMES.

\*An indictment alleging that a private house was owned by Sam M. and proof that it was owned by S. C. M. did not constitute a variance.—*Jones v. State (Tex. Cr. App.)* 29.

## NATIONAL BANKS.

See "Banks and Banking," § 3.

## NAVIGABLE WATERS.

See "Waters and Water Courses."

## NEGLIGENCE.

Causing death, see "Death," § 1.  
Measure of damages, see "Damages," § 8.  
Presentation of issues in lower court for purpose of review, see "Appeal and Error," § 2.

### *By particular classes of persons.*

See "Carriers," §§ 2, 3, 6; "Municipal Corporations," § 13.

Employers, see "Master and Servant," §§ 3-13.  
Officers taking acknowledgments, see "Acknowledgment," § 1.

Railroad companies, see "Railroads," §§ 3-7.  
Telegraph or telephone companies, see "Telegraphs and Telephones," § 2.

### *Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See "Explosives"; "Highways," § 1; "Railroads," §§ 3-7; "Street Railroads," § 2.

Demised premises, see "Landlord and Tenant," § 2.

Streets in cities, see "Municipal Corporations," § 13.

### *Contributory negligence.*

Of passenger, see "Carriers," § 8.

Of person injured at railroad crossing, see "Railroads," § 4.

Of person injured by street railroad, see "Street Railroads," § 2.

Of person injured on railroad track, see "Railroads," § 5.

Of person whose property has been injured by construction of railroad, see "Railroads," § 2.

Of servant, see "Master and Servant," § 9.

Of traveler on highway, see "Municipal Corporations," § 13.

### § 1. Acts or omissions constituting negligence.

\*One causing water to back up beside a highway so as to make it dangerous to travel *held*

required to do what is reasonably necessary to protect the public from the danger.—*Strange v. Bodcaw Lumber Co. (Ark.)* 152.

\*Proper care in the construction of freight elevators *held* not to require that they be wholly inclosed.—*Obermeyer v. F. H. Logeman Chair Mfg. Co. (Mo. App.)* 673.

### § 2. Proximate cause of injury.

\*One causing water to back up beside a highway, making travel dangerous, *held* liable for the drowning of a horse, having negligently failed to erect barriers, though the horse was frightened by goats on the highway.—*Strange v. Bodcaw Lumber Co. (Ark.)* 152.

### § 3. Contributory negligence.

\*Where plaintiff was injured in a collision between a buggy in which he was riding at the driver's invitation and a street car, the driver's negligence was not imputable to plaintiff.—*Fechley v. Springfield Traction Co. (Mo. App.)* 421.

### § 4. Actions.

\*In an action for injuries by a street railway company's failure to provide a culvert for the passage of surface water, evidence that after the injury defendant put in the culvert *held* incompetent.—*Ft. Smith Light & Traction Co. v. Soard (Ark.)* 121.

\*In an action for personal injuries alleged to have been caused by defendant's negligence, that burden of proving negligence is on the plaintiff.—*Waters-Pierce Oil Co. v. Knisel (Ark.)* 842; *Same v. Parker (Ark.)* 353.

\*In an action for injuries an instruction on contributory negligence *held* not erroneous.—*Little Rock Ry. & Electric Co. v. Doyle (Ark.)* 353.

\*Where an action for injuries was based on common-law negligence, and no violation of a city ordinance was alleged, the court did not err in excluding an ordinance offered by plaintiff which he claimed defendant had violated.—*Fechley v. Springfield Traction Co. (Mo. App.)* 421.

\*Contributory negligence in an action for injuries is an affirmative defense which must be specially pleaded.—*Goodloe v. Metropolitan St. Ry. Co. (Mo. App.)* 482.

A charge on contributory negligence should be confined to the specific acts of contributory negligence, and not be general so as to submit any other acts of negligence.—*International & G. N. R. Co. v. Wray (Tex. Civ. App.)* 74.

\*Negligence becomes a question of law only when the act complained of is in violation of the statute or when the undisputed evidence admits of the inference only that the commission of the act in question was negligence.—*International & G. N. R. Co. v. Wray (Tex. Civ. App.)* 74.

\*Defendant *held* required to plead contributory negligence, unless it is developed by plaintiff's case.—*St. Louis Southwestern Ry. Co. of Texas v. Gammage (Tex. Civ. App.)* 645.

## NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

## NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 2.

## NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 2.

\*Point annotated. See syllabus.

## NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 19.

Necessity of motion for purpose of review, see "Appeal and Error," § 2.

Remand by appellate court for new trial, see "Appeal and Error," § 22.

### § 1. Nature and scope of remedy.

\*Where a motion for a new trial was not filed until five days after judgment for plaintiff, it was within the discretion of the court to grant or refuse the same.—Cato v. Scott (Tex. Civ. App.) 667.

### § 2. Grounds.

\*Action to set aside a judgment for newly discovered cumulative evidence *held* properly dismissed for lack of diligence.—Hall v. Roberts (Ky.) 555.

\*Certain facts *held* not to constitute a ground for a new trial for surprise.—Soper v. Crutcher (Ky.) 907.

\*The objection on motion for new trial to the sufficiency of a written memorandum sued on *held* made too late.—Ewart v. Young (Mo. App.) 420.

\*A motion for a new trial of an action in which plaintiff obtained judgment in defendant's absence *held* properly denied for lack of diligence.—Cato v. Scott (Tex. Civ. App.) 667.

### § 3. Proceedings to procure new trial.

\*Where one ground of a motion for a new trial was that the court erred in giving five instructions, referred to by number, the objection was unsustainable if any of them were correct.—Wade v. Goza (Ark.) 388.

\*Under the express provisions of Code Civ. Prac. § 343 affidavits must be filed in support of a motion for a new trial on the ground of newly discovered evidence.—Soper v. Crutcher (Ky.) 907.

## NEXT OF KIN.

See "Descent and Distribution."

## NOMINATION.

For office, see "Elections," § 2.

## NONSUIT.

Before trial, see "Dismissal and Nonsuit."

## NOTARIES.

Taking of acknowledgment, see "Acknowledgment," § 1.

\*In an action on the official bond of a notary for a false certificate of acknowledgment, the notary *held* required to prove that he acted in good faith, and with due care.—Blaes v. Commonwealth (Ky.) 802.

\*A petition in an action on the official bond of a notary for a false certificate of acknowledgment *held* to state a prima facie case of negligence on the part of the notary.—Blaes v. Commonwealth (Ky.) 802.

## NOTES.

Promissory notes, see "Bills and Notes."

\*Point annotated. See syllabus.

## NOTICE.

*As affecting particular classes of persons.*  
See "Principal and Agent," § 3.

*Of particular facts, acts, or proceedings not judicial.*

See "Elections," § 1.

Loss insured against, see "Insurance," § 11.

*Of particular judicial proceedings.*

See "Lis Pendens."

## NUISANCE.

### § 1. Public nuisances.

\*Evidence *held* to support a finding that a railroad company was guilty of maintaining a common public nuisance.—Illinois Cent. R. Co. v. Commonwealth (Ky.) 467.

An indictment charging a railroad company with a nuisance arising from its obstructing a street, *held* to show that the street was in an incorporated town.—Illinois Cent. R. Co. v. Commonwealth (Ky.) 467.

An indictment for a nuisance created by a railroad in obstructing a street, *held* to show that the obstruction was permitted to remain in the street for an unreasonable period.—Illinois Cent. R. Co. v. Commonwealth (Ky.) 467.

\*An indictment charging a railroad with maintaining a nuisance by obstructing a street, *held* not bad for failing to charge that the obstruction was a common nuisance to all persons passing and repassing, and having the right to pass and repass.—Illinois Cent. R. Co. v. Commonwealth (Ky.) 467.

An instruction on a trial charging a railway company with maintaining a nuisance, resulting from its obstructing a public street, *held* to properly submit the issues.—Illinois Cent. R. Co. v. Commonwealth (Ky.) 467.

A fine imposed on a railroad company for maintaining a public nuisance, *held* not excessive.—Illinois Cent. R. Co. v. Commonwealth (Ky.) 467.

\*A brewing company *held* guilty of maintaining a public nuisance on premises rented for the sale of beer.—Jung Brewing Co. v. Commonwealth (Ky.) 595.

## OBJECTIONS.

For purpose of review, see "Appeal and Error," § 2.

To depositions, see "Depositions."

## OBSTRUCTIONS.

Of easements, see "Easements," § 1.

Of highways, see "Highways," § 1.

Of water, course, see "Waters and Water Courses," § 1.

## OCCUPATION.

Of real property, see "Use and Occupation."

## OFFER.

Of proof, see "Trial," § 2.

## OFFICERS.

Embezzlement, see "Embezzlement."

Mandamus, see "Mandamus," § 2.



*Particular classes of officers.*

See "Clerks of Courts"; "Judges"; "Justices of the Peace"; "Notaries"; "Sheriffs and Constables."

Assessors of taxes, see "Taxation," § 2.

Bank officers, see "Banks and Banking," §§ 1, 2.

Collectors of taxes, see "Taxation," § 3.

Corporate officers, see "Corporations," §§ 2, 3.

County officers, see "Counties," § 1.

Health officers, see "Health," § 1.

Municipal officers, see "Municipal Corporations," § 8.

**§ 1. Appointment, qualification, and tenure.**

Under Const. §§ 97, 152, the time for electing the successor of one appointed to fill a vacancy in the office of commonwealth's attorney in the Tenth judicial district determined.—*Robinson v. McCandless* (Ky.) 877.

**OPENING.**

Judgment, see "Judgment," § 2.

**OPINION EVIDENCE.**

In civil actions, see "Evidence," § 10.

**OPINIONS.**

Expression of, ground for challenge to jury, see "Jury," § 4.

**ORDERS.**

Review of appealable orders, see "Appeal and Error."

**ORDINANCES.**

Municipal ordinances, see "Municipal Corporations," §§ 2, 6, 11.

Presentation of issue relating to sufficiency of ordinance in lower court for purpose of review, see "Appeal and Error," § 22.

**PARENT AND CHILD.**

See "Bastards"; "Guardian and Ward"; "Infants."

Declarations as to birth or pedigree, see "Evidence," § 6.

\*A guardian held not entitled to charge for the board of her ward, her daughter, whose services were worth as much as her support.—*Leake v. Goode* (Ky.) 565; *Same v. Rhodes* (Ky.) 566.

In an action against several for enticing plaintiff's minor son from home, evidence held sufficient to sustain a verdict for defendants.—*Soper v. Crutcher* (Ky.) 907.

**PAROL EVIDENCE.**

In civil actions, see "Evidence," § 9.

**PARTIES.**

Competency as witnesses, see "Witnesses," § 1. Domicile or residence as affecting venue, see "Venue," § 1.

Interpleading, see "Interpleader."

*In actions by or against particular classes of persons.*

See "Attorney and Client," § 2.

Heirs or distributees, see "Descent and Distribution," § 2.

*In particular actions or proceedings.*

See "Equity," § 3; "Specific Performance," § 2; "Trespass," § 1.

Collateral attack on judgment, see "Judgment," § 4.

To enforce attorney's lien for services, see "Attorney and Client," § 2.

To enforce special assessments for public improvements, see "Municipal Corporations," § 10.

*Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.*

Persons concluded by judgment, see "Judgment," § 7.

*Review as to parties, and parties to proceedings in appellate courts.*

See "Appeal and Error," § 8.

Parties entitled to allege error, see "Appeal and Error," § 10.

*To conveyances, contracts, or other transactions.* See "Bills and Notes," § 2; "Fraudulent Conveyances," § 2.

**§ 1. Plaintiffs.**

\*One in whose name a contract is made, held entitled to sue on it in his own name, though stating it is for the benefit of another.—*Beekman Lumber Co. v. Kittrell* (Ark.) 988.

\*One held properly made a party, though not a necessary party.—*Beekman Lumber Co. v. Kittrell* (Ark.) 988.

Under Civil Code of Practice, § 25, held that a plaintiff not being interested may not prosecute the action for others interested but not named as parties, though the action purports to be on behalf of the one suing and all others interested.—*Overton v. Overton* (Ky.) 469.

\*Under the express provisions of Civ. Code Prac. § 18, every action must be prosecuted in the name of the real party in interest.—*Dailey v. O'Brien* (Ky.) 521.

**§ 2. Defendants.**

A motion that certain parties defend for the heirs of a certain decedent will be overruled, where such persons are not shown to be among the heirs of the decedent.—*Morris v. Martin* (Ky.) 555.

**§ 3. Defects, objections, and amendment.**

\*Where a suit on a cause of action in favor of a corporation was commenced in the names of all the stockholders, an amendment substituting the corporation as party plaintiff was not objectionable as changing the cause of action within Rev. St. 1899, § 657.—*Hackett v. Van Frank* (Mo. App.) 247.

**PARTITION.**

**§ 1. Actions for partition.**

\*Joint owners of realty suing by attorney for partition held not entitled to have the fee of their attorney paid out of the proceeds of the property, where the other owners selected another attorney to represent them.—*Hemingray v. Hemingray* (Ky.) 574.

\*The petition in an action to recover an interest in land and for partition held not to show plaintiffs to have any interest, and so to state no cause of action.—*Chaney v. Bevins* (Ky.) 1129.

**PARTNERSHIP.**

Presumptions on appeal in suit for settlement of partnership, see "Appeal and Error," § 12.

\*Point annotated. See syllabus.

**§ 1. The relation.**

\*That one held himself out as a partner does not estop him from showing that he was not a partner, except as against those who knew of such holding out and dealt with the firm in reliance thereon.—*Herman Kahn Co. v. A. T. Bowden & Co. (Ark.)* 126.

An agreement entered into by two persons for the purchase of a pearl, *held* limited to a particular occasion, and one of the parties buying the pearl at a subsequent time, *held* not bound to account for the proceeds on a sale thereof.—*Harris v. Umsted (Ark.)* 146.

\*A mere agreement by two persons to buy an article together, does not amount to an agreement to form a partnership.—*Harris v. Umsted (Ark.)* 146.

Where defendant agreed to enter a partnership with plaintiff, but later refused to perform, plaintiff was entitled to recover whatever damage he sustained.—*Hobbs v. Ray (Ky.)* 589.

Evidence examined and *held* to show that a partnership between the parties did not exist.—*Headley v. Rice (Ky.)* 903.

**§ 2. Mutual rights, duties, and liabilities of partners.**

A petition by a partner in an action against the firm and his copartners, *held* not to state grounds sufficient to justify the court to appoint a receiver for the partnership, under Civ. Code Prac. § 298.—*Campbell v. Rich Oil Co. (Ky.)* 442.

A partner in a firm engaged in certain business, *held* not entitled to relief against his copartners or the partnership, based on the acts of a manager employed by the partnership.—*Campbell v. Rich Oil Co. (Ky.)* 442.

A petition by a partner in an action against his copartners and the firm, *held* not to state a cause of action based on the ground of misappropriation of partnership funds by the general manager thereof.—*Campbell v. Rich Oil Co. (Ky.)* 442.

**§ 3. Rights and liabilities as to third persons.**

\*In an action against two persons as partners, evidence that one of them had said that he was a partner of the other, *held* sufficient to sustain a finding that he was a partner.—*Herman Kahn Co. v. A. T. Bowden & Co. (Ark.)* 126.

In an action against two persons as partners, an instruction as to the circumstances under which the jury might find one of the defendants to be a partner, *held* erroneous.—*Herman Kahn Co. v. A. T. Bowden & Co. (Ark.)* 126.

**PART PAYMENT.**

Within statute of limitations, see "Limitation of Actions," § 2.

**PASSENGERS.**

See "Carriers," § 4.

**PASTURAGE.**

Of animals, see "Animals."

**PATENTS.**

For public lands, see "Public Lands," § 1.

\*Point annotated. See syllabus.

**PAYMENT.**

See "Tender."

Of taxes to sustain adverse possession, see "Adverse Possession," § 1.

Part payment within statute of limitations, see "Limitation of Actions," § 2.

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Bills and Notes," § 4; "Judgment," § 10.

Broker's commissions, see "Brokers," § 2.

**§ 1. Requisites and sufficiency.**

Plaintiff *held* not bound to elect to execute an assignment of his claim against an insurance society for \$500 or to return such amount to defendant, but was entitled to credit such amount a pro tanto payment on such claim.—*Johnson v. Smothers (Ark.)* 386.

**PENALTIES.**

Combinations in restraint of trade, see "Monopolies," § 1.

**PENDENCY OF ACTION.**

Effect as to property involved, see "Lis Pendens."

**PEREMPTORY CHALLENGES.**

To jurors, see "Jury," § 4.

**PERJURY.****§ 1. Offenses and responsibility therefor.**

\*On a prosecution under Ky. St. 1903, § 1174, for false swearing, an indictment *held* insufficient as not charging that defendant swore falsely to any fact.—*Commonwealth v. Bray (Ky.)* 522.

\*Under Code Crim. Proc. 1895, arts. 34, 35, 36, 391, and 941, statements in answer to questions of county attorney to one suspected of having been present where gambling was carried on, *held* no basis for a prosecution for perjury.—*Williams v. State (Tex. Cr. App.)* 47.

**§ 2. Prosecution and punishment.**

\*A jury cannot find one guilty of false swearing except on the evidence of two witnesses or one with strong corroborating circumstances.—*Sweat v. Commonwealth (Ky.)* 843.

\*An indictment for false swearing *held* sufficient.—*Sweat v. Commonwealth (Ky.)* 843.

\*An indictment for perjury, *held* not demurrable on the ground that it showed that the oath administered was not taken on a subject on which defendant could be legally sworn. (Ky. St. 1890, c. 41, § 1535, art. 3.)—*Commonwealth v. Coakley (Ky.)* 876.

**PERSONAL INJURIES.**

Particular causes or means of injury.

See "Assault and Battery," § 1; "Negligence."

Operation of railroads, see "Railroads," §§ 3-7.

Particular classes of persons injured.

Employees see "Master and Servant," §§ 3-13.

Passengers, see "Carriers," § 6.

Persons on or near railroad tracks, see "Railroads," § 5.

Travelers on highways, see "Highways," § 1;

"Municipal Corporations," § 13.

Challenge to jury, see "Jury," § 4.  
 Contradiction of witnesses, see "Witnesses," § 3.  
 Harmless error in admission of evidence, see "Appeal and Error," § 17.  
 Harmless error in instructions, see "Appeal and Error," § 19.  
 Issues presented in lower court for purpose of review, see "Appeal and Error," § 2.  
 Measure of damages, see "Damages," § 3.

## PETITION.

For mandamus, see "Mandamus," § 8.  
 In pleading, see "Pleading," § 2.

## PHYSICIANS AND SURGEONS.

Competency as witnesses, see "Witnesses," § 1.  
 Sale of morphine, see "Poisons."

## PLEA.

In civil actions, see "Pleading," § 3.  
 In criminal prosecution, see "Criminal Law," § 5.

## PLEADING.

Applicability of instructions to pleadings, see "Trial," § 8.  
 As part of record on appeal, see "Appeal and Error," § 6.  
 Harmless error, see "Appeal and Error," § 16.  
 Joinder of causes of action in amended pleading, see "Action," § 2.  
 To sustain judgment, see "Judgment," § 1.

*Allegations as to particular facts, acts, or transactions.*

See "Adverse Possession," § 3; "Damages," § 5.  
 Contributory negligence, see "Negligence," § 4.  
 Statute of frauds, see "Frauds, Statute of," § 5.

*In actions by or against particular classes of persons.*

See "Attorney and Client," § 2; "Carriers," §§ 2, 3; "Executors and Administrators," § 7; "Master and Servant," § 10; "Municipal Corporations," § 13; "Notaries"; "Partnership," § 2; "Railroads," § 6.  
 Co-tenants, see "Partition," § 1.

*In particular actions or proceedings.*

See "Cancellation of Instruments," § 1; "Divorce," § 2; "Ejectment," § 1; "Negligence," § 4; "Quieting Title," § 1.  
 For admeasurement or assignment of dower, see "Dower," § 1.  
 For breach of contract, see "Contracts," § 5.  
 For breach of contract of employment, see "Master and Servant," § 1.  
 For injuries to animals on or near railroad tracks, see "Railroads," § 6.  
 For loss of or destruction of goods, see "Carriers," § 2.  
 For loss of, or injury to live stock, see "Carriers," § 3.  
 For partition, see "Partition," § 1.  
 For personal injuries, see "Master and Servant," § 10; "Municipal Corporations," § 13.  
 For separate maintenance, see "Husband and Wife," § 6.  
 For services, see "Work and Labor."  
 Indictment or criminal information or complaint, see "Indictment and Information."  
 In justices' courts, see "Justices of the Peace," § 1.

\*Point annotated. See syllabus.

On judgment, see "Judgment," § 11.  
 Pleas in criminal prosecutions, see "Criminal Law," § 5.

To enforce attorney's lien for services, see "Attorney and Client," § 2.  
 To enforce landlord's lien for rent, see "Landlord and Tenant," § 3.  
 To foreclose vendor's lien, see "Vendor and Purchaser," § 5.  
 To restrain execution, see "Execution," § 1.

### § 1. Form and allegations in general.

\*An allegation *held* a conclusion of law.—*Dailey v. O'Brien* (Ky.) 521.

\*Allegations in an answer to an interplea claiming property under a chattel mortgage, *held* mere legal conclusions as to the interpleader's rights.—*Rice-Stix Dry Goods Co. v. Sally* (Mo. Sup.) 1030.

### § 2. Declaration, complaint, petition, or statement.

\*The averments of one paragraph of a petition cannot be connected with or relied on in aid of another.—*Dailey v. O'Brien* (Ky.) 521.

### § 3. Plea or answer, cross complaint, and affidavit of defense.

\*An answer that defendants are not advised that the lands in controversy were granted to the state as swamp lands, etc., *held* insufficient to constitute a denial of such allegation in the complaint.—*Wade v. Goza* (Ark.) 388.

In a suit to restrain the cutting of timber on land a pleading filed by interveners, *held* to constitute a defense to the action, so that no judgment could be taken against defendant unless plaintiff made out his case.—*Le Moyne v. Anderson* (Ky.) 843.

\*An answer, *held* to state a good cause of action against plaintiff for labor and services, and was available as a set-off against plaintiff's action on a note.—*Snowden v. Snowden* (Ky.) 922.

### § 4. Replication or reply and subsequent pleadings.

\*Allowing filing of reply after introduction of evidence as though there was a reply, *held* in the court's discretion.—*Beekman Lumber Co. v. Kittrell* (Ark.) 988.

A defendant in trespass, *held* not entitled to judgment on the pleadings for plaintiff's failure to reply. Civ. Code Prac. § 126.—*Wheeler v. Davis* (Ky.) 451.

### § 5. Demurrer or exception.

\*The introduction of evidence to support a pleading is rendered unnecessary by a demurrer thereto, which is overruled, and the demurrant electing to stand thereon.—*Commonwealth v. Hillis* (Ky.) 873.

### § 6. Amended and supplemental pleadings and replader.

\*In an action for injuries allegations of an amended complaint, *held* not a statement of a new cause of action.—*Little Rock Traction & Electric v. Miller* (Ark.) 993.

Where plaintiff's proof established a case for the jury, the trial court should have allowed the petition to be amended to conform to the proof.—*Hobbs v. Ray* (Ky.) 589.

In an action on a fire policy an amendment to the petition, *held* not to constitute a departure.—*Home Ins. Co. of New York v. Ballew* (Ky.) 878.

In an action against an initial carrier for injuries to a shipment of hogs, the refusal to

allow an amended answer pleading a delivery to the connecting carrier, *held* not erroneous.—Illinois Cent. R. Co. v. Stevens (Ky.) 888.

\*Refusal to permit an amendment of a complaint for enticing child, *held* proper on the ground that it would have made a misjoinder of parties and of actions.—Soper v. Crutcher (Ky.) 907.

#### § 7. Signature and verification.

Under Rev. St. 1895, art. 271, a pleading signed by two attorneys, one of whom was the judge, *held* properly permitted to stand, being signed by one who was allowed to sign it.—McAllen v. Raphael (Tex. Civ. App.) 760.

#### § 8. Profert, oyer, and exhibits.

\*It is not essential to a pleading that an open account filed as an exhibit should be set out in the body of the pleading.—Snowden v. Snowden (Ky.) 922.

#### § 9. Motions.

\*Under the express provisions of Kirby's Dig. § 6081, the court may, on motion of defendant before defense, strike out a cause of action improperly joined.—Jett v. Theo. Maxfield Co. (Ark.) 143.

\*A motion to strike one of the counts of a complaint or to compel an election, *held* such that it should have been sustained.—Jett v. Theo. Maxfield Co. (Ark.) 143.

\*Where an account filed with the petition is not sufficiently specific, the remedy is by motion to make it more definite and certain, under Civ. Code Prac. § 134.—Snowden v. Snowden (Ky.) 922.

#### § 10. Issues, proof, and variance.

\*Immaterial matters unnecessarily alleged in a complaint, *held* not required to be proved.—Strange v. Bodcaw Lumber Co. (Ark.) 152.

\*Where an allegation that the land in controversy had been patented to the state as swamp land was not denied, a certificate of the State Land Commissioner evidencing the sale was properly admitted without proof of the state's title from the government.—Wade v. Goza (Ark.) 388.

\*Where, after the entry of an order overruling a demurrer to a pleading, the parties agree that the allegations of the pleading shall be taken as true, the introduction of evidence to support the pleading is unnecessary.—Commonwealth v. Hillis (Ky.) 873.

In an action for common-law negligence the exclusion of a city ordinance on which no issue was based, *held* proper.—Fechley v. Springfield Traction Co. (Mo. App.) 421.

Proof of execution by defendant of an exhibit, the foundation of the action, *held* unnecessary under Rev. St. 1899, §§ 746, 3967, not being denied under oath.—Brown Mfg. Co. v. Jilpin (Mo. App.) 669.

#### § 11. Defects and objections, waiver, and aid by verdict or judgment.

\*After trial and judgment in an action by a widow for allotment of dower, an objection cannot be made for the first time that her petition was not accompanied by decedent's title papers, as required by Civ. Code Prac. § 499.—Bartee v. Edmunds (Ky.) 535.

\*The defect in a petition, *held* waived by the filing of an answer and by the failure to have the court act on a demurrer filed thereafter.—May v. May (Ky.) 840.

\*A pleading over on the overruling of a demurrer waives the demurrer.—Glassey v. Silgo Furnace Co. (Mo. App.) 310.

\*Point annotated. See syllabus.

\*Where evidence is admitted without objection, the question of variance between the pleading and the proof cannot be raised by instructions.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

## POISONS.

An indictment of a physician for prescribing morphine in violation of Acts Twenty-Ninth Legislature, p. 45, § 2, *held* fatally defective for failure to allege not only that defendant did not prescribe such drug in good faith but that he did not deem it necessary.—Blair v. State (Tex. Cr. App.) 23.

## POLICE COURTS.

Clerks, see "Clerks of Courts."

## POLICE POWER.

Of municipality, see "Municipal Corporations," § 11.

## POLICY.

Of insurance, see "Insurance."

## POLITICAL RIGHTS.

Suffrage, see "Elections."

## POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," § 4.

## POWERS.

Of attorney, see "Principal and Agent."

## PRACTICE.

*In particular civil actions or proceedings.*

See "Account, Action on"; "Ejectment"; "Interpleader"; "Mandamus," § 3; "Replevin"; "Trespass," § 1; "Trespass to Try Title," § 2. Accounting by executor or administrator, see "Executors and Administrators," § 8. Condemnation proceedings, see "Eminent Domain," § 3.

*Particular proceedings in actions.*

See "Abatement and Revival"; "Affidavits"; "Continuance"; "Costs"; "Damages," § 5; "Depositions"; "Dismissal and Nonsuit"; "Divorce," § 2; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Reference"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

Revival of judgment, see "Judgment," § 9. Verdict, see "Trial," § 13.

*Particular remedies in or incident to actions.*

See "Garnishment"; "Injunction"; "Tender."

*Procedure in criminal prosecutions.*

See "Bail," § 1; "Criminal Law"; "Extradition"; "Intoxicating Liquors," § 5.

*Procedure in exercise of special or limited jurisdiction.*

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 1.

See "Appeal and Error"; "Exceptions, Bill of."

## PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," §§ 15-19.

Ground for reversal in criminal prosecutions, see "Criminal Law," § 24; "Homicide," § 5.

## PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," § 4.

## PREMIUMS.

For insurance, see "Insurance," § 7.

## PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1.

## PRESENTMENT.

By grand jury, see "Indictment and Information."

Of claims against estate of decedent, see "Executors and Administrators," § 5.

## PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

On appeal or error, see "Appeal and Error," § 12; "Criminal Law," § 24.

## PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

Admissions by agent, see "Evidence," § 5.

Corporate agents, see "Corporations," §§ 2, 3.

Insurance agents, see "Insurance," § 2.

### § 1. The relation.

\*Though agency may not be proved by the declarations of the agent, *held* it may be proved by his testimony.—Beekman Lumber Co. v. Kittrell (Ark.) 988.

\*Certain evidence, *held* sufficient to prove agency.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

### § 2. Mutual rights, duties, and liabilities.

A contract of agency construed, and *held* not to preclude the agents from recovering commissions for the sale of certain second-hand goods at the special request of the principal.—Gooch v. J. I. Case Threshing Mach. Co. (Mo. App.) 431.

In an action by agents for commissions for the sale of a machine, a certain instruction *held* sufficiently favorable to defendants.—Gooch v. J. I. Case Threshing Mach. Co. (Mo. App.) 431.

### § 3. Rights and liabilities as to third persons.

An agent with power to sell and receive payment has no apparent authority to accept as payment the cancellation of his own debt, due one who knows or by the exercise of reasonable diligence could know, that his debtor is acting as agent.—Grooms v. Neff Harness Co. (Ark.) 135.

\*Principals *held* charged with notice of a contract made by a subagent of which their imme-

\*Point annotated. See syllabus.

ness in a mining claim, *held* to charge him with notice of a contract made by the agent for conveyance of a corresponding portion of the claim after patent.—Carter v. Gray (Ark.) 377.

\*A corporation *held* liable for a libel written concerning the business ability of another company by its agent in the course of his employment to further defendant's interests.—Pennsylvania Iron Works Co. v. Henry Voght Mach. Co. (Ky.) 551.

\*A corporation's failure to disavow a libelous letter written by its agent, on obtaining knowledge thereof, *held* a ratification of the libel.—Pennsylvania Iron Works Co. v. Henry Voght Mach. Co. (Ky.) 551.

\*A written contract for the sale of land made by an agent, *held* unenforceable against the owner under Rev. St. 1899, § 3418.—Young v. Ruhwedel (Mo. App.) 228.

Defendant *held* liable for fraudulent representations and deceptions practiced by his agent on plaintiff.—Heath v. Schroer (Mo. App.) 313.

\*Knowledge of a servant, whose duty was limited to weighing and receiving corn purchased by his master, as to the place where the corn was raised, *held* not imputable to his master.—King v. Rowlett (Mo. App.) 493.

\*Whether it was within the scope of the apparent authority of an agent to employ one for his principal, *held* for the jury.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

\*A firm *held* estopped as against a third person by representations of bookkeeper to claim lien against tenant for store account, but not estopped to claim lien for land.—Cadenhead v. Rogers & Bro. (Tex. Civ. App.) 952.

## PRINCIPAL AND SURETY.

See "Bail."

Signing note as creating relation, see "Bills and Notes," § 2.

*Sureties on bonds for performance of duties of trust or office.*

See "Guardian and Ward," § 1; "Notaries."

*Sureties on bonds in judicial proceedings.*

See "Injunction," § 3.

### § 1. Discharge of surety.

\*That the obligee of a building contractor's bond paid the contractor more than the stipulated percentage prior to the contractor's abandonment of the contract, *held* to relieve the contractor's paid surety from liability.—National Surety Co. v. Long (Ark.) 745.

\*A building contractor's surety, *held* not entitled to claim a discharge because of the owner's delay in giving notice that the contractor was not able to perform the contract in time.—National Surety Co. v. Long (Ark.) 745.

\*Failure of a bank to apply the proceeds of real estate to a secured debt, as directed by sureties, *held* to discharge such sureties from liability, though the sureties' obligation had not matured.—Western Bank & Trust Co. v. Gibbs (Tex. Civ. App.) 947.

## PRIORITIES.

Of mortgages, see "Chattel Mortgages," § 2.

**PRIVATE ROADS.**

Rights of way, see "Easements."

**PRIVILEGE.**

Of married women, see "Husband and Wife," § 3.

**PRIVILEGED COMMUNICATIONS.**

Disclosure by witness, see "Witnesses," § 1.

**PRIVITY.**

Admissions by privies, see "Evidence," § 5.

**PROBATE.**

Of will, see "Wills," § 2.

**PROBATE COURTS.**

See "Courts," § 3.

Review of orders in, as dependent on finality of determination, see "Appeal and Error," § 1.

**PROCESS.**

*Particular forms of writs or other process.*

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Replevin."

**PROFITS.**

Loss of, as element of damages, see "Damages," § 1.

**PROHIBITION.**

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

**PROMISSORY NOTES.**

See "Bills and Notes."

**PROOF.**

Of loss insured against, see "Insurance," § 11.

**PROPERTY.**

Dedication to public use, see "Dedication." Licenses in respect to real property, see "Licenses," § 2.

Taking for public use, see "Eminent Domain."

*Particular estates or interests.*

See "Animals"; "Mines and Minerals."

*Transfers and other matters affecting title.*

See "Adverse Possession."

**PROVINCE OF COURT AND JURY.**

In civil actions, see "Trial," §§ 5-11.

In criminal prosecutions, see "Criminal Law," § 12; "Homicide," § 4.

**PROXIMATE CAUSE.**

Direct or remote consequences of injury, see "Damages," § 1.

Of injury, see "Negligence," § 2.

Of injury to servant, see "Master and Servant," § 3.

\*Point annotated. See syllabus.

**PUBLIC DEBT.**

See "Municipal Corporations," § 14.

**PUBLIC IMPROVEMENTS.**

By municipalities, see "Municipal Corporations," §§ 5-10.

**PUBLIC LANDS.**

Objections to state land certificates as evidence, for purpose of review, see "Appeal and Error," § 2.

**§ 1. Survey and disposal of lands of United States.**

The act of Congress, March 3, 1877, granting to the Hot Springs Railroad Company a right of way through the Hot Springs Reservation, did not confer on the grantee the fee in streets occupied by it.—Little Rock & Ft. S. Ry. Co. v. Greer (Ark.) 129.

\*A patent held to convey an estate in fee to a corporation, constituting a charitable trust.—Fordyce & McKee v. Woman's Christian Nat. Library Ass'n (Ark.) 155.

**§ 2. Disposal of lands of the states.**

Actual knowledge by a subsequent locator of the previous location by another precludes him from deriving any advantage from the fact that the surveyor's office contained no evidence thereof at the date of the subsequent location.—Waterhouse v. Corbett (Tex. Civ. App.) 651.

A patent issued in 1845 on a survey in 1844 after Act Feb. 1840 (Sayles' Early Laws, art. 838) cannot be declared superior to a patent issued in 1846 on a survey made in 1840, because of unreasonable delay in returning the field notes for the earlier survey, in view of Acts Dec. 1840 (Sayles' Early Laws, art. 848), and subsequent acts extending the time for the return of field notes.—Waterhouse v. Corbett (Tex. Civ. App.) 651.

Where the field notes of a survey actually made in 1840 were recorded, and a patent issued in 1846, such patent was held superior to another issued in 1845 on a conflicting survey made in 1844.—Waterhouse v. Corbett (Tex. Civ. App.) 651.

\*On an issue as to whether defendant was an actual settler on school lands when he applied to purchase, the evidence held sufficient to show such settlement.—Smith v. Florence (Tex. Civ. App.) 1096.

**PUBLIC NUISANCE.**

See "Nuisance," § 1.

**PUBLIC SCHOOLS.**

See "Schools and School Districts," § 1.

**PUBLIC USE.**

Dedication of property, see "Dedication."

Taking property for public use, see "Eminent Domain."

**PUBLIC WATER SUPPLY.**

See "Waters and Water Courses," § 2.

**PUNISHMENT.**

*Particular offenses.*

See "Homicide," § 6; "Rape," § 1.

**PUNITIVE DAMAGES.**

See "Damages," § 2.

**QUANTUM MERUIT.**

See "Work and Labor."

**QUASHING.**

Indictment or information, see "Indictment and Information," § 3.

**QUESTIONS FOR JURY.**

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 12; "Homicide," § 4.

**QUIETING TITLE.****§ 1. Proceedings and relief.**

A cross-complaint of defendant in ejectment to remove cloud and quiet title, *held* insufficient, not showing that defendant had title, though he was in possession.—Cook v. Ziff Colored Masonic Lodge, No. 119 (Ark.) 618; Same v. Slay (Ark.) 620; Same v. Hunter, Id.; Same v. Williams (Ark.) 622.

Evidence in an action to remove a cloud, *held* to show one under whose deed defendants claimed was not a child of the patentee who died owning the land.—Overton v. Overton (Ky.) 469.

**RAILROADS.**

See "Street Railroads."

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Condemnation proceedings, see "Eminent Domain."

Grants of land in aid, see "Public Lands," § 1. Obstruction of streets, see "Municipal Corporations," § 12.

**§ 1. Location of road, termini, and stations.**

\*Where a railroad company making a subsequent survey had notice of the survey previously made by another company, the fact that the latter did not first file a map of its location for record under Ky. St. 1903, § 767, did not affect its right of priority.—Cumberland R. Co. v. Pine Mountain R. Co. (Ky.) 199; Pine Mountain R. Co. v. Cumberland R. Co., Id.

\*When a railroad has located a right of way and is in good faith attempting to purchase or condemn a right of way, another company cannot locate its right of way on the same line.—Cumberland R. Co. v. Pine Mountain R. Co. (Ky.) 199; Pine Mountain R. Co. v. Cumberland R. Co., Id.

**§ 2. Construction, maintenance, and equipment.**

The turning of cattle into a field adjoining a right of way, not fenced as required by Rev. St. 1899, § 1105, *held* not contributory negligence, defeating a recovery for an injury to crops in another field.—Kirkpatrick v. Illinois Southern Ry. Co. (Mo. App.) 1036.

**§ 3. Operation—Companies and persons liable for injuries.**

\*Where there was no claim in an action for injuries at a crossing that defendant was only the lessor of the road, and that the injury was inflicted by the lessee, a contention that Kirby's Dig. § 6773, was applicable only against

the railroad property, and not against the company, *held* unsustainable.—St. Louis, I. M. & S. Ry. Co. v. Evans (Ark.) 616.

**§ 4. — Accidents at crossings.**

A person approaching a railway crossing will not be heard to say that he did not see the approaching train by which he was struck if it was plainly to be seen or heard.—St. Louis & S. F. Ry. Co. v. Wyatt (Ark.) 376.

\*In an action for injuries to a traveler at a railroad crossing, evidence *held* to require submission of plaintiff's contributory negligence.—St. Louis & S. F. Ry. Co. v. Wyatt (Ark.) 376.

\*In an action for injuries to plaintiff at a crossing, proof that plaintiff was injured by the operation of the train *held* to establish a prima facie case.—St. Louis, I. M. & S. Ry. Co. v. Evans (Ark.) 616.

In an action for injuries to plaintiff in a collision at a crossing, evidence *held* to sustain a verdict for plaintiff.—St. Louis, I. M. & S. Ry. Co. v. Evans (Ark.) 616.

In an action for injuries at a railroad crossing, an instruction *held* not objectionable for failure to confine the jury to the negligence alleged in the complaint.—St. Louis, I. M. & S. Ry. Co. v. Evans (Ark.) 616.

\*Whether the employes in charge of a locomotive exercised proper care after having discovered the dangerous situation of a pedestrian in the act of crossing the track, *held* for the jury.—Griffie v. St. Louis, I. M. & S. Ry. Co. (Ark.) 750.

\*A pedestrian struck by an engine at a railroad crossing, *held* guilty of contributory negligence as a matter of law.—Griffie v. St. Louis, I. M. & S. Ry. Co. (Ark.) 750.

\*In an action against a railroad for the death of a pedestrian struck by a train, evidence *held* not to show a regularly used public crossing at the place of the injury.—Sites v. Knott (Mo. Sup.) 206.

\*A railroad company, *held* required to give a reasonable warning before pushing cars together, and closing up openings left for the purpose of enabling the public to pass between the cars at a crossing.—Sites v. Knott (Mo. Sup.) 206.

\*Where the place where a pedestrian was killed by being struck by a train was one where the public, for a considerable length of time, had been accustomed to cross the track, and the railroad had recognized the right so to do, the railroad *held* required to give warning of the approach of trains.—Sites v. Knott (Mo. Sup.) 206.

\*An engineer seeing a pedestrian approaching a recognized crossing, *held* entitled to assume that the pedestrian will stop before reaching a point of peril.—Sites v. Knott (Mo. Sup.) 206.

\*The negligence of a pedestrian injured by being struck by an engine, *held* not to preclude a recovery where the servants in charge of the engine could by the exercise of ordinary care have avoided the injury after discovering the peril.—Sites v. Knott (Mo. Sup.) 206.

\*In an action against a railroad for injuries to pedestrian struck by cars at a crossing, the evidence *held* not to warrant the submission to the jury of the issue of the negligence of the employes in charge of the train, in failing to stop in time to have avoided the injury after discovering the peril.—Sites v. Knott (Mo. Sup.) 206.

Where plaintiff was injured while attempting to cross defendant's track between two parts of a train at a crossing, evidence *held* to require

\*Point annotated. See syllabus.

submission of plaintiff's contributory negligence to the jury.—*Boyce v. Chicago & A. Ry. Co.* (Mo. App.) 670.

In an action for injuries to plaintiff, evidence *held* to sustain a finding that defendant's brakeman told plaintiff that she might pass between two cars.—*Boyce v. Chicago & A. Ry. Co.* (Mo. App.) 670.

\*Negligence of a railroad company in bringing two parts of a train together at a crossing while plaintiff was crossing, *held* the proximate cause of her injury.—*Boyce v. Chicago & A. Ry. Co.* (Mo. App.) 670.

\*Where a brakeman was stationed at a crossing where a freight train had been cut in two, it was his duty to exercise reasonable care to prevent injuring persons passing over the tracks.—*Boyce v. Chicago & A. Ry. Co.* (Mo. App.) 670.

In an action for injuries to plaintiff while crossing a track between two parts of a train, a request to charge that she could not recover, unless defendant's employes could have anticipated plaintiff's injury, *held* properly refused.—*Boyce v. Chicago & A. Ry. Co.* (Mo. App.) 670.

#### § 5. — Injuries to persons on or near tracks.

\*In an action for injuries to plaintiff while standing between two cars, that the foreman of the train crew saw plaintiff crossing the tracks and standing near the cars, was not sufficient to charge defendant with notice that plaintiff had gone into a place of danger.—*Hocker v. Louisville & N. R. Co.* (Ky.) 528.

\*A person driving on a public highway contiguous to a railway crossing has a right to rely on the statutory warnings in approaching the crossing.—*Louisville & A. R. Co. v. Davis* (Ky.) 533.

A person struck by a train while walking along a railroad track when he could with equal convenience and safety have walked at the side of it, *held* guilty of contributory negligence as a matter of law.—*International & G. N. R. Co. v. Ploeger* (Tex. Civ. App.) 56.

\*Where a person killed while walking on a railroad track was guilty of contributory negligence it was necessary in order to recover for the death to prove that after the operatives of the train discovered that deceased was in danger they failed to use all the means at hand to stop the train.—*International & G. N. R. Co. v. Ploeger* (Tex. Civ. App.) 56.

In an action against a railroad company for decedent's death by being struck by a train while lying on the track either asleep or drunk, evidence *held* to present the issue of discovered peril, and to sustain a verdict for plaintiff.—*Texas & P. Ry. Co. v. Brannon* (Tex. Civ. App.) 1065.

#### § 6. — Injuries to animals on or near tracks.

\*In an action against a railway company for killing an animal on its track, the question of negligence *held* for the jury.—*Kansas City Southern Ry. Co. v. Edwards* (Ark.) 1061.

In an action against a railroad for the killing of a horse on the track, the evidence *held* to warrant a finding that defendant was negligent.—*Kansas City Southern Ry. Co. v. Cash* (Ark.) 1062.

\*The killing of a horse *held* presumably due to the negligence of the railroad.—*Kansas City Southern Ry. Co. v. Cash* (Ark.) 1062.

\*Where plaintiff showed that his horse was killed by defendant railroad, the burden was on

it to show that it was not the result of its negligence.—*St. Louis Southwestern Ry. Co. v. Hutchison* (Ark.) 374.

\*In an action against a railroad for the killing of stock *held* a question for the jury whether the testimony of defendant's employes, in view of the physical facts, overcame the presumption of negligence arising by Ky. St. 1903, § 809, from the fact of the killing.—*Illinois Cent. R. Co. v. Stanley* (Ky.) 846.

In an action for the killing of horses on a railroad right of way, evidence *held* insufficient to show that the improper construction of the gate through which they entered was the proximate cause of the injury.—*Rowen v. Chicago Great Western Ry. Co.* (Mo. Sup.) 1009.

An instruction *held* erroneous because permitting the jury to determine the law as well as the fact involved in an issue.—*Clem v. Quincy, O. & K. C. R. Co.* (Mo. App.) 228.

A petition, in an action against a railroad for killing animals, *held* sufficient after verdict for it charges the company with a breach of the duty imposed on it by Rev. St. 1899, § 1105, to erect and maintain fences and cattle guards of the standard fixed by section 3294.—*Clem v. Quincy, O. & K. C. R. Co.* (Mo. App.) 228.

Proof that cattle killed on a right of way passed a point where there should have been a cattle guard *held* not a variance from a petition relying upon a failure to construct a fence as required by Rev. St. 1899, § 1105.—*Kirkpatrick v. Illinois Southern Ry. Co.* (Mo. App.) 1036.

\*A failure to construct a right of way fence, as required by Rev. St. 1899, § 1105, *held* the proximate cause of injury to animals killed on the right of way.—*Kirkpatrick v. Illinois Southern Ry. Co.* (Mo. App.) 1036.

#### § 7. — Fires.

\*In an action against a railroad for damages from a fire alleged to have been caused by a locomotive, *held* not essential to recovery that the evidence should exclude all possibility of another origin.—*Monte Ne Ry. Co. v. Phillips* (Ark.) 1060.

In an action against a railroad for damages from a fire alleged to have been caused by a locomotive, a requested instruction *held* properly refused.—*Monte Ne Ry. Co. v. Phillips* (Ark.) 1060.

### RAPE.

#### § 1. Prosecution and punishment.

\*Confinement in penitentiary for 99 years *held* not excessive punishment for rape on female 9 years old.—*Moore v. State* (Tex. Cr. App.) 327.

### RATIFICATION.

Of act of agent, see "Principal and Agent," § 3.

### REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

### REAL-ESTATE AGENTS.

See "Brokers."

### RECEIPTS.

Warehouse receipts, see "Warehousemen."

\*Point unnotated. See syllabus.



## RECEIVING STOLEN GOODS.

\*Under Kirby's Dig. §§ 1829, 1830, receiving a stolen hog held an offense.—*Thrash v. State* (Ark.) 360.

## RECORDS.

*Of judicial proceedings.*

Transcript on appeal or writ of error, see "Appeal and Error," § 6; "Criminal Law," § 23.

## REDEMPTION.

From mortgage, see "Mortgages," § 4.  
From tax sales, see "Taxation," § 5.

## REFERENCE.

See "Arbitration and Award."

### § 1. Report and findings.

\*Under Rev. St. 1895, arts. 1485 and 1493, a defeated party in proceedings to establish claims against an insolvent for whom a receiver has been appointed held not entitled to a jury trial.—*San Jacinto Oil Co. v. Culbertson* (Tex. Civ. App.) 110.

## REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

### § 1. Right of action and defenses.

\*A grantor held entitled to a reformation of deed.—*Stinson v. Ray* (Ark.) 141.

\*In an action against a co-surety for contribution, evidence held to show that there was no ground for a reformation of an instrument executed between the parties, so as to embrace a settlement of the note.—*Tillar v. Wilson* (Ark.) 381.

\*A grantor held entitled to the reformation of his deed so as to conform to the intention of the parties.—*Pickett v. Taylor* (Ky.) 1111.

### § 2. Proceedings and relief.

\*In a suit to reform an instrument, a mere preponderance of evidence that it did not show the agreement of the parties, is insufficient.—*Tillar v. Wilson* (Ark.) 381.

In an action to reform a contract giving plaintiff an easement, evidence held to show mistake of draftsman whereby contract failed to express mutual intent of parties.—*Thomas v. Robinson* (Ky.) 459.

Where plaintiff prayed reformation of a deed as preliminary to having the deed declared a mortgage and foreclosed, but it was not entitled to such principal relief, it could not obtain reformation.—*Goodbar & Co. v. Bloom* (Tex. Civ. App.) 657.

## REHEARING.

See "New Trial."

## REINCORPORATION.

See "Corporations," § 4.

## RELEASE.

See "Payment."

\*Point annotated. See syllabus.

"Criminal Law," § 6.

## REMAND.

Appealability of order remanding cause, see "Appeal and Error," § 1.  
Of cause on appeal or writ of error, see "Appeal and Error," § 22.

## REMEDY AT LAW.

Affecting right to mandamus, see "Mandamus," § 1.  
Effect on jurisdiction of equity, see "Equity," § 1.

## REMOVAL OF CAUSES.

### § 1. Citizenship or alienage of parties.

\*A petition for injuries to a railroad employé held to state a cause of action against both the railroad company and a citizen employé, so as to preclude the granting of a motion by the railroad company to transfer the cause to the federal courts in the first instance.—*Dudley v. Illinois Cent. R. Co.* (Ky.) 835.

\*Where a citizen defendant is joined with a noncitizen and, at the close of plaintiff's case, no cause of action is established against the citizen, it is proper for the court to entertain and grant a new motion by the noncitizen to remove the cause to the federal courts.—*Dudley v. Illinois Cent. R. Co.* (Ky.) 835.

\*In an action for death, a petition held to state a cause of action against the three defendants jointly, one of whom was a resident of the state, precluding a removal of the cause to the federal court.—*White's Adm'r v. Chicago, St. L. & N. O. R. Co.* (Ky.) 911.

\*Nonresident defendants, on proof at trial that a resident of the same state as plaintiff was fraudulently joined to prevent a removal of the cause to the federal court, held entitled to avail themselves of the misjoinder, and procure a removal.—*White's Adm'r v. Chicago, St. L. & N. O. R. Co.* (Ky.) 911.

## REMOVAL OF CLOUD.

See "Quieting Title."

## RENT.

See "Landlord and Tenant," § 3.

## REPEAL.

Of statute, see "Statutes," § 4.

## REPLEVIN.

### § 1. Right of action and defenses.

A plaintiff held not entitled to recover possession of property in an action of claim and delivery under Code Civ. Prac. § 180, merely because the seller was insolvent.—*Collins v. Beasley* (Ky.) 479.

### § 2. Pleading and evidence.

\*A purchaser of personal property held in replevin therefor to have the burden of proving that he was an innocent purchaser and that the one under whom he claimed had no knowledge of a certain infirmity in the title.—*Grooms v. Neff Harness Co.* (Ark.) 135.

certain person should determine the sufficiency of performance *held* valid, though an arbitrary expression of dissatisfaction could not prevent the seller from recovering.—Ark.-Mo. Zinc Co. v. Patterson (Ark.) 170.

\*A delivery of goods to a common carrier under a contract of sale *held* to absolve the vendor from liability for delay of the carrier in delivering the goods.—Templeton & Adams v. Equitable Mfg. Co. (Ark.) 188.

\*Where goods were ordered to be shipped to the buyer's railroad station, the seller performed his whole duty by so shipping the goods and notifying the buyer of their arrival, after which he was entitled to treat the goods as the property of the buyer and sue for the price.—Bevins v. J. A. Coates & Sons (Ky.) 585.

\*Where defendants actually received and appropriated merchandise shipped to them under a contract, they were liable for the reasonable market value thereof, irrespective of the invalidity of the contract or the fact that the goods were of an inferior grade.—Stewart v. Jacob Sachs & Co. (Tex. Civ. App.) 1091.

### § 5. Operation and effect.

\*A purchaser of personal property *held* under the facts in no position to claim that he was an innocent purchaser without notice that title was not in seller.—Grooms v. Neff Harness Co. (Ark.) 135.

\*A sale of cotton *held* not completed by delivery on a carrier's platform so as to deprive the seller of his right of action against the company for the destruction of the property.—Garner v. St. Louis, I. M. & S. Ry. Co. (Ark.) 187.

\*Failure of vendor of goods to send vendees bill of lading *held* not to prevent passing of title to property on delivery thereof to the carrier.—Templeton & Adams v. Equitable Mfg. Co. (Ark.) 188.

\*The effect of a delivery of personal property by the vendor to a common carrier designated by the vendee is to transfer the title and fix the time and place when it passes.—Templeton & Adams v. Equitable Mfg. Co. (Ark.) 188.

\*On a sale of personal property title *held* not to have passed to the purchaser until the doing of certain acts.—Collins v. Beckley (Ky.) 479.

### § 6. Warranties.

\*In sales of chattels, a warranty of titles and against incumbrances, is implied.—Mason v. Bohannon (Ark.) 181.

\*Where goods are sold by sample, the buyer is entitled to examine and reject them, if not according to sample, though the order provided for delivery f. o. b. at the seller's place of business.—Keeler v. Paulus Mfg. Co. (Tex. Civ. App.) 1097.

Where certain firing canes, bombs, and ammunition was purchased in a single order by sample, and the canes tendered were defective, the buyer was entitled to reject the entire consignment.—Keeler v. Paulus Mfg. Co. (Tex. Civ. App.) 1097.

### § 7. Remedies of seller.

\*The seller of corn *held* not required to give formal notice of intention to resell on its wrongful rejection by the buyer, where the resale is to such buyer.—Arkansas & Texas Grain Co. v. Young & Fresch Grain Co. (Ark.) 142.

\*Point annotated. See syllabus.

Co. v. Young & Fresch Grain Co. (Ark.) 142.

The seller of a car of corn *held* not to waive his right to damages for its wrongful rejection by the purchaser, by reselling it to such purchaser.—Arkansas & Texas Grain Co. v. Young & Fresch Grain Co. (Ark.) 142.

\*The circumstances under which a seller may effect a resale and recover the difference between the proceeds and agreed price, stated.—St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co. (Mo. App.) 1040.

\*The circumstances under which the seller may hold the property subject to the purchaser's order and recover the agreed price, stated.—St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co. (Mo. App.) 1040.

\*Circumstances under which a seller may treat the property as his on the refusal of the purchaser to accept and recover the loss sustained, stated.—St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co. (Mo. App.) 1040.

\*In an action by the seller for damages because of the buyer's refusal to accept, the measure of damages determined.—St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co. (Mo. App.) 1040.

\*In an action by the seller of stoves against the purchaser for damages arising from the latter's refusal to accept, the measure of damages determined.—St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co. (Mo. App.) 1040.

In an action by the seller of stoves against the purchaser, for damages because of his refusal to accept, an instruction on the measure of damages *held* not erroneous.—St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co. (Mo. App.) 1040.

In an action by the seller of stoves against the purchaser for damages arising from his refusal to accept, an instruction *held* erroneous, as misleading.—St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co. (Mo. App.) 1040.

### § 8. Remedies of buyer.

In view of pleadings in an action for breach of contract to sell and deliver cotton of a certain kind, *held* the evidence was sufficient to show the value of such cotton when the contract was breached.—Walnut Ridge Mercantile Co. v. Cohn (Ark.) 413.

\*Statement of measure of damages for breach of contract to sell and deliver cotton.—Walnut Ridge Mercantile Co. v. Cohn (Ark.) 413.

## SATISFACTION.

See "Payment."

Of judgment, see "Judgment," § 10.

## SCHOOLS AND SCHOOL DISTRICTS.

### § 1. Public schools.

\*In the matter of establishing a new school district, the duties of the county superintendent of schools are statutory, and he cannot be made to observe the interests of any individual.—Mouser v. Spaulding (Ky.) 882.

A decree in mandamus to compel defendants to proceed with their duties as trustees of an alleged school district, which had never been validly established, *held* not to effect the es-

**See "Intoxicating Liquors."**

## STALE DEMAND.

**See “Equity,” § 2.**

**STATEMENT.**

**By witness inconsistent with testimony, see  
"Witnesses," § 3.**

Of case or facts for purpose of review, see "Appeal and Error," § 6; "Criminal Law," § 23.  
Of plaintiff's claim, see "Pleading," § 2.

**STATES.**

**Courts, see "Courts."**

**Donation deed from state as color of title to sustain adverse possession, see "Adverse Possession," § 1.**

**Interstate extradition, see "Extradition," § 1.**

**Public lands, see "Public Lands," § 2.**

## STATUTES

**Validity of retrospective or ex post facto laws,**  
see "Constitutional Law," § 3.

Violation by master of duties required by statute, see "Master and Servant," § 3.

**Provisions relating to particular subjects.**

See "Descent and Distribution"; "Game"; "Intoxicating Liquors," §§ 3, 4; "Levees"; "Lis Pendens"; "Mechanics' Liens"; "Monopolies," § 1.

Inheritance by or through bastards, see "Bastards," § 1.

Statute of frauds, see "Frauds, Statute of."

Terms of courts, see "Courts," § 1.

**§ 1. Enactment, requisites, and validity in general.**

\*Certain provisions of section 4 of Acts 1905, p. 596, dividing Union County into two judicial

ing Union County into two judicial districts held not to render the statute unconstitutional in as much as the proviso may be stricken without impairing the validity of the act.—*Pryor v. Murphy* (Ark.) 445.

## § 2. Subjects and titles of acts.

\*Acts 1904, p. 148, c. 67, relating to conveyances and purporting to amend St. 1903, § 495 held not unconstitutional on the ground that the subject is not embraced in the title.—*McPherson v. Gordon* (Ky.) 791.

\*Act March 15, 1906, entitled "An Act relating to revenue and taxation," held not violative of Const. § 51, by reason of provisions in article 2, § 10, relating to record of instruments evidencing indebtedness.—Shrader v. Semonin (Ky.) 904; Kentucky Title Co. v. Same. Id.

**§ 3. Amendment, revision, and codification.**

Acts 1904, p. 148, c. 67, in relation to the recording of conveyances and reciting that it is amendatory of section 495 held not violative of the constitutional provision that no law shall be amended unless re-enacted and published at length on the theory that such act amends Ky. St. 1903, §§ 501, 502, 503, 507, 511, 522.—*McPherson v. Gordon* (Ky.) 791.

**§ 4. Repeal, suspension, expiration, and revival.**

\*Act March 13, 1885, Acts 1885, p. 68, Kirby's Dig. § 6876, imposing a state tax on peddlers *held* not repealed by Act April 29, 1901, Acts 1901, p. 241, Kirby's Dig. § 6886; Kirby's Dig. § 6881.—Ex parte Merritt (Ark.) 983.

**§ 5. Construction and operation.**

\*Pen. Code, 1895, art. 794, making it an offense to pull down the fence of another, *held* applicable to all fences.—*McNeely v. State* (Tex. Cr. App.) 1083.

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## STAY.

Pending appeal or writ of error, see "Appeal and Error," § 5.

## STIPULATIONS.

\*A stipulation in an adverse suit under Rev. St. U. S. §§ 2325, 2326 [U. S. Comp. St. 1901, pp. 1429, 1430] to settle conflicting rights in a mining claim, waiving all but one issue, *held* valid, and to require proof of nothing else.—*Gibberson v. Wilson* (Ark.) 137.

## STOCK.

Corporate stock, see "Corporations," § 1.

## STOCKHOLDERS.

Of banks, see "Banks and Banking," § 1.

## STOLEN GOODS.

See "Receiving Stolen Goods."

## STORAGE.

See "Warehousemen."

## STREET RAILROADS.

See "Railroads."

Carriage of passengers, see "Carriers."

Use of city streets, see "Municipal Corporations," § 12.

### § 1. Establishment, construction, and maintenance.

Under a municipal ordinance a purchaser of the rights, property, and franchises of enumerated street railroads *held* authorized to lease the same to a designated street railway company, notwithstanding Const. art. 12, § 20.—*Moorshead v. United Rys. Co.* (Mo. App.) 261.

A contract between two street railway companies *held* not to establish the relation of principal and agent.—*Moorshead v. United Rys. Co.* (Mo. App.) 261.

A contract between two street railway companies *held* not to create a partnership relation between them.—*Moorshead v. United Rys. Co.* (Mo. App.) 261.

A contract between two companies *held* to constitute a lease.—*Moorshead v. United Rys. Co.* (Mo. App.) 261.

A contract between two street railroad companies creating the relation of landlord and tenant *held* not to require the landlord to turn over to the tenant any money received from any source, and to repay whatever rent was received.—*Moorshead v. United Rys. Co.* (Mo. App.) 261.

### § 2. Regulation and operation.

Permitting a cow to run at large outside the "stock limit" *held* not contributory negligence.—*Little Rock Traction & Electric Co. v. Ilicks* (Ark.) 385.

\*In an action for injuries to a pedestrian by being struck by a street car, plaintiff *held* guilty of contributory negligence.—*Ft. Smith Light & Traction Co. v. Barnes* (Ark.) 976.

In an action for injuries to plaintiff by being struck by a street car, evidence *held* to warrant a finding that defendant's motorman saw plaintiff in time to have prevented the collision by the exercise of ordinary care warranting a recovery notwithstanding plaintiff's contributory negligence.—*Ft. Smith Light & Traction Co. v. Barnes* (Ark.) 976.

\*A street railway company was not liable for the negligent death of a boy, where he was standing about eight feet from the track and suddenly ran across it immediately in front of the car.—*Louisville Ry. Co. v. Edelen's Adm'r* (Ky.) 901.

\*Plaintiff *held* entitled to recover if the motorman could have seen a boy in time either to stop the car or signal its approach and avoid the injury to him and failed to do so, though the boy was negligent.—*Louisville Ry. Co. v. Edelen's Adm'r* (Ky.) 901.

\*The duty of a motorman with respect to controlling his car to prevent a collision with a vehicle crossing the track stated.—*Barrie v. St. Louis Transit Co.* (Mo. App.) 233.

\*In an action against a street railroad company for injuries caused by a collision, evidence *held* sufficient to require submission to the jury of the question whether the motorman had an opportunity to prevent the accident after discovering plaintiff's danger.—*Barrie v. St. Louis Transit Co.* (Mo. App.) 233.

\*Under Rev. St. 1899, §§ 1187 and 4160 a street railway company leasing its property to another street railway company *held* not liable for an injury to a passenger resulting from the negligence of the employees of the latter company.—*Moorshead v. United Rys. Co.* (Mo. App.) 261.

Plaintiff, in an action for injuries in a collision between a street car and a buggy in which plaintiff was riding as a passenger, *held* guilty of contributory negligence in doing nothing to insure his safety after he knew that the driver was guilty of gross negligence in failing to look out for an approaching car.—*Fechley v. Springfield Traction Co.* (Mo. App.) 421.

\*In an action for injuries to a vehicle passenger in a collision with a street car, the driver of the vehicle *held* guilty of negligence in failing to look and listen for cars before attempting to cross the track.—*Fechley v. Springfield Traction Co.* (Mo. App.) 421.

An interurban electric railway company incorporated under Rev. St. 1899, c. 12, art. 3,

\*Point annotated. See syllabus.

§ 1187, is a railroad corporation within article 2, § 1105, requiring such corporations to fence their roads.—*Riggs v. St. Francois County Ry. Co.* (Mo. App.) 707.

An interurban electric railroad company incorporated under Rev. St. 1899, c. 12, art. 3, § 1187, is not relieved of its duty to fence its road as required by article 2, § 1105, because it was constructed on the right of way of a public road by permission of the county court.—*Riggs v. St. Francois County Ry. Co.* (Mo. App.) 707.

A city ordinance regulating the operation of street cars *held* not to prohibit the turning of a car on which plaintiff was a passenger from its regular route to make up time unavoidably lost, and to restore it to schedule.—*Dryden v. St. Louis Transit Co.* (Mo. App.) 1044.

## STREETS.

See "Highways"; "Municipal Corporations," §§ 5-10, 12, 13.

## SUBMISSION.

To arbitration, see "Arbitration and Award," § 1.

## SUBROGATION.

\*One advancing money to manufacturing concern which is used in the payment of laborers' liens *held* not entitled to a preference by being subrogated to the rights of the laborers.—*Bank of Commerce v. Lawrence County Bank* (Ark.) 749.

## SUIT.

See "Action."

## SUMMARY PROCEEDINGS.

(Collection of taxes, see "Taxation," § 3.

## SUNDAY.

\*Sender of telegram *held* entitled to recover for negligence, under Kirby's Dig. § 7947, though the message was sent on Sunday.—*Arkansas & L. Ry. Co. v. Lee* (Ark.) 148.

\*A verdict may be received and entered on the minutes on Sunday.—*Moore v. State* (Tex. Cr. App.) 321.

## SUPREME COURTS.

See "Courts," § 4.

## SURETYSHIP.

See "Principal and Surety."

## SURPRISE.

Ground for new trial, see "New Trial," § 2.

## SURRENDER.

Of written instrument for cancellation, see "Cancellation of Instruments."

## SURVEYS.

See "Boundaries," § 1.

## SUSPENSION.

Of benefit insurance, see "Insurance," § 14.

## TALESMEN.

See "Jury," § 3.

## TAXATION.

Payment of taxes to sustain adverse possession, see "Adverse Possession," § 1.

Tax deed as color of title to sustain adverse possession, see "Adverse Possession," §§ 1, 2.

### Local or special taxes.

See "Municipal Corporations," § 14.

Assessments for municipal improvements, see "Municipal Corporations," §§ 9, 10.

Levee taxes, see "Levees."

### Occupation or privilege taxes.

See "Licenses," § 1.

### § 1. Liability of persons and property.

\*Personal property of nonresidents brought within the county for use in the construction of a railroad roadbed *held* not in transit, but subject to taxation there under Kirby's Dig. §§ 6873, 6913, 6966, 6968.—*Eoff v. Kennefick-Hammond Co.* (Ark.) 986.

### § 2. Levy and assessment.

\*In taxation proceedings the description of the land must be such as fully apprise the owner without recourse to the superior knowledge peculiar to him as owner, that a particular tract of his land is sought to be charged with a tax lien.—*Buckner v. Sugg* (Ark.) 184.

In determining the sufficiency of the description of land in tax proceedings extrinsic evidence is admissible to connect the land with the description used in the assessment list and other tax proceedings.—*Buckner v. Sugg* (Ark.) 184.

Description of certain land in tax proceeding *held* sufficient.—*Buckner v. Sugg* (Ark.) 184.

\*That property is assessed too low *held* no ground for relief in courts, their jurisdiction being limited to omission to list at all.—*Commonwealth v. American Tobacco Co.* (Ky.) 460.

\*A county assessor *held* not liable on his official bond for erroneous assessment, in the absence of any malice or corruption. Ky. St. 1903, §§ 4053, 4056, 4064.—*Daugherty v. Bazell* (Ky.) 576.

\*Under Gen. St. c. 92, art. 16, § 2, and Act May 6, 1880 (1 Pub. Acts 1879-80, p. 206, c. 1563) *held* that the fact that certain land was assessed in the name of a decedent did not render the assessment invalid.—*Husbands v. Polivick* (Ky.) 825.

\*A description of land in the assessor's books as prescribed by Gen. St. c. 92, art. 4, § 1, *held* sufficient.—*Husbands v. Polivick* (Ky.) 825.

\*Under Sayles' Ann. Civ. St. 1897, art. 5082, a railroad *held* to be properly assessed as an entirety.—*State v. St. Louis, Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 69.

\*As assessment under Sayles' Ann. Civ. St. 1897, arts. 5120a, of an unrendered portion of a railroad roadbed *held* sufficient in view of articles 5073, 5082, 5118, 5119.—*State v. St. Louis, Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 69.

### § 3. Collection and enforcement against persons or personal property.

Under Const. art. 7, § 46; Act March 13, 1905 (Acts 1905, p. 207) creating the office of

\*Point annotated. See syllabus.

Collection in one action of all the taxes against property *held* proper in the absence of statutory prohibition.—*Parrman v. District of Clifton Ky.* 810.

Under *Sayles' Rev. Civ. St. art. 5232o*, a citation by publication in a suit to foreclose delinquent taxes *held* unauthorized except on the filing of a proper affidavit.—*Stoneman v. Bilby (Tex. Civ. App.)* 50.

Under article 5082, *Sayles' Ann. Civ. St. 1897*, the state *held* entitled in an action for the recovery of taxes on an unrendered portion of a railroad's roadbed to a decree for the foreclosure of a lien on an undivided interest in the whole roadbed.—*State v. St. Louis, Southwestern Ry. Co. of Texas (Tex. Civ. App.)* 69.

#### § 4. Sale of land for nonpayment of tax.

\*Under Kirby's Dig. § 7086, requiring the clerk to certify the published list of lands to be sold for taxes, the certificate must be made before the day of sale.—*Birch v. Walworth (Ark.)* 140.

\*The county clerk's certificate of publication of delinquent tax list, required by Kirby's Dig. § 7086, though not dated, *held* presumed to have been entered of record before the date of sale.—*Cook v. Ziff Colored Masonic Lodge, No. 119 (Ark.)* 618; *Same v. Slay (Ark.)* 620; *Same v. Hunter, Id.; Same v. Williams (Ark.)* 622.

\*A statement *held* a sufficient certificate by the county clerk, under Kirby's Dig. §§ 7085, 7086, of publication of delinquent tax list.—*Cook v. Ziff Colored Masonic Lodge, No. 119 (Ark.)* 618; *Same v. Slay (Ark.)* 620; *Same v. Hunter, Id.; Same v. Williams (Ark.)* 622.

\*Where an auditor's agent sells more land than is necessary to repay to the state the delinquent tax his act is void.—*Husbands v. Polivick (Ky.)* 825.

\*Under Gen. St. c. 92, art. 8, § 17, and article 4, *held* that a sheriff's report describing land sold for taxes contained a sufficient description.—*Husbands v. Polivick (Ky.)* 825.

#### § 5. Redemption from tax sale.

Where the treasurer's receipt was not filed with the county clerk, as required by Kirby's Dig. § 7099, so that the clerk could not comply with sections 7100, 7102, *held* there was no valid redemption from a tax sale.—*Cook v. Jones (Ark.)* 620.

#### § 6. Tax titles.

Kirby's Dig., § 5061, requiring seisin within two years by one bringing actions for the recovery of land sold for "nonpayment of taxes," protects the purchaser though the taxes were paid before sale.—*Dickinson v. Hardie (Ark.)* 355.

Two years statute of limitations under tax deeds or donation deeds from state *held* constitutional.—*Kelley v. McDuffy (Ark.)* 358.

A sale by the sheriff to the state for nonpayment of taxes *held* not to divest the legal title (Auditors Agent Act, § 4, Act May 6, 1880, 1 Pub. Acts 1879-80, p. 206, c. 1565).—*Husbands v. Polivick (Ky.)* 825.

In ejectment by the heirs of a decedent against one claiming under an auditor's deed conveying the decedent's land, *held* not necessary for plaintiff to show title further than decedent (Act April 22, 1882, 1 Pub. Acts 1881-82, p. 108, c. 1304, § 8).—*Husbands v. Polivick (Ky.)* 825.

\*Point annotated. See syllabus.

## TAX BILLS.

See "Municipal Corporations," § 9.

## TELEGRAPHS AND TELEPHONES.

Use of city streets, see "Municipal Corporations," § 12.

### § 1. Establishment, construction, and maintenance.

\*The use of the streets and alleys of a city to carry the poles, lines, and wires necessary to the operation of a telephone exchange is a legal use.—*City of Lancaster v. Briggs (Mo. App.)* 314.

### § 2. Regulation and operation.

Kirby's Dig. § 7947, making telegraph companies in the state liable for mental anguish for negligence, was applicable to a case where the message was received in Arkansas, addressed to a point in Louisiana, and the delay complained of was owing to transmission in Arkansas.—*Arkansas & L. Ry. Co. v. Lee (Ark.)* 148.

\*In an action against a telegraph company for negligent delay in the transmission of a message, *held* no defense that the message was delivered to the station clerk, an assistant to operator.—*Arkansas & L. Ry. Co. v. Lee (Ark.)* 148.

\*Delay in the transmission of a death message *held* to have shown negligence.—*Arkansas & L. Ry. Co. v. Lee (Ark.)* 148.

\*A telegraph company *held* not liable for the delay in the delivery of the message announcing the death of the father of the sendee.—*Western Union Telegraph Co. v. Cox (Ky.)* 594.

## TENANCY IN COMMON.

### § 1. Mutual rights, duties, and liabilities of co-tenants.

\*Where a tenant in common sold property owned by himself and his co-tenant, and received the proceeds thereof, the co-tenant could ratify the sale, and recover his share of the proceeds.—*Harris v. Umsted (Ark.)* 146.

## TENDER.

A certified check is not ordinarily the equivalent of money for the purposes of a tender.—*Hobbs v. Ray (Ky.)* 589.

## TERMS.

Of courts, see "Courts," § 1.  
Of office, see "Officers," § 1.

## TESTAMENT.

See "Wills."

## THEFT.

See "Larceny."

## TIME.

For particular acts in or incidental to judicial proceedings.

Application to set aside default judgment, see "Judgment," § 2.  
Holding court, see "Courts," § 1.



*For particular acts not judicial.*

Payment of interest, see "Interest," § 2.

\*Solar time *held* to be properly used in determining the expiration of a term of court as fixed by statute.—Texas Tram & Lumber Co. v. Hightower (Tex. Sup.) 1071.

## TITLE.

Acquired at sales, see "Sales," § 5.

Color of title, see "Adverse Possession."

Covenants of title, see "Covenants."

Of statutes, see "Statutes," § 2.

Removal of cloud, see "Quieting Title."

Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 3.

Tax titles, see "Taxation," § 6.

Title insurance, see "Insurance."

To sustain action for trespass, see "Trespass," § 1.

## TOOLS.

Liability of employer for defects, see "Master and Servant," § 4.

## TORTS.

Causing death, see "Death," § 1.

Measure of damages, see "Damages," § 3.

*Liabilities of particular classes of persons.*

See "Municipal Corporations," § 13.

Agents, see "Principal and Agent," § 3.

Employees, see "Master and Servant," § 14.

*Particular torts.*

See "Assault and Battery," § 1; "False Imprisonment," § 1; "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion."

## TOTAL LOSS.

See "Insurance."

## TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

## TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 23.

## TRESPASS.

Ejection of trespasser, see "Carriers," § 9.

To the person, see "Assault and Battery," § 1; "False Imprisonment."

### § 1. Actions.

\*In a suit for damages and to restrain defendant from further removing timber from lands alleged to belong to plaintiff, he must recover on the strength of his own title.—Le Moyne v. Anderson (Ky.) 843.

In an action to restrain the removal of timber from land, *held* proper to permit intervenors to file an answer and cross-petition alleging title in themselves, and removal of the timber by defendant under their license.—Le Moyne v. Anderson (Ky.) 843.

\*In a suit for damages and to enjoin defendant from further removing timber from lands

\*Point annotated. See syllabus.

alleged to belong to plaintiff, the burden was on him to show title.—Le Moyne v. Anderson (Ky.) 843.

In a suit to restrain the removal of timber from lands alleged to belong to plaintiff, *held*, that he had failed to show title.—Le Moyne v. Anderson (Ky.) 843.

## TRESPASS TO TRY TITLE.

See "Ejectment."

Evidence of adverse possession, see "Adverse Possession," § 3.

Harmless error in exclusion of evidence in action of, see "Appeal and Error," § 18.

Harmless error in instructions, see "Appeal and Error," § 15.

Limitation of action, see "Limitation of Actions," § 1.

Title by adverse possession, see "Adverse Possession," §§ 1, 2.

### § 1. Right of action and defenses.

\*Where plaintiff and defendant each claimed title to land by limitations, and each was in actual possession of a part only, claiming title as against the other to the whole by constructive possession, neither acquired title as against the other to any of the land which was not in his actual possession.—Morris v. Jacks (Tex. Civ. App.) 637.

Where in an action to recover realty, based on a written lease to a bank, the owner of the premises being a party prays for possession for the use of the bank, he is entitled to recover, though the lease to the bank was void.—Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.) 638.

\*Plaintiff, in trespass to try title, must recover on the strength of his own title and proof of a superior outstanding title in a third person is a good defense, though the defendant may not claim under such title.—Mann v. Hossack (Tex. Civ. App.) 767.

### § 2. Proceedings.

In trespass to try title the prima facie inference that a prior possessor is the owner is rebutted by proof of a superior outstanding title in another.—Mann v. Hossack (Tex. Civ. App.) 767.

## TRIAL.

See "New Trial"; "Reference"; "Witnesses."

Harmless error in arguments of counsel, see "Appeal and Error," § 15.

Harmless error in instructions, see "Appeal and Error," § 19.

Instructions as to limitations, see "Limitation of Actions," § 3.

Issue of existence of stated account as question for jury, see "Account Stated."

Objections to rulings at trial for purpose of review, see "Appeal and Error," § 2.

Trial de novo on appeal, see "Appeal and Error," § 11.

*Proceedings incident to trials.*

See "Continuance."

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 3.

*Trial of actions by or against particular classes of persons.*

See "Carriers," §§ 2, 3, 7, 9; "Landlord and Tenant," § 5; "Master and Servant," § 13; "Municipal Corporations," § 13; "Partnership," § 3; "Railroads," §§ 4, 6, 7; "Replevin," § 3; "Street Railroads," § 2.

*Trial of particular civil actions or proceedings.*  
 See "Account, Action on"; "Negligence," § 4.  
 Condemnation proceedings, see "Eminent Domain," § 3.  
 For breach of contract, see "Contracts," § 5.  
 For breach of contract of sale, see "Sales," § 7.  
 For broker's compensation, see "Brokers," § 3.  
 For compensation of agent, see "Principal and Agent," § 2.  
 For ejection of passenger, see "Carriers," § 9.  
 For fires caused by operation of railroads, see "Railroads," § 7.  
 For injuries to animals on or near railroad tracks, see "Railroads," § 6.  
 For loss of or injury to goods, see "Carriers," § 2.  
 For loss of or injury to live stock, see "Carriers," § 3.  
 For personal injuries, see "Carriers," § 7; "Master and Servant," § 13; "Municipal Corporations," § 13; "Railroads," § 4; "Street Railroads," § 2.  
 For services, see "Master and Servant," § 2.  
 On insurance policy, see "Insurance," §§ 13, 14.  
 Probate proceedings, see "Wills," § 2.  
 To determine rights to mortgaged chattels, see "Chattel Mortgages," § 2.  
 To enforce special assessments for public improvements, see "Municipal Corporations," § 10.  
 To establish claims against estate of decedent, see "Executors and Administrators," § 5.  
 Trespass to try title to real property, see "Trespass to Try Title."  
 Trial of right to property levied on, see "Execution," § 2.

*Trial of criminal prosecutions.*

See "Burglary," § 2; "Criminal Law," §§ 8-18; "Disorderly Conduct"; "Forgery"; "Homicide," § 4; "Larceny," § 2; "Nuisance," § 1; "Seduction," § 1.

Carrying concealed weapons, see "Weapons."  
 Violations of liquor laws, see "Intoxicating Liquors," § 5.

**§ 1. Course and conduct of trial in general.**

\*Whether a jury, in an action for injuries to a servant while operating a machine should be permitted to view the machine, as authorized by Civ. Code Prac. § 318, *held* within the discretion of the trial judge.—*Cohankus Mfg. Co. v. Rogers' Guardian* (Ky.) 437.

In an action for damages certain statements of the court made in reference to an affidavit for continuance *held* harmless.—*Louisville & E. R. Co. v. Vincent* (Ky.) 898.

**§ 2. Reception of evidences.**

\*A party cannot complain of the sustaining of an objection to a question on cross-examination where he made no avowal as to what the answer would be.—*Louisville & N. R. Co. v. Williamson* (Ky.) 1130.

A party objecting to a question asked a witness and excepting to the court overruling it need not, to save his exceptions, renew the objection when the question is renewed.—*Louisville & N. R. Co. v. Williamson* (Ky.) 1130.

\*In an action of conversion by an administrator, petition *held* to sufficiently allege that the goods were owned by decedent.—*Grant v. Hathaway* (Mo. App.) 417.

Where the evidence of a witness at a former trial was substantially the same as that at a subsequent trial, it was not error to refuse to permit the introduction of his former testimony.—*Missouri, K. & T. Ry. Co. v. Garrett* (Tex. Civ. App.) 53.

\*Objections to testimony must be taken when it is offered, and if not made then are considered

waived, *see* trial.—*In* (Tex. Civ. App.)  
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struction on that point.—Louisville & E. R. Co. v. Vincent (Ky.) 808.

\*A party desiring an extension of an instruction, must request it.—Williams v. St. Louis, M. & S. E. R. Co. (Mo. App.) 307.

\*One desiring a more specific definition of ordinary care than contained in the charge held required to request it.—Rattan v. Central Electric Ry. Co. (Mo. App.) 735.

\*Where the court charged that the burden was on plaintiff to prove every allegation essential to his recovery, the refusal of an instruction that the burden was on plaintiff to establish his case by a preponderance of the evidence, held not error.—Houston Ice & Brewing Co. v. Nicollin (Tex. Civ. App.) 84.

\*Where an instruction in an action for breach of contract was good as far as it went, and the defect was one of omission only, a party desiring an instruction to supply the omission must request it.—International Harvester Co. v. Campbell (Tex. Civ. App.) 93.

Refusal of a requested charge held not error where the issue was fully covered by instructions given.—St. Louis Southwestern Ry. Co. of Texas v. Wester (Tex. Civ. App.) 769.

\*Where a matter has been submitted in the general charge, if the party desires a fuller instruction, he must request it.—Missouri, K. & T. Ry. Co. of Texas v. Parrott (Tex. Civ. App.) 950.

\*Where the court's charge fairly presented the issue of discovered peril, it was not error to refuse requests presented by defendant on such issue.—Texas & P. Ry. Co. v. Brannon (Tex. Civ. App.) 1095.

#### § 10. — Objections and exceptions.

\*An exception in gross to several instructions held not available where any of them is good.—Walnut Ridge Mercantile Co. v. Cohn (Ark.) 413.

#### § 11. — Construction and operation.

Instructions when read together held not misleading.—Beekman Lumber Co. v. Kittrell (Ark.) 988.

A reference to certain rules of defendant railroad company in a memorandum underneath an instruction which constituted no part thereof held not to render the instruction erroneous as accentuating such rules.—De Witt's Adm'r v. Louisville & N. R. Co. (Ky.) 1122.

An erroneous instruction held not cured by another instruction.—McKinnon v. Western Coal & Mining Co. (Mo. App.) 485.

#### § 12. Custody, conduct, and deliberations of jury.

\*A motion to discharge the jury on the ground of the misconduct of jurors held properly denied.—Louisville Ry. Co. v. Masterson (Ky.) 534.

#### § 13. Verdict.

In an action to recover advancements under a contract, refusal of the court to submit special interrogatories to the jury held not error.—Holcomb-Lobb Co. v. Kaufman (Ky.) 813.

#### § 14. Waiver and correction of irregularities and errors.

An erroneous instruction held not cured by the submission of an interrogatory to the jury.—Choctaw, O. & G. R. Co. v. Stroble (Ark.) 116.

\*Where, after denial of a peremptory instruction, at the close of plaintiff's evidence, defendant introduces evidence sufficient to sustain a verdict against himself, he waives any error in refusing the peremptory instruction.—Grooms v. Neff Harness Co. (Ark.) 185.

\*Where and the evidence not competent ground to objection.—ern Ry. App.) 653.

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**§ 3. Execution of trust by trustee or by court.**

The trustee in a deed conveying land to secure bonds executed by the grantor and delivered to the trustee for sale *held* required to account to the grantor for the amount realized from the sale of the bonds.—Garth v. State Street Baptist Church (Ky.) 1124.

**§ 4. Accounting and compensation of trustee.**

\*Trustee of a large estate *held* entitled to a commission of 5 per cent. on income collected and disbursed by her, for her services.—Wilder v. Hast (Ky.) 1108.

**ULTRA VIRES.**

Acts of banks, see "Banks and Banking," § 8.

**UNDUE INFLUENCE.**

Procuring making of will, see "Wills," § 1.

**UNITED STATES.**

Courts, see "Removal of Causes."

Public lands, see "Public Lands," § 1.

**UNLAWFUL DETAINER.**

See "Forcible Entry and Detainer."

**USAGES.**

See "Customs and Usages."

**USE AND OCCUPATION.**

\*Plaintiff *held* liable on an implied contract for use and occupation of a portion of defendants' building after notice to remove his material stored therein.—Head v. Pryor & But-ton (Ky.) 465.

**USURY.**

In contract with building and loan association, see "Building and Loan Associations."

**VACANCY.**

In office, see "Officers," § 1.

In office of judge, see "Judges," § 1.

**VACATION.**

Of judgment, see "Judgment," § 2.

**VALUE.**

Evidence of value, see "Evidence," § 3.

Limits of jurisdiction, see "Courts," § 2.

**VARIANCE.**

Between pleading and proof in civil action, see "Pleading," § 10.

Between pleading and proof in criminal prosecutions, see "Indictment and Information," § 4.

See "Exchange of Property"; "Sales." Bar of action to cancel vendor's lien by prior judgment, see "Judgment," § 7. Harmless error in admission of evidence in action for purchase price, see "Appeal and Error," § 17. Pendency of other action as bar to action for rescission of sale of land, see "Abatement and Revival," § 1. Pleading adverse possession in action to recover land, see "Adverse Possession," § 3. Purchasers of property fraudulently conveyed, see "Fraudulent Conveyances," § 2. Requirements of statute of frauds, see "Frauds. Statute of," § 1. Specific performance of contract, see "Specific Performance."

**§ 1. Construction and operation of contract.**

A bond for title to land *held* to include all the land owned by defendant on the waters and beneath the watershed of a certain stream lying back of and beyond the lines of complainant's land on the same stream.—Cox v. Burgess (Ky.) 577.

\*An unconditional contract of sale of land *held* to vest in the vendee an equitable interest in the land.—Majors v. Maxwell (Mo. App.) 731.

An agreement by a grantee to reconvey *held* enforceable notwithstanding the expression of a valuable consideration in the deed to him.—McAllen v. Raphael (Tex. Civ. App.) 760.

**§ 2. Modification or rescission of contract.**

\*That a purchaser of land knew at the time of his purchase that certain heirs were in possession did not, as a matter of law, deprive him of the right to rely on his vendor's representation of title, nor estop him to rescind for the falsity of such representation.—Olschew-ske v. King (Tex. Civ. App.) 665.

**§ 3. Performance of contract.**

A vendee *held* not justified in refusing to perform on the ground that the deed to the vendor did not comply with Acts 1904, p. 148, c. 67, making it unlawful to record a conveyance not referring to the immediate source of the grantor's title.—McPherson v. Gordon (Ky.) 791.

Under Acts 1904, p. 148, c. 67, making it unlawful to record a deed not referring to the grantor's immediate source of title, a deed tendered by the vendor in a contract for the sale of land *held* sufficient.—McPherson v. Gordon (Ky.) 791.

\*Where a contract was merely for the sale of land at a specified price "to be paid when a deed is made," it would be presumed that the deed was to be one of general warranty.—Whitworth v. Pool (Ky.) 890.

\*Under contract for sale of land, vendor's title by limitation *held* required to be such as can be proved good as a matter of law.—Greer v. International Stock Yards Co. (Tex. Civ. App.) 79.

\*Where vendors agree to furnish title to be approved by attorneys and they disapprove because the title shown was only by limitation, purchasers *held* not bound.—Greer v. International Stock Yards Co. (Tex. Civ. App.) 79.

**§ 4. Rights and liabilities of parties.**

\*Where the owner of land at the time of his purchase has actual notice of a prior occupancy thereof by another, failure of such other to record the instrument under which he holds, is immaterial.—Denton v. Cumberland Telephone & Telegraph Co. (Ky.) 1112.

\*Point annotated. See syllabus.

\*A deed *held* more than a quitclaim deed and to convey the premises to the grantee entitling him to the protection of a bona fide purchaser.—Allen v. Anderson & Anderson (Tex. Civ. App.) 54.

\*A notice to a purchaser of a defect in the title *held* not notice to him of another defect.—Allen v. Anderson & Anderson (Tex. Civ. App.) 54.

\*A purchaser from a bona fide purchaser for value holding under a warranty deed is entitled to claim the same protection the bona fide purchaser would have been entitled to if he had not sold.—Allen v. Anderson & Anderson (Tex. Civ. App.) 54.

### § 5. Remedies of vendor.

\*In an action to foreclose vendor's lien notes, a purchaser from the vendee *held* to have the burden of showing that he was an innocent purchaser.—Bates v. Bigelow (Ark.) 125.

In an action to foreclose vendor's lien notes wherein defendant set up failure of title, plaintiff *held* entitled to show title by adverse possession though he had not pleaded it.—Bradbury v. Dumond (Ark.) 390.

Conveyances *held* not to destroy the right of a beneficiary in a note executed by a purchaser.—Malone's Committee v. Lebus (Ky.) 519.

One acquiring title to land, *held* to acquire it subject to the lien retained to secure the payment of the interest of a purchase-money note to a beneficiary.—Malone's Committee v. Lebus (Ky.) 519.

Premises *held* subject to a lien retained by a vendor as security for the payment of the interest on a note given by the purchaser for the premises.—Malone's Committee v. Lebus (Ky.) 519.

\*The assignee of a check for the purchase money of land *held* to obtain a vendor's lien not destroyed by his taking the vendee's note for the check.—Majors v. Maxwell (Mo. App.) 731.

### § 6. Remedies of purchaser.

\*The measure of damages for failure to convey land as agreed, *held* the difference between the contract price and market value.—Whitworth v. Pool (Ky.) 890.

## VENUE.

Of criminal prosecutions, see "Criminal Law," § 2.

### § 1. Domicile or residence of parties.

\*Acts 1905, p. 597, § 4, dividing Union County into two judicial districts examined and *held* that it should be construed in connection with section 6 (page 596) and that it has reference to actions wherein all the defendants are residents of the same district.—Pryor v. Murphy (Ark.) 445.

## VERDICT.

Directing verdict in civil actions, see "Trial," § 4.

In civil actions, see "Trial," § 13.

In criminal prosecutions, see "Criminal Law," § 17.

Operation and effect as curing defects in pleadings, see "Pleading," § 11.

\*Point annotated. See syllabus.

## VERIFICATION.

Of pleading, see "Pleading," § 7.

## VICE PRINCIPALS.

See "Master and Servant," § 7.

## VIEW.

By jury, see "Trial," § 1.

## VILLAGES.

See "Municipal Corporations."

## VINDICTIVE DAMAGES.

See "Damages," § 2.

## VOTERS.

See "Elections."

## WAGERS.

See "Gaming," § 1.

## WAGES.

See "Master and Servant," § 2.

## WAIVER.

See "Estoppel."

*Of objections to particular acts, instruments, or proceedings.*

See "Pleading," § 11; "Trial," § 14.

*Of rights or remedies.*

See "Insurance," § 8.

Exemption of homestead, see "Homestead," § 4.

## WARDS.

See "Guardian and Ward."

## WAREHOUSEMEN.

\*Where bills of lading for cotton were delivered to bank, title *held* to have passed, and not to be affected by bank's acceptance of compress receipts in lieu of the bills of lading.—Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co. (Ark.) 997.

Right of bank holding compress receipts for cotton to recover its value in equity *held* not affected by the question of the bank's title to the cotton.—Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co. (Ark.) 997.

\*Compress and warehouse company delivering cotton on presentation of compress receipts by one not the owner *held* liable therefor to owner.—Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co. (Ark.) 997.

In action by owners of cotton to recover its value, evidence *held* to sustain finding that persons who presented receipts for the cotton had obtained them without the owners' consent.—Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co. (Ark.) 997.

**WARRANTY.**

By insured, see "Insurance," §§ 6, 7.  
On sale of goods, see "Sales," § 6.

**WATERS AND WATER COURSES.**

See "Levees."

Water courses in cities, see "Municipal Corporations," § 13.

Water supply for cities, see "Waters and Water Courses," § 5.

**§ 1. Natural water courses.**

\*A street railway company having obstructed the flow of water along a street and turned the same into a creek *held* bound to see that the creek was not obstructed beyond its capacity to carry off the water.—*Ft. Smith Light & Traction Co. v. Soard* (Ark.) 121.

\*A purchaser of a street railway *held* bound to exercise ordinary care to see that required culverts for the passage of water had been constructed and were not allowed to become filled.—*Ft. Smith Light & Traction Co. v. Soard* (Ark.) 121.

**§ 2. Public water supply.**

Under the provisions of a contract between the city and a water company for a municipal water supply, a contention that the city would be at the mercy of the corporation as to the amount of water to be supplied *held* groundless.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

A contract between a water company and a city for a municipal water supply *held* to have amply protected the city, both as to quantity and quality.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

The charge made by a water company for hydrant rentals *held* not shown to be so exorbitant as to invalidate the contract for furnishing municipal water supply.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

A charge made by a water company for furnishing additional hydrants in providing a municipal water supply *held* not so exorbitant as to invalidate the contract.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

An ordinance whereby a city contracted for a water supply *held* not unjust, unreasonable, or oppressive because of the length of the franchise.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

A provision of a contract for a municipal water supply *held* not objectionable on the ground that it appropriated all the revenues of the city in advance of its levy and collection.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

A provision of an ordinance whereby a city contracted for a water supply *held* not violative of Kirby's Dig. §§ 5445-5447.—*Lackey v. Fayetteville Water Co.* (Ark.) 622.

Whether city offered to other tenants of a building a contract or application provided in its scheme of furnishing water to the inhabitants, *held* immaterial to the rights of a tenant who paid his proportion of the water rates.—*Cox v. City of Cynthiaiana* (Ky.) 456.

\*A regulation by a city owning its water works plant that where one or more persons are supplied through a single tap the water will be shut off if any part of the bill therefor is unpaid, *held* reasonable and valid.—*Cox v. City of Cynthiaiana* (Ky.) 456.

A contract binding a water company to construct a way over a strip acquired by it for the laying of a main *held* binding.—*Bell v. Louisville Water Co.* (Ky.) 572.

\*Point annotated. See syllabus.

**WAYS.**

Private rights of way, see "Easements."

Public ways, see "Highways"; "Municipal Corporations," §§ 12, 13.

**WEAPONS.**

Challenge to juror in prosecution for unlawfully carrying, see "Jury," § 4.

In a prosecution for unlawfully carrying a pistol, defendant *held* not excusable on the ground that the pistol was used and carried in self-defense.—*Woodroe v. State* (Tex. Cr. App.) 30.

In a prosecution for unlawfully carrying a pistol, *held* that a certain instruction requested by defendant should have been given.—*Quinn v. State* (Tex. Cr. App.) 33.

In a prosecution for unlawfully carrying a pistol, a certain defense relied on by defendant *held* not deprived of its validity because the facts upon which it was based did not exist.—*Quinn v. State* (Tex. Cr. App.) 33.

\*In a prosecution for unlawfully carrying a pistol defendant *held* not protected by the exception in favor of travelers.—*Navarro v. State* (Tex. Cr. App.) 932.

\*In a prosecution for unlawfully carrying a pistol, it was no defense that the pistol was broken, in the absence of proof that it could not be fired.—*Smith v. State* (Tex. Cr. App.) 1086.

**WIDOWS.**

Dower, see "Dower."

Rights under statutes of descent and distribution, see "Descent and Distribution," § 1.

**WILLS.**

See "Descent and Distribution"; "Executors and Administrators."

Charitable bequests and devises, see "Charities." Construction and execution of trusts, see "Trusts."

Courts of probate, see "Courts," § 3.

**§ 1. Requisites and validity.**

An instrument in the form of a letter *held* to be a will.—*Arendt v. Arendt* (Ark.) 982.

\*Declarations of a testator are not admissible as evidence of undue influence or of the truth of the facts stated by him.—*Wetz v. Schneider* (Tex. Civ. App.) 59.

\*In proceedings for the contest of a will on the ground of undue influence, evidence of declarations of the testatrix not tending to show a weak mind *held* inadmissible.—*Wetz v. Schneider* (Tex. Civ. App.) 59.

In proceedings for the contest of a will, evidence *held* not to tend to show undue influence.—*Wetz v. Schneider* (Tex. Civ. App.) 59.

**§ 2. Probate, establishment, and annulment.**

An instruction as to unimpeached evidence to establish as a will, under Kirby's Dig. § 8012, an instrument in the handwriting of and signed by deceased, but having no attesting witness, *held* substantially correct.—*Arendt v. Arendt* (Ark.) 982.

The judgment of the circuit court on appeal under Ky. St. 1908, § 4850, from the judgment of a county court admitting to probate under section 4854 a will probated in another state *held* to leave the will as though it had not been probated in the state, so that title to

answer as to prejudice defendant.—*Moore v. State* (Tex. Cr. App.) 321.

**§ 3. Credibility, impeachment, contradiction, and corroboration.**

\*The jury are warranted in disbelieving a witness on account of inconsistencies and contradictions in his testimony.—*St. Louis Southwestern Ry. Co. v. Hutchison* (Ark.) 374.

Witness in prosecution for homicide *held* properly examined as to contents of affidavit containing contradictory statements so as to authorize its admission in evidence.—*Stinson v. Commonwealth* (Ky.) 463.

\*Under Civ. Code Prac. § 597, the credibility of accused in a prosecution for murder could not be affected by proof that he had previously killed a man in another state and fled before his arrest.—*Britton v. Commonwealth* (Ky.) 556.

\*Where in an action for injuries to a passenger defendant introduced evidence of her statements immediately after the accident, plaintiff *held* entitled to introduce evidence in contradiction.—*South Covington & C. St. Ry. Co. v. Core* (Ky.) 562.

\*Where, in a prosecution for theft from the person, prosecutor was an unwilling witness it was not error to permit the state to call his attention to a statement alleged to have been made by him to another, that his money was taken without his consent.—*McMahan v. State* (Tex. Cr. App.) 17.

In a prosecution for violating the local option law it was competent for the state to prove on cross-examination of a witness that he asked the prosecuting witness what he swore

in the grand jury room and that he answered: "Yes, sir."—*Owens v. State* (Tex. Cr. App.) 31.

## WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

\*One *held* not entitled to recover for services rendered on the understanding that nothing but support is to be given therefor.—*Smith v. Sisters of Good Shepherd of Louisville* (Ky.) 549.

Evidence *held* to require a finding that plaintiff intended to pay for board furnished her by defendant and that the reasonable value thereof was sufficient to cancel a note sued on.—*Deatley v. Tolle* (Ky.) 920.

Under the express provisions of Ky. St. 1903, § 2178, no recovery can be had by a person other than an innkeeper or the keeper of a house of private entertainment for board and lodging. In the absence of an express contract to pay therefor.—*Snowden v. Snowden* (Ky.) 922.

\*In an action on an account for work, labor and services, it is not necessary to allege a promise to pay.—*Snowden v. Snowden* (Ky.) 922.

## WRITS.

### Particular writs.

See "Execution"; "Habeas Corpus"; "Injunction"; "Mandamus"; "Replevin." Writ of error, see "Appeal and Error."

## YEAR.

Agreements not to be performed within one year, see "Frauds, Statute of," § 2. Estates for years, see "Landlord and Tenant."

\*Point annotated. See syllabus.

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